

## NOTICEBOARD

### Federal Court Notes: March 2004

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

#### **Corporations law - Extension of period to lodge notice of charge extended after "critical day" in s266(8) Corporations Act**

In *Hewlett Packard Australia P/L v. GE Capital Finance P/L* ([2003] FCAFC 256; 21.11.2003) a Full Court concluded it had power to extend the period to lodge notice of a charge under s266(4) of the Corporations Act after the "critical day" in s266(8).

#### **Migration - Spouse visa - "domestic violence"**

In *Cakmak v. MIMIA* ([2003] FCAFC 257; 21.11.2003) a Full Court concluded the concept of "domestic violence" in the Migration (1994) Regulations did not extend to psychological violence absent physical violence.

#### **Federal Court - Appeal from Federal Magistrates' Court - Change in law before appeal - Whether Full Court should determine appeal**

In *VAAW v. MIMIA* ([2003] FCAFC 259; 21.11.2003) a Full Court concluded that it should determine the appeal for itself from a decision of the Federal Magistrates' Court, notwithstanding the law had altered after the date of that decision, where it was clear what the result on any remitter would be.

#### **Migration - Visa cancellation for criminal conduct - Natural justice**

In *M238 of 2002 v. Ruddock* ([2003] FCAFC 260; 21.11.2003) a Full Court concluded the appellant had not been denied natural justice in the decision to cancel his visa under s501 of the Migration Act but considered examples of when this might occur.

#### **Migration - Visa - School visa - Visa refused because course a "regression" - Application of policy**

In *Ou Yang v. MIMIA* ([2003] FCAFC 258; 24.11.2003) a Full Court concluded the subject decision should be set aside because it represented either the inflexible application of an unwritten policy or failure to take into account a relevant matter.

#### **Migration - "Gazetted Agency"**

In *Evans v. MIMIA* ([2003] FCAFC 276; 1.12.2003) a Full Court divided as to when the Acts Interpretation Act 1901 (Cth) will operate to save a Gazette Notice which failed to "specify" law enforcement agencies as required by the Migration Act.

#### **Migration - Jurisdictional error - Failure to consider relevant fact at all**

In *Applicant M190 of 2002 v. MIMIA* ([2003] FCAFC 1362; 28.11.2003) the RRT rejected the application by the applicant finding he had copied the application of another. Finklestein J found jurisdictional error made out because the RRT had not considered facts which suggested the applicant could not have copied the form but that the other person had copied his form.

#### **Migration - Confidential information not disclosed by RRT**

In *NAVK v. MIMIA* ([2003] FCAFC 1389; 28.11.2003) Emmett J considered when the refusal by the RRT to inform an applicant for a protection visa of confidential documents under s438(3) of the Migration Act on the advice of the Department of Immigration, and after deciding not to exercise power under

s427 of that Act to obtain answers from the Department to certain questions, constituted a denial of procedural fairness.

#### **Human rights - Freedom of speech for Commonwealth officers**

In *Bennett v. President HREOC* ([2003] FCA 1433; 10.12.2003) Finn J concluded Reg 7(13) under the Public Service Act 1922 (Cth) requiring Commonwealth public servants not to disclose information about public business or things of which they had official knowledge could infringe the implied freedom of political communication and was not appropriate or adapted to serving a purpose that did not unreasonably impair the freedom. Consideration of the duty of loyalty of public servants and their obligations of secrecy and the permissible public comment and disclosure of official information.

#### **Environment - Whether decision to acquire land in SA for nuclear waste dump unlawful**

In *SA v. Hon Slipper MP* ([2003] FCA 1414; 8.12.2003) Selway J dismissed proceedings contending that the acquisition of land by the Commonwealth under the Lands Acquisition Act 1989 (Cth) for a nuclear waste dump had been achieved contrary to the AD (JR) Act.

#### **Native title - Extinction**

In *Daniel v. WA* ([2003] FCA 1425; 5.12.2003) R D Nicholson J considered whether reservation of land for cemeteries, water supply, nature reserves and wildlife sanctuaries, and jetties extinguished native title.

#### **Customs - Anti-dumping**

In *Expo-Trade v. Minister for Customs* ([2003] FCA 1421; 5.12.2003) Moore J dismissed an application to review a recommendation of the CEO of Customs in relation to anti-dumping where there was no domestic market for ammonium nitrate in the source countries of Estonia or Russia.

#### **Courts - Representative proceedings - Determination of final membership**

In *King v. AG Australia Holdings Ltd* ([2003] FCA 1420; 5.12.2003) Moore J considered how the final membership of a class in a class action was to be determined under Part IVA of the Federal Court of Australia Act 1976 (Cth) where the proceeding had settled.

#### **Native title - Procedure**

In *Anderson v. WA* ([2003] FCA 1423; 4.12.2003) French J considered how an application was to be amended to substitute applicants where there was disagreement between applicants concerning the proposed amendments.

#### **Trademarks - "Crazy John's" infringed by "Crazy Ron's"**

In *Mobile World Communications P/L v. Q & Q Global Enterprise* ([2003] FCA 1404; 4.12.2003) Allsop J concluded a trademark "Crazy John's" registered in respect of telephones was infringed by the trademark "Crazy Ron's".

#### **Migration - Revival of visa by order of AAT**

In *Lesi v. MIMIA* ([2003] FCAFC 285; 11.12.2003) the appellant was deported from Australia under s200 of the Migration Act in October 2000. At that time a certificate preventing him seeking review by the AAT was thought to be effective. It was proved invalid in unrelated proceedings. The partner of the appellant returned to Australia and commenced proceedings in the AAT which in April 2002 set aside the

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deportation order. A request by the appellant for permission to return to Australia on the basis his earlier visa had revived was rejected. This decision was upheld by the primary judge. On appeal a Full Court concluded that in the unique circumstances the visa of the appellant had been revived and he should be entitled to return to Australia.

### **Constitutional law - Judicial power - "Matter"**

In *C of A v. Lyon* ([2003] FCAFC 284; 12.12.2003) a Full Court concluded an application by the Commonwealth to prevent in the public interest disclosure in committal proceedings of matters relating to witness protection raised a "matter" over which the Federal Court had jurisdiction under s39B(1A)(a) of the Judiciary Act.

### **Native title - Standing of traditional custodians**

In *De Rose v. SA* ([2003] FCAFC 286; 16.12.2003) a Full Court considered when custodians of traditional land had abandoned, or lost, their connection with the land so as to be prevented from bringing a claim under the Native Title Act 1993 (Cth).

### **Trade practices - Misleading conduct - Corrective advertising**

In *Medical Benefits Fund of Australia Ltd v. Cassidy* ([2003] FCAFC 289; 16.12.2003) a Full Court considered the role of corrective advertising in relation to advertisements for private health insurance said to be misleading or deceptive.

### **Migration - Jurisdictional error - Actual bias**

In *MIMIA v. SGJV* [2003] FCAFC 290; 16.12.2003) a Full Court concluded that the primary Judge had erred in finding the decision of the RRT affected by actual bias arising from the circumstances in which the visa applicant had been interviewed. However the Full Court concluded the decision of the RRT amounted to a denial of natural justice because the respondent had been led to believe there was no need to call a witness to counter the effect of the interview.

### **Federal Court - Constitutional Writs - Whether order dismissing application interlocutory order**

In *NAHQ v. MIMIA* ([2003] FCAFC 297; 17.12.2003) a Full Court observed an order dismissing an application for an Order Nisi for a Constitutional Writ was interlocutory and leave to appeal was required.

### **Constitutional law - Constitutional Writ - When decision unreasonable**

In *SHJB v. MIMIA* ([2003] FCAFC 303; 17.12.2003) a Full Court concluded the question of whether a decision was unreasonable in the *Wednesbury* sense was not to be approached by the English overlay of "relative reasonable satisfaction" because it involved human rights. The Court concluded Australian Authority revealed that the question of whether the reasons for decision were so opaque or obviously unreasonable was a question of degree [33].

### **Motor vehicles - Approval of importation after the event**

In *Minister for Transport and Regional Services v. Maara* ([2003] FCAFC 29; 18.12.2003) a Full Court concluded the AAT had not erred in considering whether to approve under the Customs Act 1901 (Cth) importation of the respondent's motorcycle into Australia after it had in fact been landed.

### **Migration - "best recollection" of reason**

In *Dagli v. MIMIA* ([2003] FCAFC 298; 19.12.2003) a Full

Court concluded the appeal should be allowed where the appellant would have succeeded in his application but for the fact that the respondent gave reasons required to be given at the time the decision subject of the litigation was made in the middle of the proceedings seeking to review. The Court observed that reasons produced long after a decision must be treated with caution [67]. The Full Court considered the breach of natural justice identified by the primary Judge was not answered by the subsequently provided reasons.

### **Federal Court - Service outside jurisdiction**

In *Costa Varaca P/L v. Bell Regal P/L* ([2003] FCAFC 305; 19.12.2003) a Full Court considered whether the requirements for service of protest out of the jurisdiction under FCR Ord 8 r2(2) had been satisfied.

### **Migration - Notification of decisions**

In *Veau of 2002 v. MIMIA* ([2003] FCAFC 311; 22.12.2003) a Full Court considered whether a notice had been validly given to a person under s494D(1) of the Migration Act where it was addressed care of the authorised recipient at the address of the authorised recipient. The Court concluded such a document was addressed to the authorised recipient not the intended person.

### **Corporations - Power of AAT**

In *ASIC v. Donald* ([2003] FCAFC 418; 23.12.2003) a Full Court concluded the AAT had power, in reviewing a decision by ASIC to accept an undertaking (s93AA Corporations Law) to order that ASIC accept a written undertaking even though AAT itself had no power to accept one.

### **Migration - Procedural fairness - Whether documents of delegate sent to RRT**

In *NABC v. MIMIA* ([2003] FCAFC 317; 24.12.2003) a Full Court concluded procedural unfairness Court be established where an applicant acted on the assumption that all documents from the primary decision-maker had been sent to the RRT.

### **Migration - Procedural unfairness - Confrontational approach by RRT**

In *MIMIA v. WAFJ* ([2004] FCAFC 5; 15.1.2004) a Full Court concluded the Federal Magistrate had not erred in finding a transcript of a hearing by the RRT revealed procedural unfairness where the RRT member adopted a confrontational approach involving sarcasm and rudeness.

## **High Court Notes: March 2004**

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### **Statutes - Transitional provision - Specific and general saving provisions**

In *Dossett v. TKJ Nominees P/L* ([2003] HCA 69; 4.12.2003) the appellant's application for leave to commence common law proceedings for personal injuries under the Workers' Compensation and Rehabilitation Act 1981 (WA) had been filed when the provisions were replaced by the more restrictive conditions introduced by the Workers' Compensation and Rehabilitation Amendment Act 1999 (WA). The transitional provisions in this Act did not specifically refer to a person in the circumstances of the Appellant. The district Court held the amended provisions applied to the appellant's application. His appeal to the Supreme Court WA was dismissed. His appeal to the High Court was allowed: McHugh; Gummow, Hayne,

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Heydon JJ; Kirby J. The Court considered the distinction between when legislation is "amended" and "repealed" and when repeal substitution of legislation will constitute a "repeal" for s37(1) Acts Interpretation Act 1984 (WA).

### **High Court - Whether order of Justice refusing leave to issue process interlocutory order**

In Re Luck ([2003] HCA 70; 4.12.2003) a Full Court (McHugh, Gummow, Heydon JJ) concluded an order refusing a vexatious litigant leave to commence proceedings was an interlocutory order [9]. Its concluded an appeal without leave was incompetent.

### **Migration - Refugees - Social group - Homosexual Bangladeshi men**

In Appellant S395/2002 v. MIMA ([2003] HCA 71; 9.12.2003) the appellants were males who feared persecution on return to Bangladesh because they were homosexuals. The RRT found their fear was not well founded because they could conduct themselves "in a discreet manner". Their appeal to the single Justice of the Federal Court and the Full Court of that Court failed. The appeal to the High Court succeeded by majority: McHugh, Kirby JJ; Gummow with Hayne JJ; contra Gleeson CJ; Callinan, Heydon JJ. Appeal allowed.

### **Constitutional law - Aliens**

In Shaw v. MIMA ([2003] HCA 72; 9.12.2003) the applicant was a British subject when he entered Australia in 1974 aged two. Following a criminal history the respondent purported to cancel his visa under s501(2) of the Migration Act in July 2001. A case was stated as to whether the applicant was an "alien" for the purposes of Constitution s51(xix). The majority of the High Court concluded that all persons who entered Australia after the commencement of the Citizenship Act on 26 January 1949 and who were not born out of Australia of Australian parents and who had not become Australian citizens remained within the scope of the "aliens" power within Constitution s51(xix): Gleeson CJ, Gummow, Hayne JJ [32]; sim Heydon J; contra McHugh; Kirby JJ; Callinan J. Questions answered accordingly.

### **Negligence - Action in ACT Supreme Court against Commonwealth - Applicable limitation law**

In Blunden v. C of A ([2003] HCA 73; 10.12.2002) in May 1998 the appellant, who had been a seaman on HMAS Melbourne when it collided on the high sea in February 1964 with HMAS as Voyager sued the Commonwealth for damages for personal injury. The question of which limitation law applied to the claim was removed to the High Court under s40(2) Judiciary Act. The High Court concluded the proceeding was subject to the Limitation Act 1985 (ACT): Gleeson CJ, Gummow, Hayne, Heydon JJ jointly; sim Kirby J; Callinan J.

### **Criminal law - Murder - Statutory murder - Whether point may be raised on appeal**

In Arulthilakan v. Q ([2003] HCA 74; 10.12.2003) the majority of the High Court concluded the directions to the jury concerning the charges of murder and "statutory murder" arising out of an armed robbery within s12A Criminal Law Consolidation Act 1935 (SA) did not involve any error of law or miscarriage of justice. The Court also determined a point not raised below concerning causation and concluded again there had been no miscarriage: Gleeson CJ, Gummow, Hayne JJ, Callinan, Heydon JJ contra Kirby J.

**Trade practices - Exclusionary provisions - Whether arrangement that one publisher would circulate new newspaper in area of other publisher unless it withdrew its newspaper in first publishers area - Liability of accessories - Trade Practices 1974 (Cth) ss14, 45(2), 46(1), 75**

In Rural Press Ltd. v. ACCC ([2003] HCA 75; 11.12.2003) the High Court considered the construction of provisions of the Trade Practices Act 1974 (Cth) concerning agreements to restrict competition. The Court also considered how the motive for an "arrangement" was to be proved and the involvement required of officers of trading corporations for them to "involved in" a contravention of the Act.

## **LAW WEEK 2004**

### **Opening the Door to the Law**

## **15-23 May**

This year Law Week will include a series of community education workshops in Darwin, Casuarina, Palmerstone, Litchfield, Alice Springs, Katherine and (hopefully) Elliot.

Proposed topics include:

- \* Arrest and police powers;
- \* Centrelink and the law;
- \* Consumer rights;
- \* Complaints;
- \* Confidentiality and privacy;
- \* Crime prevention;
- \* Dispute resolution;
- \* Domestic violence;
- \* Drugs and the law;
- \* Employment law;
- \* Sentencing and correctional services;
- \* Family law;
- \* Motor vehicle accidents;
- \* The law for young people;
- \* Personal injury and public liability insurance;
- \* Property law and conveyancing;
- \* Victims of crimes;
- \* Wills and power of attorney;
- \* Traffic offences and drink driving; and
- \* Incorporating associations law.

If you are able to assist with any of these workshops or would like to be involved in the community education workshops, please contact Zoe Malone on (08) 8981-5104, or via email at [publicrelations@lawsocnt.asn.au](mailto:publicrelations@lawsocnt.asn.au)