

NOTICEBOARD

High Court Notes February/March 2003

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

Constitutional law - Judicial power - Privative clause - Whether privative clause may exclude judicial power from reviewing decision for jurisdictional error

In *Plaintiff S157/2002 v. C of A* ([2003] HCA 2; 4.02.2003) by s474 the *Migration Act* provided that a "privative clause decision" was final and was not subject to the remedies of prohibition, mandamus, injunction, declaration (found in *Constitution* s75(v)) or Certiorari. A "privative clause decision" was defined to mean a decision of an administrative character made, proposed or required to be made under the Act. By s486A the Act required any application to the High Court for relief under *Constitution* s75(v) be made within 35 days of the actual notification of the decision. The Plaintiff desired to institute proceedings in the High Court after the time limit in s486A had expired in respect of the refusal to grant him a visa. He brought an action in the original jurisdiction of the High Court claiming ss474(1) and 486A were invalid. The High Court generally concluded that s474(1) of the *Migration Act* was not invalid because, on its proper construction, the term "privative clause decision" referred to decisions made absent jurisdictional error. On this basis the High Court concluded that it remained possible to seek the Constitutional Writs in respect of decisions made under the *Migration Act* where the relief was sought on the grounds of jurisdictional error: Gleeson CJ [23], [37]; Gaudron, McHugh, Gummow, Kirby, Hayne JJ [76], [83]; sim Callinan J [160]. The Court rejected the contention that the privative clause provision was a "lead" provision which effected an implied amendment to all the other provisions of the *Migration Act* and its complex regulations. The majority observed that the question of whether a decision involved jurisdictional error may involve reconciling the provisions under which the decision was made with the privative clause provision [77] - [78]. The Court concluded s486A of the *Migration Act* did not apply to prevent the proceeding proposed by the Plaintiff because it only prevented decisions in respect of a "privative clause decision" and did not prevent review of decisions on the ground of jurisdictional error. Questions reserved answered accordingly.

Constitutional law - Constitutional Writs - Jurisdictional error - Constructive failure to exercise jurisdiction - Failure to take into account relevant matter - Utility of relief - Failure of RRT to notice in application by wife and children for protection visa that their separated husband had been granted one in Australia

In *Re MIMIA; ex p Applicants S134/2002* ([2003] HCA 1; 4.02.2003) the prosecutors (a wife and her five children), citizens of Afghanistan, applied for protection visas in February 2001. A criterion for the visa was that the Applicant was a member of the same family unit as a person who had been granted a protection visa. The departmental file before the RRT revealed that the husband/father, from whom the Applicants had been separated in travel, had been granted a

temporary protection visa in Australia in August 2000. The Applicants were unaware that the husband/father was in Australia. Shortly after the RRT decision the prosecutor learned of her husband's situation and requested the Minister exercise his personal power under s417 of the *Migration Act* to set aside the decision of RRT in favour of a decision to grant a visa. The Minister refused in April 2002. The prosecutors obtained an Order Nisi from the High Court in June 2002 for Constitutional Writs to set aside the decision of the RRT and require the Minister to reconsider the personal power given by s417 of the *Migration Act*. The Respondent contended both decision were "privative clause decisions" within the *Migration Act* as amended from 2 October 2001. The High Court discharged the Order Nisi: Gleeson CJ, McHugh, Gummow, Hayne, Callinan JJ jointly. Gaudron, Kirby JJ differed by quashing the decision of the RRT. The majority concluded the RRT did not make a jurisdictional error by failing to address a claim not raised [33] for failing to make findings of fact [40]. The majority concluded the decision of the Minister under s417 was the exercise of a personal and essentially non-reviewable power [45], [48]. Gaudron and Kirby JJ concluded the decision of the RRT involved a jurisdictional error because it could not be said to be satisfied of criteria where it had overlooked that matter [87] - [88]. They agreed that because the power under s417 was personal and discretionary no order of the Court would have utility [100]. Orders that the time for commencing proceeding be extended an Order Nisi be discharged with costs.

Negligence - Liability - Vicarious liability - Non-delegable duty - Liability of school authorities for sexual assaults by teachers

In *NSW v. Lepore; Samin v. Q; Rich v. Q* ([2003] HCA 4; 6.02.2003) the High Court heard two matters. In *NSW v. Lepore* the Respondent was molested as a school student by a teacher who took an occasion of disciplining the student to commit sexual assaults for which the teacher was convicted. L sued the teacher (who did not appear) and NSW. The Primary Judge found there had been assault by the teacher and that therefore NSW was liable. The Court of Appeal concluded the State was liable for non-delegable duty (2001) 52 NSWLR 420. In the second matters (*Samin v. Q; Rich v. Q*) two girls were molested by the single teacher at a country school. The Plaintiff's alleged breach of a non-delegable duty in the pleadings rather than vicarious liability. The Court of appeal in Q concluded the State was not liable for non-delegable duty (2001) Aust. Torts R 81-626. The High Court considered the extent to which authorities could be liable in negligence where there was no allegation of fault by authorities and any damage was caused by servants or agents on a frolic of their own. The Court considered generally the allegations of liability on the basis of non-delegable duty of care failed but that the allegations which had, or could be, made alleging the carers liability may succeed depending on the evidence. Orders accordingly.

Constitutional law - Legislative power of Commonwealth - Implied limitation - Viability of the States - Discriminatory taxation legislation

In *Austin v. Commonwealth* ([2003] HCA 3; 5.02.2003) the High Court concluded that the provisions of Commonwealth

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Income Tax Legislation which required State judicial officers to pay a Commonwealth Superannuation contributions surcharge by means of a lump sum on retirement were invalid. The Court generally reasoned that the Commonwealth was the subject in exercising its legislative powers to an implied limitation which required it to respect the continued viability of the States. The Court reasoned that this would prevent the Commonwealth enacting a discriminatory tax against State officer and the legislation which attempted achieve this indirectly was invalid.

Trade practices - Markets

In *Boral Besser Masonry Ltd v. ACCC* ([2003] HCA 5; 7.02.2003) the High Court considered when a trader had a substantial degree of market power and how use of that power for a prescribed purpose contrary to s46 of the *Trade Practices Act 1974 (Cth)* was to be proved.

PRACTICE DIRECTIONS

From the Chief Magistrate of the NT, Hugh Bradley

I am writing to advise that in future months members of the profession may notice that magistrates are sitting in one another's courts from time-to-time. I am writing to indicate to you that when this happens it is part of an ongoing program of judicial education being undertaken by the court for the improvement of its services to the profession and the public.

From Judicial Registrars, Brenda Monaghan and Tanya Fong Lim

Extensions of time on originating process

It has come to our attention that practitioners have been applying by letter to the Local Court Civil Registry for extensions of time for service of Statements of Claim. This appears to have happened particularly in relation to small claims debt recovery. This practice will not continue.

Direction

Pursuant to the Local Court and Small Claim Rules, applications to extend the time for service of any originating processes are made by way of interlocutory application (see Local Court Rules 5.07 and 7.06 and 5.06 and Small Claims Rule 7.05). Although some lenience will be given to small claims applications (see below), the following procedure for such extensions of time is to be followed from this date.

In the Local Court Jurisdiction a formal interlocutory application under Part 5 must be filed. The application will in most cases be ex parte (unless there are other parties involved who have already been served) and as such can be dealt with in chambers. The application should be accompanied by an affidavit in support including such matters as attempts made to serve, explanations for any delay and any issues of prejudice. All inter partes applications will be dealt with in open court in the interlocutory list. All ex parte applications will initially be considered by a Judicial Registrar in chambers and an extension of time may be granted on the papers.

If the Judicial Registrar considers it necessary, then the ex parte application will be placed in the interlocutory list and the party notified of the hearing date on the returned application.

In the Small Claims jurisdiction, formal compliance with rule 2.04 will be dispensed with for all ex parte applications for extensions of time and a request in the form of a letter will be acceptable. Note however, that the letter must be accompanied by an affidavit in support.

All inter partes applications must be by way of a formal interlocutory application to be heard in open court.

From Judicial Registrars, Brenda Monaghan and Tanya Fong Lim

Attendance at Directions Conferences, Conciliation conferences and Prehearing conferences by phone

The issue of attendance of parties at conferences by phone has become a source of delay and frustration amongst the registry staff and the clients. It should always be remembered that leave to attend the court by phone is an indulgence of the court and should not be taken for granted.

The proper procedure is as follows:

1. An application can be made for an attendance by phone up to 24 hours before the allotted time for the conference. If a late application is made in the 24 hours prior to the conference, leave will most likely be refused.
2. The application should be in writing and may be sent by facsimile to the Civil Registry.
3. The phone number of the person who is attending by phone should be provided in the letter applying for leave. This is required just in case another party may require leave to attend by phone –necessitating the organisation by the Registry of a three way (or more) teleconference.
4. If a three way teleconference is required it is the party's responsibility to provide a landline number upon which they can attend and to which their part of the call can be charged. Attendance by mobile phone will not be generally accepted as the quality of such connections has often been unsatisfactory.
5. When given leave to attend, the party will be given a number to call at the time of the conference.
6. Parties must immediately respond to requests by the Court staff for their telephone numbers in circumstances where a 3-way link-up is required and no number has earlier been provided. Failure to respond in a timely fashion may result in the adjournment of the conference with possible cost implications on the delaying party.

Practitioners are reminded of the above and are asked to adhere to the procedure at all times.

NOTICE

From the National Institute of Forensic Science (NIFS)

The NIFS has for some years been building a Resource Register of forensic science related service providers. The Register is now at a point where it contains information about individuals and organisations throughout Australia who provide a diverse range of services relevant to criminal and civil investigations.

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2003 CLE Program

19 Mar	Practice Management	Kriss Will
16 Apr	Juvenile Court Issues	Chief Magistrate Hugh Bradley
21 May	TBA	
18 Jun	"Bits and pieces" of legislation	Ian Morris
30 Jul	Administrative Appeals	Hon Justice John Mansfield
30 Aug	AustralAsia Railway Project - Challenges Overcome	Alastair Shields
17 Sep	TBC	Jenny Blokland SM
22 Oct	Sentencing Act	John Lowndes SM

Prices are \$22 members, \$27.50 non-members, \$5.50 students (all include GST). The CLE presentations are videoconferenced to venues in Alice Springs and Katherine. They take place from 5.30pm to 6.30pm.

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NIFS will provide information (eg contact details) relative to particular service providers. The information is provided free of charge. It should be noted that the information provided makes no comment on the quality of service provision and the NIFS accepts no responsibility in that regard.

NIFS would be interested in receiving information about relevant service providers that have previously provided a satisfactory service to members of the legal profession. If they do not appear on the current register, we would contact them to ascertain if they wish to be included for future reference.

NIFS can be contacted at: ph: (03) 9459 4299, fax: (03) 9457 3622, email: info@nifs.com.au

DEADLINES

Contributions to Balance are welcome.

Copy should be forwarded to the Editor of Balance, Law Society NT, no later than the 5th of each month.

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Personal injuries

Hunt, Peter - Liability of psychiatric injury extended, Law Society Journal, Vol 40(10) 2002 pp: 62-65

Professional liability - legal profession

Goudkamp, James - Is there a future for advocates' immunity? Tort Law Review, Vol 10(3) 2002 pp: 188-206
Llyod, David A - Solicitors must advise their clients about their own negligent acts or omissions, Law Society Journal, Vol 40(11) 2002 pp: 78-80

Property law

Lavelle, Keren - Title insurance - is it wanted here? Law Society Journal, Vol 40(10) 2002 pp: 46-51

Sentencing

Lovegrove, Austin - Intuition, structure and sentencing - an evaluation of guideline judgments, Current Issues in Criminal Justice, Vol 14(2) 2002 pp: 182-204

Sexual offences

Briody, Michael - The effects of DNA evidence on sexual offence cases in court, Current Issues in Criminal Justice, Vol 14(2) 2002 pp: 159-181

Sports law

Fridman, Saul - Sport and the law - The South Sydney appeal, Sydney Law Review, Vol 24(4) 2002 pp: 558-568
Harkess, Jason - 'Danger' sports and the spectre of criminal negligence, Law Institute Journal, Vol 76(11) 2002 pp: 48-53

Subpoenas

Carson, Pat - Centrelink and subpoenas, Brief, Vol 24(11) 2002 pp: 20

Succession

Cook, Richard - Testator's family maintenance - the new reforms at work, Law Institute Journal, Vol 76(11) 2002 pp: 42-47

Superannuation

Bourke, Stephen - The new super splitting laws, Law Society Journal, Vol 40(11) 2002 pp: 74-76

Terrorism

Williams, George - One year on - Australia's legal response to September 11, Alternative Law Journal, Vol 27(5) 2002 pp: 212-215

Torts law

Lunney, Mark - Practical joking and its penalty - Wilkinson v Downton in context, Tort Law Review, Vol 10(3) 2002 pp: 168-187

Goudkamp, James - Is there a future for advocates' immunity? Tort Law Review, Vol 10(3) 2002 pp: 188-206

Water law

Gardner, Katherine - Worried about water? Law Society Journal, Vol 40(11) 2002 pp: 60-63