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# Noticeboard

## High Court judgements: September 2007

### Migration – Tribunals – Procedure – Duty to give information that may be a reason for affirming decision – “Information”

In *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; 13.06.07 the High Court concluded that “discrepancies” between accounts given by an applicant for a visa did not amount to “information” that the migration tribunal was required to alert the applicant to under s 424A of the Migration Act 1958 (Cth) as a reason for refusing the visa (Gleeson CJ, Gummow, Callinan, Heydon, Crennan JJ jointly; Kirby J and Hayne J to same result on the ground relief would be futile in any event. Consideration of whether the assessment processes of the RRT or MRT could be considered as “Information” that must be disclosed.

### Criminal law – Procedure – Verdict – Statutory alternative verdicts – Role of appellate court

In *AJS v Q* [2007] HCA 27; 13.06.07 the conviction of AJS of a charge of incest was set aside by the court of Appeal of Victoria which ordered a new trial without specifying on what charge. The High Court accepted that AJS was entitled to entry of judgement and a verdict of acquittal on the charge of incest and an order that the retrial be limited to the charge of taking part in an indecent act: Gleeson CJ, Hayne, Heydon, Crennan JJ; Kirby J. Consideration of alternative verdicts, role of appellate court and orders on appeal where alternative offences area available. Appeal allowed.

### Defamation – Power of appeal court to reverse findings of jury in defamation action

In *John Fairfax Publications Pty Ltd v Gacic* [2007] HCA 28; 14.06.07 a jury found under part 7A of the Defamation Act 1974 (NSW) that aspects of a review of G’s restaurant by the appellant newspaper were not defamatory. On appeal by G the NSW Court of Appeal found no reasonable jury could have found this. The appeal by the appellant newspaper to the High Court was dismissed: Gleeson CJ with Crennan J; Gummow J with Hayne J; Callinan J with Heydon J; contra Kirby J. Role of appellate courts in varying decisions of juries considered. Appeal dismissed.

### Criminal law – Miscarriage of justice – Inappropriate conduct of prosecutor

In *Libke v Q* [2007] HCA 30; 20.06.07 the High Court divided on whether the vigorous cross-examination

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of a person charged with sexual offences against an intellectually impaired person lead to a miscarriage of justice: Gleeson CJ agreed with Hayne J: Heydon J sim; contra Kirby, Callinan JJ. Consideration of what is a “fair trial” and the “miscarriage of justice” proviso. Appeal dismissed.

### Constitutional law – Judicial power - Military law – Trial by service tribunal – Whether service tribunals exercise Commonwealth judicial power

In *White v Director Military Prosecutions* [2007] HCA 29; 19.06.07 the High Court rejected arguments that the provisions of the Defence Force Discipline Act 1982 (Cth) that allowed military personnel to be tried for crimes as found in the Laws of the ACT by service tribunals (Military Magistrates and courts martial) offended Constitution Chp III by allowing exercise of judicial power other than by a court or imposition of imprisonment other than as provided in Constitution s 80. Gleeson CJ; Gummow, Hayne, Crennan JJ; Heydon j: contra Kirby J. Application for constitutional writs dismissed.

## Federal Court judgements: September 2007

### Migration – Visas – Domestic violence

In *MIC v Ejuetytsi* [2007] FCAFC 89; 8 06.07 a Full Court considered the operation of the provisions in the Migration (1994) Regs and whether the required statement of a competent person could establish domestic violence by implication.

### Migration – Visas – Refugee – Further evidence on appeal

In *Applicant S 1983 of 2003 v MIC* [2007] FCA 854; 8.06.07 Branson J received further evidence on appeal and concluded the RRT failed to address the claim made by the applicant. She concluded this was jurisdictional error because the RRT misunderstood the social group propounded by the applicant.

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### **Media – Censorship - When publication incites**

In *NSW Council for Civil Liberties v Classification Review Tribunal* [2007] FCA 896; 14.06.07 Edmonds J dismissed an application seeking review of the decision of the Classification Review Board to refuse to classify a publication. Consideration of when a publication may incite violence.

### **Migration - Migration agents – Good character – Criminal convictions**

In *Seymour v MARA* [2007] FCAFC 76; 4.06.07 a Full Court found it was not necessary to decide whether an order that a person had committed contempt of court was a “conviction”.

### **Migration – Spouse visa- Domestic violence – AVO**

In *MIC v Yacoub* [2007] FCAFC 84; 5.6.07 a Full Court concluded the FMC was correct in finding the failure of the MRT to take into account the currency and duration of an AVO in determining whether a marriage was genuine involved jurisdictional error.

### **Migration – Statutory natural justice**

*MZXKH v MIC* [2007] FCA 663; 15.6.07 Tracey J concluded the RRT did not commit a jurisdictional error by failing to inform the applicant of matters under s 424A(1) where those matters arose from, or were absent from, material supplied by the applicant under s424A(3)(b) of the Migration Act. He concluded the applicant gave the RRT material that stated he had not made a different claim.

### **Migration –Statutory natural justice – Futility**

*Jiang V MIC* [2007] FCA 907;15.6.07 Bennett J dismissed an application for a constitutional writ on finding the MRT had failed to comply with s 359A Migration Act because the same decision by the MRT was inevitable.

### **Migration – Refusal of visa on character grounds - Treaty obligations**

*AB v MIC* [2007] FCA 910; 21.6.07 Tracey J concluded judicial review of the decision of the Minister personally to refuse a visa under s 501 Migration Act was not made out by reason of the consideration the Minister gave treaty provisions in the ICCPR that affected the applicant but were not binding. He also concluded natural justice was not denied by failure to give the applicant a copy of departmental assessments.

### **Discrimination – Access to building with assistance animal**

*Forest v Queensland Health* [2007] FCA 936; 22.6.07 Collier J concluded the respondent discriminated against the applicant by refusing admission to the

applicant and his assistance animal (which satisfied s 9(1)(f) of the Disability Discrimination Act 1992 (Cth) until the animal had also been assessed by it.

### **Veterans’ compensation – Alcoholism**

In *Repat Comm. V Codd* [2007] FCA 877; 15.6.07 Gordon J allowed an appeal from the AAT concerning the application of Statements of Principle as to whether a reasonable hypothesis connected the ex-serviceman’s death from alcohol to eligible war service. See also *Repat Comm v Warren* [2007] FCA 866; 8.6.07.

### **Corporations – Credit unions – Access to register of members in take-over**

In *Capricornia Credit Union v ASIC* [2007] FCAFC 79; 5.06.07 a Full Court considered whether it was appropriate to grant an acquiring company access to the register of members of the target credit union under s 17(3B)(b)(ii) Corporations Act 2001 (Cth).

### **Copyright – Crown copyright – Survey plans**

In *Copyright Agency Ltd v NSW* [2007] FCAFC 80; 5.06.07 a Full Court considered whether survey plans were made at the direction of the State and were subject to Crown copyright and how this related to the statutory scheme of land registration.

### **Superannuation – Role of Superannuation Complaints Tribunal – “Dependent”**

*Edwards v Postsuper Pty Ltd* [2007] FCAFC 83; 5.6.07 a Full Court considered whether the term “dependent” centred on financial dependence and whether the reasons of the SCT revealed error. The Full Court affirmed the decision by the SCT that a claim by parents on benefits as “dependents” of their deceased son be rejected in favour of the defacto spouse.

### **Land Rights**

In *Moses v WA* [2007] FCAFC 78; 7.6.07 a Full Court reviewed whether a native land-holding system was traditional, when more than one native title holding groups could be recognised in respect of one claim and circumstances where native title can be extinguished. In *Moses v WA* [2007] FCAFC 82; 7.6.07 a Full Court considered when a native title claim for exclusive title could be defeated by finding non-exclusive title in another group and when a native title claim can be transmitted within or between claimant groups.

### **Land rights - Extinguishment of land rights**

In *King v NT* [2007] FCA 944; 26.6.07 Moore J considered, inter alia, whether native title was extinguished where land was used as campsites on pastoral leases, for roads and for other purposes.

### **Administrative law – Appointment of administrator**

### **to aboriginal corporation - Notice**

In *Guissepe v Registrar Aboriginal Corporations* [2007] FCAFC 91; 15.6.07 a Full Court concluded the appointment of an administrator was unlawful when the period of "reasonable" notice given, as required by s 71 of the Aboriginal Councils and Associations Act 1976 (Cth), was only one day.

### **Industrial law – When union "party to or concerned in" industrial action**

In *CFMEU v Clarke* [2007] FCAFC 87; 8.6.07 a Full Court concluded the appellant union was not a party to or concerned in industrial action contrary to s 170 MN of the Workplace Relations Act where its officials counselled against the industrial action. Finding of WA Industrial Court set aside.

### **Taxation – Charity**

In *Navy Health Ltd v Deputy C of T* [2007] FCA 931; 20.6.07 Jessup J concluded the AAT had not erred in finding the appellant health society conducted for members of the navy and dependants was not a charity within s 65J (1)(b) of the Fringe Benefits Tax Assessment Act 1986 (Cth) for promoting efficiency in the Navy and thus benefiting the community generally.

### **Social security – Homeowner**

In *Sec DEWR v Vanderpluym* [2007] FCA 876; 7.6.07 Greenwood J considered the meaning of the term "Homeowner" in the Social Security Act 1991 (Cth).

### **Corporations – Conflict of interest**

*ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963; Jacobson J considered whether there had been a contravention of ss 1043H and 1043A of Corporations Act. Consideration of the adequacy of "Chinese walls, when supposition may be "information" and when information in the mind of an officer in one part of a corporation is in the possession of the employing corporation or employees of other parts of it.

### **Criminal law - Execution of search warrant – Copy warrant**

*Commissioner AFP v Oke* [2007] FCAFC 94; 26.6.07 a Full Court concluded that it was a precondition to the lawful execution of a search warrant under Crimes Act 1914 (Cth.) that the occupier be given a copy of the warrant and as the respondent had only been given a copy of a draft the search and seizure were illegal.

### **Crimes Commission – Whether special investigation authorised by Board "in writing"**

In *CC Pty Ltd v Aust Crime Commission* [2007]

FCAFC 96; 26.6.07 a Full Court concluded the board of the ACC had made a determination "in writing" within s 7C of the ACC Act 2002 (Cth) by adopting without signing a pre-prepared "instrument" that set out the suggested determination.

## **Full Court Sittings for 2008 Federal Court of Australia Principal Registry**

The Chief Justice has approved the dates for the sittings of the Full Court in 2008.

Subject to there being sufficient business, sittings of a Full Court of the Federal Court of Australia during 2008 will be held in all capital cities within the periods indicated below:

- 11 February – 7 March 2008
- 5 May – 30 May 2008
- 4 August – 27 August 2008
- 3 November – 28 November 2008

Any urgent matter may be transferred to a place of sitting other than that at which the matter was heard at first instance.

If the circumstances require it, a Full Court may sit in capital cities to hear appeals on dates other than those listed.

If you have any queries please contact me on (02) 9230 8336.

Philip Kellow  
Deputy Registrar

## **Federal Court (Corporations) Amendment Rules 2007 (No 1)**

The Federal Court Amendment Rules 2007 (No 1) was registered on the Federal Register of Legislative Instruments on 24 July 2007. The Amendment Rules commence on 25 July 2007 (being the day after registration).

A copy of the Amendment Rules will be available on the Internet from the ComLaw site at <http://www.comlaw.gov.au/>.

The Amendment Rules make the following amendments to the Federal Court Rules:

1. Insert a new Order 20 and make consequential amendments to Order 10 rule 4, Order 54 rules 6 and 7 and Order 54B rules 5 and 6 – the new Order 20 addresses the concern about Order 20 rule 1A that was inserted in 2006 and clarifies the rules for summary disposal and stay of proceedings in light of section 31A of the Federal Court of Australia Act 1976;
2. insert a new Order 46 rule 7AA and Schedule 3 which sets out the powers that a Registrar may exercise pursuant to a delegation under section 35A(1)(h) of the Federal Court of Australia Act – the amendment gives effect to the decision of the Judges' Meeting that the power that may be exercised by a Registrar pursuant to a delegation under section 35A(1)(h) should be specifically enumerated in the Rules;
3. replace Order 52 rule 10A to allow a judge determining an appeal from the Federal Magistrates Court to have the same powers as the Full Court in relation to revoking or amending grants of a leave to appeal;
4. amend Order 53B so that a Notice of Appeal from a decision of the Superannuation Complaints Tribunal must be filed in the registry in the State or Territory in which the

complainant resides;

5. amend Order 62 rule 40B and insert new rules 40C and 40D to provide for a short form bill of costs in migration appeals and clarify that the rule does not limit a party's right to make an application under Order 62 paragraph 4(2)(c) at a hearing for an immediate lump sum costs order;

6. amend Form 20 to require a table of contents for any affidavit which is longer than 30 pages;

7. amend Forms 55 and 55A to include a statement that orders as to costs can be given in the absence of a party;

8. amend Form 57 by replacing the reference to an objection to the jurisdiction of this Court with an objection to competency of the application.

Philip Kellow

Deputy Registrar

## Footnotes - A national emergency? But it's all been said before by Raelene Webb QC, continued from page 26

1. Martin D F, *Aboriginal and non-Aboriginal Homicide: same but different*, in H Strong & S Gerull (eds), *Homicide: Patterns, Prevention and Control*, proceedings of a conference 12-14 May 1992, Australian Institute of Criminology, Canberra, 167-176 at p 168.

2. Dodson M, *Violence Dysfunction Aboriginality*, Paper presented at the National Press Club, Canberra, 11 June 2003, quoting from Sutton P, *Indigenous disadvantage, culture and reconciliation in Australia*, Inaugural Berndt Foundation Biennial Lecture, Annual conference of the Australian Anthropological Society, University of Western Australia, 23 September 2000, p 3.

3. <http://www.pm.gov.au/media/Interview/2007/Interview24380.cfm>

4. The Report titled *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"* can be read online at [www.nt.gov.au/dcm/inquiry/saac/pdf/bipacs\\_final\\_report.pdf](http://www.nt.gov.au/dcm/inquiry/saac/pdf/bipacs_final_report.pdf)

5. <http://law.anu.edu.au/anu/ia/dodson.pdf>: see also footnote 2 above. See also "Black child abuse 'at crisis point'" by Misha Schubert & Paul Toohey (12/06/03: *The Australian front page*) at <http://www.indigenousviolence.net/materials/TA120603-2.pdf>

6. Gordon S, Hallahan K & Henry D (2002): *Putting the Picture Together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*: WA Department of Premier and Cabinet, Perth. [http://www.premier.wa.gov.au/feature\\_stories/gordoninquiryreport.pdf](http://www.premier.wa.gov.au/feature_stories/gordoninquiryreport.pdf)

7. Memmott P, Stacy R, Chambers C & Keys C (2001), *Violence in Indigenous Communities*, Commonwealth of Australia, Canberra. The report can be found at <http://www.ncp.gov.au/agd/www/Ncphome.nsf/Page/3AF90A4576B81394CA256B430001AF24?OpenDocument>

8. Memmott Report, pp41-44

9. Memmott Report, p41 referring to Martin D F (1988), *Background Paper on Social and Family Factors for the Arukun Case*, Report to the Royal Commission into Aboriginal Deaths in Custody. Department of Prehistory and Anthropology, ANU, Canberra.

10. Memmott Report, p 42 referring to Miller B (1990), *Submission to the Royal Commission on Deaths in Custody from the Aboriginal Co-ordinating Council*, Cairns.

11. Memmott Report, p43 referring to Australian Institute of Health and Welfare 1994-5: 17

12. Australian Institute of Health and Welfare (2007) *Child Protection Australia 2005-06*, p26: <http://www.aihw.gov.au/publications/cws/cpa05-06/cpa05-06.pdf>

13. At pp241-242

14. At p13, by reference to submissions made by Colin MacDonald QC, Counsel assisting the Coroner in an inquest into the deaths of four young Aboriginal people at Nguuiu in 1998, and the wise words of Justice Muirhead in some 21 years previously in *Jabaltjaril v Hammersley* (1977) 15 ALR 94 (NT) at 98.

15. See, for example, Brennan F (28 June 2007), *Suspect motivations behind stark Government rhetoric*, <http://www.eurekastreet.com.au/edition.aspx?eid=209>

16. The Convention of the Rights of the Child entered into force for Australia on 16 January 1991.

17. Rayner M (1994), *The Commonwealth's Role in Preventing Child Abuse: A Report to the Minister for Family Services*, Australian Institute of Family Studies, Melbourne.

18. At p 82.

19. [http://www.nt.gov.au/health/comm\\_svcs/facs/community\\_welfare\\_act\\_review/pdf/draft\\_bill.pdf](http://www.nt.gov.au/health/comm_svcs/facs/community_welfare_act_review/pdf/draft_bill.pdf)

20. At 87-91.

21. McIntosh G & Phillips J (2002), *Who's Looking after the Kids? An Overview of Child Abuse and Child Protection in Australia*: [http://www.aph.gov.au/library/intguide/SP/Cild\\_Abuse.htm](http://www.aph.gov.au/library/intguide/SP/Cild_Abuse.htm)

22. See Part 1, Section 7. *Government Responses*, p83 ff.

23. At p85.

24. *Overarching Agreement on Indigenous Affairs between the Commonwealth of Australia and the Northern Territory of Australia 2005-2010*: <http://www.oipc.gov.au/publications/PDF/IndigenousAffairsAgreement.pdf>

25. Clause 11.

26. Clause 15.

27. Clauses 16 and 17.

28. 2007 Northern Territory Report at p83.

29. 30 April 2007.

30. 2007 Northern Territory Report at p85.

31. See Media Release *National emergency response to protect Aboriginal children in the NT* 21 June 2007 [http://www.facsia.gov.au/internet/Minister3.nsf/content/emergency\\_21june07.htm](http://www.facsia.gov.au/internet/Minister3.nsf/content/emergency_21june07.htm); also <http://www.pm.gov.au/media/Interview/2007/Interview24380.cfm>

32. To date, the writer is not aware of any draft legislation available for public perusal.

33. <http://www.joehockey.com/mediahub/mprDetail.aspx?prID=430>.

34. CDEP earnings are wages, not welfare.

35. In the joint press release, <http://www.joehockey.com/mediahub/mprDetail.aspx?prID=430>, Minister Hockey said: "CDEP participants moving on to income support will be covered by a single system of quarantining that will apply to welfare payments. This initiative will reduce the flow of cash going to alcohol and drug abuse."

36. <http://www.pm.gov.au/media/Speech/2007/Speech24394.cfm>

37. *Ibid.*

38. *Ibid.*

39. At p16.

40. <http://www.pm.gov.au/media/Speech/2007/Speech24394.cfm>

41. Brennan F (28 June 2007), *Suspect motivations behind stark Government rhetoric*, <http://www.eurekastreet.com.au/edition.aspx?eid=209>

42. Stanley J, Tomison A M & Pocock J (2003), *Child abuse and neglect in Indigenous Australian communities*, National Child Protection Clearinghouse Issues Paper No 19, Australian Institute of Family Studies, Melbourne, at p20.

43. Lynch P (2001), *Keeping them home: The best interests of Indigenous children and communities in Canada and Australia*, *Sydney Law Review*, Vol 23, No 4 pp501-542, at 508-509.

44. Stanley J, Tomison A M & Pocock J (2003), at p20.

45. At 7, point 1.