Court Notes

Federal Court Notes

By Thomas Hurley, Barrister VIC, NSW, ACT. Editor of Victorian Administrative Reports

Fisheries - validity of policy.

In P.W. *Adams Pty Lid v Australian Fisheries Management Authority* (NG 217/97, 23 January 1998) Branson J concluded that a decision by the AAT that the relevant policy of the respondent concerning fish management was valid and further the AAT did not err in law by considering the economic efficiency of the policy generally and failing to address its impact on the applicant.

Federal Court - procedure - costs - flying a gross sum.

In *Canvas Graphics P/L v Kodak (Australasia) P/L (SG 45/94,* 23 January 1998) O'Loughlin J considered the operation of *Federal Court Rules* 062 r4(1)(c) authorising payment of costs by way of a fixed sum in lieu of taxed costs.

Mutual recognition - legal profession - fees for admission.

In *The Legal Practice Board (WA) v Boroky SING 97/97,* 23 January 1998) by s40(1) the *Mutual Recognition (Western Australia) Act* 1995 (WA) authorises a "local registration authority" to impose fees on applicants for admission which are not greater than fees applicable for registration otherwise. The AAT ordered the applicant reconsider the request of solicitors for admission in Western Australia. In doing this the AAT considered that the fee to be charged to the applicant not exceed the reasonable administrative costs of admitting the applicant. R.D. Nicholson J concluded that the power given by s40 was unfettered and permitted a fee resulting from general calculation regardless of the administrative work performed in the particular instance or fees fixed outside the State.

Income tax - deductions - legal costs.

In *Schokker v C of* T (WAG 83/97, 23 January 1998) R.D. Nicholson J considered when expenses incurred by a taxpayer in allegedly preserving employment conditions by contesting allegations by the Commissioner that he had breached secrecy provisions were allowable as deductions from income tax. Appeal against decision of AAT to dismiss claims for deductions itself dismissed.

Industrial law - whether police officers employees.

In *Karl Conrad v Victoria Police* (Marshall J.; VI 2244R/96, 22 January 1998) and *Ward v Commissioner of Police (WA)* (Moore J; WI 1137/96, 14 January 1998) the Federal Court considered the legal basis upon which a police officer and an Aboriginal police aide were appointed. Marshall J in the *Conrad* case concluded that the applicant held a statutory office and was not an "employee" for the *Workplace Relations Act* 1996 (Cth). Moore J in *Ward's* case concluded the applicant was a person whose termination of employment was regulated within s170EA(1) of the *Industrial Relations Act* 1988 (Cth).

Practice - security for costs - representative proceedings.

In *Woodhouse v McPhee* (VG 3237/97, 24 December 1997) Merkel J considered the basis upon which an application for security for costs should be made where the applicant brought proceedings as a representative under Part IVA of the *Federal Court of Australia Act* 1976 (Cth). He observed the power to award costs was limited by s43(1A) of that Act which granted represented persons a general immunity from paying costs. Merkel J considered the inter-relationship of s43(1A) and s33ZG(c)(v) which provided that nothing in Part IVA affected the law relating to security for costs. Application for security for costs dismissed.

Corporations - winding up - liquidators.

In *Pace v Antleres P/L (in liq)* (NG 131/94, 12 January 1998) Lindgren J considered the duties of liquidators under the Corporations Law to bring solvent companies out of liquidation within a reasonable time. Lindgren J also considered the entitlement of liquidators to the "costs and expenses of the winding up". He considered who was liable to pay income tax and additional tax where the liquidator failed to do so and whether liquidators were entitled to remuneration where the authority to receive it was based on an invalid approval by "creditors".

Corporations law - information obtained by ASC for use by receiver in action against auditors.

In *Boys v ASC* (WAG 71/97, 8 January 1998) the ASC made available to the receiver of a company information obtained by the ASC investigating the company. The receiver and his solicitor were appointed as consultants to the ASC without charge. A Full Court concluded that the ASC had not acted improperly, was not in conflict of interest and was not biased in making the information available. The ASC made available to the receiver of a company, appointed by the trustee for debenture-holders, information obtained by the ASC in its investigation of the company. The receiver obtained the information for use in the civil action against the auditors of the company. A Full Court concluded the ASC had not acted improperly, was not in conflict of interest and was not biased in making the information available or appointing the receiver and his solicitors as consultants.

High Court Notes

96/57 Negligence - duty of care - statutory body - whether statutory body possessing statutory powers liable where damage caused by failure to exercise powers - mandamus - escape of fire.

In *Pyrenees Shire Council v Day* (23 January 1998) the appellant was the municipal body for an area in rural Victoria. In 1988 it was advised by fire fighters called to a domestic fire that the chimney in a

continued on page 17

shop/dwelling within the municipality was defective. The appellant sent a notice under s695(1A) *Local Government Act* 1958 (Vic) to the "owner and occupier" of the premises requiring the chimney to be made good. The appellant took no follow up action. The tenant of the premises (T) did not inform the owner of the premises (N) of the notice. The tenant (T) sold the business and assigned the lease to S. In 1990 a second fire destroyed the premises and damaged abutting premises owned by D. The owner of the premises (N), the occupier of the premises (S) and the neighbour (D) each successfully sued the former tenant (T). The neighbour (D) succeeded in its action against the appellant municipality but claims against the appellant municipality by the owner (N) and the occupier (S) failed. The parties appealed to the Court of Appeal (Vic). This court concluded by reference to the doctrine of "general reliance" that the appellant municipality owed a duty to the owner of the adjoining premises (D) but not to the tenant (S) as it was in occupation of the premises with the defective chimney. As the tenant (S) could have inspected the chimney at any time it did not rely on the appellant municipality to perform its duties. The municipality appealed to the High Court against the judgment against it in favour of the neighbour(D). The tenant (S) appealed against its failure to obtain judgment against the municipality. The appeal to the High Court by the municipality was dismissed by all five members of the High Court. The appeal by the tenant (S) was allowed by majority: Brennan CJ, Gummow, Kirby JJ; contra Toohey J; McHugh J. The High Court considered the basis on which a duty of care arose. Brennan CJ concluded damages could be awarded for private loss following a failure to exercise public statutory duty where the decision not to exercise the duty was irrational. Toohey J and McHugh J generally concluded the doctrine of "general reliance" applied and rendered the appellant municipality liable to the adjoining owner (D) but not liable to the tenant/occupier (S). In their judgments Gummow J and Kirby J doubted or criticised the existence of the doctrine of "general reliance" and found the municipality liable to both the adjoining owner (D) and the tenant/occupier (S) by reference to a general duty of care. Appeal by appellant municipality dismissed; appeal by occupier/tenant (S) allowed and judgment entered for it.

61/96 Criminal law - evidence - admissions - admission by suspect to undercover police or police informer after suspect declines to answer formal police questions.

In *R v Swaffield; Pavic v R* (20 January 1998) the High Court considered when admissions by accused will be admitted where those admissions have been made to undercover police, or police informers, after the suspect has declined to participate in a formal police interview. In *Swaffield* the accused admitted to an undercover Queensland police officer investigating drug offences that he had committed an arson. Swaffield had earlier declined to participate in a formal interview. In *Pavic* the accused admitted to a friend who had been "wired" by the Victorian Police that he was involved in a murder after he also declined to respond in a formal police interview. The High Court considered the operation of "unfairness" discretion and the "public policy" discretion by which courts may reject unfairly obtained evidence. All five members of the High Court concluded the confession in *Swafield* should have been excluded principally on the basis of ensuring that police did not adopt tactics designed simply to frustrate appropriate limits on their inquisitorial functions. The court concluded by majority that the confession in *Pavic* had been properly admitted: Brennan CJ; Toohey, Gaudron, Gummow JJ jointly; contra Kirby J.

97/49 Criminal law (Q) - sexual offences - maintaining sexual relationship with a child.

In KBT v *The Queen (9* December 1997) by s229B(1) the *Criminal Code (Q)* creates an offence of maintaining a sexual relationship with a child. S229B(1A) provided that a person shall not be convicted of the offence without proof of an act constituting an offence of a sexual nature between the accused and the child on three or more occasions during the course of the alleged relationship notwithstanding that the evidence did not disclose the dates or circumstances of the occasion. The appellant was convicted of the offence created by s229B(1) of the Code on evidence alleging a general course of misconduct with a minor. His appeal to the Court of Criminal Appeal (Q) was dismissed in part on the basis that no complaint against the evidence had been made at trial. His appeal to the High Court was allowed: Brennan CJ, Toohey, Gaudron, Gummow JJ jointly; sim Kirby J. The High Court concluded that the direction to the jury failed to alert them to the requirement that they find there had been three occasions constituting offences of a sexual nature. The High Court observed that failure to take a point at trial will not necessarily lead to the conclusion on appeal that no substantial miscarriage of justice has actually occurred where the point is valid. Appeal allowed.

41/97 Criminal law - evidence - cross-examination - suggestion to complainant that evidence is "payback" - whether cross-examination of accused permissible to prove absence of "payback".

In *Palmer v Q* (20 January 1998) the appellant was charged with sexual assault on a young woman. He denied the charges. Counsel for the appellant in cross-examining the complainant suggested that her evidence was "some sort of payback". The prosecutor cross-examined the appellant and obtained the concession that the appellant knew of no basis for a "payback". The appellant was convicted. His appeal to the Court of Appeal (Vic) failed. His appeal to the High Court was allowed: Brennan CJ, Gaudron, Gummow JJ jointly; McHugh J; Kirby J. The High Court considered when it is proper to cross-examine an accused as to his knowledge of-why a complainant or prosecution witness would lie. The court observed such cross examination may cause confusion in the minds of the jury that because the accused has no knowledge of why a complainant or witness is

continued on page 19

NT Women Lawyers' Association

Following is the text of a media release from the Women Lawyers of WA (Inc).

"Women lawyers call for abortion to be treated as a health issue"

"The regulation of abortion services in Western Australia should be treated as a health issue and not be regulated by the criminal law," said Narelle Johnson, President of Women Lawyers of WA (Inc).

"Women Lawyers believes this is primarily a health issue and the law should reflect this by restricting criminal sanctions to abortions performed by those other than qualified medical practitioners".

Ms Johnson expressed WLWA's concern that the ongoing debate about the meaning of the State's abortion laws is hindering women's access to safe and legal abortion.

The provision of abortion services by qualified medical practitioners should not be threatened by the lack of clarity about the law and the apparently selective prosecutions which have recently occurred."

Northern Territory Women Lawyers' Association advise that a

General Meeting

will be held on

Thursday 28th MAY 1998 5pm
at the
Roma Bar, Cavenagh St, Darwin

The abortion issue (and the press release of Women Lawyers of WA) will be on the agenda for discussion.

Court Notes

High Court Notes

continued from page 17

lying, the complainant or witness is ipso facto a truthful witness. The court observed evidence of the opinion of the accused is irrelevant and may lead to a reversal of the burden of proof by requiring an accused to establish a motive for the complainant or witness to lie. Observations in *R v E* (1996) 39 NSWLR 450 approved. The court also concluded that the conviction was unsafe. The appellant was a process server. Evidence was given of where he said he had been serving process at the time of the alleged offences. The High Court concluded this evidence was sufficient to create a doubt that the appellant had an alibi. Appeal allowed. Acquittal entered.

171/96 Stamp duty - deed establishing discretionary trust - value of property conveyed - whether trustee's right to exoneration constitutes beneficial interest in trust assets.

In *Chief Commissioner of Stamp Duties (NSW) v Buckle* (23 January 1998) the High Court considered whether a supplemental deed conveyed property to trustees holding property under a former deed within the *Stamp Duties Act* 1920 (NSW) or merely conveyed the beneficial interest in remainder of beneficiaries where liabilities attaching to the property had to be taken into account in identifying the unencumbered value of the property conveyed. The court accepted that a trustee has a first charge on the assets vested to secure the trustee's right to reimbursement and exoneration. The court concluded this right was not a right which was created over the interests of beneficiaries to encumber those interests within the *Stamp Duties Act.*

97/48 Admiralty - proceedings *in rem* - when one ship a "surrogate" for another.

In *Laemthong International Lines Co. Ltd v BPS Shipping (9* December 1997) the High Court concluded that the provisions of s3(6) of the *Admiralty Act* 1988 (Cth) which defines one ship as being a "surrogate" ship for the purposes of that Act, did not control the definition of the term "ship" in the provisions of s19 creating the right to proceed *in rem:* Brennan CJ; Toohey J; Gaudron, Gummow, Kirby J jointly. The High Court accepted that it could have regard to the report of the Australian Law Reform Commission on which the two provisions were based.