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Benchmark

Friday, 18 October 2024

Weekly Government Review

A Weekly Bulletin listing Decisions of Superior Courts of Australia covering government

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Executive Summary (One Minute Read)

SkyCity Adelaide Pty Ltd v Treasurer of South Australia (HCA) - customers spending credits obtained from loyalty points gave rise to an amount received by a Casino in consideration for gambling - the general law of penalties did not apply to a statutorily authorised agreement between the Casino and the SA Treasurer

Automotive Invest Pty Limited v Commissioner of Taxation (HCA) - car dealer which attracted customers by styling its premises as a classic car museum nevertheless held the cars as trading stock for the purposes of the luxury car tax and GST

Gaynor v Minister for Communications (FCA) - Classification Review Board erred in giving an "Unrestricted" classification to the publication *Gender Queer*

Commissioner of Corrective Services v Hamzy (NSWCA) - appeal allowed against ruling of primary judge that permitted a supermax prisoner to have a particular standard of laptop in his cell at all times to prepare for hearings

Commissioner of Police v Attorney General for New South Wales (NSWCA) - the *Law Enforcement Conduct Commission Act 2016* (NSW) abrogates public interest immunity in relation to the production under notices issued under s114(3)(d) for the purpose of oversight and monitoring of a critical incident investigation

Z v St Vincent's Hospital Sydney Ltd (NSWSC) - Court restrained hospital from withdrawing life support from motor accident victim for eight days, to enable parents to raise funds to transport her to China for treatment they hoped would be effective

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Xing v Recorder of Titles and Strata Corporation 141766, Tasman Heights, Dynnyrne (TASSC) - decision of the Recorder to set aside an easement for non-use set aside, as the evidence was that the plaintiff had used the easement in that time

HABEAS CANEM

Peace

Summaries With Link (Five Minute Read)

SkyCity Adelaide Pty Ltd v Treasurer of South Australia [2024] HCA 37
High Court of Australia
Gageler CJ, Gordon, Edelman, Gleeson, & Beech-Jones JJ
Taxation - SkyCity operates the SkyCity Casino pursuant to a licence granted under the *Casino Act 1997* (SA) - s16 of the *Casino Act* provides for an Approved Licensing Agreement between the licensee and the Minister - s51 imposes liability on SkyCity, as licensee, to pay casino duty - duty is calculated under a Casino Duty Agreement ("CDA") that exists pursuant to s17 - there was a dispute as to the correct interpretation of the current CDA and the duty payable in accordance with it, and the parties agreed that SkyCity would commence proceedings in the Supreme Court - the Court of Appeal answered three questions of law, (1) "Converted Credits" arising from the conversion of loyalty points by the casino's customers, when played by customers, constituted an "amount received" by SkyCity "for or in respect of consideration for gambling in the Casino premises" within the meaning of the CDA; (2) loyalty points received by customers for gambling using electronic gaming machines and automated table games do not constitute "monetary prizes" within the definition of "net gambling revenue" in the CDA; and (3) the common law or equitable principles concerning penalty clauses applied to the interest for late payment provisions in the CDA (see Benchmark 19 March 2024) - SkyCity was granted special leave to appeal to the High Court in respect of answer (1) - the treasurer sought special leave to cross-appeal in respect of answer (3) - held special leave to cross-appeal should be granted - SkyCity's approved cashless gaming system has always operated as "a system that enables the storage of monetary value for use in operating a gaming machine" - each time a customer uses SkyCity's cashless gaming system to bet, monetary value has been received by SkyCity as consideration for its acceptance of that bet, in the form of a reduction in SkyCity's indebtedness to the customer - the origin of the electronic gaming credits is irrelevant - SkyCity's appeal dismissed - the Court of Appeal's reasoning on penalties inverted the scheme of *the Casino Act* - the CDA was an agreement that was authorised and required by statute to govern the imposition of a tax - the imposition of a tax is inherently and exclusively statutory - the provisions in the *Casino Act* that authorised the CDA did not imply that the CDA must be independently capable of enforcement at common law or in equity - on the contrary, they made enforceable an agreement that would not be enforceable at common law or in equity - the Treasurer's cross appeal allowed.
SkyCity Adelaide Pty Ltd
[From Benchmark Friday, 18 October 2024]

Automotive Invest Pty Limited v Commissioner of Taxation [2024] HCA 36
High Court of Australia
Gageler CJ, Edelman, Steward, Gleeson, & Jagot JJ
Taxation - the appellant traded under the name "Gosford Classic Car Museum" - the cars in the premises were for sale, and most of the money made by the appellant was from selling the cars, although the appellant made some money from charging for admission to the museum - the

Commissioner contended that the appellant was liable for luxury car tax and GST - the appellant appealed under Part IVC of the *Taxation Administration Act 1953* (Cth) - the appellant' case was that each car was used only for the purpose of holding it as trading stock and that the museum concept was no more than a unique and inventive means of selling stock - the primary judge held for the Commissioner - the Full Court of the Federal Court (by majority) dismissed an appeal (see Benchmark 15 August 2023) - the appellant was granted special leave to appeal - held (by majority, Gageler CJ and Jagot J dissenting): the *A New Tax System (Luxury Car Tax) Act 1999* (Cth) is drafted to speak directly to the public using ordinary language and communication - it was necessary to look "at the substance and reality of the matter" and apply a "commonsense and commercial approach" - the ordinary language of s9-5(1) of that Act showed that it is concerned with the purpose for which "you have the intention" of using the car, that is, the intended rather than actual purpose of use - there is a difference between "motive", "means" and "purpose", in that "purpose" is the end goal of conduct, whereas "motive" is the reason for seeking that end goal - at the appropriate level of generality, consistently with the legislative purpose of s9-5(1), the appellant's purpose in holding the cars was to hold them as trading stock - the museum was merely the means by which this purpose was achieved, not the ultimate goal itself - even though the museum operation was substantial, at no point did it become an end in itself - neither s9-5 nor s15-30(3) of the Act is concerned with the purpose of a reasonable person and the primary judge had been correct to accept the evidence of the guiding mind of the appellant as to what his purpose was - appeal allowed.
Automotive Invest Pty Limited
[From Benchmark Friday, 18 October 2024]

Gaynor v Minister for Communications [2024] FCA 1186
Federal Court of Australia
Jackman J
Administrative law - a majority of the Classification Review Board upheld a decision of the Classification Board which classified a publication titled *Gender Queer* as "Unrestricted" and gave consumer advice of "M-Not recommended for readers under 15 years" under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) - the Review Board described *Gender Queer* as "an autobiographical non-fiction graphic memoir, written by Maia Kobabe, that explores the author’s path to identifying as nonbinary and asexual" - an applicant sought judicial review of the Review Board’s decision - the applicant contended that the Review Board ignored, overlooked, or misunderstood relevant facts or materials, namely (1) the written submissions from interested members of the public, and (2) a letter from a lecturer in Educational Psychology and Child Protection at the University of South Australia - if a decision-maker ignored, overlooked, or misunderstood relevant facts or materials, that may give rise to jurisdictional error - in applying that principle, the Court must bear in mind its limited role in reviewing the exercise of an administrative discretion and not substitute its decision for that of an administrative decision-maker - the "overwhelming" or dominant theme of the submissions were that the book tolerates or promotes paedophilia, and that such a stance is against the criminal law in Australia and is morally repugnant - few of the submissions opposing an

unrestricted classification could rationally be described as "broadly anti-LGBTQIA+", as characterised by the Review Board, although some clearly did - no rational person who had actually read the submissions could arrive at the conclusion that they were broadly anti-LGBTQIA+ - the Review Board had also ignored, overlooked, or misunderstood an argument made by the lecturer in her letter that an ancient Greek image depicting a sexual encounter between a teacher and his student may be problematic in the light of standards of morality, decency and propriety generally accepted by reasonable adults whether or not the student were a child - decision quashed and an order in the nature of mandamus be made to compel the Review Board to determine the matter according to law.
Gaynor
[From Benchmark Wednesday, 16 October 2024]

Commissioner of Corrective Services v Hamzy [2024] NSWCA 240
Court of Appeal of New South Wales
Bell CJ, Payne, & Stern JJA
Administrative law - an inmate in the supermax unit at Goulbourn had been classified as a "Category A1" inmate pursuant to r12(1) of the *Crimes (Administration of Sentences) Regulation 2014* (NSW) and designated as an "extreme high risk restricted inmate" pursuant to r17 - he sought declaratory relief regarding the validity and application of various provisions of those Regulations - the Court was to determine six separate questions - the inmate was also due to defend himself in further District Court criminal proceedings - the inmate sought orders to enable him to prepare for these hearings, including that he have access to all his tubs of legal material in his cell, and that he be provided with a laptop with word processing capability - the primary judge ordered that the Commissioner provide the inmate with a laptop, upon the inmate paying the reasonable cost of doing so - the Commissioner sought leave to appeal - held: the primary judge had erred in in failing to consider the evidence as to the arrangements made to make facilities available to the inmate, that had been contained in an affidavit before him - at the time the primary judge decided the application, the inmate had effectively secured what he had sought, as he had permanent access in his cell to the material in his storage tubs which was to be uploaded to his e-brief laptop (which allowed him to view material but not type or create documents, and he had access in his day room (to which he had exclusive access at certain times) to a "blue" computer with word processing functionality, enabled to permit the copying of work product onto a USB and the ability to print to a printer in his day room - the primary judge had also erred in adopting the concept of "equality of arms" as a starting point for his analysis - "equality of arms" is a concept rooted in European human rights jurisprudence, and does not readily translate to NSW or align with NSW authorities - the role of the Court is to ensure a fair trial and the Court accepted that an "irreducible minimum" of resources may be required to achieve that - any irreducible minimum requirement must be assessed in the context of the particular case, including the statutory context which confers discretions and power on corrections authorities who are far better placed than courts to assess what is required for the safe and secure management of corrections facilities - appeal allowed.
View Decision

[From Benchmark Monday, 14 October 2024]

Commissioner of Police v Attorney General for New South Wales [2024] NSWCA 150
Court of Appeal of New South Wales
Ward P, Gleeson, & Adamson JJA
Public interest immunity - the Law Enforcement Conduct Commission, a corporation constituted by s17 of the *Law Enforcement Conduct Commission Act 2016* (NSW), was monitoring two critical incident investigations pursuant to Pt 8 of that Act, which each involved the death of a person during a police operation - it issued a notice under s114(3)(d) of the Act in respect of each incident to the relevant police officers - the Commissioner of Police took the view that, on its proper construction, s114(3)(d) did not abrogate public interest immunity, with the result that the notices did not compel the production of the documents sought - the Chief Commissioner of the LECC decided that s114 did abrogate public interest immunity - the Commissioner of Police and the relevant officers sought declaratory relief in the summary jurisdiction of the Court of Appeal - held: on the proper construction of s114(3)(d), read in the context of the legislation as a whole and having regard to the objects and purpose of the legislation, public interest immunity had been abrogated by necessary intendment in relation to the production of material to LECC under notices issued under that section for the purpose of oversight and monitoring of a critical incident investigation - the stated legislative objective was that there be "independent oversight and real time monitoring" by LECC of critical incident investigations by the Police - the legislature contemplated that LECC would be overseeing and monitoring the critical incident investigation as it was occurring and would be provided with all relevant materials to enable it to form the necessary view as to the conduct of the investigation so as to give the advice contemplated by s117 whether it considered the investigation was fully and properly conducted - the obligation of co-operation in relation to the investigation (by the Police) and monitoring (by LECC) of critical incident investigations was a strong indication that Parliament intended that LECC and the Police effectively work together in the exercise of their respective functions - proceedings dismissed.
View Decision
[From Benchmark Wednesday, 16 October 2024]

Z v St Vincent's Hospital Sydney Ltd [2024] NSWSC 1270
Supreme Court of New South Wales
Hammerschlag CJ in Eq
Parens patriae jurisdiction - a young woman sustained serious brain injuries in a motor accident - the uncontradicted medical evidence of a neurosurgeon was that she had a catastrophic brain injury from which she would not recover - the woman's parents came to Australia from China and wanted to arrange for her to be medically transported to Shanghai, believing that she might receive treatment there which may have some beneficial outcome - the parents obtained an interlocutory injunction requiring the hospital to continue to provide life support - the Court now considered final relief, and whether the Court should appoint the parents as the woman's guardians and make orders to facilitate the medical transport to China - held: the evidence was

slim as to the parent's ability to raise the funds that would be required, but the parents thought they could raise the funds in about seven days - the Court gave due weight to the hospital's contention that medical practitioners will not be ordered by a Court to provide treatment where it is inconsistent with their medical opinion and not in accordance with what they see to be their ethical responsibilities and applicable codes of conduct - despite the grim medical predictions, some degree of credit must be given to the hopes of her parents and family for some recovery - the Court considered that life support (by way of intubation) should be maintained for eight days, but no more, to give the parents an opportunity to raise the required funds - the hospital should not be ordered to provide resuscitation (as opposed to maintaining life support without resuscitation) during this period, as this would be contrary to what the hospital said were the medical practitioners' ethical responsibilities.
View Decision
[From Benchmark Monday, 14 October 2024]

Xing v Recorder of Titles and Strata Corporation 141766, Tasman Heights, Dynnyrne [2024] TASSC 50
Supreme Court of Tasmania
Marshall AJ
Easements - when Xing purchased vacant land in 2007, he intended to build a house on it - title searches showed that the land carried with it a right of way over a neighbouring property - in 2009, Xing commenced building work, and had the location of the easement confirmed by survey - in 2017, a fence was placed blocking the easement, and Xing replaced part of the fence with a gate and pulled out some plants that had been planted on the easement - Xing placed gravel on the easement - an application to cancel the easement was unsuccessful - Council requested Xing stop landfilling the easement and apply for a driveway permit - a second application to cancel the easement was successful, on the basis that the Recorder was satisfied the easement had been abandoned - Xing challenged the Recorder's decision under s144 of the *Land Titles Act 1980* (Cth) - held: in deciding a s144 application, the Court stands in the shoes of the Recorder and makes a decision which it considers the Recorder should have made on the evidence available to the Recorder, supplemented by any relevant further evidence available to the Court - the factual question was whether Xing had abandoned the easement by not using it for at least 20 years - Xing had acquired the land in 2007, less than 20 years ago - he had used the right of way in 2009 and 2010 during the building works - in 2017, he had removed a fence that was preventing his use of the right of way, and had removed plants and placed gravel - the respondents' contention that, before Xing bought the property, the easement had been unused for at least 20 years did not assist them - the question for the Recorder was whether the easement had not been used for 20 years at the time of application - decision of the Recorder to cancel the easement of the applicant is set aside.
Xing
[From Benchmark Tuesday, 15 October 2024]

INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Aquino v Bondfield Construction Co (SCC) - The fraudulent intent of a senior employee, found to be the directing mind of companies, can be attributed to the companies in a bankruptcy proceeding

Summaries With Link (Five Minute Read)

Aquino v Bondfield Construction Co 2024 SCC 31
Supreme Court of Canada
Wagner CJ, Karakatsanis, Côté, Rowe, Martin, Jamal, & O'Bonsawin JJ
The President of two family-owned construction companies had for years fraudulently taken tens of millions of dollars from the companies through a false invoicing scheme. In subsequent bankruptcy proceedings against the companies, the payments made under the invoicing scheme were challenged under the *Bankruptcy and Insolvency Act*. Under the Act, money paid by the debtor can be recovered if the transfers were made at undervalue with the intent to defraud creditors. The lower court concluded that these were payments made at undervalue with fraudulent intent. The bankrupt entities contended that the payments were made to creditors and that fraudulent intent was not present. The Court held that the executive's fraudulent intent could be attributed to the bankrupt companies and that the money should be paid back. The Supreme Court (Jamal J, joined by Wagner CJ, Karakatsanis, Côté, Rowe, Martin, O'Bonsawin JJ) dismissed the appeal and held that the courts could find that a debtor intended to defraud creditors even if the debtor was not insolvent at the time of the undervalue transfers. Specifically, the executive's fraudulent intent should be attributed to the debtor companies because he was their directing mind. The Supreme Court stated that the test for corporate attribution is simply whether the executive was the directing mind of the business and whether the actions were performed within the corporate responsibility assigned to him. If so, the fraudulent intent of the executive could be attributed to the corporation.
Aquino

Poem for Friday

In My Craft or Sullen Art

By Dylan Thomas (1914-1953)

In my craft or sullen art
Exercised in the still night
When only the moon rages
And the lovers lie abed
With all their griefs in their arms,
I labour by singing light
Not for ambition or bread
Or the strut and trade of charms
On the ivory stages
But for the common wages
Of their most secret heart.
Not for the proud man apart
From the raging moon I write
On these spindrift pages
Nor for the towering dead
With their nightingales and psalms
But for the lovers, their arms
Round the griefs of the ages,
Who pay no praise or wages
Nor heed my craft or art.

Dylan Marlais Thomas, poet, writer and broadcaster, was born on 27 October 1914 in Swansea, Glamorgan, Wales. His well-known works include Under Milk Wood, “a play for voices”, Do not go gentle into that good night, and, And death shall have no dominion. He loved Wales but was not a Welsh nationalist. His father wrote that he was “*afraid Dylan isn’t much of a Welshman”.* Robert Lowell, wrote of criticism of Thomas’ greatness as a poet, "Nothing could be more wrongheaded than the English disputes about Dylan Thomas's greatness...He is a dazzling obscure writer who can be enjoyed without understanding." The Welsh Academy Encyclopedia of Wales described him, and particularly his life in New York City before his death as a "roistering, drunken and doomed poet."

Dylan Thomas reads “In My Craft or Sullen Art”
https://www.youtube.com/watch?v=Tiw3uOT2eUc

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian

parents. He trained at the Royal Central School of Speech and Drama in London. In the UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage actress: https://en.wikipedia.org/wiki/Patricia_Conolly and https://trove.nla.gov.au/newspaper/article/47250992.

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