

Law Council of Australia

Federal Court Notes
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Suggested Title:
Gender Discrimination

Discrimination - spouse - person of opposite gender.

In *Rohnerv Minister for Immigration* ([1998] 1006 FCA, 24 August 1998) Reg 1.15A(2)(a)(i) of the *Migration Regulations* required, for the definition of "de facto spouse", that the spouses be "of opposite sexes". A Full Court concluded that this definition did not contravene s5(1), 26(1) *Sex Discrimination Act* 1984 (Cth) because to the extent the regulation caused less favourable treatment to homosexual couples, it was a result of their decisions as to sexual practice and not because of "the sex of the aggrieved person".

Discrimination - proof of disability - comparison between applicant and other person whose circumstances "are the same or not materially different".

In *CofA v Humphries* ([1998] 1031 FCA, 25 August 1998) Kiefel J concluded a decision of an Inquiry Commissioner under the *Disability Discrimination Act* 1992 (Cth) that a visually impaired respondent had been discriminated against contrary to ss5(1), 15(1) of that Act should be set aside. She concluded the Commissioner had not undertaken the inquiry required by s5(1) of the Act in comparing the respondent's circumstances with non-disabled persons when the inquiry required comparison with other persons who were disabled but had reasonable needs.

Evidence - discovery - public interest immunity of Cabinet submissions - annexures.

In *Ryan v Great Lakes Council* ([1998] 998 FCA, 24 August 1998) Wilcox J concluded that while s130 of *Evidence Act* 1995 (Cth) prevented the "admission into evidence" of documents relating to matters of State, the provision provided the principle be applied in determining claims in ancillary or interlocutory proceedings. He concluded that while State Cabinet submissions were exempt, the factual appendices to it were not. On 2 September 1998 a Full Court ([1998] 1057

FCA) allowed an appeal. It concluded the primary Judge had not given weight to the nature of the documents and declared the State was not required to produce any part of the appendices which had not previously been discovered.

Public interest immunity - evidence that applicant initiated as Triad.

In *Choi v Minister for Immigration* ([1998] 1098 FCA, 25 August 1998) Lindgren J concluded public interest immunity protected information upon which the Minister for Immigration concluded an applicant for a business visa was not of good character within s501(2)(a) *Migration Act* because the applicant had in Macao been initiated in a Triad group.

Income tax - deductions - liability of insurance companies incurred but not reported.

In *Mercantile Mutual Insurance (Aust) Ltd v CofT* ([1998] 997 FCA, 25 August 1998) Foster J considered the appropriate method by which an insurance company taxpayer could value the deduction it claimed for liabilities incurred in the relevant period but not reported. He concluded the deduction was properly valued on the basis of the nominal or future payout figure rather than the figure for present value.

Income tax - deductions - land developer - subdivision and infrastructure costs.

In *C of T v Kurts Development Ltd* ([1998] 1037 FCA, 28 August 1998) a Full Court considered the treatment of land as the trading stock of a land developer. The Full Court concluded that costs of a land developer in creating titles on a Plan of Subdivision were incurred in creating trading stock and there was no justification for drawing a distinction between direct costs of the lots and general or infrastructure costs. The court concluded all costs were to be regarded as part of the cost price of the individual subdivided lots.

Income tax - exempt bodies - corporation administering coal industry long service leave liability.

In *Coal Mining Industry Long Service Leave (Funding) Corp v CofT* ([1998] 1058 FCA, 3 September 1998) Emmett J concluded the applicant was not a "public authority" within s23(d) of *ITAA* exempt from income tax.

Income tax - deductions - year in which default assessment for pay-roll tax claimable.

In *Layala Enterprises P/L (In Liq) v C of T* ([1998] 1075 FCA, 3 September 1998) a Full Court concluded that liability for pay-roll tax arose under the *Pay-roll Tax Assessment Act* 1971 (WA) immediately after, and as a direct consequence of, the payment by an employer of taxable wages and not upon assessment of the tax by the Commissioner of State Taxation.

Bankruptcy - when liability to pay income tax arises.

In *Jones v Deputy CofT* ([1998] 1076 FCA, 4 September 1998) Branson J concluded the *ITAA* imposed an obligation on a bankrupt before the date of his bankruptcy to pay income tax on the income he earned prior to the sequestration order so that the bankrupt was entitled to claim this was a provable debt within s82 of the *Bankruptcy Act* which had been discharged by bankruptcy.

Corporations law - dealer's licence - relevance of policy.

In *Amrein Associates P/L v ASC* ([1998] 1020 FCA, 26 August 1998) Lindgren J concluded the ASC did not err in refusing an application for an unrestricted dealer's licence under s784 of *Corporations Law* where the delegate took into account, inter alia, policy documents issued by the ASC as to qualifications and industry experience looked for in satisfaction of s784(2)(c) of that law.

Corporations - liability of directors after resignation to indemnify for unpaid tax.

In *Deputy CofT v Austin* ([1998] 1034 FCA, 27 August 1998) Madgwick J concluded that a person could be liable to provide indemnity to taxation authorities under s588FGA of *Corporations Law* for the tax liability of the company notwithstanding that the director had resigned where there was evidence the person continued to act as a de facto director.

Contract - whether Executive Chairman of Board of Directors authorised to make contract.

In *Cambridge Gulf Holdings NL v CLC Corporation* ([1998] 1045 FCA, 28 August 1998) a Full Court concluded the Trial Judge did not err in finding that the Executive Chairman of the Board of Directors of a company had implied actual authority to bind the company. The court concluded the Primary Judge was correct in finding the company was not one which was in fact run by its board and the director was "at its helm".

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Corporations - winding up - application to wind up company being wound up voluntarily - whether liquidator independent.

In *Citrix Systems Inc. v Telesystems Learning Pty Ltd* ([1998] 1050 FCA, 31 August 1998) Moore J ordered under s459B, 467B of Corporations Law that a company being wound up voluntarily be wound up by court order. He concluded that the order should be made because the moving creditor's belief that the incumbent liquidator was not independent was a reasonable one.

Customs - transaction value - payments to vendor or "associate of vendor" - commission.

In *Kia Australia P/L v Chief Executive Officer, Customs* ([1998] 1060 FCA, 1 September 1998) Finkelstein J considered when a person was an "associate" of the vendor of goods within s154 of *Customs Act* 1901 (Cth) so that payments to the person were included in the price by which the transaction value of imported goods was determined for the *Customs Act*. He concluded the AAT erred in finding that because one Japanese corporation held shares in another, the two were associated.

Criminal law - imposing upon Commonwealth by untrue representation with a view to obtaining benefit.

In *Guillot v Hender* ([1998] 1033 FCA, 27 August 1998) the applicants sought judicial review of decisions of a State Magistrate to commit them for trial for Commonwealth offences. Sundberg J concluded that because the applications raised pure questions of law he would determine them. He considered that the charges lay against the applicants under s29B of *Crimes Act* 1901 (Cth) was known to the law and rejected a submission that the applicants were charged with an attempt to commit an "imaginary crime" which, while they had believed it to be a crime, was not a crime.

Migration - review tribunals - procedures - failure of written reason to advert to material questions of fact.

In *Kandiah v Minister for Immigration* ([1998] VG 238/97, 2 September 1998) Finn J considered that by imposing on the RRT an obligation to give a written statement of reasons which sets out its reasons for the decision and findings on any material questions of fact, s430(1) of *Migration Act* created a procedure to be observed by the RRT in making its decision within s476(1)(a)

Migration Act. He concluded that the failure of the RRT to address in its reasons medical records which corroborated the account of the applicant when deciding to disbelieve the applicant constituted a failure to make a finding on a material question of fact.

Migration - Refugee Review Tribunal - procedural fairness.

In *Baroi v Minister for Immigration* ([1998] 991 FCA, 21 August 1998) Sackville J concluded that, assuming the RRT was under an obligation to provide procedural fairness, it had done so when it brought to the applicant's attention similarities between his statutory declaration and his evidence in unrelated but successful proceedings. He concluded the RRT was not obliged to provide a copy of the other declaration.

Migration - deportation - impugning conviction.

In *Luu v Minister for Immigration* ([1998] 1021 FCA, 25 August 1998) Weinberg J concluded that it was not open to a person subject to a deportation order pursuant to s200 of the *Migration Act* to invite the delegate or the AAT to consider evidence, which if accepted, would set at naught the conviction upon which the deportation order was based.

Migration - deportation order - procedural fairness - whether AAT had regard to improperly obtained documents.

In *Percerep v Minister for Immigration* ([1998] 1088 FCA, 4 September 1998) Weinberg J concluded an applicant had been denied procedural fairness where it appeared the AAT had considered material erroneously produced to it under subpoena by a State body when the applicant was advised the material had not been placed before the AAT. Consideration by Weinberg J of when a reviewing court may infer an event happened and whether the member of the AAT should have given evidence.

Migration - marriage - spouse incapacitated.

In *Ozbunbar v Minister for Immigration* ([1998] 1086 FCA, 28 August 1998) Kiefel J concluded the concept of "spouse" for the *Migration Regulations* was independent of the benefit derived, and that a person could be in a "marriage" notwithstanding that one party to it had become incapacitated by psychiatric illness.

Migration - refugee status - social group

- medical condition.

In *Gounder v Minister for Immigration* ([1998] 1080 FCA, 19 August 1998) Lindgren J concluded that a Fijian suffering from end stage renal failure who required treatment not available at a public hospital in Fiji was not a member of a "particular social group" by reason of the failure of the Fijian government to allocate funds for such a facility.

Migration - refugee status - right of access to third country.

In *Rajendran v Minister for Immigration* ([1998] 1085 FCA, 4 September 1998) a Full Court concluded that a Sri Lankan Tamil who had the right to return to New Zealand could not be recognised as a refugee in Australia.

Migration - refugee status - credibility.

In *Kopalapillai v Minister for Immigration* ([1998] 1126 FCA, 8 September 1998) a Full Court considered the approach to be adopted by the RRT in assessing credibility of an applicant for refugee status. The court concluded there is no rule a decision maker must hold a positive state of disbelief before making an adverse credibility assessment.

Migration - second application.

In *Bedington v Chong* ([1998] 1139 FCA, 14 September 1998) a Full Court considered the Minister for Immigration was entitled to lay down guidelines indicating the basis on which the Minister would exercise the power given by s48B of *Migration Act* to permit a second application.

Industrial law - log of claims - claim referable to previous employment.

In *A-G Qld v DP Hancock* ([1998] 1071 FCA, 3 September 1998) a Full Court concluded that a log of claims which contained demands referable to earlier employment which was "deemed" employment with the respondent State was merely a means of demanding benefits by reference to earlier employment and service and thus pertained to the existing relationship of employer and employee.

Bankruptcy - validity of Bankruptcy Notice - attached court computer print-out

In *St George Bank Ltd v Klintworth* ([1998] 1066 FCA, 25 August 1998) Hill J concluded that a Bankruptcy Notice which had attached to it a court print-out giving notice of entry of a default judgment did not have attached to

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it a court record contemplated by Reg. 4.01(1) of the *Bankruptcy Regulations* but this was a formal defect or irregularity not invalidating the proceedings.

Administrative law - adequate reasons - social security exclusion period.

In *Haidar v Secretary, DSS* ([1998] 994 FCA, 20 August 1998) Hill J concluded that in considering a claimant's circumstances at the time of hearing, but after the preclusion period, the AAT had taken into account an irrelevant matter in deciding whether special circumstances existed within *Social Security Act* 1991 (Cth) s1184(1) excusing the applicant from the preclusion period generally applicable after receipt of lump sum damages.

AUSTUDY - means test - whether "active" and "passive" business expenditure.
In *Leah v Secretary, DEETYA* ([1998] 1004 FCA, 21 August 1998) Madgwick J concluded the AUSTUDY Regulations did not recognise a distinction between "active" and "passive" business expenditure excluded from consideration for the means test.

Copyright - breach - computer program written by reverse-engineering.

In *Coogi Australia P/L v Hysport International P/L* ([1998] 1059 FCA, 21 August 1998) Drummond J concluded copyright in the computer program used in a computerised knitting machine was not infringed where the alleged infringer reverse-engineered a sample of the fabric and wrote a new program for its own machines. He further considered that copyright in fabric as a "work of artistic craftsmanship" existed in the entire fabric and infringement was not proved where the owner failed to identify that the alleged infringer's stitch structure had been taken from the original work.

Copyright - publication of photograph beyond specific purpose.

In *Matthews v ACP Publishing Pty Ltd* ([1998] 1122 FCA, 10 September 1998) Beaumont J concluded that a photographer was entitled to restrain use of a photograph taken for a specific purpose from being used outside that purpose.

Patents - disposable nappies.

In *Kimberley-Clark Australia P/L v Aircro Trading International P/L* ([1998] 1103 FCA, 8 September 1998) Burchett J concluded the applicant's patent for disposable nappies was valid, not void for obviousness and had been infringed.

Workers compensation - interpretation of impairment guide.

In *Whitaker v Comcare* ([1998] 1099 FCA, 7 September 1998) a Full Court considered the interpretation of the impairment guide by which impairment of the musculo-skeletal system was assessed for the *SRC Act* 1988 (Cth). Observations on the power of court to give effect to confused statutory language.

Workers compensation - jurisdiction of AAT to review matters beyond immediate reviewable decision under SRC Act.

In *Comcare v Burton* ([1998] 1144 FCA, 9 September 1998) Finn J concluded the AAT did not have jurisdiction to decide an entitlement to compensation which, while pertinent to the applicant, was not the question determined by Comcare and subject of review.

Medicine - proof of excessive services.

In *Edelsten v Minister for Health* ([1998] 1112 FCA, 7 September 1998) Ryan J concluded a Medical Services Review Tribunal erred in concluding by reference to expert opinion of the statistical occurrence of the need for particular medical procedures that there was prima facie support for the conclusion that the subject medical practitioner had provided excessive services without considering the practitioner's clinical notes without evidence from the practitioner. Proof of issues in administrative proceedings considered.

Administrative law - bias - remittal to same tribunal.

In *Winch v Repatriation Commission* ([1998] 1110 FCA, 8 September 1998) Merkel J concluded there was no reasonable apprehension of bias where a matter was remitted from the Federal Court and heard by the AAT including a member who had sat in a prior hearing of the applicant's claim.

Nursing homes - whether landlord of nursing home entitled to be heard in respect of decision to relocate premises.

In *Corio Bay & District Private Hospital v Smith* ([1998] 1111 FCA, 8 September 1998) Merkel J concluded a landlord of a nursing home in respect of which subsidised places were allocated under the *Aged Care Act* 1997 (Cth) was not entitled to be heard in respect of a decision to re-allocate those places to another nursing home.

Aviation - limitation of claims.

In *South Pacific Air Motive P/L v Magnus* ([1998] 1107 FCA, 9 September 1998) a Full Court concluded that claims for psychological injuries were separate from claims for physical injury within s28 of the *Civil Aviation (Carriers Liability) Act* 1959 and the Act operated to exclude causes of action pleaded by passengers. The court concluded the Act did not operate to exclude a claim for psychological injury by non-passengers.

Administrative Appeals Tribunal - validity of remitter order.

In *AB v C of T* ([1998] 1116 FCA, 9 September 1998) Foster J concluded the power of the Federal Court to remit a question under s44(5) of the *AAT Act* was not constitutionally invalid.

Industrial law - jurisdiction to grant injunction under s170NG of Workplace Relations Act. In *Independent Education Union of Australia v Canonical Administrators* ([1998] 1127 FCA, 9 September 1998) Ryan J considered whether the court had jurisdiction to entertain an application for an injunction under s170NG of the *WR Act* where no application was made for imposition of penalty.

Public service - inquiry.

In *Buonopane v Secretary, DEEYA* ([1998] 1128 FCA, 9 September 1998) Sundberg J considered whether the procedure for laying charges against public servants for failing to fulfil duties had been performed so that the applicant was denied procedural fairness at the inquiry stage.

Income tax - self-assessment - role of tax agents.

In *Knuckey v C of T* ([1998] 1143 FCA, 16 September 1998) a Full Court dismissed an appeal by a tax agent who contended that the decision to subject his practice to the requirements of a work-related expenses audit program whereby his clients were required to substantiate their claim was improper.

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