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High Court Notes November 2002

Prepared for the Law Council of Australia and its constituent bodies by Thomas Hurley, Barrister, Vic., NSW, ACT (Editor, Victorian Administrative Reports)

Constitutional law - Power of Commonwealth agency to prosecute breaches of State law - When Commonwealth agency may appeal

In *Macleod v. ASIC* ([2002] HCA 37; 11.09.2002) the ASC prosecuted M for breach of the 1989 *Corporation Law of WA*. He was convicted of one count by a WA Magistrate in 1998. This conviction was set aside by a Commissioner of the Supreme Court of WA in an appeal commenced by M. The ASC appealed by leave to the Full Court of WA under s206A of the *Justices Act 1902 (WA)*. The Full Court of the Supreme Court restored the conviction of the Magistrate. M appealed to the High Court contending the appeal by the ASC to the Full Court was incompetent because while the ASC was authorised by s49(2) of the ASC Act to carry prosecution of offences against State law this power was spent on the making of the orders by the Magistrate. The Court concluded that s79 of the *Judiciary Act* did empower the ASC to institute the appeal to the Full Court nor "pick up" any provision of State law which would [43], [44]. Appeal allowed.

High Court - Practice - Evidence in applications for special leave

In *Road and Traffic Authority v. Cremona* ([2002] HCA 38;

19.08.2002) Kirby J considered when in an application for special leave to appeal affidavits would be admitted to show the question was of public importance.

Immigration - Refugees - Failure to refer to Minister request for dispensation

In *Re MIMIA; ex p Applic* ([2002] HCA 39; 19.08.2002) Kirby J dismissed an application for a constitutional writ in respect of the failure to forward to the Minister for Immigration a request that he exercise the personal power under s48B of the *Migration Act* to allow a second application

Federal Court Notes November 2002

Prepared for the Law Council of Australia and its constituent bodies by Thomas Hurley, Barrister, Vic., NSW, ACT (Editor, Victorian Administrative Reports)

Migration - Visa cancellation - Whether departmental briefing paper sets out reasons for decision

In *MIMA v. W157/00A* ([2002] FCAFC 281; 4.09.2002) a Full Court considered whether the giving to a person whose visa has been cancelled of a departmental submission to the Minister which the Minister had signed constitutes that the giving of a notice which sets out the reasons for the decision as required by s501G(1)(e) of the *Migration Act*. The Court concluded that while the document did not constitute a statement of "reasons" the ground of review on s476(1)(a) of the *Migration Act*, (failing to comply with procedures required

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in connection with the making of the decision), was not made out as the giving of reasons of a decision was not in connection with making the decision.

Trade marks - "Inherently adapted to distinguish" goods

In *Kenman Kandy Australia P/L v. Registrar of Trade Marks* ([2002] FCAFC 273; 28.08.2002) a Full Court considered whether the design of confectionary was able to distinguish it from other confectionary and whether these goods were "inherently adapted to disguise" themselves from other goods for the purposes of the *Trade Marks Act 1995 (Cth)*.

Migration - RRT - Information which could lead to decision being affirmed

In *WAPG of 2002 v. MIMIA* ([2002] FCAFC 226; 13.09.2002) the RRT concluded the Appellant gave evidence to it different from material in a "green card" he gave it. A Full Court concluded any difference was not "information" which the RRT could consider would be a reason for affirming the decision and which the RRT was required by s424A of the *Migration Act* to inform the Applicant of fault.

Courts - Summary dismissal of request for orders under s12GD of ASIC Act

In *Medibank Private Ltd v. Cassidy* ([2002] FCAFC 290; 13.09.2002) a Full Court considered the jurisdiction given by s12GD, 12GM of the *ASIC Act 1989 (Cth)* to order compensation to non-party to a proceeding.

Income tax - Deductions - Management fees paid where no business carried on - Deduction where "scheme"

In *Vincent v. Commissioner of Taxation* ([2002] FCAFC 291; 16.09.2002) a Full Court considered whether management fees could be claimed as a deduction under s51(1) of *ITAA* and whether a deduction could be a "tax benefit" within s177C(a) of the *ITAA*.

Income tax - Collection - Notice to third party payer

In *Saitta P/L v. Commissioner of Taxation* ([2002] FCA 1105; 6.09.2002) a Full Court considered the nature of money due which could be subject to a notice from the Commissioner to a debtor of the tax payer under s260-5 of the *Tax Administration Act 1953 (Cth)*.

Trade practices - Misleading conduct - Advertisement - "Lifetime health cover" - Small print exceptions

In *Cassidy v. Medical Benefits Funds of Australia & Anor. (No. 2)* ([2002] FCA 1097; 9.09.2002) Hill J considered whether advertisements espousing "lifetime" health insurance cover were misleading or deceptive where the insurer asserted it would waive waiting periods subject to small print exceptions.

Migration - Visa cancellation - Inviolable condition of notice

In *Osborne v. MIMIA* ([2002] FCA 1113; 9.09.2002) French J considered when notification to a visa holder that it was intended to cancel his visa was an indispensable condition precedent to making the decision to cancel the visa.

Costs - Order against non-party

In *Chapman v. Luminis P/L (No. 6)* ([2002] FCA 1100; 10.09.2002) von Doussa J considered when it was in the

interests of justice that a successful Respondent obtain an order for costs against the non-party where the Applicants were people of straw.

Migration - Inviolable limitation

In *Zahid v. MIMIA* ([2002] FCA 1108; 10.09.2002) Sackville J considered whether the failure of the MRT to consider both claims by a visa Applicant that he was a "remaining relative" and also a "special need relative" constituted infringement of an "inviolable limitation". The decision of the Full Court in *NAAV v. MIMIA* [2002] FCAFC 228 analysed in detail.

Migration - Student visa - Substantial compliance with conditions

In *Zou v. MIMIA* ([2002] FCA 1126; 13.09.2002) Hill J considered whether the visa Applicant had complied substantially with the conditions attached to his former visa, whether an earlier decision of a Judge in the Federal Court was clearly wrong and whether any constructive failure by the MRT to exercise jurisdiction was defeated by the operation of the "privative clause" in s474 of the *Migration Act*.

Elections - Petition struck out

In *Kelly v. Campbell* ([2002] FCA 1125; 11.09.2002) Madgwick J dismissed an election petition to the Court as the Court of Disputed Returns contending the half Senate election in NSW was invalid because, inter alia, the commission of the NSW Governor was not valid.

Corporations - Creditors - Employees transferred to company without their knowledge

In *McCluskey v. Karagiozis* ([2002] FCA 1137; 12.09.2002) Merkel J concluded persons who had been employees of a company and whose contracts of employment had been transferred to another company in a corporate group as part of a corporate restructure without their knowledge remained creditors of the pre-structured companies in respect of their employee entitlements.

Industry development grants - Eligibility

In *Australian Tea Tree Oil Research Institute v. IRD Board* ([2002] FCA 1127; 13.09.2002) Stone J considered whether the AAT erred in finding eligibility for registration under the *IRD Act 1986 (Cth)* was found in criteria published in the Gazette and whether the AAT erred in identifying the criteria and considering whether a discretion existed to enable registration where criteria not satisfied.

Income tax - Refusal to remit general interest charge

In *Elias v. Commissioner of Taxation* ([2002] FCA 1132; 13.09.2002) Hely J considered whether a decision by the Commissioner not to remit a general interest charge evidenced reviewable error and whether there had been an unreasonable delay in making the decision causing unequal treatment between tax payers.

Discrimination - Racial vilification on the internet

In *Jones v. Toben* ([2002] FCA 1150; 17.09.2002) Branson J concluded racial vilification had been established in relation to Jews in Australia as a group with common "ethnic origin" where a non-password protected website distributed material likely to offend, insult or humiliate them in relation to the "Holocaust".

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