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LAWYERS

Benchmark

Friday, 28 June 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)

Monash University v Murthi (FCA) - Fair Work Commission had jurisdiction to arbitrate a dispute between a University and an academic accused of plagiarism

Koutsouroupas v Minister for Health and Aged Care (FCA) - Court upheld amendments that sought to ensure a pharmacist, approved at particular premises, does not move the essential steps of dispensing medication off site, or set up business serving customers in person at other premises, without obtaining approval for those other premises

Botha v Secretary, NSW Department of Customer Service (NSWSC) - Appeal Panel of the NSW Personal Injury Commission had properly engaged with the ground of appeal raised by the plaintiff

Hanson Construction Materials Pty Ltd v Decmil Australia Pty Ltd (VSC) - adjudicator under the *Building and Construction Industry Security of Payment Act 2002* (Vic) erred in taking an excluded amount into consideration

Queensland Racing Integrity Commission v Endresz; Racing Queensland Board v Endresz [No2] (QCA) - Court declined to award costs on separable issues, even though the defendants had succeeded on one important point of law

DU v Jackson (DCJ) (QCA) - judicial review proceeding against District Court judge raising the same issues as an unsuccessful appeal was permitted to be made, as it raised a question of law that the District Court's reasons for judgment showed that the District Court likely misapprehended the nature of its task on appeal

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Lawler v Real Estate Institute of Tasmania (TASSC) - an appeal to a Tribunal from a decision of the Property Agents Board regarding alleged misconduct by a property agent is by way of a hearing *de novo*, rather than an appeal in the strict sense

HABEAS CANEM

First beach holiday

Summaries With Link (Five Minute Read)

Monash University v Murthi [2024] FCA 663
Federal Court of Australia
Wheelahan J
Employment law - Monash University academic staff member accused of plagiarism in breach of the *Australian Code for the Responsible Conduct of Research 2018* (the Research Code) - the staff member denied the allegation, and claimed the University had denied procedural fairness in breach of its obligations under the *Monash University Enterprise Agreement (Academic and Professional Staff) 2019* (the Agreement) the staff member referred the dispute to the Fair Work Commission - the University sought a declaration that the Fair Work Commission lacks jurisdiction to determine whether the staff member breached the Research Code, or otherwise to determine the merits or outcome of such an allegation, in the context of arbitrating a dispute about the application of the Agreement - held: as a result of its approval pursuant to s186(1) of the *Fair Work Act 2009* (Cth), the Agreement has statutory force because, under s50 and s51 of that Act, a person to whom an enterprise agreement applies must not contravene the agreement - the Commission's authority to arbitrate a dispute arising under an enterprise agreement so as to make a binding determination does not arise as a result of the enterprise agreement having statutory force, but arises in general law as a result of an agreement of the parties to submit a dispute to the Commission, as with private arbitration - where consent to arbitration is in issue, its resolution involves a factual inquiry - the initiation of a dispute and the lodging of the relevant form with the Commission by a staff member may well amount to a submission to arbitration in circumstances where, by the University's consent to the terms of the Agreement, the University has offered to submit to arbitration - the question was whether the matters raised by the staff member before the Commission involved a dispute "as to the application of [the] Agreement or any matters arising from it" as provided in the dispute resolution clause of the Agreement - on its proper construction, the Agreement invested the Commission with arbitral jurisdiction over the whole of any such dispute - there was no tension between a clause in the Agreement that envisaged that the University alone would determine whether plagiarism has occurred, and the clause investing the Commission with jurisdiction to deal with disputes where it is alleged the University has not followed the required process in making such a determination - declaration not made.
Monash University
[From Benchmark Monday, 24 June 2024]

Koutsouroupas v Minister for Health and Aged Care [2024] FCA 677
Federal Court of Australia
Kennett J
Administrative law - the applicants were proprietors of pharmacy businesses and franchisees in the Chemist Warehouse chain - the lawfulness of their operations is potentially affected by amendments that were made to the *National Health (Pharmaceutical Benefits) (Conditions of Approval for Approved Pharmacists) Determination 2017* (Cth) by the *National Health*

Legislation Amendment (Conditions of Approval for Approved Pharmacists) Instrument 2023 (Cth) - they sought declarations that items 5 and 18 of the Instrument were invalid - the impugned aspect of item 5 was the definition of "dispensing step" which encompasses a large number of administrative steps associated with the supply of medications by a pharmacist - item 18 substituted a number of sections in the Determination that now restricted pharmacists from supply a pharmaceutical benefit at certain premises - held: in substance the impugned provisions sought to ensure that a pharmacist, who is approved for the purpose of supplying pharmaceutical benefits at particular premises, does not move the essential steps of dispensing medication off site, or set up business serving customers in person at other premises, without obtaining approval for those other premises - the provisions do not purport to prevent supply "from" approved premises as authorised by the *National Health Act 1953* (Cth) - control over the locations at which pharmaceutical benefits can be supplied, and control directed at limiting the expansion of individual pharmacy businesses, were within the scope of policies which may legitimately be pursued under the relevant provisions of the *National Health Act* - proceedings dismissed.

Koutsouroupas

[From Benchmark Thursday, 27 June 2024]

Botha v Secretary, NSW Department of Customer Service [2024] NSWSC 781

Supreme Court of New South Wales

Stern JA

Workers compensation - the plaintiff sustained psychiatric injury by reason of interpersonal conflicts with her direct supervisor in her role as a Senior Executive (Director of Client Stakeholder Services) employed by the Department of Customer Service - she sought compensation and a dispute arose as to the extent of her impairment - a Medical Assessor certified that she had a 9% permanent impairment - as this was less than 15%, s65A and s151H of the *Workers Compensation Act 1987* (NSW) provided that no compensation for non-economic loss under Div 4 of Pt 3 of that Act or claim for work injury damages was available - an Appeal Panel of the NSW Personal Injury Commission affirmed the Medical Assessor's certificate - the plaintiff sought judicial review of the Appeal Panel's decision - held: subject to materiality, failure by an Appeal Panel to perform its statutory task of conducting a review on the ground, or grounds, of appeal advanced, or a misunderstanding of the case brought by an applicant, may amount to jurisdictional error - it was apparent from the Appeal Panel's decision that the Appeal Panel was aware of, considered, and rejected the plaintiff's sole ground of appeal - in two places, the Appeal Panel correctly identified the plaintiff's contention as to demonstrable error, including that the Medical Assessor's conclusion was illogical and unsupported having regard to the findings in the body of the Certificate - the Appeal Panel engaged with the issue raised by the plaintiff's ground of appeal, which was whether the matters found by the Medical Assessor supported his conclusion as to categorisation on the Social and Recreational Psychiatric Impairment Rating Scale - while the Appeal Panel did not expressly engage with the plaintiff's contention that the Medical Assessor's conclusion should be construed as relying only upon social activities which involved the plaintiff leaving her home, it

was implicit in the Appeal Panel's reasoning that they rejected that contention - it was also clear that the Appeal Panel was satisfied that the findings of the Medical Assessor in the body of the Certificate properly supported the Medical Assessor's conclusion that the plaintiff's attendance at social and recreational activities was "regular" - application for judicial review dismissed.
View Decision
[From Benchmark Friday, 28 June 2024]

Hanson Construction Materials Pty Ltd v Decmil Australia Pty Ltd [2024] VSC 361
Supreme Court of Victoria
Stynes J
Administrative law - Decmil subcontracted Hanson to supply and deliver concrete and associated mixing, testing and pouring services for the construction of 52 wind turbines - Hanson served a payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) in relation to a foundation - Decmil responded with a payment schedule stating a nil amount to be paid, on the basis that the foundation was defective and that Decmil was entitled to set off the costs of rectification, which were greater than the amount of the payment claim - an adjudicator under the Act found that the foundation was defective, Decmil was entitled to a set off, but in an amount less than the payment claim, leaving an amount of about $700,000 payable to Hanson under the payment claim - Hanson sought judicial review of the adjudicator's decision - held: the rectification costs claimed by Decmil were an excluded amount for the purpose of s10B of the Act - an "excluded amount" relevant includes "any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract" - s23 provides that, in determining an adjudication application, the adjudicator must not take into account any part of the claimed amount that is an excluded amount - there is an important difference between the NSW and Victorian Acts, in that the Victorian Act includes s23(2B), which relevantly provides that if an adjudicator's determination takes into account an excluded amount, it is void to that extent - the Victorian Supreme Courts is also more willing than the NSW Supreme Court to order remittal of a matter to an arbitrator where jurisdictional error is established - adjudication decision quashed in so far as the adjudicator took into account the costs of rectification, and adjudication application remitted to the adjudicator to determining the adjudicated amount in accordance with law.
Hanson Construction Materials Pty Ltd
[From Benchmark Thursday, 27 June 2024]

Queensland Racing Integrity Commission v Endresz; Racing Queensland Board v Endresz [No2] [2024] QCA 123
Court of Appeal of Queensland
Morrison JA, Fraser AJA, & Williams J
Costs in administrative law cases - a gelding named Alligator Blood won a race on the Gold Coast with prize money of almost $1 million payable to the owners - a prohibited substance was detected in the horse's urine sample - the trainer was charged with a contravention of the

Australian Rules of Racing for bringing a horse with a prohibited substance to a racecourse for the purpose of participating in a race - at a steward's inquiry the trainer was found guilty and fined $20,000, and, by force of the Australian Rules of Racing, the horse was disqualified from the race - the owners were not given any formal notice of the stewards' inquiry or the hearing of the charge against the trainer, and were not afforded an opportunity to be heard by the stewards - the Court of Appeal had upheld a finding of the primary judge that the disqualification was void (see Benchmark 10 May 2024) - the Court now determined costs - Racing Queensland argued that it succeeded on appeal upon a distinct and separable, multi-faceted question, namely, the issue whether the Australian Rules of Racing conferred upon the owners a right to appeal against the disqualification, and that it should therefore be ordered to pay on 60% of the owners' costs - held: to the extent that it was in the interests of the racing industry as a whole to have an authoritative resolution of the question whether the Australian Rules of Racing conferred upon the owners of the disqualified horse a right to appeal against the disqualification, that factor did not favour an order that that the owners pay the costs in relation to that question - the Stewards' conduct had kept the owners in the dark about their adjudication, and the owners had been left with no realistic alternative but to bring the proceedings, and to contest the appeals, to vindicate their right to natural justice as a condition of a valid disqualification - the owners' arguments at trial on the question whether there was a right to appeal from the disqualification were not unreasonable, and the primary judge had accepted those arguments, and it had not been unreasonable for the owners to seek to uphold that on appeal - although the defendants' arguments on that question were ultimately accepted, the owners remained wholly successful in establishing their claimed right to natural justice - it was not appropriate hear to award costs on separable issues - defendants to pay the owner's costs.
Queensland Racing Integrity Commission
[From Benchmark Tuesday, 25 June 2024]

DU v Jackson (DCJ) [2024] QCA 122
Court of Appeal of Queensland
Bond & Dalton JJA, and Williams J
Appeals - DU and his onetime girlfriend, TG, each sought protection orders against the other under the *Domestic and Family Violence Protection Act 2012* (Qld) - a Magistrate made a protection order in favour of TG and dismissed DU's application - the District Court dismissed an appeal by DU against the making of the order against him but allowed an appeal by DU against the Magistrate's failure to make an order against TG, and remitted this issue to a different Magistrate, and a different Magistrate had heard the matter but not yet given judgment - DU filed an application seeking leave to appeal from the District Court decision - a judge of the Court of Appeal struck that application out, holding that there is no right to appeal from a District Court decision on appeal from a Magistrate under the *Domestic and Family Violence Protection Act*, as s169(2) provides that the appeal decision is 'final and conclusive' - DU then sought judicial review of the District Court decision - the Registrar referred the judicial review application to a Judge rather than issuing it, as he considered that it appeared to be an abuse of process - DU sought leave to seek an order that the Registrar issue the application - the primary

judge refused leave - DU appealed - held: the Court was hearing an appeal in the strict sense in this matter - while the Court had a discretion to hear the appeal by way of rehearing, it should not do so - the appellant has not demonstrated that any arguments he ran before the primary judge should have succeeded - however, on the appeal the appellant had raised a point he had not raised below, that the District Court's reasons for judgment showed that the District Court likely misapprehended the nature of its task on appeal - this was a point of law and was apparent on the material before the primary judge - if the District Court did mistake its function on appeal, that would amount to jurisdictional error, and the order dismissing the appeal against the order against DU would be of no effect - this was a viable basis for a suit for a declaration, and perhaps for certiorari, so as to justify the issue of process - the fact that the likely error was of such consequence, and solely an error of law, meant that the Court should allow the appeal even though the error was not raised below - appeal allowed.
DU
[From Benchmark Wednesday, 26 June 2024]

Lawler v Real Estate Institute of Tasmania [2024] TASSC 31
Supreme Court of Tasmania
Brett J
Appeals - the CEO of the Real Estate Institute of Tasmania complained about the conduct of the appellant, who had been a property agent at the relevant time - the Property Agents Board determined that, although the conduct in question had been established, it did not amount to misconduct within the meaning of the *Property Agents and Land Transactions Act 2016* (Tas) - a Tribunal established under the Act dismissed the Real Estate Institute's appeal - the Magistrates Court then allowed the Real Estate Institute's application to review the Tribunals' decision, and found the appellant's conduct amounted to unsatisfactory professional conduct - the appellant appealed to the Supreme Court on questions of law - held: the appeal to the Tribunal under s116 of the Act - the statutory context led inevitably to the conclusion that an appeal from the Board to the Tribunal under s116 is by way of a hearing *de novo* - there was no need for error to be established before the Tribunal could exercise its powers under s116(5), and it was simply required to determine the question afresh - the Deputy Chief Magistrate had erred in holding that an appeal under s116 was an appeal in the strict sense - however, the Chief Magistrate had then not erred in determining the case, as he had assessed the evidence, applied the relevant law, and made his own determination as to whether or not the conduct fell within the definition of unsatisfactory professional conduct, and further amounted to minor misconduct - the Deputy Chief Magistrate therefore actually assessed the case in the correct manner despite the errors he made as to the appropriate standard of appellate review - the relevant findings had been open - the Magistrate had correctly understood that he himself was conducting a hearing de novo of the Tribunal's decision under s26 of the *Magistrates Court (Administrative Appeals Division) Act 2001* (Tas), and that he therefore sat in the shoes of the Tribunal and exercised the same powers subject to the same limitations - appeal dismissed.
Lawler
[From Benchmark Wednesday, 26 June 2024]

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Executive Summary and (One Minute Read)

United States v Rahimi (SCOTUS) - Federal statute that prohibits individuals who are subject to a domestic violence restraining order from firearm possession does not violate the Second Amendment right to keep and bear arms

Summaries With Link (Five Minute Read)

United States v Rahimi 602 US __ (2024)
United States Supreme Court
In an 8-1 decision (Thomas, J dissenting), the Supreme Court upheld the validity of what are known as 'red flag' laws that prohibit firearm possession by domestic abusers. During a dispute with his girlfriend, Rahimi fired a gun that he kept in his car. She obtained a restraining order from a court in Texas. The Texas Court further suspended Rahimi's gun license for two years on the grounds that the violence was likely to occur again. During this period, Rahimi threatened additional women with a gun and was a suspect in an additional five shootings. When police searched his home, they found firearms, ammunition, and a copy of the restraining order. Rahimi was indicted for violating a federal statute that prohibits firearm possession while subject to a domestic violence restraining order. Rahimi claimed that the statute was unconstitutional because it established a restriction on the right to keep and bear arms that was not part of firearm regulation at the time the Second Amendment was adopted in the 18th Century. The District Court rejected this argument, but the US Court of Appeals agreed that the statute was unconstitutional. In the opinion by Roberts CJ, the Court pulled back from a purely historical approach to gun rights. The Chief Justice stated that recent court decisions expanding firearm rights 'were not meant to suggest a law trapped in amber'. By this the Court moved away from the history and tradition test and recognised that the Second Amendment permits regulations that may not have existed in 1791. The Court held that, while the right to keep and bear arms was a fundamental right, prohibitions on going armed were accepted as part of the common law at the time the Second Amendment was adopted. The Court said that the statute only prohibited possession while the restraining order was in effect and where a court had found that the individual represented a credible threat to the physical safety of others in a domestic situation.
United States v Rahimi

Poem for Friday

Adlestrop

By Edward Thomas (1878-1917)

Yes. I remember Adlestrop
The name, because one afternoon
Of heat the express-train drew up there
Unwontedly. It was late June.

The steam hissed. Someone cleared his throat.
No one left and no one came
On the bare platform. What I saw
Was Adlestrop only the name

And willows, willow-herb, and grass,
And meadowsweet, and haycocks dry,
No whit less still and lonely fair
Than the high cloudlets in the sky.

And for that minute a blackbird sang
Close by, and round him, mistier,
Farther and farther, all the birds
Of Oxfordshire and Gloucestershire.

Edward Thomas, an English poet biographer, author, essayist, and critic was born on 3 March 1878, the son of Welsh parents, a railway clerk, politician and preacher Phillip Thomas, and Mary Townsend. His connection to Wales was important throughout his life. He was described by Aldous Huxley as "*one of England's most important poets*". Thomas wrote poetry from 1914, when he was 36, encouraged by his new neighbour, the then relatively unknown Robert Frost. During his life, his only published poetry was *Six Poems* (1916) under the pseudonym Edward Eastaway. Thomas struggled with the burden of constant production of what some critics described as "hack work" to support his family, and the work he wished to produce. At times he was reviewing up to 15 books each week. He made many attempts at suicide, suffering marital disharmony and depression. Adelstrop is considered one of Thomas' finest poems. The poem describes the ordinary circumstances of Thomas' train from Paddington to Malvern, stopping at Adlestrop station at 12:15pm with images of the surrounding English countryside. However the poem elicits profound feelings in the reader through those descriptions. Thomas was killed in the Battle of Arras, in France on 9 April 1917, having enlisted for service in the British infantry in 1915. Ted Hughes described Thomas as "*the father of us*

all".

Adestrop by Edward Thomas, composed by Susanna Self- the third of six "Songs of Immortality"
https://www.youtube.com/watch?v=2NYUdo12yfg

Reading by Patricia Conolly. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada. Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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