

Noticeboard

Federal Court Notes

Family Court of Australia Notification

Notice to Legal Practitioners re. Change in Transcription Distribution

Please note that from 1 March 2008, the method in which transcripts are distributed changed.

All transcripts that are not deemed to be automatic (for example committal transcript, and jury trial transcript) must now be ordered through the provider, Merrill Legal Solutions (MLS), who are based in the Supreme Court Building at Darwin.

Order forms are available from the counter of each of the Court Registries at Darwin, Alice Springs, Katherine, Tennant Creek and Nhulunbuy. The Magistrates Court will accept orders on behalf of MLS, while orders at the Supreme Court in Darwin can be left at the Supreme Court Registry counter.

MLS will arrange for the distribution of all transcripts that are ordered, including automatic transcripts.

The charges for transcription in the Magistrates Court are:

- \$7.00 per page for an electronic copy of a transcript; and
- \$8.20 per page for a printed copy of a transcript.

The charges for transcription in the Supreme Court are:

- \$13.20 per page for running and urgent transcript; and
- \$12.15 per page for delayed transcript

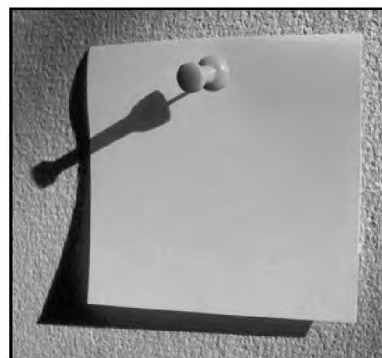
A copy of the order forms can be found on the Supreme Court and Magistrates Court websites.

Federal Court of Australia Notice to Practitioners issued by the NT District Registrar

Judge's Copy Documents - No. 1 of 2008 (NT)

This Notice sets out the guidelines for preparing and filing a set of Judge's Copy Documents in the Northern Territory District Registry. It applies, subject to any directions by a Judge, to all final hearings other than those in Appeals, Tax Objections, Migration and

*Produced for the
Law Council of
Australia and its
constituents by
Thomas Hurley,
Barrister,
Melbourne*



Bankruptcy matters.

Once a matter has been set down for a final hearing, the solicitor for the applicant is to file a set of Judge's Copy Documents. This set of documents is to be filed not later than 21 days before the day set down for the final hearing, or, if there is less than 21 days between the setting down and the final hearing, as soon as possible.

The Judge's Copy Documents are to comprise:

- (i) the originating process;
- (ii) all pleadings;
- (iii) any affidavit to be relied on at the trial (not those for any interlocutory purposes);
- (iv) all particulars which have been furnished, whether in the form of a court document or a letter, and the requests for those particulars.

Wherever possible this set of documents should be filed in electronic form.

Where any amendments have been made to pleadings, the consolidated form of the pleading, not showing any matter that has been excised by amendment, should be included in the Judge's Copy Documents.

This notice does not apply to an interlocutory hearing. When allocating a date for an interlocutory hearing, the Judge will give appropriate directions for the filing of any copy documents.

The costs of preparing Judge's Copy Documents will be allowed on taxation.

James Brohier

District Registrar

6 March 2008

Federal Court (Bankruptcy) Amendment Rules 2008 (No 1)

The Federal Court (Bankruptcy) Amendment Rules 2008 (No 1) was registered on the Federal Register

of Legislative Instruments on 12 March 2008. The Amendment Rules commence on 1 April 2008.

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 (Bankruptcy) Rules:

1. amending paragraph 4.06(3)(b) by inserting a new paragraph (b) that requires the affidavit to include a statement that there were no details of a debt agreement on the day on which the search in the National Personal Insolvency Index was made;
2. amending paragraph 4.07(b) by requiring, where a fax copy of the original affidavit has been filed, the original affidavit to be kept and produced as directed by the Court;
3. amending rules 7.02, 7.03 and 7.06 to reduce the time for service of annulment applications and applications to review a Registrar's decision to make a sequestration order;
4. amending subrule 7.04(1) so as to leave to the Court the question of whether a trustee's report is required;
5. amending paragraph 7.04(4)(b) to reflect the fact that the trustee's report must be provided prior to the date fixed at the first hearing for the 'final' hearing of the application;
6. amending Forms 2 and 3 to insert a note referring to the requirement under subrule 2.01(3) and (4) respectively that the application must include a statement of the relevant section of the *Bankruptcy Act* or Bankruptcy Regulations under which the application is brought; and
7. amending Form 6 by inserting a new note referring to the requirement under regulation 4.05(1) of the Bankruptcy Regulations that the creditor must give a copy of the petition to the Official Receiver within three working days after presentation.

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

Philip Kellow

Deputy Registrar

Federal Court Judgments: April 2008

Trade practices

Misleading conduct – Representations as to future matters – Whether duty to avoid economic loss – Damages

In *McGrath v Australian Naturalcare Products Pty Ltd* [2008] FCAFC 2 (24 January 2008) a Full

Court considered the primary judge had not erred in concluding a supplier of goods had breached the *Trade Practices Act* by representing that its goods would be produced to an acceptable quality when the goods were produced to a standard that led to the representor's licence under the *Therapeutic Goods Act 1989 (Cth)* being revoked. Consideration of the operation of s51A of the *TPA* and onus of proof as to reasonable belief as to future matters.

Migration

Visas – Cancellation on character grounds

In *Gilbert v MIC* [2008] FCA 16 (23 January 2008) Marshall J concluded the Minister had cancelled the applicant's absorbed person visa and not a temporary one. He also concluded the Minister did not err by taking into account outstanding charges.

Migration

Tribunals – Information – Whether doubts about authenticity "information"

In *NAWZ v MIC* [2008] FCA 6 (24 January 2008) Madgwick J concluded doubts about the authenticity of documents were not "information" the RRT was obliged by s424A(1)(b) of the *Migration Act* to raise.

Administrative law

AD(JR) Act – When forming opinion a decision

In *Dunstan v Orr* [2008] FCA 31 (25 January 2008) Besanko J concluded that the decision of one officer to suspend another officer under the *Public Service Act 1922 (Cth)* was a decision reviewable under the AD(JR) Act and it was not necessary to decide whether the formation and conveying of opinions by other officers to the one who made the decision were also decisions. He also concluded client legal privilege under s122(2) of the *Evidence Act 1995 (Cth)* was not lost where a privileged document was inadvertently disclosed.

Native title

Creation of interest – Defective documents

In *Murgha v Queensland* [2008] FCA 33 (25 January 2008) Dowsett J considered whether he should make a declaration of native title in circumstances where the formal provisions of the *Aboriginal and Torres Strait Islanders (Land Holdings) Act 1985 (Qld)* had not been complied with and how any declaration should address the formal defects.

Statutory power

Whether investigation for an improper purpose

In *Washington v Hadgkiss* [2008] FCA 28 (29 January 2008) Marshall J declined to find that the investigation by the Australian Building and Construction Commissioner into alleged breaches

of s816 of the *Workplace Relations Act* was for an improper purpose of establishing union officials were reluctant to cooperate with the ABCC.

International arbitration

Whether dispute covered by arbitration clause

In *Seeley International Pty Ltd v Electra Air Conditioning* [2008] FCA 29 (29 January 2008) Mansfield J concluded the subject dispute was not covered by an arbitration agreement under the *International Arbitration Act 1974 (Cth)* and declined to stay the proceeding.

Costs

Public interest litigation

In *Horn v Australian Electoral Commission* [2008] FCA 43 (30 January 2008) McKerracher J rejected a submission that costs should not follow the event on the dismissal of a proceeding that sought to challenge electoral questions but was found to be without substance.

Bankruptcy

Effect – Claim for damages for unlawful dismissal – Whether claim for personal injuries that does not vest in trustee in bankruptcy

In *Fitzpatrick v Keelty* [2008] FCA 35 (31 January 2008) Moore J concluded a claim by a former member of the AFP for unlawful dismissal and for review under the *AD(JR) Act* of the decision to dismiss were not proceedings for a personal injury or wrong done to the bankrupt excluded from vesting in the trustee under s60 of the *Bankruptcy Act 1966 (Cth)*.

Industrial law

Formal requirements of AWA

In *Rilstone v BP Australia* [2008] FCA 44 (1 February 2008) Branson J considered the effect of formal defects in an AWA that failed to comply with reg 8.11 of the *Workplace Relations Regulations 2006 (Cth)*.

Federal Court Judgments: May 2008

Copyright – Encoded broadcast – Free list

In *Haddad v Foxtel Management Pty Ltd* [2008] FCAFC 11 (22 February 2008) a Full Court concluded that the fact that certain persons were able to receive Foxtel on a complimentary basis did not mean its broadcast to the public was not made only on payment of subscription fees within s135AL of the *Copyright Act 1968 (Cth)*.

Constitutional law – Whether setting of standards of health care “civil conscription” – Whether conferring of judicial power

In *Selim v Lele* [2008] FCAFC 13 (27 February 2008) a Full Court concluded that provisions in Part VAA of the *Health Insurance Act 1973 (Cth)* that concerned over-servicing regulated provision of services to patients in the Medicare scheme and did not amount to “civil conscription” of the services of medical practitioners. The Court also followed its earlier decisions and rejected an argument that the scheme gave judicial power to a commonwealth officer.

Tax – Energy grants – Whether taxpayer “purchased” fuel

In *Colby Corporation Pty Ltd v C of T* [2008] FCAFC 10 (20 February 2008) a Full Court considered whether a taxpayer contracted to conduct exploratory drilling that was supplied with fuel by the site owner “purchased” the fuel so as to be eligible for energy grants under the Energy Grants (Credits) Scheme 2003 (Cth). Consideration of meaning of “purchase” and the need for a question of law to be present in appeals from the AAT.

Federal Court – Practice – Preliminary discovery – Consent orders

In *Telstra Corporation Ltd v Minister for Broadband, Communications and the Digital Economy* [2008] FCAFC 7 (14 February 2008) a Full Court, confronted with consent orders disposing of an appeal in relation to preliminary discovery, considered them and when preliminary discovery is warranted and made the orders.

Trade practices – Access to services – Interpretation of recommendation of National Competition Council

In *Rio Tinto Ltd v Australian Competition Tribunal* [2008] FCAFC 6 (14 February 2008) a miner requested the National Competition Council declare a railway service in Western Australia as one to which the miner be granted access under the Trade Practices Act. A Full Court rejected a submission that as the recommendation by the National Competition Council did not totally correspond with the request it was invalid and had never been validly before the Minister and there was no deemed refusal of it. The Court concluded the Council’s recommendation was not to be construed in a pedantic way.

Statutes – When jurisdictional fact a condition precedent

In *Anvil Hill Project Watch Association v Minister for the Environment* [2008] FCAFC 3 (14 February 2008) a Full Court considered the primary judge had not erred in concluding it was not a precondition to the exercise of the power given by s75 of the *Environmental Protection and Biodiversity Conservation Act 1990 (Cth)* that a proposed action have a significant impact on a matter protected under Part three of the Act.

The Court concluded the Minister was able to make a decision in any event. Consideration of when a circumstance is a condition precedent.

Migration – Tribunals – Effect of third party fraud – Evidence

In *MIC v SZLIX* [2008] FCAFC 17 (5 March 2008) a Full Court concluded there was insufficient evidence before the Federal Magistrate to support the finding of fraud by a person claiming to be a migration agent as that Court had found and the evidence supported negligence or oversight if at all.

Migration – Visas – Spouse visa – Domestic violence – Whether MRT bound at hearing by Div 1.5 of Regulations

In *MIC v Sok* [2008] FCAFC 18 (5 March 2008) a Full Court concluded the provisions of Div 1.5 of the Migration Regulations that exhaustively provided how domestic violence was to be established only applied to consideration of this issue by the primary decision maker and did not restrict the way the MRT determined the issue at hearing.

Migration – Appeal from AAT decision on review of decision to cancel visa on character grounds

In *Rountree v MIC* [2008] FCA 251 (6 March 2008) Collier J concluded that by virtue of s483 of the *Migration Act 1958 (Cth)* no appeal lay to the Federal Court from a decision of the AAT in respect of a decision to cancel a visa on character grounds, but the proceeding could be considered as an application for a constitutional writ against the decision of the AAT.

Migration – Tribunals – Information the applicant “gave” the MRT

In *MIC v Chamnam You* [2008] FCA 241 (6 March 2008) Sundberg J concluded that a copy of the decision of the delegate the applicant gave the MRT was information the applicant “gave” the MRT within s359A of the *Migration Act* and was not required to be given to the applicant by the MRT.

Migration – Tribunals – “Information”

In *NAWZ v MIC* [2008] FCA 6 (24 January 2008) Madgwick J concluded that the conclusion of the RRT that documents may have been forged was not “information” required to be given to the applicant by s424A of the *Migration Act*.

Migration – Visas – Cancellation by Minister personally – Hearing

In *Nguyen v MIC* [2008] FCA 199 (6 March 2008) Sackville J concluded the Minister was not required to personally conduct a hearing with a visa holder before personally exercising the power under s500 of the *Migration Act* to cancel the visa where the visa holder had been alerted to the process and had made

submissions that were reported to the Minister.

Migration – Tribunals – Notification of decision

In *MIC v SZKPQ* [2008] FCAFC 21 (6 March 2008) a Full Court briefly considered the operation of the deemed notification provisions in ss494B, 494D of the *Migration Act*.

Migration – Delay in seeking constitutional writ

In *MIC v SZIQB* [2008] FCAFC 20 (6 March 2008) a Full Court concluded the Federal Magistrates Court had erred in extending time and declaring in 2007 a 1999 decision of the RRT to be invalid rather than dismissing the application to the FMC for delay.

Patents – Joint inventorship

In *Polwood Pty Ltd v Foxworth Pty Ltd* [2008] FCAFC 9 (18 February 2008) a Full Court considered how the rights of joint inventors were to be recognised under the *Patents Act 1990 (Cth)*. The Court concluded both parties were entitled to an equal undivided share of the patent issued.

Practice – Subpoena – Documents going to credit

In *Comcare v Maganga* [2008] FCA 285 (11 March 2008) Bennett J concluded the AAT had denied Comcare procedural fairness by refusing it leave to inspect subpoenaed documents that related solely to credit where credit was the sole issue in the proceedings.

Federal Court – Appeal from Federal Magistrates Court – Whether leave required

In *Applicant S1494/2003 v MIC* [2008] FCA 286 (6 March 2008) Reeves J concluded leave to appeal was required to appeal from a decision of the FMC that dismissed under r13.10 of the FMC Rules an application for a constitutional writ to quash a decision of the RRT that it no longer had jurisdiction in a matter.

Constitutional law – Judicial power – “Matter” – Joinder of insurers in non-binding proceedings

In *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* [2008] FCAFC 28 (7 March 2008) a Full Court concluded that a claim by investors in an action against the directors of an investment scheme for a declaration against the insurer of the directors involved a matter, notwithstanding that the declaration would not bind the insurer.

Industrial law – Jurisdiction of AIRC

In *TWU NSW v AIRC* [2008] FCAFC 26 (6 March 2008) a Full Court concluded the AIRC had jurisdiction to restrain a union registered solely under state legislation and the validity of orders expressed to cover employees of the union and those eligible to be its members, whether members or not. The Court

concluded that while some parts of the order were invalid because the period of its operation had expired, no relief would be granted.

Industrial law – False or misleading representation – Partnership as eligible person

In *Hadgkiss v CFMEU* [2008] FCAFC 22 (5 March 2008) a Full Court considered how an allegation that a person had made a false or misleading representation about another person's obligation to join a union was to be pleaded and proved and that a partnership can be an eligible person for s298S of the *Workplace Relations Act 1996* (Cth).

Copyright – non-infringing accessory

In *The Polo/Lauren Company v Ziliani Holdings* [2008] FCA 49 (5 February 2008) Rares J concluded copyright was not infringed where articles lawfully embroidered with a logo were imported into Australia as an exercise of "parallel importation". He concluded the definition of "non-infringing accessory" in s44C of the *Copyright Act* included a "label".

High Court Judgments: April 2008

Criminal law

Evidence – Leave to re-open

In *Mahmood v WA* [2008] HCA 1 (30 January 2008) M participated in a video re-enactment of the circumstances in which he found his wife deceased at their restaurant. Only part of this was played at his trial for her murder. The prosecutor commented that M's demeanour in the video played was inconsistent with his claimed grief. The trial judge refused a defence application to tender the entire video that contained such expressions. M's appeal to the WA Court of Appeal was dismissed but his appeal to the High Court allowed: Gleeson CJ, Gummow, Kirby, Kiefel JJ jointly; Hayne J sim. Consideration of when leave to re-open should be given.

Constitutional law

Judicial power – Whether Takeovers Panel exercises judicial power

In *Attorney-General (Cth) v Alinta Ltd* [2008] HCA 2 (31 January 2008) all members of the High Court agreed that the Takeovers Panel established under Ch 6 of the *Corporations Act 2001* (Cth) did not exercise judicial power that under the Constitution Ch III was reserved for courts: Gleeson CJ; Gummow J; Kirby J; Hayne J; Heydon J; Crennan with Kiefel JJ. Appeal from decision of Full Court of the Federal Court allowed.

Insolvency

Contract – Whether IATA set-off

In *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3 (6 February 2008) the High Court by majority concluded the provisions as to mutual set-off of debts between airlines achieved by the regulations under IATA contracts rendered IATA a creditor of the respondent airline to the exclusion of the individual airlines in the IATA arrangement. Gleeson CJ; Gummow, Hayne, Crennan, Kiefel JJ jointly; contra Kirby J. Appeal allowed. Declaration of primary judge that IATA a creditor restored.

High Court Judgments: May 2008

Constitutional law – Judicial power – State judicial power – Provision in state Act enabling police to certify evidence confidential

In *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* [2008] HCA 4 (7 February 2008) legislation in WA authorised the police to seek orders that fortified buildings frequented by criminals be demolished or rebuilt. One provision provided that the Commissioner of Police could identify information that may affect police operations etc. and this was not to be divulged by the court. The High Court by majority concluded that this scheme did not impinge on the independence of the state court contrary to the Constitution Ch III: Gleeson CJ with Crennan J; Gummow, Hayne, Heydon and Kiefel JJ jointly; contra Kirby J. Appeal dismissed.

Compulsory acquisition (NSW) – Market value

In *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5 (27 February 2008) the High Court in a joint judgment considered whether the efforts of the local council in resisting the rezoning of land prior to its compulsory acquisition by another agency should be taken into account in determining market value.

Corporations – Winding up – Statutory demand – extension of time

In *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* [2008] HCA 9 (26 March 2008) the High Court concluded that no application for extension of time to comply with a statutory demand can be made after the time for compliance has passed: Gleeson CJ, Hayne, Crennan, Kiefel JJ; contra Kirby J.

Criminal law – Amendment

In *Ayles v Q* [2008] HCA 6 (28 February 2008) the High Court considered how an information should be amended to allege a new statutory offence where the accused had pleaded guilty on dates other than those specified in the new information.

Criminal law – Appeals – Failure of judge hearing trial to give adequate reasons – Miscarriage of justice

In *AK v WA* [2008] HCA 8 (26 March 2008) the High Court considered whether a substantial miscarriage of justice had occurred where the reasons of a judge hearing an indictable offence failed to give adequate reasons as required by s120(2) of the Criminal Procedure Act 2004 (WA). Appeal to High Court allowed.

Constitutional law – Legislative powers – Acquisition of property – Provisions of *Trade Practices Act* requiring access be granted to infrastructure

In *Telstra Corporation v Commonwealth* [2008] HCA 7 (6 March 2008) all members of the High Court in a joint judgment concluded that the provisions of Part XIC of the *Trade Practices Act* that required Telstra (as the owner of “local loops” in the telephone system that was infrastructure that was a “declared” service) to grant access to others on terms that were agreed or imposed by the ACCC were not invalid as an acquisition of property on other than just terms contrary to the Constitution s51(xxxi).

Sassoli, M. & Tougas, M. ICRC and the Missing, IRRC December 2002 Vol. 84 No 848, p872-749.

Stover, E. & Shigekame, R. The missing in the aftermath of war: When do the needs of victims’ families and international war crimes tribunals clash? IRRC December 2002 Vol. 84 No 848 p845-865.

The Geneva Conventions of August 12 1949.

Nesiah, V. Overcoming tensions between family and judicial procedures, IRRC December 2002 Vol. 84 No 848, 9823-842.

Turk, V. & Nicholson, F. Refugee protection in international law: an overall perspective, Working Paper.

Zegveld, L. Remedies for victims of violations of international humanitarian law, IRRC September 2003 Vol. 85 No 851, p497-526.

Missing persons internationally bibliography...cont.

Summary Conclusions: family unity.

International Committee of the Red Cross International Humanitarian Law & the Challenges of Contemporary Armed Conflicts, 28th International Conference of the Red Cross and Red Crescent 2-6 December 2003.

ICRC (2001) Punishing Violations of International Humanitarian Law at the National Level; A guide for Common Law States, Advisory Service on International Humanitarian Law.

ICRC (2003) The Missing.

International Convention for the Protection of All Persons from Enforced Disappearance.

Jastram, K. & Newland, K. Family unity and refugee protection, working paper.

Crettol, M. & La Rosa, A.M. The missing and transitional justice: the right to know and the fight against impunity, International Review of the Red Cross, Vol.88 N.862 June 2006, p355-362.

Office Of The United Nations High Commissioner For Refugees (1983) UNHCR Guidelines on Reunification of Refugee Families, Contained in United Nations General Assembly Document No. 12A A/36/12/Add.1.

Protocols Additional to the Geneva Conventions of 12 August 1949.