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# Noticeboard

## High Court Notes: January/ February 2008

### Criminal law – Evidence – Evidence of earlier acquittal

In *Washer v WA* [2007] HCA 48; 8 Nov 2007 W was charged with conspiracy to possess a prohibited drug with intention to supply it. He had earlier been acquitted of another conspiracy to possess prohibited drugs at a different time and with different persons. The High Court by majority concluded that the trial judge did not err in admitting evidence that had been admitted at the earlier trial where W was acquitted that tended to show W was a drug dealer and also did not err in preventing questioning of a police witness about that trial: Gleeson CJ, Heydon, Crennan JJ; *sim* Hayne J; Kirby J reached the same result only on the basis that the other evidence against W was overwhelming. Appeal dismissed.

### Criminal law (NSW) – Offences by children – Procedure

In *PM v Q* [2007] HCA 49; 8 Nov 07 a child was charged with various offences one of which was a “serious children’s indictable offence” that the Children’s Court did not have jurisdiction over. The proceedings were transferred to the District Court. In that Court the prosecutor did not proceed with the serious children’s indictable offence. The High Court considered the District Court was able to proceed and deal with the proceedings and they were not required to be remitted (Gleeson CJ, Hayne, Heydon, Crennan JJ; *sim* Kirby J).

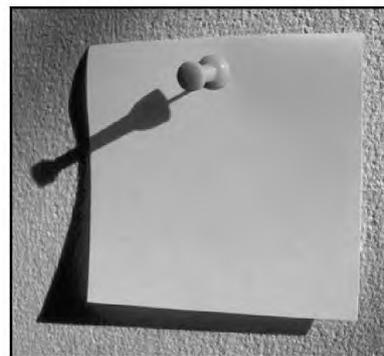
### Environmental law – Planning – Extent of permit allowing aluminium remelting

In *Weston Aluminium Pty Ltd v EPA* [2007] HCA 50; 8 Nov 07 the High Court considered whether planning permission that allowed aluminium remelting at a site permitted treatment of dross not generated at the site. Appeal allowed (Gleeson CJ, Gummow, Hayne, Heydon, Crennan JJ jointly).

### Criminal law – Orders – Whether recommendation that prisoner not be released an order that may be appealed

In *Elliot v Q*; *Blessington v Q* [2007] HCA 51; 8 Nov 2007 in 1992 the NSW Supreme Court sentenced E and B to life imprisonment for murder. In the sentencing remarks the judge recommended that they not be released. This was the practice at that time to prevent the administrative grant of “ticket of leave” licences. The High Court concluded that these remarks were not part of the order or sentence of the court that

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could be the subject of an appeal. The High Court considered that leave to re-open an earlier appeal had been correctly refused and the effect of legislation introduced after a court order does not establish an error or miscarriage of justice. Appeal dismissed (Gummow, Hayne, Heydon, Crennan, Kiefel JJ).

### Criminal law – Confiscation of property obtained by criminal – Gift by criminal of half interest in matrimonial home to wife – Whether natural love and affection “sufficient consideration”

In *DPP(Vic) v Le* [2007] HCA 52; 14 Nov 07 L was charged with drug trafficking offences in June 2003. He then held the matrimonial home as sole proprietor. In August 2003 he transferred a half interest to his wife for natural love and affection. The Court of Appeal (Vic) concluded that natural love and affection between spouses could be sufficient consideration for the transaction to be excluded from the operation of the *Confiscation Act 1997 (Vic)*. By s 52(1) this Act excluded transfers of “tainted property” where the transferee was not involved in the crime, was unaware of it and the transfer was for “sufficient consideration”. The High Court concluded by majority that natural love and affection was “sufficient consideration” and the wife’s interest in the property was excluded from the confiscation order: Gleeson CJ [7] agreeing with Kirby and Crennan JJ [122]; *contra* Gummow and Hayne JJ [47], [48]. Appeal allowed.

### Real property – Interests – Mortgages – Mortgage transferred – Whether Torrens statute operated to transfer right to recover monies

In *Queensland Premier Mines Pty Ltd v French* [2007] HCA 52; 15 Nov 07 the High Court in a judgement given by Kiefel J (and concurred in by Gleeson CJ, Gummow, Heydon and Crennan JJ and Kirby J agreeing in a separate judgement) concluded that registration of a mortgage under the Torrens system did not effect an assignment of the right to recover monies owing under a separate agreement for loan secured by the mortgage.

### Income tax – Collection – Non residents – Notice to company requiring it to retain funds to enable non-

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### **resident shareholders to pay tax – Whether notice may be given before dividend payable**

In *Bluebottle UK Pty Ltd v Deputy C of T* [2007] HCA 54; 5 .12.07 the Commissioner gave notices under s 255 of ITAA 1936 (Cth) to VA Pty Ltd requiring it to retain funds from dividends declared but not yet payable in respect of the liability of non-resident shareholders to pay tax on the dividend. Two shareholders of VA Pty Ltd who were not resident in Australia assigned their shares to the Appellant (B) who gave VA Pty Ltd an irrevocable direction to pay the dividends to B. The High Court in a joint judgement concluded that while some notices were defective as they were issued before any assessment had been issued so no tax was payable the other notices were effective as VA Pty Ltd then had control of funds payable to a non-resident where tax was payable: Gleeson CJ, Gummow, Kirby, Hayne, Crennan JJ Jointly. Appeal from Court of Appeal NSW dismissed.

### **Criminal law – Evidence – Video evidence – Whether jury should view tape of evidence of complainant while deliberating - Irregularities**

In *Gately v Q* [2007] HCA 55; 6 Dec 07 the evidence a child victim of sexual offences gave in the preliminary hearing was recorded as provided in ss 21 AK, 21 AM of the *Evidence Act 1977(Q)*. The High Court concluded that the receipt by a jury while it deliberated of a video copy of the evidence the child gave at the preliminary committal proceedings was irregular and the evidence should have been played in open court. The majority concluded no miscarriage of justice had occurred: Gleeson CJ, Heydon J and Crennan J agreeing with Hayne J; contra Kirby J. Appeal dismissed.

## **High Court Judgements: March 2008**

### **Bankruptcy – Provable debt – Costs order made after bankruptcy – Nature of costs order**

In *Foots v Southern Cross Mine Management* [2007] HCA 56 (7 December 2008) F was made bankrupt in September 2005. A costs order was made against him in February 2006. The High Court by majority concluded the order for costs was not a provable debt within s83 of the *Bankruptcy Act 1966 (Cth)* and the stay created by s58(3) of the *Bankruptcy Act* was not engaged: Gleeson CJ, Gummow, Hayne, Crennan JJ; contra Kirby J. Appeal dismissed.

### **Consumer credit – Pre-contractual disclosure – Payment to others – Holdback fees – Whether disclosure of related contracts required**

In *Australian Finance Direct Ltd v Director Consumer*

*Affairs Vic* [2007] HCA 57 (12 December 2007) AFD lent money to persons attending real estate seminars. The High Court concluded the analysis that prevailed in the Victorian Court of Appeal was to be preferred and s15A(a)(ii) of the Consumer Credit (Vic) Code required fees paid under associated contracts to be disclosed: Gleeson CJ, Gummow, Hayne, Crennan JJ jointly; Kirby J. Appeal dismissed.

### **Criminal law (SA) – Intercourse with child – Defence where offender over 16 and believed child over 17 at time of offence – When date of offence relevant**

In *WCG v Q* [2007] HCA 58 (12 December 2007) the High Court considered how an accused was to raise as a defence to a charge of intercourse with a minor that the intercourse occurred at a later date when a statutory defence was available under s49(3) of the *Criminal Law Consolidation Act 1935 (SA)*. Appeal dismissed by majority: Hayne with Heydon JJ; Crennan J; contra Gummow J; Kirby J.

### **Criminal law (NSW) – Evidence – In-court demonstration – Discretionary exclusion of alibi evidence tendered without notice**

In *Evans v Q* [2007] HCA 59 (13 December 2007) E was convicted of armed robbery after a trial at which he was required while being cross-examined to wear clothing found at his home and sunglasses that were not. The trial judge prevented evidence of an alibi proposed without required notice. The High Court allowed E's appeal by majority: Gummow with Hayne JJ; Kirby J; contra Heydon J; Crennan J. Heydon J extensively reviewed the history of s53 of the *Evidence Act 1995 (NSW)* and concluded it did not apply to in-court demonstrations, experiments or inspections. Appeal allowed.

### **Defamation – Defences – Fair comment**

In *Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60 (13 December 2007) the High Court reviewed authority in *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309 as to what constitutes "fair comment", distinction between statements of comment and fact, and whether a promotion of an allegedly defamatory program was in a special category. Appeal dismissed by majority: Gleeson CJ; Gummow, Hayne, Heydon JJ jointly; contra Kirby J. Appeal dismissed; cross-appeal allowed.

### **Contract – Termination for breach – Repudiation for breach of term – How essential and non-essential terms identified**

In *Koompahtoo Local Aboriginal Council v Sanpine Pty Ltd* [2007] HCA 61 (13 December 2007) the High Court considered the principles by which breach of certain essential contractual terms entitled the

other party to terminate the contract and how other terms were identified as non-essential: Gleeson CJ, Gummow, Heydon, Crennan JJ; sim Kirby J. Appeal allowed.

## Federal Court Notes

### Income tax – Charitable body

C of T v Word Investments Ltd [2007] FCAFC 171; 14 Nov 07 a Full Court considered when the objects, purposes and activities of a body revealed it was a charitable body and concluded the primary judge did not err in concluding the respondent body devoted to proclaiming the Christian faith was a charitable body.

### Income tax – Alienation of personal services income

In IRG Technical Services Pty Ltd v Deputy C of T [2007] FCA 1867; 5 Dec 07 Allsop J considered the operation of provisions of the ITAA 1936 (Cth) relating to the alienation of personal income and concluded the Applicants were not entitled to a Personal Services Business Declaration under Part 2 -24.

### Income tax – Deductions – Management fees paid by professional sportsman

Riddell v F CT [2007] FCA 1818; 23 Nov 07 and Spriggs v FCT [2007] FCA 1817; 23 Nov 07 Gordon J concluded management fees paid by professional sportsmen were deductible and were not on capital account.

### Native title – Procedure – Claimant not authorised

In C of A v Clifton [2007] FCAFC 190; 6 Dec 07 a Full Court concluded that it was not permissible for a respondent to a claim for Native Title to seek a determination of title where the respondent was not authorised by a claimant group as required by s 61 of the *Native Title Act 1993 (Cth)*.

### Native title – Exclusive possession

Griffiths v NT [2007] FCAFC 178; 22 Nov 07 a Full Court concluded the primary judge had erred in not accepting the uncontradicted evidence of the Aboriginal claimants established the exclusive possession of the land by the claimants. Consideration of whether change from patrilineal to cognatic descent in the claimant group negated its continuity of possession. Further consideration of the application of usufructuary rights to native title claims.

### Environment Protection – Acts likely to threaten species – Exemption

Forestry Tasmania v Brown [2007] FCAFC 186; 30 Nov 07 a Full Court concluded s 38 of the *Environment*

*Protection and Biodiversity Conservation Act 1999 (Cth)* operated through a regional forest agreement to exempt the relevant forestry activities of Appellant in Tasmania from the prohibition on the activities that would otherwise occur. Consideration of when fresh evidence will be allowed on appeal.

### Environmental law – Lawfulness of procedure selected to review proposed pulp mill in Tasmania

In Wilderness Soc Inc v Turnbull [2007] FCAFC 175; 22 Nov 2007 a Full Court rejected submissions that the time limit imposed by the Minister for Environment for public comment under the E.P and B *Conservation Act 1999 (Cth)* was too short and selected for an improper purpose being the commercial advantage of the developer. In a decision on costs of the initial proceeding the primary judge held that the public interest aspects of the proceeding were not enough to displace the usual order that costs follow the event: [2007] FCA 1863; 30 Nov 07; Marshall J

### Estoppel – Anshun estoppel

Egglisshaw v Australian Crime Commission [2007] FCAFC 183; 28 Nov 07 a Full Court considered that in not seeking in earlier proceedings challenging the right of the Crime Commission to seize items to ask for copies of them E was not barred by reason of Anshun estoppel from seeking in later proceedings copies under s 3N of the *Crimes Act 1914 (Cth)*.

### Trade Practices Act – Market power- Real estate data collected by Qld Government

In RP Data Ltd v State of Queensland [2007] FCA 1639; 30 Oct 07 Collier J considered the State was engaged in trade and for the purposes of s 46 of the *TP Act* commerce in selling bulk real estate data but had not contravened it in renegotiating the licence agreement whereby the Applicant accessed the information.

### Industrial law – Trade union as competent administrative authority

Claveria v Pilkington Australia Ltd [2007] FCA 1692; 7 Nov 07 Kenny J held that a trade union may be a “competent administrative authority” for certain purposes under s 659(2)(e) of the *Workplace Relations Act 1996 (Cth)* so that dismissal for complaining to one was prohibited under that provision.

### Industrial law – Jurisdiction of State tribunal to determine long service leave for employees of constitutional corporation

In Endeavour Coal Pty Ltd v CFME Union [2007] FCAFC 177; 22 Nov 07 a Full Court concluded the Industrial Court of NSW erred in concluding the NSW IR Commission had power to make an award binding a constitutional corporation in respect of long service

leave.

### **Industrial law – Prohibition of leave on day of protest**

In *CPSU v C of A* [2007] FCA 1861; 4 Dec 07 Cowdroy J concluded a decision to ban leave being granted to public servants on a day of national industrial action constituted a breach of the relevant Workplace agreement contrary to s 792(1) of the *WorkPlace Relations Act 1996 (Cth)*.

### **Migration – Inconsistent findings by RRT**

In *QAAA of 2004 v MIMIA* [2007] FCA 1918; 6 Dec 2007 Collier J concluded that having accepted Iran was the “sworn enemy” of the USA it was not open to the RRT to find Iranian authorities would have no interest in the Applicant because of his low rank when serving as a member of the US Navy.

### **Migration – Illogical or irrational decisions**

*SZDTZ v MIC* [2007] FCA 1824; 23 Nov 07 Greenwood reviewed authority as to when decisions under enactments can be reviewed for want of logic or irrationality.

### **Administrative review – Classification of adult literature**

*Adultshop.com Ltd v Members of the Classification Review Board* [2007] FCA 1871; 29 Nov 07 Jacobson J considered how it was to be decided that adult material was “likely to cause offence to a reasonable adult”. He concluded that guidelines of the Ministers made under s 12 of the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* were not ultra vires the legislative scheme. In a separate decision [2007] FCA 1872 of 29 Nov 2007 he declined in the public interest to allow minutes of the meetings of Ministers that were in evidence in the proceeding be published to promote the effective functioning of this body.

### **Constitutional law – Parliament - Secret ballot at elections**

In *Horn v Australian Electoral Commission* [2007] FCA 1827; 23 Nov 07 McKerracher J dismissed a proceeding where the Applicant claimed the absence of curtains or screens from voting booths meant the election did not comply with s 206 of the *Electoral Act 1918 (Cth)*, which required booths to be constructed to “screen voters from observation” while they vote.

### **Statutory interpretation – When invalid instrument may be read down**

In *Telstra Corporation v ACCC* [2007] FCA 1905 (12 December 2007) Bennett J reviewed authority as to when s46 of the Acts Interpretation Act 1901 (Cth) will save an instrument partly beyond power but not one wholly invalid. She concluded the subject competition notice under s15AKA(2) of the *Trade Practices Act*

was totally invalid for failure to first issue the notice referred to in s15AKA(10).

### **Misleading conduct – “Certified practising accountant”**

In *CPA Pty Ltd v Dunn* [2007] FCA 1966 (12 December 2007) Weinberg J restrained the respondent, an “independent” accountant, from describing himself as a certified public accountant or certified practising accountant while not a member of the appropriate body.

### **Legal privilege – Inhouse lawyers – Whether independent**

In *Rich v Harrington* [2007] FCA 1987 (13 December 2007) Branson J concluded, in litigation between partners of a firm of accountants, that the office of general counsel in the firm was not independent and documents it created were not protected by legal professional privilege.

### **Courts – Amendment of ambiguous orders**

In *K-Aire Pty Ltd v Polyaire Pty Ltd* [2007] FCAFC 192 (11 December 2007) a Full Court concluded the Court had power to amend sealed orders after appeals had been heard to remove ambiguities.

### **Veteran’s entitlement – Stress – Failure to apply correct test**

In *Repatriation Commission v Robertson* [2007] FCA 1674 (4 December 2007) Cowdroy J allowed an appeal against a decision of the AAT that accepted a claim for compensation based on stress without adverting to the correct test set by s70(5)(a) of the *Veterans’ Entitlements Act 1986 (Cth)* and an incorrect understanding of eligible service.

### **Industrial law – Unlawful termination – Compensation – Superannuation**

In *Claveria v Pilkington Australia Ltd (No 2)* [2007] FCA 1917 Kenny J concluded superannuation entitlements were to be included in considering compensation under s655 of the *Workplace Relations Act 1996 (Cth)* for unlawful termination.

### **Migration – Visas – Cancellation on character grounds – “Association” with criminals – Nature of “association” – Involuntary association via family membership**

In *MIC v Haneef* [2007] FCAFC 203 (21 December 2007) H’s visa was cancelled by the Minister for Immigration under s501(6) of the *Migration Act* because of his “association” with suspected criminals who were members of his extended family. The primary judge concluded the Minister had adopted a test of “association” that was too broad and this reasoning and result was upheld by a Full Court in a joint judgment. The Court considered whether the character test was

so broad on a literal view as to constitute “legislative overreach”. Appeal dismissed.

**Migration – Visas – Conditions – Failure of students to achieve academic certification – How students comply with condition**

In *Dai v MIC* [2007] FCAFC 199 (20 December 2007) a Full Court upheld an appeal by a student visa holder on the basis that the student had not complied with a condition that the student be certified by the institution as having achieved a result where the student had no power to obtain the required certification. In agreeing with the Court, Gyles J concluded the regulation was at the time uncertain and unreasonable.

**Income tax – Deductions – Legal costs – Costs of defending discipline charges**

In *C of T v Day* [2007] FCAFC 193 (21 December 2007) a Full Court considered when an employee would be entitled to deduct legal costs incurred in defending discipline charges.

**Income tax – Penalties – Purpose of scheme**

In *C of T v Starr* [2007] FCAFC 204 (21 December 2007) a Full Court considered how the purpose for which a scheme was entered into was to be ascertained.

**Procedure – Summary dismissal for estoppel or abuse of process – Tax cases**

In *Spassked Pty Ltd v C of T* [2007] FCAFC 205 (21 December 2007) a Full Court considered when litigation was an abuse of process for relitigating in subsequent tax years questions raised in litigation in earlier years and whether Anshun estoppel was applicable.

**Federal Court – Practice – Representative proceedings**

In *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* [2007] FCAFC 200 (21 December 2007) a Full Court considered when an order should be made under s33N(1) of the *Federal Court Act* that proceedings should no longer be representative proceedings.

## **Family Court of Australia Notification**

**Consent parenting orders and allegations of abuse – Rule 10.15A**

Your attention is drawn to the requirements of Rule 10.15A which commenced on 7 July 2007 (Family Law Amendment Rules 2007 (No two)) and imposes requirements to provide information upon parties

in relation to proposed consent parenting orders in pending proceedings in the Family Court.

The effect of the Rule (outlined in the Explanatory Statement) is:

This amendment incorporates Practice Direction 6 of 2004 into the Rules.

It provides that before the making of a parenting order by consent, in the course of an oral application, each party, or if represented, the party’s lawyer, must advise the court that no allegations of child sexual or other physical abuse or risk of abuse, have been made in: (i) any document filed or exhibited in the proceedings (ii) any report prepared for the proceedings; or (iii) any document subpoenaed to the court in the proceedings or, if such allegations have been made, must explain to the court how the order attempts to deal with the allegations.

For all other applications, other than an application under paragraph 10.15 (1) (b) each party, or if represented, the party’s lawyer, must certify in an annexure to the draft consent order, that no allegations of child sexual or other physical abuse or risk of abuse have been made in: (i) any document filed or exhibited in the proceedings (ii) any report prepared for the proceedings; or (iii) any document subpoenaed to the court in the proceedings or, if such allegations have been made, must in the annexure identify each document containing them and explain to the court how the order attempts to deal with the allegations.

A form of ‘Annexure to Consent Parenting Order’ is available on the Family Court website at [www.familycourt.gov.au](http://www.familycourt.gov.au) and any Registry.

This notice is issued as a reminder that the Rule has been in force for over six months and is being enforced. In the event the appropriate annexure (where orders are submitted to be considered in chambers) or sufficient information (where orders are handed up in Court) is not provided, further information from the parties may be required before orders can be considered.

Angela Filippello Principal Registrar

Family Court of Australia

15 January 2008

## **Compulsory Family Dispute Resolution**

Practitioners are aware of the provisions of ss 60I and 60J and the requirement of a party to an application for a parenting order to provide a certificate from a registered family dispute resolution practitioner before filing an application for an order under Part VII of the Act in relation to a child.

Currently, Practice Direction No two of 2007 - Family Dispute Resolution - applications for orders under Part VII *Family Law Act 1975*, provides that a certificate must be filed with an application unless the applicant is seeking an exception, in which event the applicant must set out the evidence supporting the exception in the affidavit filed with their application. Applications without a certificate are considered by a Federal Magistrate on the first return date.

The current Practice Direction will be replaced to ensure consistency of practice with the processes adopted by the Family Court of Australia.

Commencing 1 March 2008, the Federal Magistrates Court of Australia will be adopting the same processes as the Family Court of Australia for the filing of applications for an order under Part VII of the *Family Law Act 1975*. This means that a certificate will be required at the point of filing unless an exemption has been granted by a Registrar.

- Practice Direction No two of 2007 - Family Dispute Resolution - applications for orders under Part VII *Family Law Act 1975* will be substituted with another Practice Direction to come into effect 1 March

2008, which will require the certificate to be filed at the same time as the application unless an exemption has been granted. Where a certificate is required and is not produced, the application will not be accepted for filing.

- The new Practice Direction will also provide that where an exemption is sought it can be identified by way of the pro forma Affidavit approved under the Family Law Rules 2004 or by an existing Affidavit accompanying the Application, in which event the Applicant must identify the relevant portions of the Affidavit.

- The Federal Magistrates Court Rules 2001 will be amended to delegate powers under ss 60I and 60J to Registrars to make determinations under these provisions. Registrars will be available to determine requests for exemptions as they currently do for the Family Court of Australia, rather than by a Federal Magistrate on the first court date.

Adele Byrne, Principal Registrar, Federal Magistrates Court of Australia

Telephone: (03) 8600 4470

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## CONFERENCES

13-16 February 2008  
**Better Choices Better  
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28-29 February 2008  
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www.familylawsection.org.au

Plenary speakers include the Hon Justice Diana Bryant, Chief Justice of the Family Court of Australia, Chief Federal

Magistrate John Pascoe AO, the Honourable EP (Ted) Mullighan QC, Dr Hugh Mackay and Professor Alan Hayes. International guests include Madam Justice Susanne R Goodman (Canada), Nicholas Mostyn QC (UK), Professor Maggie Bruck (USA), Professor Rebecca Bailey-Harris (UK) and Anita Chan (NZ). A large number of Australian judges, federal magistrates and leading practitioners will also participate in the Conference.

18-19 April 2008  
**Updates in Legal  
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The conference program will cover topics including: Global trends in Legal PII, Country Overviews, Key Global Decisions in Legal PII, Trends in Reinsurance,

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