High Court Notes: December 2004

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

Constitutional law - Aliens - Validity of detention imposed without judicial order - Detention of minors

In Re Woolley; ex p Applicants M276/2003 ([2004] HCA 49; 7.10.2004) proceedings were brought in the original jurisdiction of the High Court on behalf of four non-citizen children required by s189 of the Migration Act 1958 (Cth) to be detained until they asked to be removed or were granted a visa. It was submitted to the High Court that because the power concerning aliens granted by s51(xix) of the Constitution was "subject to the Constitution" it did not authorize a law permitting detention other than by an order of a Court under Constitution Chp III. All members of the Court held that detention of non-citizens by administrative officials was authorised while for the purpose of addressing their non-citizen status: Gleeson CJ [28]; McHugh J [62], [78], [95]; Gummow J [150]; Kirby J [211]; Hayne J [227]; Callinan J [260]. The applicants attempted to distinguish their detention relying on Choo Kheng Lim v Minister for Immigration (1992) 176 CLR 1. Their claims that their detention was unlimited as to time and that as infants they lacked the capacity to request their removal and end their detention were dismissed. The High Court concluded that the detention of the applicants was not unlimited but would end when they were granted a visa or removed and their status as infants did not determine the legality of their detention. Applications dismissed.

Migration - Proceedings in the Federal Court - Time limit for applications - When applicant "notified of the decision" of RRT

In WACB v MIMIA ([2004] HCA 50; 7.10.2004) by s478(1)(b) the Migration Act 1958 (Cth) provided between 1988 and 2001 that an application to the Federal Court to review a decision of, inter alia, the RRT must be lodged within 28 days of the applicant "being notified of the decision". By s430 the Act obliged the RRT in making a decision to prepare a written statement of it and its reasons. In March 2001 the applicant, a minor who was not fluent in English and in detention, was given verbal notice that the RRT had rejected his application but not given the reasons for sometime after that. The primary judge, and the Full Court of the Federal Court, concluded he had been "notified" and his application to the Federal Court of May 2001 was incompetent. His appeal to the High Court was allowed by majority: Gleeson CJ, McHugh, Gummow, Heydon JJ. The majority concluded the scheme of the Act required reasons to given [37] as did s501G(1)(e) [20]. The majority concluded the putative role of the Minister as statutory guardian possibly imposed by the Immigration Guardianship of Children Act 1946 was not relevant. Contra Kirby J. Appeal allowed.

Constitutional law - Judicial power - State Court exercising Federal judicial power - Whether State Court given jurisdiction repugnant to its status as a Court exercising Federal jurisdiction - Indefinite sentencing

In Baker v Q ([2004] HCA 45; 1.10.2004) the appellant was convicted of murder in 1974. In sentencing B to imprisonment for life the sentencing judge opined that B should remain in prison for life. The Sentencing Act 1989 (NSW) when enacted contained provisions authorizing persons serving a life sentence to apply to the Supreme Court for the determination of a minimum term, and an additional term during which the person could be eligible for parole. These provisions were amended in 1997 to introduce as s13A(3) a provision that a person serving a life sentence who had been subject to a "non-release recommendation" by the sentencing judge, was not eligible for determination of a minimum term, unless the Supreme Court was satisfied that "special reasons exist". The application by B for the imposition of a minimum term was dismissed by the primary Judge in the Supreme Court of NSW, on the grounds that B was not eligible. This conclusion was affirmed by the Court of Criminal Appeal NSW. B's appeal to the High Court was dismissed by majority: Gleeson CJ; McHugh, Gummow, Hayne, Heydon JJ; Callinan J; contra Kirby J. The majority concluded it was open to the NSW Parliament to make the scheme operate on the circumstance that the sentencing judge had expressed an opinion, notwithstanding that it then had no legal effect. The majority considered the principle established in Kable v DPP (NSW) (1996) 189 CLR 51. The majority concluded the requirement that the Supreme Court find a "special reason" did not render the application to that Court an unstructured charade [19]; [49]; [173]; Kirby J in dissent differed [141]. Consideration of "special reasons". Appeal dismissed.

Constitutional law - Judicial power - State courts invested with Federal judicial power - Whether State court given incompatible function - Provisions requiring Court to determine prisoners whose term had expired remained "unacceptable risk".

In Fardon v A-G Qld ([2004] HCA 46; 1.10.2004) the Dangerous Prisoners (Sexual Offenders) Act 2003 (Q) purported to authorize the continued detention in custody of a convicted person after the sentence had expired "to ensure adequate protection of the community". By s13(2) the Court could make an order only if satisfied there remained an "unacceptable risk" that the prisoner would commit a serious sexual offence. The onus of establishing this rested on the Attorney-General. In 1989 the appellant (F) was sentenced to fourteen years imprisonment, to expire in June 2003, for various sexual offences. A Judge in the Supreme Court (Q) ordered, under the Act, on the application of the Attorney-General, that F be detained in custody for an indefinite term. F's appeal to the Queensland Court of Appeal was dismissed. He was granted special leave to appeal to the High Court contending the statutory scheme was repugnant. Constitution for reasons identified in Kable v DPP (NSW) (1996) 189 CLR 51. The High Court generally observed that the orders affecting F would not be authorised under Federal law in light of the constitutional consideration that the involuntary detention of a citizen by the Commonwealth would be penal or punitive in character

and could only exist as an incident of the exclusively judicial function of judging and punishing criminal guilt [77]. The majority concluded, however, the Queensland statutory scheme was not repugnant to a State court exercising Federal jurisdiction because the scheme operated on "material", gave the Court recognised alternatives, provided for possible review by the Court of any order made and was conducted independently of the executive branches of Government [107]-[116]; Gleeson CJ; McHugh J; Gummow J; Hayne J; Callinan with Heydon JJ; contra Kirby J. Appeal dismissed.

Trade practices - Abuse of market power - Statutory body distributing electricity - Crown immunity - Statutory distributor of electricity - Practice - Filing written submissions after oral argument

In NT Power Generation P/L v Power and Water Authority (NT) ([2004] HCA 48; 6.10.2004) the appellant generated electricity in NT. The respondent ("PAWA") was established under the Power and Water Authority Act (NT). It generated electricity and owned the transmission network in NT. In August 1998 PAWA refused a request by the appellant to supply its transmission network services to enable the appellant to distribute electricity. The appellant in proceedings in the Federal Court contended PAWA had taken advantage of its market power contrary to s46(1), 46(4)(c) of the Trade Practices Act 1974 (Cth). A majority in the Federal Court concluded PAWA enjoyed immunity from s46 as an emanation of the NT Government that was not carrying on a business within s2B of the TP Act. A majority in the Federal Court concluded that if this immunity had not applied, PAWA would have been in breach of s46 of the TP Act. A majority concluded, a subsidiary of PAWA enjoyed similar protection. The appeal by the appellant was allowed: McHugh ACJ, Gummow, Callinan, Heydon JJ; contra Kirby J. The majority rejected the submission, because PAWA did not provide access to its infrastructure to anyone, it did not carry on business [88]. In reaching this conclusion the High Court considered the argument was not prevented by the conduct of the appellant at trial, where the appellant alleged PAWA abused its power in the market for supplying electricity infrastructure and not in the market for retail sale of electricity. The majority concluded the refusal of PAWA was not protected by s2C(1)(b) of the TP Act as merely granting etc a "licence" to use in its infrastructure [103]. The majority concluded the fact that PAWA did not supply access to its infrastructure to others and was subject to ministerial direction did not prevent a finding that PAWA took advantage of its market power for prescribed purposes and these findings of the Federal Court should not be disturbed [153]. The majority concluded the subsidiary of PAWA did not have "derivative" Crown immunity and this issue would be remitted for trial [190]. All members of the Court observed submissions should not have been filed after oral hearing without leave [192]. The Court considered the operation of the Competition Policy Reform (NT) Act and the operation of the TP Act on Government enterprises. Appeal allowed; matter remitted to primary Judge.

Criminal law - Sexual intercourse without consent - Whether relevant "act" is intercourse or intercourse without consent

In DPP (NT) v WJI ([2004] HCA 47; 6.10.2004) the High Court concluded that the offence of sexual intercourse without consent created by s192(3) of the Criminal Code (NT) was established where there was evidence that an act of sexual intercourse took place without the consent of the other person and it was appropriate for the trial Judge to charge the jury on the basis they were required to find the accused intended to have sexual intercourse with the complainant without her consent: Gleeson CJ; Gummow, Heydon J; Kirby J; contra Hayne J. Appeal dismissed.

Federal Court Notes: December 2004

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

Legal profession - Legal professional privilege - When displaced - Non-citizen sought by authorities - Confidential communication of telephone number to solicitor - Whether telephone number privileged

In Hamdan v MIMIA ([2004] FCA 1267; 1.10.2004) a non-citizen was released from detention by Federal Court order. Following a High Court judgment he was required to return to Court and his detention thereafter was certain. Before the Federal Court hearing he telephoned his solicitor to seek advice. He gave the solicitor his mobile telephone number on an assurance it would remain confidential. The Minister served a notice on the solicitor under s18 of the Migration Act. This required persons capable of giving information concerning a non-citizen to do so. It was an offence not to comply without reasonable excuse. Finn J concluded the solicitor was not required to respond to the notice. The Minister contended communication of the telephone number was not subject to legal professional privilege because it was collateral to the advice given and was given for the purpose of frustrating the law. Finn J rejected the submission that the number was "a mere collateral fact" for the purposes of legal professional privilege [22]. Finn J concluded the confidence was not for the purpose of "frustrating any law" or improper because the non-citizen was not committing any offence by merely remaining unlawful [34]. Likewise he concluded the confidence did not thwart any process of the Court to be a contempt because the Court itself would not order the detention of the non-citizen which would occur by operation of law [41]. He declared the solicitor was not obliged to comply with the notice.

Migration - Jurisdictional error - Tribunals - Whether requirement to give notice of reason for upholding decision must be given prior to RRT hearing

In SRFB v MIMIA ([2004] FCAFC 252; 8.09.2004) a Full Court concluded that s424A of the Migration Act did not require the RRT to give to an applicant prior to the RRT hearing particulars of matters etc which could justify a decision to dismiss the application to the RRT. The Full

Court concluded natural justice, and s424A of the Migration Act could be complied with by giving notice at or after the RRT hearing.

Migration - RRT - Failure to disclose country information

In MIMIA v NAMW ([2004] FCAFC 264; 23.09.2004) a Full Court concluded, by majority, that the provision in s424A of the Migration Act requiring the RRT give notice of information that was "specifically about" the applicant was intended to replicate s57(1) of the Migration Act. The majority concluded that by enacting s422B Parliament could be said to be accepting that hearings before the RRT were not required to comply with s424A, but it was not necessary to decide this. The majority concluded the Federal Magistrate had been correct in holding that the failure of the RRT to disclose relevant country information upon which it relied resulted in it failing to accord procedural fairness [145].

Administrative law - Unreasonableness - English "variable standard"

In STKB v MIMIA ([2004] FCAFC 251; 8.09.2004) a Full Court observed that the variable standard of unreasonableness accepted by Courts in England was contrary to Australian authority [25].

Income tax - Income - Mutuality - Lack of identity between contributors and participants

In Coleambally Irrigation Mutual Co-operative Ltd v C of T ([2004] FCAFC 250; 7.09.2004) a Full Court considered whether contributions by certain persons who were members of the co-operative to a sinking fund levy were income in its hands. The Court concluded the mutuality principal was not available in respect of the contributions and they formed part of the assessable income of the co-operative.

Migration - Visas - Cancellation of student visa - Whether merits review can be undertaken of an invalid decision

In Zubair v MIMIA ([2004] FCAFC 248; 3.09.2004) a Full Court concluded that the MRT was able to conduct a review of a decision by an officer under the Migration Act notwithstanding that by failure to comply with procedural requirements the officer's decision was a nullity. The Court concluded that notwithstanding this the decision remained reviewable and that merits review bodies could review invalid decisions.

Bankruptcy - Issue of bankruptcy notice - When Court may go behind judgment debt - Alleged error of law

In Wolter Joosse v Deputy C of T ([2004] FCAFC 245; 3.09.2004) a Full Court concluded a Federal Magistrate had erred in failing to consider whether the decision of the Court on which the judgment supporting a bankruptcy notice rested involved an error of law. The Full Court decided, by majority, that the sequestration order should have been set aside. Appeal allowed.

Jurisdictional error - When factual error or misunderstanding of evidence constitutes jurisdictional error

In NABE v MIMIA (No 2) ([2004] FCFCA 263; 16.09.2004) a Full Court considered when a misunderstanding by a Tribunal of a submission could lead it to identify a wrong issue and constitute jurisdictional error [53] and when failure to deal with a claim could also constitute jurisdictional error [63]. The Court concluded the subject decision of the RRT was one within jurisdiction.

Fisheries - Constitutional validity of seizure provisions

In Olbers Co Ltd v C of A ([2004] FCAFC 262; 16.09.2004) a Full Court concluded provisions for the forfeiture of a vessel under s106A of the Fisheries Management Act 1991 (Cth) were constitutionally valid [29].

Migration - Jurisdictional error - "unfairness" - Whether applicant invited to incriminate himself in bribery

In VAT v MIMIA ([2004] FCAFC 255; 15.09.2004) a Full Court concluded that the decision of the RRT did not involve jurisdictional error where it questioned the applicant in relation to an alleged bribe in circumstances that could amount to self-incrimination.

Constitutional law - Whether abolition of privilege against self-incrimination in Australian Crime Commission Act interferes with State Courts.

In Barnes v Boulton ([2004] FCA 1219; 20.09.2004) Finn J concluded the provisions in the ACC Act abolishing the privilege against self-incrimination in certain circumstances did not impermissibly interfere with the operation of State courts. He also considered the effect of abrogation of the common law of the Australia by an Act of the Commonwealth Parliament.

Federal Court - Civil contempt - Penalty

In Rip Curl International P/L v Phone Lab P/L ([2004] FCA 1215; 17.09.2004) Hely J imposed fines of $38,000.00 and imposed a term of suspended imprisonment in response to wilful and contumelious contempt.

Negligence - Negligence of pilot navigating a ship

In Port Kembla Coal Terminal Ltd v Braverus Maritime Inc ([2004] FCA 1211; 17.09.2004) Hely J considered provisions in the Navigation Act 1912 (Cth) and the Ports Corporatisation and Waterways Management Act 1995 (NSW) concerning the liability of ship owners for the negligence of a pilot employed by a port corporation. He concluded provisions in the Navigation Act removing a cause of action were not a law with respect to acquisition of property.

Aborigines - Land Rights - Changes to character of claimed land

In Raymond v NT ([2004] FCAFC 258; 14.09.2004) a Full Court considered the operation of amendments to land rights legislation which provided a claim should not proceed in the absence of consent from the aboriginal interest holders. In Lansen v NT ([2004] FCAFC 257 257; 14.09.2004) a Full Court considered the operation of land rights legislation which raised questions as to the status of the land due to events which occurred before the land claim was made and the effect indefeasibility provisions in the Torres System.

Trade practices - Deceptive conduct - Employment

In Lythgoe v Baycorp Advantage Ltd ([2004] FCA 1198; 15.09.2004) Weinberg J considered the operation of the Trade Practises Act on the early termination of a fixed term contract of employment. Application dismissed.

Worker's compensation - Excluded injury - Failure to obtain promotion

In Comcare v Hart ([2004] FCA 1144; 3.09.2004) Whitlam J considered provisions of the SRC Act excluding failure to obtain promotion and its consequences from being a compensable injury.

Trade practices - Pyramid selling - Global Internet gambling

In ACCC v Worldplay Services P/L ([2004] FCA 1138; 2.09.2004) Finn J concluded "pyramid selling" provisions in the Trade Practises Act applied in relation to a global Internet gambling business conducted outside Australia and not accessible using an Internet connection provided within Australia.

Migration - Refugees - Non-violent separatist

In Applicant S454/2003 v MIMIA ([2004] FCA 1136; 1.09.2004) Gyles J concluded the RRT had erred in the way it concluded a non-violent member of a separatist association in Indonesia was not a refugee.

Parliament - Elections - Order of candidates on ballot-paper

In Assaf v Australian Electoral Commission ([2004] FCAFC 265; 30.9.2004) a Full Court considered whether an irregularity had occurred in determining the order of names on a ballot-paper in the election for the House of Representatives within s213(1)(a)(ix) of the Commonwealth Electoral Act 1918 (Cth).

Industrial law - Protected industrial action - Notice

In AFMEPKIU v Henry Walker El ([2004] FCA 1274; 30.09.2004) French J concluded an employer gave sufficient notice of a lockout by affixing written notice of it to the door of Union offices and giving written notice to employees mustering before work.

AAT - Jurisdiction to declare proceedings vexatious

In Duncan v AAT (No 2) ([2004] FCA 1258; 28.09.2004) French J set aside a direction of the AAT that any future application by the applicant for review of a decision under the FOI Act not be made without leave of the AAT.

Sex discrimination - Union rules imposing inflexible quota for women

In Jacomb v AMACSU ([2004] FCA 1250; 24.09.2004) Crennan J considered whether a requirement in rules of a trade union imposing quotas for the election of women constituted a "special measure" under ss7D of the Sex Discrimination Act 1984 (Cth).

Migration - MRT - Whether conclusions on evidence constitute "information"

In Rith Sok v MIMIA ([2004] FCA 1235; 22.09.2004) Heerey J concluded the view of the MRT that declarations on behalf of "competent persons" failed to express the required "opinion" did not constitute "information" required to be disclosed under s359A of the Migration Act.

Migration - Visas - Identity of applicants for protection visa - Subsequent applications

In AB v MIMIA ([2004] FCAFC 1227; 22.09.2004) Gray J considered whether it was permissible to report proceedings where a person who had previously applied unsuccessfully for a protection visa applied for a different class of visa.

COURT LIBRARY NOTES

Court Library Notes

The general inquiry phone number in Darwin is 8999 6583 and in Alice Springs is 8951 5707. The generic email address for inquiries is doj.cts.library@nt.gov.au. This address applies to both libraries.

The Library Committee meets regularly throughout the year. The nominees for the Law Society Northern Territory are Susan Porter (De Silva Hebron) and John Duguid (Summary Prosecutions). The nominee of the Bar Association is Peter McNab (William Forster Chambers). If you have suggestions about the library please contact these representatives or the Librarian, Frieda Evans. The next meeting of the committee is in the third week of February 2005. Topics of discussion at recent meetings have been putting the library indexes to NT judgments on the Supreme Court webpage, renovations in the Alice Springs library, setting up a work health database and feedback from the Court Support Services' survey in June 2004.

NT LEGISLATION

Legislative changes in October 2004, notified in the NT Government Gazette

New Acts

55/2004 Criminal Code Amendment (Child Abuse Material) Act 2004 (10.11.04)

Commencements

48/2004 Coroners Amendment Act 2004 (27.10.04)

51/2004 Remuneration Tribunal Amendment Act 2004 (20.10.04)

54/2004 Statute Law Revision Act (No.2) 2004 (27.10.04)

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Courts and technology strategic committee

The Courts and Technology Strategy Committee (CATS) meets on a quarterly basis to develop, monitor and drive the implementation and ongoing strategies for the use of all technologies, including information and information systems, within the Northern Territory Courts. Periodically the committee will be updating members of the legal community on various matters.

Issues that have been discussed at recent meetings include a five-year vision for the court, the use of wireless technology in and by the courts, video conferencing and improvements to the webpages of the courts. The developments in wireless technology and video conferencing will be the topics covered in the December 2004 issue of *Balance*. Other topics will appear in subsequent issues.

There have been several recent developments as a result of the deliberations of the committee. There have been improvements made to the searching facilities for NT judgments and sentencing transcript. The database of sentencing records maintained by the Judges' associates has been made available through the libraries in Darwin and Alice Springs where its use is increasing; the costs and options involved in the web enabling of this database are being investigated. An information/ideas session will be held to develop the 5-Year vision for the courts.

The next meeting of the committee is on 16 December 2004. For further information please contact Frieda Evans on 8999 6585 or frieda.evans@nt.gov.au in the first instance. Another avenue of input to the CATS Committee could be through the court user groups.

Frieda Evans (Executive Officer, CATS Committee)

Pool builder named after complaints

A Darwin pool builder has been publicly named by NT Consumer and Business Affairs after an unacceptable number of complaints.

The Consumer Affairs Commissioner Richard O'Sullivan said he has received an unacceptably high number of consumer complaints regarding Olympic Pool Constructions (NT) Pty Ltd and companies associated with Brian Julius Rigby Smith and the construction of swimming pools.

Olympic Pool Constructions (NT) also advertises under the names Olympic Pool Constructions Pty Ltd and Olympic Pool Construction Pty Ltd. Brian Julius Rigby Smith is a director of Olympic Pool Constructions (NT) Pty Ltd.

The complaints against Olympic Pool Constructions include allegations of poor quality or standard of work, failure to comply with contractual obligations such as warranties and failure to observe relevant Australian Standards.

Engineering reports in relation to swimming pools associated with Olympic Pool Constructions (NT) Pty Ltd indicate the workmanship is of poor quality and does not comply with the relevant Australian Standard.

According to Consumer and Business Affairs, this appears to contradict express statements made by Olympic Pool Constructions.

Mr O'Sullivan said consumers are reminded to always take great care when entering into such contracts. In particular consumers are reminded to:

* ensure that legal documentation is in place before money is exchanged and work starts;
* seek independent legal advice in relation to contracts;
* obtain references from past customers.

DEADLINES

Contributions to Balance are welcome.

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