

## NOTICEBOARD

### High Court Notes: September 2004

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

#### **Criminal law - Defences - Honest mistake of fact - Ignorance of law - Whether mistake as to legal status a mistake of fact or law**

In *Ostrowski v Palmer* ([2004] HCA 30; 16.06.2004) by s24 the Criminal Code (WA) provided a person was not criminally responsible for an act or omission performed under an honest and reasonable but mistaken belief in the existence "of any state of things". By s22 ignorance of the law was not a defence. The respondent was convicted of unlawfully taking rock lobster from a prohibited area having been incorrectly informed by a State Government employee he was permitted to take lobster in the particular area. His conviction was set aside by the Full Court Supreme Court (WA). The High Court allowed an appeal by the informant: Gleeson CJ with Kirby J; McHugh J; Callinan with Heydon JJ. The Court considered the difference between a mistake of fact and a mistake of law and concluded the mistake in question was one of law. Appeal allowed.

#### **Negligence - Duty of care - Duty of liquor licensee to intoxicated patron**

In *Cole v South Tweed Heads Rugby League Football Club Ltd* ([2004] HCA 29; 15.06.2004) the appellant was injured in a motor vehicle accident after leaving the premises in an intoxicated state after she refused an offer of transport from the respondent. The High Court concluded by majority that the respondent club did not breach any duty to the appellant patron in serving her alcohol or failing to ensure that she travelled safely away from the premises: Gleeson CJ; Gummow with Hayne JJ; Callinan J; contra McHugh J; Kirby JJ. The Court considered the role of statutory provisions penalizing intoxication in the identification of any duty of care and causation in negligence. Appeal dismissed.

#### **Constitutional law - Courts - Independence - Whether appointment of NT Magistrate with short-term remuneration compromises independence of court**

In *North Australian Aboriginal Legal Aid Service Inc v Bradley* ([2004] HCA 31; 17.06.2004) s6 of the Magistrates Act (NT) provided a Magistrate appointed under the Act was to be paid such remuneration and hold office on such terms as the Administrator determined. The High Court concluded that appointing a Magistrate who could serve for eleven years until compulsory retirement with remuneration determined for only a two year period was valid and did not compromise the impartiality or independence of the Court: Gleeson CJ; McHugh, Gummow, Kirby, Hayne, Callinan, Heydon JJ jointly. Appeal against decision of the Federal Court dismissed.

#### **Employment - Duty of care by employer to employee - Employee controller of corporate employer - Construction of indemnity clauses - Contribution between joint tortfeasors**

In *Ander Transport P/L v Brambles Ltd* ([2004] HCA 28; 15.06.2004) the High Court concluded that a corporate employer owed a duty of care to an employee even where the employee was the "alter ego" of the corporation and its

controller. The Court applied authority that agreements granting indemnity were to be construed, where ambiguous, in favour of the person granting the indemnity and concluded that the indemnity granted by the respondent purporting to completely exclude liability for injury to a corporate contractor did not apply to personal injuries suffered by the contractor's employee. The Court concluded that the question of contribution between tortfeasors raised different questions of apportionment from determination of contributory negligence and when an apportionment based on contributory negligence could be a circumstance relevant to deciding whether it was just and equitable to order contribution between tortfeasors within s24(2) of the Wrongs Act 1958 (Vic). The High Court concluded this question was appropriate to be determined on remitter: Gleeson CJ, McHugh, Gummow, Hayne, Heydon JJ sim Kirby J; contra Callinan J. Appeal allowed.

#### **Migration - Review of personal decisions of the Minister**

In *Trinh ex p; Nichols* ([2004] HCA Trans 77; 15.03.2004) Hayne J dismissed an application seeking to review the decision of the Minister not to intervene under s351 of the Migration Act following a decision of the MRT.

#### **Migration - Tribunals - Jurisdictional error - Procedural fairness - "no evidence"**

In *MIMIA v SGLB* ([2004] HCA 32; 17.06.2004) the Respondent was said to be mentally unstable when the RRT concluded in August 2002 he was not a refugee. His application for Constitutional Writs was refused by the FMC. On appeal to a single justice the Federal Court concluded there was no evidence before the RRT on which it could have assessed the effects of a post traumatic stress condition on the credibility of the respondent and that the RRT had erred by failing to satisfy itself the respondent was competent enough to participate in the proceeding. The appeal by the Minister to the High Court was allowed by majority: Gleeson CJ; Gummow with Hayne JJ; Callinan J contra Kirby J. Gummow and Hayne rejected [57] a submission that the circumstance that a finding that a person was a refugee involved discretionary factors extended through the private clause the power of the decision-maker. Appeal allowed.

### Federal Court Notes: September 2004

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#### **Defence - Service offences - Civilian crimes**

In *Hoffman v Chief of Army* ([2004] FCAFC 148; 31.05.2004) a Full Court of five justices considered when laying of service offences under the Defence Force Discipline Act 1982 (Cth) against a member of the military was authorised where the offence also constituted a crime in the "civilian" criminal law. A majority (Black CJ, Wilcox, Gyles JJ) concluded the Defence Force Magistrate erred in holding a service offence rose from conduct which would constitute the "civilian" crime of assault [41].

#### **Migration - Carer visa - Relative not willing to provide assistance**

In *Rafiq v MIMIA* ([2004] FCA 564; 6.05.2004) Finn J quashed a decision of the MRT which adopted an erroneous

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construction of the provisions concerning a subclass 836 (carer) visa.

### **Migration - Refugees - Laws of general application - Opportunity to comment on adverse information**

In Applicant A101/2003 v MIMIA ([2004] FCA 556; 6.05.2004) Finn J considered whether laws were of general application and whether an applicant had had an opportunity to comment on adverse information in quashing a decision of the RRT.

### **MRT - Whether applicant misled**

In Talasinga v MIMIA ([2004] FCA; 6.05.2004) Gray J concluded the MRT did not mislead an applicant where having stated at the hearing that it was satisfied about certain evidence it proceeded to reject it.

### **Intellectual property - Patents - Reverse infringement test**

In Aus Fence Hire P/L v Thomas ([2004] FCA 557; 5.05.2004) Keifel J considered the operation of the reverse infringement test in considering an innovation patent.

### **Migration - Jurisdictional error - English authority**

In STKB v MIMA ([2004] FCA 546; 5.05.2004) Selway J considered the application of English authority and whether there was a "lower level" of unreasonableness in a case involving human rights, and whether fresh evidence could be led to show factual error by a tribunal. Application for constitutional writ refused.

### **Federal Court - Procedure - Role of application and statement of claim**

In O'Halloran v Wood ([2004] FCA 544; 5.05.2004) Selway J considered the respective functions of an application and statement of claim. He declined to determine as a preliminary question whether the circumstance that an employee was in excess of requirements was a jurisdictional fact.

### **Industrial law - Unlawful termination - Compensation**

In Vickery v Assetta ([2004] FCA 555; 4.05.2004) Finklestein J concluded the employment of the applicant was terminated in circumstances that contravened ss170CK and 170CM of the Workplace Relations Act. He considered how unpaid wages referable to "ordinary hours" were to be calculated and to whom compensation was payable.

### **Federal Court - Procedure - Costs - Taxation**

In Potier v MIMIA ([2004] FCA 520; 4.05.2004) Stone J considered whether an impecunious applicant would be allowed to file notice of objection to an estimate of costs for which a certificate of taxation would issue without being required to pay the costs under O62 r46 of the Federal Court Rules.

### **Federal Court - Procedure - Costs in public interest litigation**

In Mees v Kemp (No. 2) ([2004] FCA 549; 3.05.2004) Weinberg J concluded that the applicant in this public interest litigation be required to pay 50% of the successful first respondent's cost but not be required to pay costs in relation to contentions regarding costs.

### **Migration - RRT - Sabean Mandaem from Iran**

In WAHV v MIMIA ([2004] FCA 536; 30.04.2004) R D Nicholson J concluded the RRT did not err in rejecting a claim for refugee status and the fact that many other persons in a similar situation had been granted refugee status did not require this finding. He rejected a submission that

jurisdictional error from unreasonableness was established.

### **Trade practices - Misleading conduct - Labelling of cordials**

In ACCC v Cadbury Schweppes P/L ([2004] FCA 516; 30.04.2004) Gray J concluded it was appropriate to make a declaration that misleading conduct had occurred in contravention of the Trade Practices Act where cordial was labelled with real fruit but no fruit was actually used in making the cordial. Consideration of extent of injunction to remedy past but concluded conduct.

### **Federal Court - Practice - Service out of the jurisdiction**

In Fublian Catering Service Ltd v Compass Group (Aust) P/L ([2004] FCA 532; 29.04.2004) French J considered the criteria justifying service out of the jurisdiction of process alleging contravention of the Trade Practices Act.

### **Tax - Avoidance - Proof**

In C of T v Sleight ([2004] FCAFC 94; 4.05.2004) a Full Court considered how the Commissioner could prove a taxpayer and his wife entered into a scheme with the dominant purpose of obtaining tax benefits to attract operation of Part IVA of ITAA.

### **Discrimination - Disability discrimination - Withholding information**

In Forbes v AFP ([2004] FCAFC 95; 5.05.2004) a Full Court considered whether an employer who withheld information concerning a former employee's medical condition from a review panel considering re-employment discriminated against the employee. Decision of FMC that discrimination had occurred set aside.

### **Migration - Application for constitutional writ remitted from High Court - Procedure**

In M111 of 2003 v MIMIA ([2004] FCAFC 97; 5.05.2004) a Full Court concluded the primary Judge had not erred in refusing to grant an Order Nisi in proceedings remitted from the High Court. Brief consideration by the Court of procedure in obtaining leave to appeal from an interlocutory order.

### **Migration - Detention - Whether detainee owed duty of care**

In Secretary. DIMIA v Mastipur ([2004] FCAFC 93; 29.04.2004) a Full Court concluded that while the appellant admitted it owed some duty of care to an immigration detainee it did not owe a duty to avoid exposing a detainee to emotional shock and psychiatric injury by sudden removal or detention in isolation.

### **Federal Court - Procedure - Costs**

In Feteherson v Peninsula Health (No. 2) ([2004] FCA 594; 11.05.2004) Heerey J rejected a submission that proceedings under the Disability Discrimination Act 1992 (Cth) were "no costs" matters.

### **Trade practices - Pleading**

In Enregex Ltd v Alstom Australia Ld ([2004] FCA 575; 7.05.2004) and Spotwire p/L v Visa International Service Association (No 2) ([2004] FCA 571; 7.05.2004) Weinberg J considered whether a cause of action arising under s82 of the Trade Practices Act arose when goods were purchased or when loss was discovered and Bennett J considered how an arrangement in contravention of s4D of the Trade Practices Act was to be pleaded, respectively.

### **Trade practices - Deceptive claim to intellectual**

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### **property in design of polls**

In *Council of City of Sydney v Gladspaar P/L* ([2004] FCA 568; 7.05.2004) Gyles J considered whether pre-contractual conduct was misleading or deceptive, whether manufacture of street polls was in breach of copyright and accessory liability of company officers for misleading claims of intellectual property.

### **Federal Magistrate - Summary dismissal - Role of pleadings**

In *Rana v University of SA* ([2004] FCA 559; 7.05.2004) Lander J considered the philosophy underlying proceedings in the FMC and the conduct of proceedings in the absence of pleadings in the context of a claim for summary dismissal.

### **Crimes Act - Search warrant**

In *Kennedy v Baker* ([2004] FCA 562; 6.05.2004) Branson J considered whether removal of the hard drive from a computer was authorised by a search and seizure warrant granted under ss3L(1A) of the Crimes Act 1914 (Cth) and how a claim for legal professional privilege of the contents of the hard drive was to be made under s3ZX of that Act.

### **Migration - Interpretation of RRT reasons - Whether information reason for decision**

In *VAF v MIMIA* ([2004] FCA 123; 12.05.2004) a Full Court considered how the reasons of a tribunal were to be interpreted and whether certain information which had allegedly not been put to the applicant as required by s424A(1) of the Migration Act was "the thread" that could have caused the decision "to unravel".

### **Tax - Privilege**

In *Pratt Holding P/L v C of T* ([2004] FCAFC 122; 12.05.2004) a Full Court considered how a claim for professional privilege was to be made in response to a request by the Commissioner for access to documents under s263 of the ITAA. The Court also considered whether privilege can attach to a document prepared by a third party at the direction of a principal so the principal could submit it to a legal advisor for advice. Claim for privilege upheld.

### **Bankruptcy - Privilege against self-incrimination**

In *Griffin v Pantzer* ([2004] FCAFC 113; 11.05.2004) a Full Court generally concluded that a claim for privilege against self-incrimination did not answer the requirement that documents be produced in an examination under s81 of the Bankruptcy Act 1966 (Cth).

### **Trade practices - Liability of directors - Pleading**

In *Arktos P/L v Idyllic Nominees P/L* ([2004] FCAFC 119; 10.05.2004) a Full Court concluded a party was entitled to judgment against directors of a corporation found to have breached the Trade Practices Act and the Fair Trading Act 1987 (WA) notwithstanding that the pleading in respect of the directors was vague.

### **Income tax - Deductions - Cost of managing tax affairs**

In *Salcetta v C of T* ([2004] FCAFC 117; 10.05.2004) a Full Court considered what deduction was allowed for expenditure for managing tax affairs and complying with a director penalty notice and further whether apportionment of costs was appropriate.

### **Migration - Character test - Concurrent sentences**

In *MIMIA v Hicks* ([2004] FCAFC 114; 7.05.2004) a Full Court applied the decision of another Full Court in *Ball v MIMIA* [2004] FCAFC 91 to conclude that sentences that

operated concurrently were not sentences constituting separate "terms of imprisonment" within s501(7)(d) of the Migration Act.

### **Veteran's affairs - Post-traumatic stress - Question of fact**

In *Garzina v Repatriation Commission* ([2004] FCA 96; 3.05.2004) a Full Court concluded that whether DSM-IV was satisfied by stress was consequent on the horrors of war is a question of fact.

### **High Court - Practice - Whether application for constitutional writ ex parte**

In *Applicants S61 of 2002 v Refugee Review Tribunal* ([2004] FCAFC 150; 4.06.2004) a Full Court observed that while High Court Rules Ord 55 contemplated an application for a constitutional writ would be made ex parte this was not mirrored in O51A r5 of the Federal Court Rules. The Court concluded that once a matter had been remitted to the Federal Court its rules applied.

### **Migration - Visa cancellation - Punitive decision**

In *Djalic v MIMIA* ([2004] FCAFC 151; 4.06.2004) a Full Court dismissed an appeal raising questions including whether the power to cancel a visa under s501(2) of the Migration Act should be read to exclude punitive considerations or an obligation to make further enquiries.

### **Industrial law - Costs**

In *Spotless Services Australia Ltd v SDP Marsh* ([2004] FCAFC 155; 9.06.2004) a Full Court concluded s347(1) of the Workplace Relations Act did not preclude the award of costs for a proceeding instituted without reasonable cause.

### **Migration - Provision to MRT of information subject to ministerial certificate under s375A of the Migration Act.**

In *Davis v MIMIA* ([2004] FCA 686; 1.06.2004) Dowsett J considered the operation of s375A of the Migration Act and how the MRT was to set out its reasons where certain information was not to be disclosed.

### **Industrial law - Whether threat if non-union member employed in building industry**

In *Hadgkiss v Blevin* ([2004] FCA 697; 1.06.2004) Conti J considered whether provisions of the Workplace Relations Act had been breached by a threat of "trouble" if an employee did not become a member of a building trade union.

### **Trade practices - Exclusive dealing**

In *Australian Automotive Repairers; Association Inc v Insurance Australia Ltd* ([2004] FCA 700; 2.06.2004) Lindgren J considered whether the creation by an insurance company of a system of preferred motor vehicle repairers constituted exclusive dealing prohibited by the Trade Practices Act.

### **Worker's compensation - Loss of vision**

In *Comcare Australia v Silver* ([2004] FCA 701; 3.06.2004) Finn J considered whether in an application for worker's compensation for loss by progressive decline of vision impairment should be assessed having regard to one or both eyes.

### **Trade practices - "collateral contract"**

In *Matland Holdings P/L v NTZ P/L* ([2004] FCA 710; 4.06.2004) Kenny J considered what constituted a "collateral agreement" and whether it was merged into a conveyance. She further considered whether a claim made under the Fair Trading Act 1985 (Vic) survived the repeal and re-enactment of that legislation in 1999.

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### **Administrative law - Refusal of Court to accept allegedly frivolous proceeding**

In *Duncan v Fayle* ([2004] FCA 723; 4.06.2004) French J set aside a decision of a Registrar of the FMC to refuse to accept proceedings challenging a decision of the AAT as frivolous. Consideration of when and how a proceeding can be said to be frivolous.

### **Industrial law - Elections - Eligibility of honorary members to stand**

In *Rivers, Re Shop Distributive etc Union SA* ([2004] FCA 711; 8.06.2004) Mansfield J considered whether the rules of the respondent union entitled an honorary member to stand for office.

### **Migration - Visa cancellation - Interests of children**

In *Powell v MIMIA* ([2004] FCA 717; 8.06.2004) Carr J set aside a decision to cancel a visa under s501 of the Migration Act where the reasons for decision revealed cancellation of the visa may have a detrimental effect on children and that effect was not assessed.

### **Availability of Marshals of the Federal Court of Australia**

The Marshals of the Court are able to arrest a vessel anywhere in Australia on any day of the year.

The Court has Marshals in every State and Territory. In addition to the Marshals based in each registry of the Court, suitably qualified staff from relevant agencies (usually the Sheriff's Office or local police) in Victoria, Western Australia, South Australia, Tasmania and the Northern Territory have been appointed as Federal Court Marshals. Many of these Marshals are based in regional and remote parts of Australia. In addition to these ongoing appointments, there are arrangements in each registry for the urgent appointment of Marshals where necessary. A Marshal may be appointed, for example, where there is insufficient time for a registry-based Marshal to reach the vessel before it leaves the jurisdiction or where the cost of sending a registry-based Marshal to the vessel is excessive. Such appointments are strictly supervised by the Marshal in the relevant registry of the Court.

### **High Court of Australia - Biennial increase in fees**

Pursuant to various regulations, the High Court has introduced biennial increases to fees payable in federal courts and tribunals (effective from 1 July 2004).

The Federal Attorney-General's Department has published the new schedule of fees in the Government Notices Gazette. A schedule of fees is also available from the Law Society Northern Territory.

#### **Federal Court fees schedule**

Pursuant to regulation 19A of the Administrative Appeals Tribunal Regulations 1976, the fees payable for lodging applications with the Administrative Appeals Tribunal will increase on 1 July 2004. The rise has been calculated in accordance with movements in the consumer price index. For those applications in relation to which a fee is payable, the standard application fee will increase to \$606 from \$574. The lower application fee for matters to be dealt with in the Small Taxation Claims Tribunal will increase to \$61 from \$58.

### **Practice Directions**

#### **NO 1 OF 2004: COURT OF APPEAL/COURT OF CRIMINAL APPEAL - UNREPRESENTED LITIGANTS**

If a litigant before the Court of Appeal or Court of Criminal Appeal is unrepresented, subject to any direction by the presiding Judge to the contrary, not less than 10 days prior to the time fixed for the hearing of the appeal the Registrar or Sheriff shall advise the presiding Judge that a litigant is unrepresented.

Unless otherwise determined by the presiding Judge, a directions hearing will be held before the presiding Judge or another Judge not less than 7 days before the date listed for the hearing of the appeal for the purposes of managing the progress of the appeal and other matters including issues concerning the unrepresented litigant's knowledge of his or her rights and legal representation.

#### **NO 2 OF 2004: RULE 48 - EXTENSION OF PRACTICE DIRECTION 5/2000**

Pursuant to Rule 48.28, practice direction No 5/2000 is renewed for a period of 6 months from 1 July 2004.

### **COURT LIBRARY NOTES**

#### **LIBRARY NEWS**

The library in Darwin has an email address to reach all staff. It is [doj.cts.library@nt.gov.au](mailto:doj.cts.library@nt.gov.au). Requests for information about services, copies of cases etc, can be sent to this address. We are arranging for it to go on the website as soon as possible.

Thank you to those people who completed the client survey forms in June. Many comments were received. We will be working through the comments to see how we can accommodate the suggestions. Thank you especially for the many positive comments.

The Court Support Services Charter was launched recently. It includes a feedback form. Copies of the charter are available from the counters throughout CSS as well as from the library in Darwin and Alice Springs.

The search engine for the NT Supreme Court and Magistrates Court decisions has been improved, which makes searching faster and more accurate. If you would like help in searching for NT decisions, please contact the library in Darwin or Alice Springs.

#### **NT LEGISLATION**

Legislative changes in July-August 2004, notified in the *NT Government Gazette*

#### **New Acts**

36/2004 Appropriation Act 2004-2005 (1.7.04)

37/2004 Debts Tax Amendment Act 2004 (N/C)

38/2004 Mineral Royalty Amendment Act 2004 (1.7.04)

39/2004 Pay-Roll Tax Amendment Act 2004 (Parts 1 – 6.7.04, Parts 2, 3 & 4 – 1.7.04, Rest – N/C)

40/2004 Stamp Duty Amendment Act (No.2) 2004 (Part 1 – 6.7.04, Part 2 – 18.5.04, Parts 3 & 4 – 1.7.04)

41/2004 Taxation (Administration) Amendment Act 2004 (Part 1 – 6.7.04, Part 2 – 18.5.04, Parts 3, 4 & 5 – 1.7.04, Part 6 – 23.6.04)

42/2004 Northern Territory Employment and Training Amendment Act 2004 (N/C)

43/2004 Soccer Football Pools Amendment Act 2004 (N/

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44/2004 Gaming Control Amendment Act 2004 (N/C)

45/2004 Gaming Machine Amendment Act 2004 (N/C)

### **New Regulations**

24/2004 Jabiru Town Development (Accounting) Regulations (14.7.04)

25/2004 Uncollected Goods Regulations (14.7.04)

### **Commencements**

59/2003 AustralAsia Railway (Third Party Access) Amendment Act 2003 (21.7.04)

### **Repealed legislation**

24/1995 Road Transport Charges (Northern Territory) Act – Repealed by 82/2003

National Transport Commission (Consequential Amendments) Commonwealth Act

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