

NOTICEBOARD

High Court Notes September 2003

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

Negligence - Medical negligence - Damages - Damages for birth of healthy child

In *Cattanach v. Melchior* ([2003] HCA 38; 16.07.2003) the High Court concluded that damages were recoverable by the parents of a healthy child born as a consequence of medical negligence and the damages included the costs of raising and maintaining the child to the age of eighteen: McHugh, Gummow JJ; Kirby J, Callinan J; contra Gleeson CJ; Hayne J; Heydon J. Appeal dismissed.

Federal Court Notes September 2003

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

Bankruptcy - Provable debt - Whether parking fines imposed by "Court"

In *State of Victoria v. Mansfield* ([2003] FCAFC 154; 18.07.2003) a Full Court concluded fines imposed under the PERIN penalty notice procedure authorised by the Magistrates' Court Act 1989 (Vic) as an alternative to proceeding by way of a charge in Court remained fines imposed "by a Court" and excluded as provable debts in a bankruptcy by s82(3) of the *Bankruptcy Act* [51].

Courts - Disqualification of Judge for bias - Conduct of retrial - Misfeasance in Public Office

In *Sanders v. Snell* ([2003] FCAFC 150; 2.07.2003) a Full Court concluded that the Chief Justice of Norfolk Island did not err in failing to disqualify himself for bias by proceeding to make procedural orders in, and hearing, the retrial ordered by the High Court (1998) 196 CLR 329 84. The Full Court concluded the Judge had erred by finding the tort of misfeasance in public office was made out when there was no basis on which the Court could conclude the decision to dismiss the respondent was made with actual knowledge by the appellant of want of power or reckless indifference to the absence of power based upon want of procedural fairness [116]. Appeal allowed.

Trade practices - Whether item performing its functions is not of merchantable quality

In *Medtel P/L v. Courtney* ([2003] FCAFC 151; 7.07.2003) a Full Court concluded the Primary Judge did not err in finding a pacemaker which had a risk of malfunctioning was not of merchantable quality within s74D of the TP Act notwithstanding the pacemaker had yet to malfunction. Consideration of determination of liability in class action proceeding.

Federal Court - Representative proceedings - Trade practices claim based on conduct outside Australia

In *Bray v. F Hoffmann-La Roche Ltd* ([2003] FCAFC 153; 15.07.2003) a Full Court considered when an action under the Trade Practices Act was based on conduct engaged in outside Australia, when leave to serve out of the jurisdiction should be granted and whether in a representative proceeding every member of the group must have a claim against each respondent.

Migration - Cancellation of visa on character grounds - Natural justice

In *Ayan v. MIMIA* ([2003] FCAFC 139; 27.07.2003) a Full Court concluded the errors in the summary of the appellant's criminal history given to the Minister were not significant enough to have affected the decision to cancel his visa and any failure to give the appellant a copy of the submission prepared for the Minister did not constitute a breach of natural justice.

Income tax - Collection of tax - Whether taxpayer and FCT had rights of set-off

In *Deputy C of T v. Dexcam Australia P/L* ([2003] FCAFC 148; 30.06.2003) a Full Court considered whether the relations between a taxpayer and the Commissioner involved any right to set-off or cross-claim different tax liabilities and credits accrued pursuant to the Prescribed Payments System.

Veterans' entitlement - Injury - Whether consumption of alcohol in Mess contributing cause to injury

In *Roncevich v. Repatriation Commission* ([2003] FCAFC 146; 30.06.2003) a Full Court concluded, by majority, that the finding of the AAT that injury suffered by the appellant while intoxicated following a function at his sergeant's Mess did not reveal a defence caused injury within s70(5) of the Veterans' Entitlements Act 1986 (Cth).

Income tax - Income - Monies received by elite athlete

In *Stone v. C of T* ([2003] FCAFC 145; 27.06.2003) a Full Court considered whether payments made to an elite athlete were assessable as income in addition to the salary she received as a police officer. The Court considered which of the various payments for sponsorships, prize money and grants were assessable as income.

Migration - Protection visa - Doctrine of effective protection - When jurisprudence arising from incorrect decision should be applied

In *NAGV v. MIMIA* ([2003] FCAFC 114; 27.06.2003) a Full Court concluded an earlier decision in *MIMA v. Thiyagarajah* (1997) 80 FCR 543 was wrongly decided but the doctrine of "effective protection" which arose from it should be applied.

Administrative law - Whether breach of natural justice an error of law

In *Clement v. Independent Indigenous Advisory Committee*
continued next page

continued from previous page

([2003] FCAFC 143; 27.06.2003) a Full Court considered when a denial of natural justice by the AAT (which determined an application on the erroneous belief that the absent applicant knew of it) constituted an "error of law" on which an appeal lay to the Federal Court.

Migration - Good faith

In *MIMIA v. NAOS* of 2002 ([2003] FCAFC 142; 27.06.2003) a Full Court allowed an appeal against a decision of a Federal Magistrate which concluded a decision of the RRT did not constitute exercise of power in good faith.

Racial discrimination

In *Toben v. Jones* ([2003] FCAFC 137; 27.06.2003) a Full Court considered that Part IIA of the Racial Discrimination Act 1975 (Cth) (prohibiting offensive behaviour based on racial hatred) was constitutionally valid, the degree of causal connection required by s18C of that Act and whether publication of racially offensive material could be justified on the grounds of genuine academic purpose or as being in the public interest.

Trade practices - Market power

In *ACCC v. Australian Safeway Stores P/L* ([2003] FCAFC 149; 30.06.2003) a Full Court considered whether a supermarket operator had a substantial degree of market power in the wholesale market of bread products and whether it had ceased to acquire bread from one baker for a reason that contravened s46(1) of the Trade Practices Act.

Migration - Protected information - Publicly available information

In *Ball v. MIMIA* ([2003] FCA 699; 11.07.2003) Ryan J set aside a decision to cancel a visa on character grounds for error of law where the decision was based on counting as separate terms of imprisonment ordered to be served concurrently. This decision was based in part on "protected information" within 503A Migration Act. On the relevant agency reconsidering the status of the information it became apparent that the "protected information" was in fact publicly available records of New Zealand Courts. Consideration of how a visa holder is to be given natural justice by being informed of the outline of protected information. In *Hicks v. MIMIA* [2003] FCA 757; 21.07.2003 French J also set aside a decision to cancel a visa where concurrent criminal sentences were counted separately.

Assent to Proposed Laws

His Honour the Administrator assented to the following proposed laws:

Thursday 26th June 2003

Tobacco Control Amendment Act 2003
(No. 24 of 2003)

Firearms Amendment Act 2003

(No. 25 of 2003)

Information Amendment Act 2003

(No. 26 of 2003)

Financial Management Amendment Act 2003

(No. 27 of 2003)

Major Cricket Events Act 2003

(No. 28 of 2003)

Energy Pipelines Amendment Act 2003

(No. 29 of 2003)

Desert Knowledge Australia Act 2003

(No. 30 of 2003)

Friday 27th June 2003

Land Development Corporation Act 2003

(No. 31 of 2003)

Trade Development Zone Act Repeal Act 2003

(No. 32 of 2003)

G. GADD

for Clerk of the

Legislative Assembly

Family law update

The Family Court has indicated that the commencement date of the proposed new Family Court Rules will be approximately 1 April 2004 rather than 1 January 2004 as originally announced. It is expected that a Judges' meeting will be held in November 2003 to discuss the draft Rules.

The Attorney-General and the Minister for Children and Youth Affairs have announced an inquiry into child custody arrangements in the event of family separation.

The House of Representatives Family and Community Affairs Committee will look at what other factors should be taken into account in deciding the respective time each parent should spend with the child post separation having regard to the fact that the best interests of the child are the paramount consideration.

In particular, the Committee will examine whether there should be a presumption that a child will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted. It will also look at the circumstances in which a court should order the children of separated parents have contact with other persons, including their grandparents.

The Committee is to report to the Parliament by 31 December 2003.

Inquiry into ministerial discretion in migration matters

On 19 June 2003 the Senate established the Select Committee on Ministerial Discretion in Migration Matters. The Committee is inquiring into:

- the use made by the Minister for Immigration of the discretionary powers available under sections 351 and 417 of the Migration Act 1958 since the provisions were inserted in the legislation;
- the appropriateness of these discretionary ministerial powers within the broader migration application, decision-

NOTICEBOARD

making and review and appeal processes;
c) the operation of these discretionary provisions by ministers, in particular what criteria and other considerations applied where ministers substituted a more favourable decision; and
d) the appropriateness of the ministerial discretionary powers continuing to exist in their current form, and what conditions or criteria should attach to those powers.

The Committee comprises ALP Senators Ludwig, Nick Sherry and Penny Wong, Government Senators Santo Santoro, David Johnston and Gary Humphries and Australian Democrat Senator Andrew Bartlett.

Submissions to the committee close on 1 August 2003. Public hearings are expected to be held in late August and early September and the Committee will report to Parliament by 3 November 2003.

Refugee Review Tribunal

The fee for unsuccessful applications for review, made to the Refugee Review Tribunal, has increased to \$1,400 for applications lodged after 1 July 2003. For applications lodged before 30 June 2003, the fee will remain at \$1,000. On 12 June 2003 the Migration Amendment Regulations 2003 (No. 4) were made. Amongst the amendments to the existing migration regulations 1994, subregulations 4.31B (1) and (5) were amended to read:

(1) The fee for review by the Tribunal of an RRT-reviewable decision is:

(a) if the application for review was made before 1 July 2003 - \$1,000; or

(b) if the application for review was made on or after 1 July 2003 - \$1,400.

(5) This regulation applies in relation to a review of a decision only if the application for review was made on or after 1 July 1997 and before 1 July 2005.

The amendments will commence on 1 July 2003 and will apply in relation to an application for a visa whether (a) made, but not finally determined (within the meaning of subsection 5 (9) of the Migration Act 1958), before 1 July 2003; or (b) made on or after 1 July 2003.

The substitution of subregulation 4.31B(1) increases the fee payable for review by the Tribunal of an RRT-reviewable decision to \$1,400 for review applications made on or after 1 July 2003. The amendment to subregulation 4.31B(5) amends the sunset clause so that r.4.31B as amended will only apply in relation to a review if the review application was made before 1 July 2005.

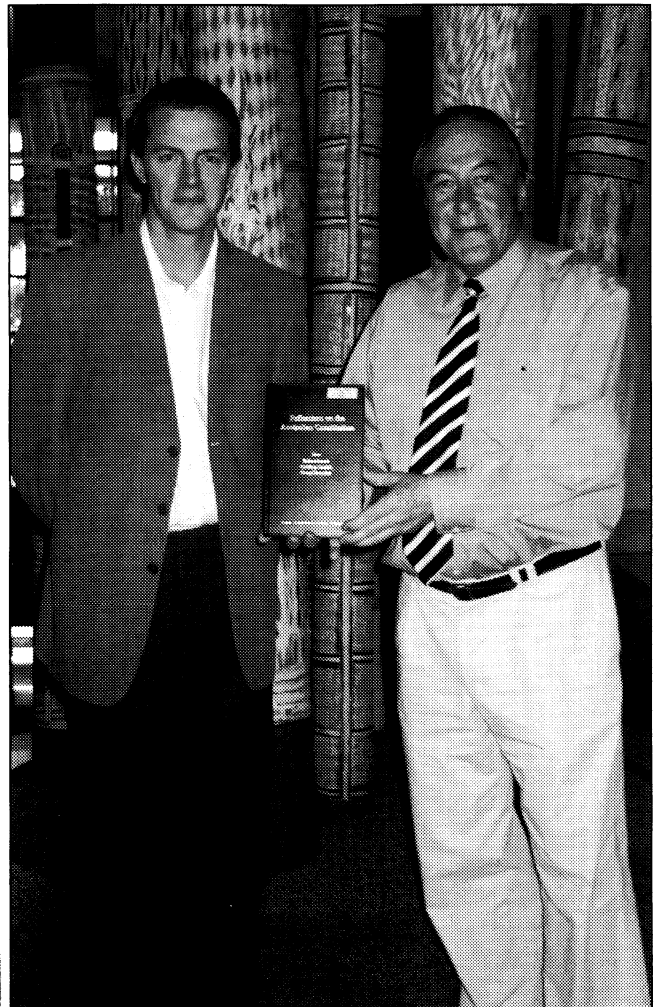
AACL launches new branch in Darwin

On Thursday 24 July 2003, the Australian Association of Constitutional Law (AACL) held its first event in the Northern Territory - a book launch at the Supreme Court, Darwin.

NT Solicitor General Tom Pauling QC officially launched *Reflections of the Australian Constitution*, which is edited by the Hon Robert French (a Justice in the Federal Court and President of the AACL), Professor Cheryl Saunders AO (from the University of Melbourne and Vice President of the AACL) and Professor Geoffrey Lindell (Professorial Fellow of the University of Adelaide and former Secretary of the AACL).

The AACL aims to: develop and promote constitutional law in Australia; support the teaching, research and practice of the discipline; provide a forum for the exchange of knowledge and information between members; increase public awareness and understanding; and maintain membership to the International Association of Constitutional Law.

For further information please contact the Australian Association of Constitutional Law Secretariat on Tel: (03) 8344 1011, Fax: (03) 8344 1013, or Email: cccs@law.unimelb.edu.au



AACL Program Co-ordinator Patrick Keyzer and NT Solicitor General Tom Pauling QC at the book launch.