

## NOTICEBOARD

### High Court of Australia (Fees) Regulations 2004

The Regulations prescribing the fees payable in relation to proceedings commenced in the High Court of Australia have been amended by the High Court of Australia (Fees) Regulations 2004 with effect from 1 January 2005. The fees regulations have been revised to reflect changes to the High Court's procedural rules introduced by the High Court Rules 2004.

A copy of the High Court of Australia (Fees) Regulations 2004 can be obtained from the website maintained by the Commonwealth Attorney-General's Department at [www.scaleplus.gov.au](http://www.scaleplus.gov.au).

Explanatory Statement: Statutory Rules 2003 No 372  
*Issued by the authority of the Federal Attorney-General  
Judiciary Act 1903*

The Commonwealth Constitution established the High Court of Australia (the Court) as Australia's federal supreme court.

Section 88 of the *Judiciary Act 1903* (the Act) provides in part that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. In particular, paragraph 88(ca) provides that regulations may be made prescribing the fees payable in respect of proceedings in the High Court and the execution of the process of the High Court.

The *High Court of Australia (Fees) Regulations 1991* ('the Old Regulations') prescribe certain fees in relation to the Court's proceedings and make provision for the payment of those fees.

The High Court of Australia has recently completed a review of the *High Court Rules 1952* ('the Old Rules'), made under section 86 of the Act. As a result of this review, on 1 January 2005 a new set of rules, the *High Court Rules 2004* ('the 2004 Rules'), came into operation. One consequence of the making of the 2004 Rules was the need to update the Old Regulations to achieve consistency between the two.

The purpose of the *High Court of Australia (Fees) Regulations 2004* ('the 2004 Regulations') is to replace the Old Regulations with regulations that are consistent with the 2004 Rules. The 2004 Regulations also remove or change some obsolete provisions, and are structured in a way that is easier to read and understand than the Old Regulations.

The Act does not specify any conditions that need to be met before the power to make the 2004 Regulations may be exercised.

#### Practice Direction 4 of 2004

Pursuant to Rule 48.28 and for the purpose of considering the practicality of changing Order 48, it is directed that the following new procedure is to apply to all matters commenced after the date of this direction.

The period during which the direction is to apply is 12 months after the date of commencement.

There is substituted for Rule 48.06(1)(d) the following:

"(d) if the originating process has been served and an appearance has been entered -

(i) consider whether the order referred to R 48.02(2)

ought to be made and, if appropriate, make such an order;

(ii) determine whether a defence has been filed and served and, if not, to give such directions in that regard as the Master thinks fit."

There is substituted for Rules 48.07, 48.08, 48.16, 48.17 and 48.18 the following which is hereafter referred to as the "litigation plan" -

- 1 The Master or a Judge may dispense with the whole or any part of the litigation plan and restore the same at any time as he thinks fit.
- 2 If the Master or a Judge dispenses with the whole of the litigation plan then the rule for which the litigation plan is substituted shall be revived.
- 3 In the litigation plan Master includes Registrar.

#### Litigation Plan

- 1 One month after pleadings have closed each party shall file and serve on each other party to a proceeding a litigation plan which shall state:
  - 1.1 what the party contends are the primary legal and factual issues and which of those issues, if any, are capable of being agreed;
  - 1.2 what the party contends is the necessary evidence to prove his or her or its case;
  - 1.3 what the party contends are the outstanding and required interlocutory steps to be completed prior to the proceeding being ready for trial;
  - 1.4 what the party contends is a possible timetable for the completion of all outstanding steps prior to trial;
  - 1.5 the numbers of witnesses the party has spoken to as at the date of filing the litigation plan;
  - 1.6 how many proofs of evidence the party has obtained as at the date of filing the litigation plan;
  - 1.7 how many more witnesses the party needs to contact and obtain statements from prior to trial;
  - 1.8 the date by which it is anticipated all necessary proofs of evidence will be obtained and reasons for time required to obtain such proofs of evidence;
  - 1.9 the number of expert witnesses that are likely to be called at trial, the field of expertise and what expert reports have been obtained;
  - 1.10 what steps can be taken to shorten the duration of the proceedings;
  - 1.11 the date when the proceedings is likely to be ready for trial and why such time is necessary to get the matter ready for trial;
  - 1.12 what attempts have been made to settle the proceedings;
  - 1.13 the names of the legal practitioners who have the conduct of the proceeding;
  - 1.14 how many counsel will be briefed;
  - 1.15 a preliminary list of documents that are likely to be tendered in evidence at trial by agreement or otherwise. The list should identify the issues in the proceeding to which the documents relate;
  - 1.16 what directions are required;
  - 1.17 what aspects of the proceeding may be appropriate for separate determination or for mediation;
  - 1.18 that the party has been given an estimate as to costs incurred to date and the costs likely to be

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incurred in the resolution of the proceeding.

The litigation plan shall be signed by the solicitor who has the conduct of the proceedings, and, if the solicitor who has the conduct of the proceedings is not a partner in the firm representing the party, a partner.

2 The Master shall arrange a directions hearing to take place six weeks after pleadings have closed.

3 At the directions hearing the Master shall:

3.1 examine the parties legal representatives as to their litigation plans and the progress of the proceedings;

3.2 make whatever directions are necessary; and

3.3 list the proceeding for trial at a sittings.

4 There will be four sittings a year presided over by two Judges. There may be more proceedings listed than can be heard during a sittings in the anticipation that some will not proceed.

5 There will be a call over by a Judge two months before a sittings is due to commence. The Judge will allocate dates for hearing and make whatever directions that are necessary.

6 This direction will commence on 1 January 2005

7 Proceedings commence prior to the date for commencement of this direction will be listed for trial at a sittings.

Chief Justice Brian Martin

Supreme Court of the Northern Territory

13 October 2004

### **Practice Direction 1 of 2005**

#### ***Legal Practitioners (Incorporation) Act 1989***

Practice Direction 4 of 1999 is rescinded.

Chief Justice Brian Martin

Supreme Court of the Northern Territory

21 January 2005

### **Supreme Court Rules - Costs Variation**

I, David Norman Angel, the Acting Chief Justice of the Supreme Court of the Northern Territory of Australia, pursuant to paragraph 4 of Part 1 of the Appendix to Order 63, and after considering the recommendation of the Acting Master, direct that the rate per unit applicable under paragraph 3 of that Part will, from 1 January 2005 be as follows:-

(a) for a solicitor- \$19.00 per unit; and

(b) for a clerk - \$10.00 per unit.

Acting Chief Justice David Angel

Supreme Court of the Northern Territory

14 December 2004

### **Parliamentary Joint Committee on the Australian Crime Commission**

The Joint Committee has invited submissions on its inquiry into the ACC Annual Report. Pursuant to Section 55(1) of the Australian Crime Commission Act 2002, the Parliamentary Joint Committee is required to:

(a) to monitor and to review the performance by the ACC of its functions;

(b) to report to both Houses of Parliament, with such comments as it thinks fit, upon any matter appertaining to the ACC or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament

should be directed;

(c) to examine each annual report on the ACC and report to the Parliament on any matter appearing in, or arising out of, any such annual report;

The Australian Crime Commission has now completed almost two years of operation, however its first Annual Report dealt only with the first six months of the Commission's existence, and contained little information on which to base an evaluation of the Commission. The ACC's 2003-2004 Annual Report is there the first opportunity to evaluate the Commission's progress, structure and effectiveness.

The Committee has asked that submissions containing views about the ACC and its operations be lodged by 8 April 2005. Submissions become the PJC's documents and only become public after a decision by the PJC. Persons making submissions must not release them without the approval of the PJC. While submissions are covered by parliamentary privilege, the unauthorised release of them is not.

### **Independent contracting and labour hire arrangements**

The House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation is conducting an inquiry into independence contracting and labour hire arrangements. The Committee would appreciate gaining an insight into the experience of your organisation on these matters.

Flexibility in working arrangements is sought by employers and employees to meet the demands of economic growth, and the desire to strike a better balance between independent contractors and sole traders, and there has been an increasing trend towards the use of contract workers in labour hire arrangements.

The Committee is to inquire and report on:

- \* the status and range of independent contracting and labour hire arrangements;
- \* ways independent contracting can be pursued consistently across state and federal jurisdictions;
- \* the role of labour hire arrangement in the modern Australian economy; and
- \* strategies to ensure independent contract arrangements are legitimate.

The Committee aims to report on the inquiry mid-year, and so seeks submission by 11 March 2005. Submissions should be forwarded to:

The Secretary

Standing Committee on Employment, Workplace Relations and Workforce Participation

House of Representatives

Parliament House

CANBERRA ACT 2600

Email: ewrp.reps@aph.gov.au

### **Practice Direction 3 of 2004**

#### **Guidelines - Disclosure by Insolvency Practitioners of Fees to be Charged**

1 The Insolvency Practitioners Association of Australia no longer publishes a Scale of Rates in respect to fees.

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- 2 Where application is made to the Court for an order that a company be wound up or for an official liquidator to be appointed as a provisional liquidator of a company, an official liquidator must consent in writing to be appointed: Corporations Act 2001 (Cth) (the Act), subs 532(9); Corporations Law Rules (the Rules) 6.1(1). The consent must be in accordance with Form 8 to the Rule: see rr 5.5(2); 6.1(2). Form 8 requires disclosure of the hourly rates currently (as part at the signing of the consent) charged in respect of work done as a liquidator or provisional liquidator (as the case may be) by the person signing the consent, and by that person's partners and employees who may perform work in the administration in question.
- 3 The provisions referred to in 2 above have no application, however, to appointments of persons as external administrators:
  - \* otherwise than by the Court; or
  - \* by the Court otherwise than as liquidator provisionally.

Moreover, even in the case of appointments as liquidator or as liquidator provisionally, the provisions referred to in 2 above do not touch on changes in the hourly rates after the signing of the Form 8 consent.
- 4 Various provisions of the Act empower the Court, in certain circumstances, to determine or review the remuneration of insolvency practitioners when they are filling the office of various forms of external administrator: see ss 425; 449E; 473(2), (3), (5), (6); 504.
- 5 With the exception of Form 8, where it is applicable, the provisions referred to in 2 above do indicate a standard of disclosure of fees to be charged which the Court might regard as appropriate in any situation in which it may be relevant for the Court to take into account whether an insolvency practitioner has followed a practice of making adequate disclosure of such fees.
- 6 The guidelines in 7 and 8 below are intended to fill that gap. Those guidelines are not, however, intended to limit the judicial discretion available in any particular case, or to require non-observance of guidelines to be taken into account where that would not be relevant to the exercise of a judicial discretion.
- 7 All external administrators (including persons appointed as liquidators or as liquidators provisionally) should, in their first report to creditors:
  - \* disclose the hourly rate of fees which are being charged by them and by any of their partners and employees who may work in the administration; and
  - \* give their best estimate of the cost of the administration to completion or to a specified milestone identified in the report.
- 8 If, at any time after an external administrator has reported in accordance with 7, the hourly rates are to change, or the administrator has reason to believe that the estimate given to creditors is no longer reliable, he or she should report to creditors, disclosing the new hourly rates and giving a revised estimate.

Note: The guidelines are not intended:

- \* to prevent an external administrator from charging hourly rates or revising estimates if he or she is otherwise lawfully permitted to do so; or
- \* to authorise an external administrator to charge hourly rates or revise estimates if he or she is not otherwise lawfully permitted to do so.

Chief Justice Brian Martin

Supreme Court of the Northern Territory

3 August 2004

### High Court Practice Directions

The Justices of the High Court of Australia have issued two new Practice Directions.

#### Practice Direction No 1 of 2004

##### Applications for Leave or Special Leave to Apply

- 1 This Practice Direction applies to all applications for leave or special leave to appeal pending after 1 January 2005 in which the applicant is unrepresented.
- 2 At the time of filing a draft notice of appeal and written case required by Rule 41.10.1 of the High Court Rules 2004 the applicant shall lodge two additional copies of the draft notice of appeal, the written case and all the documents filed by the applicant in accordance with Rule 41.01.2.

8 December 2004

#### Practice Direction No 2 of 2004

##### Rescission of Practice Directions

The following Practice Directions are rescinded with effect from 1 January 2005:

Practice Direction No 2 of 1984 Applications for Special Leave to Appeal  
 Practice Direction No 2 of 1987 Video Link Special Leave Hearings  
 Practice Direction No 1 of 1991 Criminal Special Leave Applications  
 Practice Direction No 1 of 1994 Applications for Industrial Order Nisi  
 Practice Direction No 1 of 2001 Applications for Removal Pursuant to s40 of the Judiciary Act 1903 (Cth).

8 December 2004

### National Guide to Counsel Fees

The Federal Court of Australia has released its National Guide to Counsel Fees, which is effective from 1 January 2005.

The guide may be applied by taxing officers of the Federal Court when making an estimate pursuant to Order 62 rule 46 of the Federal Court Rules or upon taxation of a party and party Bill of Costs.

In many cases the range of fees in the guide will bear no relationship to the amounts that members of the Bar actually charge as a fee on an hourly rate.

Where, for example, by reason of the number, difficulty and/or complexity of the questions of law or fact involved, the time required for preparation of the hearing is substantially extended beyond what might be regarded as "average", a taxing officer may determine that a fee at or above the upper end of the range may be appropriate. In particular cases, the standing experience of the counsel concerned may also be relevant matter for consideration.



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Similarly, where the matter is not complex or difficult, a fee at or towards the lower end of the range may be appropriate.

A copy of the guide is available on the Court's website at <http://www.fedcourt.gov.au/>.

The Court will be reviewing the guide during 2005. In the meantime, if you have any queries please contact Philip Kellow, Deputy Registrar, on (02) 9230 8336 or by email at [Philip.Kellow@fedcourt.gov.au](mailto:Philip.Kellow@fedcourt.gov.au).

### **New Video-conferencing Arrangements for the Federal Court**

The Federal Court has revised its charges where a video link is requested as part of a Federal Court proceeding. These changes are effective from 1 February 2005.

The charges have been revised so that the minimum charge will now be \$150 per Federal Court site. This will cover the cost of set-up at each site, as well as the first 15 minutes of video-conferencing. Thereafter, video-conferencing will be charged at \$50 per completed 15 minutes of video-conferencing for each Federal Court site. Previously, a minimum one hour charge applied.

In addition, transmission costs will continue to be charged. These will vary according to the transmission speed and will be charged for each completed 15 minutes of video-conferencing.

No charges apply to proceedings brought under the *Native Title Act 1993* (Cth).

Further information can be found on the Federal Court's website at <http://www.fedcourt.gov.au/> or by contacting your local Federal Court Registry.

Philip Kellow

Deputy Registrar

Federal Court of Australia

1 February 2005

### **Reminder from the Federal Court**

Practitioners are reminded that in order to practice and appear in the Federal Court of Australia a practitioner must be:

- \* Admitted to practise as a barrister or solicitor, or as both, in the Supreme Court of a State or Territory; and
- \* Appear in the Register of Practitioners kept by the Chief Executive and Principal Registrar of the High Court.

The application form for the Register of Practitioners is available at the High Court website [www.highcourt.gov.au](http://www.highcourt.gov.au).

### **Federal Court Notes: January 2005**

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

#### **Federal Court - Costs - Non-legal practitioner**

In *ACCC v The IMB Group P/L (In Liq)* ([2004] FCA 1592; 3.12.2004) Keifel J concluded costs were not payable in respect of work done preparing a defence by persons who are not legal practitioners.

#### **Migration - Refugees - Modified behaviour**

In *NALZ v MIMIA* ([2004] FCAFC 320; 2.12.2004) Full Court distinguished *Appellant S395/2002 v MIMA (2003) 203 ALR 112* on the basis that it was not inappropriate to expect a person to avoid persecution by refraining from selling electrical goods to Sri Lankan nationals and thus

avoid membership of an imputed group.

#### **Customs - Whether duty validly demanded**

In *Parks Holdings P/L v CEO Customs* ([2004] FCAFC 317; 1.12.2004) a Full Court considered whether there had been a valid demand of duty for s167 of the *Customs Act 1901* (Cth) where there was no valid delegation to make the purported demand.

#### **Migration - Natural justice**

In *Moradian v MIMIA* ([2004] FCA 1590; 6.12.2004) Gray J set aside a decision which concluded a person had been "employed" on a voluntary basis for failing to give the person concerned an opportunity to respond to what the decision would turn on. Consideration of "employed".

#### **Migration - Refugee Review Tribunal - Interpreting errors**

In *STBB v MIMIA* ([2004] FCA 1587; 6.12.2004) Lander J dismissed an application where the applicant claimed inaccurate interpretation resulted in procedural unfairness.

#### **Social security - Whether payments recovered in good faith - Departmental error**

In *Jordan v Secretary DFCS* ([2004] FCA 1582; 3.12.2004) Finn J concluded the applicant received Newstart and NEIS benefits, without reduction of Newstart, solely due to administrative error made by the Commonwealth within s1237A of *Social Security Act 1991* (Cth). He concluded the payments had been received in good faith and the debt should be recalculated in light of this.

#### **Federal Court - Costs - Important and novel question of construction**

In *MIMIA v VBAO of 2002* ([2004] FCA 1581; 3.12.2004) Marshall J made no order as to costs because the appeal raised important and novel questions of construction.

#### **Migration - Removal of non-citizen - Injunction to restrain removal pending completion of civil proceeding**

In *Mastipour v Secretary, DIMIA* ([2004] FCA 1571; 3.12.2004) Mansfield J restrained the respondent from removing the applicant from Australia pending the completion of his claim for damages for alleged breaches of care whilst in immigration detention.

#### **Evidence - Statements at mediation - Costs**

In *The Silver Fox Company P/L v Lenard's P/L* ([2004] FCA 1570; 3.12.2004) Mansfield J considered when statements of the mediation could be adduced in evidence on the question of costs notwithstanding a confidentiality term in the mediation agreement.

#### **Superannuation - Whether decision open to SCT**

In *Commonwealth Superannuation Scheme Board v Dexter* ([2004] FCA 1434; 2.12.2004) Gray J considered when it was open to the SCT to find decisions of the trustee were not fair and reasonable or contrary to law.

#### **Federal Court - Contempt - Penalty**

In *Hughes v ACCC* ([2004] FCAFC 319; 30.11.2004) a Full Court allowed in part an appeal against orders of the primary Judge sentencing the appellant to arguably an indefinitely suspended sentence for non-compliance with mandatory orders arising from the misleading and deceptive sale of contraceptives. Consideration of penalty for civil contempt.

#### **Migration - Jurisdictional error - Findings by RRT of**

**claim not made by visa applicant**

In *SZAOG v MIMIA* ([2004] FCAFC 315; 26.11.2004) a Full Court, by majority, concluded the appellant had not made a claim of conscientious objection to military service and thus the RRT's failure to deal with it did not constitute jurisdictional error.

**Industrial law - Dismissal - Remedy - Whether previous relief**

In *Stannard ex p McIntyre VP* ([2004] FCAFC 210; 25.11.2004) a Full Court quashed a decision of the AIRC which concluded the prosecutor had previously sought relief within s170HB of the *Workplace Relations Act 1996* (Cth) by seeking, as a public servant, judicial review of the decision to terminate his employment. The Court concluded such a claim did not bar relief within s170HB of the Act.

**Evidence - Admissibility - Whether native title claim - Disconformity between expert anthropologist and indigenous people**

In *Jango v NT (No 4)* ([2004] FCA 1539; 26.11.2004) Sackville J considered when an anthropologist was an expert, how a divergence between the evidence of such an expert and indigenous witnesses was to be resolved and the difficulties in forming an expert opinion based on an uncertain language.

**Corporations - Insider trading - Oppressive conduct**

In *Rivkin Financial Services Ltd v Sofcom Ltd* ([2004] FCA 1538; 26.11.2004) Emmett J considered how insider trading was to be proved in *Corporations Act* s1043A and how an improper purpose was to be proved in proceedings alleging oppressive conduct.

**Migration - Visa cancellation - Visa holder in refugee family**

In *Zhaho v MIMIA* ([2004] FCA 1532; 26.11.2004) Moore J concluded no jurisdictional error was evident where the Minister cancelled the visa of a person on character grounds consequent on conviction where the spouse of the family member appeared to have an entitlement for a protection visa. He concluded delay in serving notice of the decision did not establish bad faith.

**Migration - Waiver of condition 8503**

In *Verlicia v MIMIA* ([2004] FCA 1529; 26.11.2004) Moore J concluded irrelevant considerations had not been taken into account in refusing to waive an 8503 condition on a visa.

**Migration - Visa cancellation - Relevant matter - Mental state of visa holder**

In *Herrera v MIMIA* ([2004] FCAFC 214; 25.11.2004) a Full Court dismissed an appeal relying on the assertion that the Minister by failing to consider the subjective state of mind of the visa holder at the time he committed crimes failed to take into account a relevant matter in cancelling the visa for criminal conduct under s501(2) *Migration Act*.

**Income tax - GST - When motel constitutes new residential premises**

In *Marana Holdings P/L v C of T* ([2004] FCAFC 307; 25.11.2004) a Full Court considered whether motel accommodation could constitute "new residential premises" or "residential premises" for the purposes of the GST legislation.

**Migration - Detention - Delay in executing deportation order**

In *MIMIA v Cisinski* ([2004] FCAFC 302; 24.11.2004) a primary Judge concluded a person still in detention in October 2003 consequent on a deportation order made in July 1997 was detained unlawfully because the provisions of the *Migration Act* requiring detention were subject to an implied term that the detention be for a reasonable period of time. This conclusion was reversed by a Full Court notwithstanding the circumstance that the respondent appeared to be a "stateless alien" and that attempts to procure his removal have been unsuccessful.

**Native title - Whether extinguished**

In *Lawson v Minister Assisting the Minister for Natural Resources (Lands)* ([2004] FCAFC 308; 19.11.2004) a Full Court dismissed an appeal against a conclusion of the primary Judge that land resumed by the Crown for irrigation works along the Murray ceased to be land available for native title by virtue of ss23B, 23E of the *Native Title Act 1993* (Cth).

**Migration - Judicial review - Primary visa applicant deceased - Business visa**

In *Kamychenko v MIMIA* ([2004] FCA 1517; 24.11.2004) Cooper J struck-out judicial review proceedings against the decision of the MRT refusing a business visa where the primary applicant had deceased. He also struck-out an application in the name of spouse and children as secondary applicants.

**Migration - Business visas - "ownership interest"**

In *Yu v MIMIA* ([2004] FCA 1477; 16.11.2004) Keifel J considered whether beneficial ownership of shares was including in concept of "ownership interest" in Reg 1.03 of the *Migration (1994) Regulations*. She considered whether Reg 1.11A was invalid.

**Australian Crime Commission - Power - Self incrimination**

In *X v ACC* ([2004] FCA 1475 and *Loprete v ACC* ([2004] FCA 1476; 17.11.2004) Finn J considered whether the Board of the ACC established under the *Australian Crime Commission Act 2002* (Cth) had power to amend an authorisation and determination for a special investigation, whether the term "instruments" in s33(3) *Acts Interpretation Act 1901* (Cth) was limited to instruments of a legislation character and whether s30(2) of the ACC Act abrogated privilege against self-incrimination in respect of foreign offences.

**Migration - Special need relative**

In *Singh v MIMIA* ([2004] FCA 298; 12.11.2004) a Full Court concluded no error was evident in the interpretation of "special need relative" because the MRT had failed to address the nominator's need for assistance rather than what the visa applicant was able to provide.

**Migration - RRT - Findings of fact - Whether RRT must consider whether it is in error**

In *Applicant A233 of 2003 v RRT* ([2004] FCAFC 296; 12.11.2004) a Full Court concluded the findings of the RRT were so clear there was no need for it to proceed and consider what the circumstances would be if it was in any doubt.

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### **Administrative law - Whether notification of penalty a "decision"**

In *Madera v C of T* ([2004] FCA 1616; 8.12.2004) Stone J concluded a "decision" to notify a person of a penalty incurred under a self-executing statutory provision was not a "decision under an enactment" within the AD (JR) Act.

### **Industrial law - Costs - Whether vexatious**

In *Zhang v The Royal Australian Chemical Institute Inc (No 2)* ([2004] FCA 1626; 10.12.2004) Finkelstein J concluded an action for unlawful dismissal was instituted vexatiously and without reasonable cause so that the applicant should be required to pay costs within s170CF(1) of the *Workplace Relations Act*.

### **Administrative law - Request for funding - Guidelines treated as mandatory criteria**

In *Applicant S214 of 2002 v Attorney-General* ([2004] FCA 1635; 13.12.2004) Hely J concluded a decision to refuse legal assistance to the applicant under s69 of the AAT Act was in error because departmental guidelines were treated as mandatory criteria to be substituted for the statutory test.

### **Trade practices - Unconscionable conduct - Resolution of motor vehicle accident - Special disadvantage**

In *Moss v Insurance Australia Ltd* ([2004] FCA 1636; 14.12.2004) Jacobson J dismissed an application where an insured alleged an insurer had acted unconscionably and contrary to s51AA of the *Trade Practices Act* in settling liability arising from a motor vehicle accident.

### **Bankruptcy - Bankruptcy notice - Incorrect basis for interest-precedent**

In *Adams v Lambert* ([2004] FCAFC 322; 9.12.2004) a Full Court considered whether claiming post-judgment interest in a bankruptcy notice under the wrong Act was a failure which rendered the notice invalid and concluded it was inappropriate to reconsider the decision in *Australian Steel Co (Operations) P/L Lewis (2000) 109 FCR 33*.

### **Migration - Business sponsor - "satisfactory record"**

In *MM International (Australia) P/L v MIMIA* ([2004] FCAFC 323; 9.12.2004) a Full Court considered whether the MRT had incorrectly concluded the appellant did not have a "satisfactory" record of, or a "demonstrated" commitment to, training.

### **Tort - Privacy**

In *Kalaba v Commonwealth of Australia* ([2004] FCA 326; 13.12.2004) a Full Court doubted whether Australian law recognised a tort of "privacy" and whether Australia Post had a complete defence to the claim concerning late delivery of post given by s34 of the *Australian Postal Corporation Act 1999*.

## **Federal Court Notes: February 2005**

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

### **Income tax - Tax avoidance - Application of Part IVA of ITAA**

In *Pridecraft P/L v C of T* ([200] FCA 339; 23.12.2004) a Full Court concluded the appellant had not shown that C

of T had erred in concluding a single contribution by the appellant as an employer to the trustee of a fund from which future bonuses to employees were to be paid constituted a scheme established for the dominant purpose of obtaining a tax benefit so that the consequent cancellation of tax benefit was authorised by Part IV of ITAA.

### **Legal professional privilege - Foreign lawyer**

In *Kennedy v Wallace* ([2004] FCAFC 337; 23.12.2004) a Full Court concluded the appellant businessmen had not established that he made notes in a London hotel for the dominant purpose of obtaining legal advice from his Swiss legal advisor. The Court also considered when the doctrine of legal professional privilege would extend to communications with foreign lawyers relevant to transactions disputed in Australia.

### **Health - Procedure of Professional Services Review Scheme**

In *Freeman v Health Insurance Commission* ([2004] FCAFC 335; 22.12.2004) a Full Court dismissed an appeal contending a denial of procedural fairness where in the operation of the Professional Services Review Scheme under Part VAA of the *Health Insurance Act 1973 (Cth)* the Determining Authority made a direction which went beyond the recommendation of the HIC.

### **Aviation - Restraint of pilot pending investigation - Orders to restrain investigation when it had concluded**

In *Civil Aviation Safety Authority v Boatman* ([2004] FCAFC 336; 24.12.2004) a Full Court set aside orders made by the primary Judge under s30DE of *Civil Aviation Act 1988 (Cth)* prohibiting the respondents from flying aircraft pending conclusion of an investigation when the investigation had in fact concluded before application was made.

### **Extradition - Whether surrender of person unjust - Prison conditions in requesting country**

In *de Bruyn v Minister for Justice & Customs* ([2004] FCAFC 334; 22.12.2004) a Full Court allowed an appeal and set aside the determination of the respondent Minister that the appellant be surrendered under the *Extradition Act 1988 (Cth)* to South Africa. The Full Court concluded jurisdictional error (s39B *Judiciary Act*) was established when the Minister failed to take into account as circumstances which would render extradition "unjust, oppressive or incompatible with humanitarian consideration" (s22(3)(b) *Extradition Act* and Reg 5(4) *Extradition Republic of South Africa Regulation*) the possibility that the appellant would be gang raped in prison and acquire AIDs.

### **Extradition - Bail**

In *Republic of Ireland v O'Donoghue* ([2004] FCA 1753; 30.12.2004) French J concluded a Magistrate had not erred in finding that special circumstances and the absence of a risk of flight warranted grant of bail pending an extradition hearing. Application by requesting country for revocation of bail refused.

### **Migration - Student visa - Failure to make satisfactory academic progress**



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In *MIMIA v Yu* ([2004] FCAFC 333; 22.12.2004) a Full Court allowed the appeal by the Minister. The Court concluded a Federal Magistrate had erred in finding the MRT was required to enquire of an educational institute which asserted the results of a student visa holder were inadequate.

### **Migration - Tribunals - Apprehended bias**

In *NADH of 2001 v MIMIA* ([2004] FCAFC 328; 22.12.2004) a Full Court quashed a decision of the RRT on the ground of apprehended bias where the RRT member entered into a vigorous debate with the applicant for a protection visa on theological issues.

### **Migration - Application of 91R of Migration Act**

In *WAJW v MIMIA* ([2004] FCAFC 330; 20.12.2004) a Full Court concluded the RRT had correctly applied s91R of the *Migration Act* in considering whether the appellant, who was an Iranian and a Sabean Mandaem, had suffered specific persecutory treatment.

### **Migration - Visa cancellation on character grounds - Failure to provide written reasons**

In *Howells v MIMIA* ([2004] FCAFC 227; 16.12.2004) a Full Court refused an appeal notwithstanding that the respondent had failed to provide reasons for cancelling the visa as required by s501 *Migration Act*. The Full Court rejected an application made to it for Mandamus to require the respondent to give reasons.

### **Migration - Regulations - Validity of subjective requirement in Schedule 1**

In *MIMIA v Kim* ([2004] FCAFC 329; 22.12.2004) a Full Court upheld the conclusion of Keifel J that the *Migration (1994) Regulations Sch1* should be construed on the basis that the decision to determine whether an application was "valid" and required to be processed, should not involve subjective or elastic considerations which may be raised in deciding whether the visa should be granted being a decision subject to merits review.

### **Migration - RRT - Speculation of RRT not put to applicant**

In *SZAJC v MIMIA* ([2004] FCA 1686; 21.12.2004) Tamberlin J set aside a decision of the RRT which had rejected an application for a protection visa for reasons which included speculation as to documents and other matters which were not put to the applicant and to which the applicant had no opportunity to respond.

### **Migration - Carer's visa**

In *Naidu v MIMIA* ([2004] FCA 1692; 21.12.2004) Ryan J set aside the decision of the MRT because it had, in considering whether relatives could assist a person in Australia, not distinguished between the reasonable assistance the relatives could offer and whether the visa applicant could reasonably obtain that assistance.

### **Migration - Visa cancellation - Minister incorrectly briefed**

In *Lu v MIMIA* ([2004] FCAFC 340; 24.12.2004) a Full Court concluded that a decision of the Minister to cancel a visa on character grounds should be quashed where the submission to the Minister failed to accurately describe the criminal conduct leading to the failure by the holder of the character test. The majority concluded the errors may have misled the Minister as to the

offences committed by the appellant.

### **Migration - Validity of detention charges**

In *Shahid Kamran Qureshi v MIMIA* ([2005] FCA 11; 17.01.2005) Kenny J rejected the contention that s209 of the *Migration Act* (authorising imposition of fees for persons compulsorily detained), was beyond constitutional power or constituted acquisition of property otherwise than on just terms.

### **Migration - Jurisdictional error**

In *Sidhu v MRT* ([2004] FCA 1672; 22.12.2004) a Full Court reviewed authority as to when an erroneous construction of the Regulations will constitute an error of law that is a jurisdictional error.

### **Visa cancellation - No reasons - Given material supports suspicion**

In *Seyfarth v MIMIA* ([2004] FCA 1713; 22.12.2004) Hely J concluded that a decision to cancel a visa under s501(2) of the *Migration Act* was valid notwithstanding that no reasons have been given because the supporting documentation provided material on which the Minister could have formed the reasonable suspicion the applicant failed the character test.

### **Veterans' Entitlement - Assets test**

In *Repatriation Commission v Tsourounakis* ([2004] FCAFC 332; 20.12.2004) a Full Court concluded the respondents had not effectively alienated the beneficial ownership of real property in favour of their son by virtue of improvements he effected to the property so that it was removed from their assets for the *Veterans' Entitlement Act 1986 (Cth)*.

### **Worker's Compensation - Defence personnel**

In *MCRC v Wall* ([2004] FCA 1711; 22.12.2004) Hely J concluded the AAT had not erred in determining a claim for compensation under the *Military Rehabilitation and Compensation Act 2004 (Cth)* by reason of referring to guidelines and legislation relating to the entitlement of veterans rather than workers.

### **Bankruptcy - Service of bankruptcy notice**

In *Skalkos v T & S Recoveries P/L* ([2004] FCAFC 321; 6.12.2004) a Full Court concluded a bankruptcy notice was validly served where it was posted to a place of business when an order for substituted service had been made. The Court concluded the orders for substituted service did not preclude service otherwise than as that order provided and considered the meaning of the term "last known address".

### **Petroleum marketing - Whether notices terminating franchise agreements just and equitable**

In *Goodlen P/L v BP Australia P/L* ([2004] FCAFC 331; 22.12.2004) a Full Court considered whether the notices terminating the franchise agreement between an oil company and a petrol station proprietor set out the full grounds on which the termination was placed within s16(3)(b) of the *Petroleum Retail Marketing Franchise Act 1980 (Cth)* and whether, assuming the notice is valid, termination was "just and equitable".

### **Trademarks - Nature of appeal from decision of Registrar**

In *Health World Ltd v Shin-Sun Australia P/L* ([2005] FCA 5; 11.01.2005) Cooper J considered the nature of an appeal

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from the decision of the Registrar under s56 of the *Trademarks Act 1995 (Cth)*.

### **Social security - Recovering from common law damages - Loss and damages**

In *Singh v Secretary, DFCS* ([2004] FCA 1685; 23.12.2004) Gray J concluded an order that a worker's compensation insurer pay arrears of compensation that was received in a lump sum did not attract the provisions of the *Social Security Act 1991 (Cth)* that applied a longer preclusion period to damages awarded in a lump sum.

### **Social security - Apportionment of shared care of children**

In *Wade v Secretary, DFCS* ([2004] FCA 1660; 20.12.2004) Kiefel J considered how the Family Tax Trust Benefit should be apportioned and calculated where the care of children was shared.

### **Worker's Compensation (Cth) - Notice of injury**

In *Frosch v Comcare* ([2004] FCA 1642; 15.12.2004) Whitlam J considered what was required to constitute a valid notice of injury as required by s53 of the *SRC Act 1998 (Cth)*.

### **Trade practises - Admissions by servant**

In *ACCC v Leahy Petroleum* ([2004] FCA 1678; 17.12.2004) Merkel J considered when the conduct or statements of a servant of a corporation could constitute admissions against it.

### **Migration - Visa cancellation - Whether New Zealander may return**

In *Hicks v MIMIA* ([2004] FCA 1671; 17.12.2004) R D Nicholson J concluded that where a decision cancelling a visa New Zealand citizen was set aside the visa did not revive to permit the holder to return.

### **Industrial law - Termination of employment - Whether employer should be ordered to reinstate employee where a position abolished**

In *Chelvarajah v Global Protection P/L* ([2004] FCA 1661; 21.12.2004) Gray J declined to grant an injunction requiring a former employer reemploy an employee as ordered by the AIRC but imposed a penalty for breach of the order.

### **Costs - Habeas corpus**

In *Falee v MIMIA* ([2004] FCA 1681; 20.12.2004) Tamberlin J concluded the applicant was entitled to half his costs where a visa was granted to him midway through his application for a Writ of *Habeas corpus*.

### **Industrial law - Written notice**

In *Bluescope Steel Ltd v CEEEIPPASUA* ([2005] FCA 3; 7.01.2005) Heerey J considered whether a fax constituted a "written notice" within s28A(2)(a) of the *Workplace Relations Act* and whether a notice of industrial action was invalid because it included an impermissible claim.

### **Industrial law - Protected action**

In *Wesfarmers Premier Coal Ltd v AFMEPKIU (No 2)* ([2004] FCA 1737; 23.12.2004) French J considered when terms of a proposed certified agreement relate only to the "employer-employee relationship".

### **Industrial law - Freedom of Association - Corporate independent contractor**

In *PG & LJ Smith Plant Hire P/L v Lanksy Constructions*

*P/L* ([2004] FCA 1618; 17.12.2004) Wilcox J considered whether s298K(2) and s298S(2) of the *Workplace Relations Act 1996 (Cth)*, and s45E of *Trade Practices Act 1974 (Cth)* prevented punitive action against an independent contractor for the prohibited reason of not being a union member where the independent contractor was in the form of a corporation. See also *Employment Advocate v Barclay Mowlem Construction P/L* [2005] FCA 16 per Branson J.

### **Migration - "compelling circumstances"**

In *Babici v MIMIA* ([2004] FCA 1645; 16.12.2004) Moore J dismissed an application contending the MRT made a jurisdictional error in construing the phrase "compelling circumstances".

### **Migration - Visa cancellation - Holder informed no action would be taken**

In *Watson v MIMIA* ([2004] FCA 1654; 15.12.2004) Spender J quashed a decision to cancel a visa which had been made after the visa holder had been informed by letter that no further action would be taken to effect his removal from Australia.

### **Procedure - Intervenor**

In *Wilson v Manna Hill Mining Co P/L* ([2004] FCA 1663; 20.12.2004) Lander J considered the circumstances in which leave to intervene will be given under *Fed Court CC Rules Ord 6 r17*.

### **Practice - Representative action - Withdrawal of representative party**

In *Tongue v Council of City of Tamworth* ([2004] FCA 1702, 1703; 21.12.2004) Jacobson J considered the liability of the costs on withdrawal of the representative party in a representative action.

### **Procedure - Non-appearance by party - Party represented by solicitors**

In *Grey v Mango Pre Paid Calling Cards P/L* ([2004] FCA 1664; 17.12.2004) R D Nicholson J set aside a judgment entered into for non-appearance where the respondent had in fact been represented by solicitors who had not appeared.

### **Procedure - Orders - Setting aside consent order**

In *Fang v MIMIA* ([2004] FCA 1665; 17.12.2004) R D Nicholson J declined to set aside a consent judgment said not to affect the intention of the Court.

## **High Court Notes: February 2005**

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

### **Patents - Validity - Fair basing of claims in specification**

In *Lockwood Security Products P/L v Doric Products P/L* ([2004] HCA 58; 18.11.2004) s40(3) of the *Patents Act 1990 (Cth)* provided that a claim defining the invention subject to a patent must be clear and succinct and "fairly based on the matter described in the specification". The respondent, a manufacturer of door locks, brought proceedings in the Federal Court claiming the appellant patentee unjustifiably claimed it had breached the patent. The appellant cross-claimed for infringement of the patent. The respondent replied by seeking revocation. The trial Judge "in a chiseled, economical and speedily delivered



*judgment*" [15] revoked certain claims in the patent. The Full Court of the Federal Court dismissed an appeal. The further appeal by the patentee was allowed by the High Court in a joint judgment (Gleeson CJ, McHugh, Gummow, Hayne, Heydon JJ). The Court observed that s40(3) required separate consideration of each ground of invalidity, that not all authorities from England were applicable and the test of fair basing involved consideration of "merits", "inventive step", "technical contribution to the art" and general "fairness". Appeal allowed.

## **Criminal law - Procedure - Accomplice warning - Whether warning required when accused relies on evidence**

In *Jenkins v Q* ([2004] HCA 57; 17.11.2004) the High Court in a joint judgment (Gleeson CJ, Gummow, Hayne, Callinan, Heydon JJ) considered when it was necessary for the trial judge to give a warning to a jury as to the reliability of evidence of accomplices of an accused [25]-[29]. The Court concluded that in circumstances where the accused had relied on evidence of the accomplice to support aspects of the defence the accomplice warning was not required [34]. Appeal dismissed.

## **Contract - Oral agreement preceding inconsistent written agreement - Which agreement prevails**

In *Equuscorp P/L v Glengallan Investments P/L* ([2004] HCA 55; 16.11.2004) the High Court in a joint judgment (Gleeson CJ, McHugh, Kirby, Hayne, Callinan, JJ) observed that absent a claim for rectification of a written agreement so it conformed to the terms of an earlier oral agreement the written agreement prevailed [33]-[36]. The Court observed the claim that the oral agreement prevailed was not made in the context of a collateral agreement. Appeal allowed.

## **Torts - Interference with contractual relations - Defence of justification**

In *Zhou v Treasurer State of NSW* ([2004] HCA 56; 17.11.2004) the respondent was responsible for the Sydney Organizing Committee for the 2000 Olympic Games (SOCOG) which by statute had the right and duty to protect the intellectual property of the Olympic movement. In 1999 the plaintiff entered into an agreement with a third party (TOC) which authorised the plaintiff to sell memberships in an "Olympic club" to persons in China. In November 1999 TOC was persuaded to terminate the agreement by SOCOG. The appellant sued the respondent for interfering with its contractual relations. It succeeded before the primary judge of the Supreme Court of NSW. The respondent successfully appealed to the NSW Court of Appeal. The further appeal by the respondent to the High Court was allowed in a joint judgment: Gleeson CJ, Gummow, Kirby, Callinan, Heydon JJ. The High Court considered authority as to when justification provides a defence for the tort of interfering with contractual relations and concluded the defence was not open because it was not reasonably necessary for SOCOG to have done what it did to protect even the broadest conception of its rights [172]. The Court further considered the construction of a Deed Poll. Appeal allowed.

## **Private international law - Cross-vesting legislation - Relationship with forum non-conveniens - Action in NSW Dust Diseases Tribunal for asbestos disease contracted in SA**

In *BHP Billiton Ltd v Shultz* ([2004] HCA 61; 7.12.2004) S was employed by the appellant in Whyalla in SA before 1977 and exposed to asbestos. S, while a resident in SA, brought a claim against the appellant in the Dust Diseases Tribunal of NSW. An application to the NSW Supreme Court by the appellant for an order that the proceeding in the tribunal be transferred first to the NSW Supreme Court and then transferred to the Supreme Court of SA under the *Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW)* was dismissed in October 2002. Sec 13 of the *Cross-Vesting Act* provided no appeal made from a decision under the Act. The appeal by the appellant, brought directly to the High Court under *Constitution* s73(ii) by special leave, was upheld by all members: Gleeson CJ, McHugh, Heydon JJ; Gummow J; Kirby J; Hayne J; Callinan J. The Court observed that while the choice of a plaintiff to invoke the jurisdiction of a Court or Tribunal should not lightly be overridden was relevant in considering questions relating to forum non conveniens this approach was not relevant when considering cross-vesting statutes [25]. The Court also considered whether the provisions in s11A of the *Dust Diseases Tribunal Act* (which authorised damages on an assumption that no further condition would develop and multiple awards of damages) unfairly disadvantaged the respondent and, or, whether the provisions of s30B of the *Supreme Court Act 1935 (SA)* (which authorised interim awards of damages) unfairly advantaged by either party [26]. Appeal allowed; proceeding removed from NSW Supreme Court and transferred to Supreme Court SA.

## **Trade practices - Misleading and deceptive conduct - Diagram in real estate brochure with disclaimer**

In *Butcher v Lachlan Elder Realty P/L* ([2004] HCA 60; 2.12.2004) the appellant purchasers entered into a contract to purchase land in Sydney relying on a brochure prepared by a real estate agent which showed that the swimming pool was on title. The agent obtained the map in the brochure from the solicitors for the vendor. The pool was not completely on the title. The appellant purchasers sued the respondents and their agents for misleading and deceptive conduct. The primary Judge found that while the conduct of the vendor had been misleading it was not in the trade or commerce of the vendor; and that the agent was protected by a disclaimer in the brochure. Appeals by both parties to NSW Court of Appeal failed. The further appeal to the High Court by the appellants was dismissed by majority: Gleeson CJ, Hayne J; Heydon J; contra McHugh J; Kirby J. The majority agreed with the Courts below. McHugh and Kirby JJ dissented principally on the question of whether the disclaimer operated to protect the agent [175] and thereby reduce the operation of the doctrine of misleading or deceptive conduct. Appeal dismissed.

## **Real property (NSW) - Whether title to land registered under the Torrens system assistance may be subject to easements arising from obligations imposed on**

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### **subdivision creating title**

In *Hillpalm P/L v Heaven's Door P/L* ([2004] HCA 59; 1.12.2004) the High Court rejected a contention that there could be implied into the title consequent on a subdivision of land leading to title being registered under the *Real Property Act 1900 (NSW)* a term to compel the title to one parcel of land to be amended to accept an easement of carriage over it for the benefit another abutting piece of land. The Court concluded that the circumstance that the subdivision had been approved on the basis that a carriage way would be created did not create an entitlement to have titles amended and the *Land and Environment Court* did not have jurisdiction to enforce a personal action between the title holders because no provision of any planning legislation had been breached within s123(1) of the *Environmental Planning and Assessment Act (NSW)*: McHugh, Hayne, Heydon JJ; contra Kirby, Callinan JJ. The minority concluded the Land and Environment Court of NSW had jurisdiction to make the orders in question. Appeal allowed.

### **Migration - Tribunals - Natural justice - Failure of RRT to give promised opportunity to respond after hearing**

In *Applicant NAFF of 2002 v MIMIA* ([2004] HCA 62; 8.12.2004) at the hearing before it the RRT pressed the applicant for a protection visa on certain factual matters. At the conclusion of the hearing the RRT said it would give the applicant a chance to respond in writing to its concerns. The RRT proceeded to make a decision without doing this. The application by the appellant to the Federal Court for a Constitutional Writ failed before the primary Judge and before the majority of a Full Court. The appeal to the High Court was allowed: McHugh, Gummow, Callinan, Heydon JJ; Kirby J sim. The Court concluded the applicant had been denied procedural fairness.

### **Negligence - Evidence - Motor vehicle accident - Apportionment of liability - Role of Appellate Court**

In *Anikin v Sierra* ([2004] HCA 64; 9.12.2004) the appellant was injured as pedestrian when struck by a bus driven by the respondent. His claim for damages succeeded before the District Court of NSW subject to a finding of 25 percent contributory negligence. This decision was reversed by the NSW Court of Appeal. The appeal by the appellant to the High Court was allowed by majority: Gleeson CJ, Gummow, Kirby J Hayne JJ; contra Callinan J. The High Court considered when an Appellate Court may conduct its own independent review of the evidence and when an Appellate Court may reassess contributing negligence. Appeal allowed; orders of trial Judge restored.

### **Town planning - Compensation - Whether right to compensation passes with the land**

In *Western Australian Planning Commission v Temwood Holdings P/L* ([2004] HCA 63; 9.12.2004) the respondent was granted approval to subdivide land in WA subject to ceding portions of it to the Crown without compensation. Its appeal to the Town Planning Appeal Tribunal was dismissed and this decision was upheld by the primary Judge in the Supreme Court WA. On further appeal the

Full Court of the Supreme Court of WA concluded the condition requiring the respondent cede land without compensation was beyond power. This conclusion was reversed by the High Court by majority: McHugh J; Gummow with Hayne JJ; contra Callinan J; Heydon J. The Court considered whether a statutory entitlement to compensation on acquisition of the land passed with the title to the land.

### **Supreme Court Notes: February 2005**

*Prepared by Cameron Ford, Editor-in-Chief, Northern Territory Council of Law Reporting*

### **Contract – Contributory negligence – Implied terms – Damages – Personal Injury**

*Bryan v Parks & Wildlife Commission of the NT [2005] NTSC 1*

The plaintiff was butted by a ram in the base of the back. She had a contract for services with the defendant, which she sued in contract for damages for personal injuries. She was not an employee of the defendant. She pleaded an implied term in the contract akin to the duty of care owed by an employer to an employee to take reasonable precautions for the safety of employees. The defendant countered that there was no implied term, but if there was, there was in the contract an express term that the plaintiff would indemnify the defendant in respect of the loss. Further, the defendant claimed an indemnity from the plaintiff for such of the loss caused by the negligence of the plaintiff. Thomas J held that: (1) the alleged term was implied into the contract; (2) the injury was reasonably foreseeable; (3) the defendant was responsible for the ram; (4) the defendant breached the implied term by not adequately containing the ram; (5) the plaintiff was not obliged to indemnify the defendant because her injury did not arise from or out of the works the subject of the contract; (6) there may be an implied term that the plaintiff take reasonable precaution for her own safety, but here the defendant's breach was the sole cause of the injury. Damages of \$1,278,151.81 awarded.

### **Costs – apportionment between issues – Appeal – Workers' compensation**

*NT Drilling Pty Ltd v McFarland [2005] NTSC 2*

The employer was successful on 2 out of 4 of its grounds of appeal. Three of those issues were significant in time and to the proceedings, one less so. The worker's 2 grounds of cross-appeal were dismissed; both were significant. Riley J ordered the employer to pay 85% of the worker's trial costs, reducing it from 90%. His Honour ordered the worker to pay 50% of the employer's appeal costs. His Honour said: "The exercise of my discretion is to be addressed in light of the nature of the issues raised in the proceedings, the time taken in addressing those issues and the overall importance of the issues to the parties in the context of the case. The dollar consequences that flow from the resolution of issues may be important in some cases but not in the present case."

### **MA(C)A – stock route – "public street" – "accident" – "place open to, or used by, the public"**

*Hooper v Territory Insurance Office & Anor [2005] NTSC 3*

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The plaintiff's wife died in a motor vehicle accident on a stock route. The vehicle was driven by the second defendant. The plaintiff sought a declaration that the second defendant was entitled to be indemnified by TIO under s 6(1)(b) of the *Motor Accidents (Compensation) Act (NT)* for his liability arising from the accident. His entitlement to indemnity depended on whether or not the stock route was a public street which in turn depended on whether or not it was a "place open to, or used by, the public". Angel J held that the stock route was a public street, stating that where the public is shown to have a positive right of access, there is no need to embark upon the additional consideration of actual user. There is a critical difference between use by the public for a limited purpose and use by limited members of the public. In the former, the place is open to the public. The fact that the second defendant was not using the stock route for the purpose of conveying stock is irrelevant. A place open to or used by the public does not cease to be so because a particular individual may be acting unlawfully or otherwise at any time in that place.

### **Workers' compensation – claim – time – "reasonable cause"**

*Van Dongen v Northern Territory of Australia* [2005] NTSC 4

The appellant worker did not lodge a claim for compensation within 6 months of his injury. He said he hoped his incapacity would resolve. Angel J dismissed that part of the appeal, holding that the appellant failed to establish on the balance of probabilities other reasonable cause for not lodging a claim. Consideration of "reasonable cause". The appeal was allowed on another ground which the magistrate failed to address, and remitted to the magistrate.

### **Evidence – suppression order – Evidence Act s 57 – relevant test**

*L v ABC & Ors* [2005] NTSC 5

The appellant applied for an order in the nature of certiorari quashing a determination of a magistrate lifting an order suppressing publication of anything that would identify him. Mildren J held that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia, but the most fundamental principle of all is the requirement that the accused must receive a fair trial. Where the principle of a fair trial is threatened by the principle of open justice, the principle of a fair trial must prevail. Once the court is satisfied that there is a realistic possibility of creating the relevant risk, court should not hesitate to use the power of suppression. The prominence or otherwise of an applicant for an order is not in itself a relevant consideration, but if the applicant is well-known in the community, the likelihood of the material being forgotten is of a different order. The Supreme Court has original jurisdiction under s 57 *Evidence Act* to make a suppression order and there was no need for certiorari. Order made.

### **Practice & procedure – r 47.04 - separate trial of question – principles**

*Vlietstra v Ranger & Anor* [2005] NTSC 6

The plaintiff suffered personal injury in motor vehicle

accident and brought an action for damages at common law. The defendants alleged that the plaintiff was a resident of the Territory within s 5 *Motor Accidents (Compensation) Act (NT)* as was thereby precluded from suing for damages. They applied for a separate trial of that question. Southwood J dismissed the application, holding that to succeed, the defendants would have to overturn *Buric v Transfield PBM Pty Ltd* (1992) 112 FLR 189, and that to do so would probably require an appeal to the Court of Appeal. His Honour also held that the issue of residency would likely involve mixed fact and law and require calling at least 4 witnesses. Discussion of the principles governing applications for separate trials.

### **Court Library Notes**

Since *Balance* has moved to a bimonthly publication, the Court Library notes will no longer be published in the magazine.

The Court Library is changing to an email distribution system for this information. On a monthly basis, the Library will be distribute a list of articles in recently received journals, legislation updates and a selection of new textbooks received.

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