

THE AUSTRALIAN LAW JOURNAL

Volume 93, Number 12

December 2019

CURRENT ISSUES – Editor: Justice François Kunc

An End-of-Year Innovation 975

A New Link across the Tasman; a guest contribution by The Right Honourable Dame Helen Winkelmann GNZ, Chief Justice of New Zealand 975

The Curated Page 977

LETTER TO THE EDITOR 979

CONSTITUTIONAL LAW – Editor: Anne Twomey

Dicey on Brexit and the Conservative Nature of Referendums 981

STATUTORY INTERPRETATION – Editor: The Hon John Basten

Statute and the Common Law 985

NEW ZEALAND – Editor: Justice Matthew Palmer

Recent Bill of Rights Cases in New Zealand: From Toupee to Tooth Decay 988

AROUND THE NATION: NORTHERN TERRITORY – Editor: Hon Dean Mildren AM RFD QC

Compulsory Retirement Age for Judges Increased to 72 995

PERSONALIA – Editor: Emily Vale

The Hon John Dowsett AM QC 998

Commonwealth

Justice Wendy Abraham 999

Justice Stewart Anderson 999

Justice John Snaden 1000

Western Australia

Justice Jennifer Hill 1000

RECENT CASES – Editor: Ruth C A Higgins SC

Constitutional Law (Cth) – Implied Freedom of Communication on Governmental and Political Matters – Whether ss 10(1), 13(11) and 15(1) of Public Service Act Impose Effective Burden on Implied Freedom – Whether Justified – Whether for Legitimate Purpose – Whether Suitable, Necessary and Adequate in Balance 1001

Defamation – Publication – Liability of Media Company Owner of Public Facebook Page for Comments by Third Party Users 1004

ARTICLES

PENALTY PRIVILEGE IN NON-CURIAL PROCEEDINGS: THE DECISION IN FRUGTNIET

Simon Frauenfelder

In its recent decision in *Migration Agents Registration Authority v Frugtniet* (Frugtniet), the Full Court of the Federal Court of Australia held that the privilege against self-exposure to a penalty – known as “penalty privilege” – did not apply in non-curial proceedings of the Administrative Appeals Tribunal relating to cancellation of a migration agent’s registration. In doing so, the Full Federal Court also purported to lay down a “three-factor test” of general application as to when penalty privilege would apply in the Australian federal context. By reference to key Australian authorities on penalty privilege, this article argues that the Full Court’s decision and its “three-factor test” are incorrect in that the decision wrongly overlooked persuasive intermediate appellate court authority, it did not consider all relevant aspects of the governing statute and did not account for Australian courts’ historical expansion of penalty privilege. The article submits that, since special leave to appeal the decision in Frugtniet has been denied, the issue of whether and when penalty privilege will apply in non-curial proceedings must soon be addressed by the High Court. 1007

COLLECTIVE BEST INTERESTS IN STRATA COLLECTIVE SALES

Edward S W Ti

New South Wales’ strata regime has had considerable global influence, inspiring many jurisdictions across and beyond the commonwealth. Both Singapore and British Columbia have adopted New South Wales’s strata model. That being said, these jurisdictions have permitted a collective sale by a supermajority of owners for some two decades while New South Wales only recently enacted legislation allowing for a strata scheme to be redeveloped or collectively sold via a 75% majority. This marks a significant milestone as it departs from the orthodox position requiring unanimity. Given the newness of the legislative amendments, there is no jurisprudential guidance regarding the content of a strata renewal committee’s duty in New South Wales. Through a comparative analysis of British Columbia and Singapore, this article suggests how New South Wales could articulate the duty of care imposed on the strata renewal committee when effecting a collective sale. Being only the second State in Australia to permit strata renewal by a supermajority, the issues raised by the article may be of some interest in coming years. 1025

BOOK REVIEW

Indonesian Law, by Simon Butt and Tim Lindsey 1040

Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Thomson Reuters

DECISIONS RECEIVED IN OCTOBER/NOVEMBER 2019

| | |
|--|------|
| Bosanac v Federal Commissioner of Taxation (<i>High Court and Federal Court; Taxes and Duties</i>) ([2019] HCA 41) | 1327 |
| Fennell v The Queen (<i>Criminal Law</i>) ([2019] HCA 37) | 1219 |
| HT v The Queen (<i>Criminal Law; Evidence</i>) ([2019] HCA 40) | 1307 |
| Kalimuthu v Commissioner of the Australian Federal Police (<i>Criminal Law</i>) ([2019] HCA 39) | 1282 |
| Lordianto v Commissioner of the Australian Federal Police (<i>Criminal Law</i>) ([2019] HCA 39) | 1282 |
| Mann v Paterson Constructions Pty Ltd (<i>Contracts; Restitution</i>) ([2019] HCA 32) | 1164 |
| Vella v Commissioner of Police (NSW) (<i>High Court and Federal Court; Statutes</i>) ([2019] HCA 38) | 1236 |