

High Court Notes

EXECUTION OF WARRANT

Jacobson v Rogers

Full Bench 17 February 1995
FC 95/002

The decision overturns *Rogers v Moore* (1993) 117 ALR 347 which held that a search warrant obtained under the Crimes Act (Cwth), section 10, was invalid and could not be executed upon the WA Department of Fisheries. The Crown (Cwth. State or Territory) is no longer immune from search warrants, whether obtained under Cwth or State (or Territory) legislation. However, the question still remains, in case of State (Territory) warrant, whether execution of warrant is likely to affect or limit the government activity of Commonwealth Crown. If so, State (Territory) Act cannot bind the Crown and is invalid to the extent that it purports to do so. Crown may also resist seizure on the basis of public interest immunity, but that must be decided on a case-by-case basis.

Bropho v Western Australia (1990) 171 CLR 1, discussed and applied.

DL

REPRESENTATIVE ACTION

Carnie and Anor v Esanda Finance Corporation

Full Bench, 23 February 1995
FC 95/004

The High Court considered the provisions of the NSW Supreme Court Rules (Pt. 8, r.13(1)) which provide for representative actions *where numerous persons have the same interest in proceedings.* (cf Order 18 of NT Rules ... *one or more persons have the same interest*), tracing the history of such actions. The NSW Court of Appeal had struck out a statement of claim in an action against Esanda insofar as it purported to plead a representative action (see *Esanda v Carnie* (1992) 29 NSW LR382).

The plaintiffs' claim was that financial agreements with Esanda did not comply with relevant legislation and they sought declarations and orders not only for themselves but on behalf of all parties who had entered into the offending agreement.

The Court held that having the same interest does not mean that all members of the "class" were parties to the same contract. Nor was it necessary that every member to the class be identified, rather that it be done *with sufficient particular-*

ity. The observation by the majority in the Court of Appeal that the rule was too *simple* to be used as the foundation of a class action was thought, rather, to be its advantage.

The relevant rule provides (as does that in the NT) that an action may proceed as a representative action if the plaintiffs properly bring themselves within the description, subject to the Court's discretion *to otherwise order.* It is in this latter context that questions of *res judicata* and the like should be considered. The Court of Appeal had confused the two separate issues. The Appeal was unanimously upheld. This is an important case establishing (or confirming) as it does the basis for class action within the existing procedural rules.

RW

MITIGATION OF DAMAGES

Medlin v SGIC (SA)

Dean, Dawson, Toohey, Gaudron and McHugh JJ, 16 February 1995
FC 95/001

Appeal from Full Court of South Australia upholding decision of trial judge. In issue was whether the plaintiff aged 60 was entitled to damages for loss of earning capacity when he voluntarily retired from employment (he was a professor of philosophy at Flinders University) in circumstances where the employer would have maintained his employment until age 65. It was held that he was so entitled and the matter was remitted to the Supreme Court for re-assessment of damages.

"The necessary causation between a defendant's negligence and the termination of a plaintiff's employment, in the sense that the termination of the employment is the product of an accident-caused loss of earning capacity, can exist notwithstanding the fact that the immediate trigger of the termination of the employment was the plaintiff's own decision to retire prematurely.

... The question asked by the trial judge whether a 60-year-old man who has sustained permanently incapacitating injury "should" continue in his employment or is "acting reasonably" in accepting premature employment was not the appropriate one. (The relevant question was) ... in the context of what was reasonable between the plaintiff and the defendant in "determining the de-

endant's liability for damages, (whether) the premature termination of the plaintiff's employment was the product of the plaintiff's loss of earning capacity notwithstanding that it was brought about by his own decision to accept voluntary retirement."

Furthermore, it was held that the assessment of damages for loss of earning capacity does not necessarily cease at a pre-determined date, say age 65 years (that is, the age of retirement in the instant case).

"A defendant cannot accordingly require a plaintiff to remain in employment for the purpose of reducing the damages that the defendant would otherwise have to pay if to do so would interfere with the plaintiff's reasonable enjoyment of life. The doctrine of mitigation of loss was not intended to have injured plaintiffs into economic slaves" (Per McHugh J).

RW

ABORIGINAL CRIMINAL LAW

Dennis Walker v State of NSW

Judgment of Mason CJ,
16 December 1994, s.94/005

The respondent (plaintiff), a member of the Noonuccal "nation" of Aboriginal people, and charged with an offence against the laws of NSW, in his statement of claim, challenged the validity of the criminal law as it applies to Aboriginal people. Mason CJ in striking out the respondent's statement of claim under Order 26 s18 High Court Rules referred to *Mabo v Queensland* [No. 2] (1992) 175 CLR 1 and the subsequent decision in *Coe v Commonwealth* (1993) 58 ALJR 110 to reiterate the principle that *Mabo No. 2* did not recognise a new source of sovereignty residing in Aboriginal people. Australian Parliaments do not lack legislative competence to regulate or affect the rights of Aboriginal people. The sovereign power of Australian parliaments to make laws for the peace, welfare and good government remains in all cases, unchallenged.

Mason CJ also rejected outright the analogy as between the Criminal law and the principle in *Mabo No. 2* of common law recognition of native title being held by Aboriginal people and the underlying radical title being vested in the Crown.

Mason CJ considered that a construction which results in different sanctions applying to different persons for the same conduct offends the basic principle that all people should stand equal before the law, more importantly in the application of the Criminal law which is inherently universal in its operation.

KR