
Noticeboard

Notice to Practitioners and Litigants Issued by the Registrar – Accredited Mediators in the Federal Court

On 4 June 2008 the Registrar of the Federal Court issued the Notice to Practitioners and Litigants issued by the Registrar – Accredited Mediators in the Federal Court. A copy of the Notice is enclosed and will be available from the Court's web site.

The Federal Court adopted the Australian National Mediator Accreditation System on 28 January 2008 and is now a Recognised Mediator Accreditation Body.

The Court has taken steps to ensure that its registrar mediators have the skills, knowledge and ethical understandings required for accreditation under the Australian Mediator Standards. As stated in the Notice, from 1 July 2008 the Court will, unless there are exceptional circumstances, use accredited registrar mediators when a matter has been referred to a registrar for mediation.

The Court's adoption of the Accreditation System, and the use of accredited registrar mediators, continues its commitment to providing a high standard of mediation services to litigants.

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

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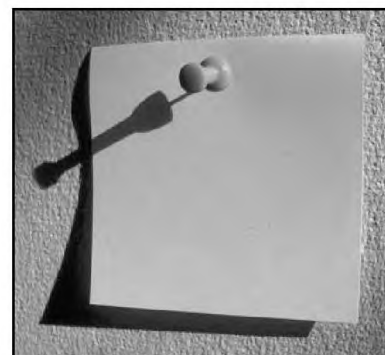
On 29 January 2008 the Federal Court adopted the Australian National Mediator Accreditation System and is a Recognised Mediator Accreditation Body.

From 1 July 2008 the Federal Court will, unless there are exceptional circumstances, use registrars who are accredited mediators under the Australian National Mediator Accreditation System when the Court refers all or part of a matter to a registrar for mediation under section 53A of the *Federal Court of Australia Act 1976 (Cth)*.

This Notice does not apply to referrals to a private mediator agreed by the parties.

Warwick Soden, Registrar, 4 June 2008

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



Notice to High Court and Federal Court Notes July 2008

Criminal law – Evidence – Sexual offences – ‘Uncharged acts’

In *HML v Q* [2008] HCA 16; 24.04.08 the High Court considered the admissibility in sexual offences of evidence that the accused had engaged in other disreputable or possibly criminal conduct in addition to the matters that were the subject of the charge. Appeal dismissed.

Courts – Appeal – Right of appeal against decision as to amount of payment from a fund – Whether right of appeal extends to decision that claim not maintainable

In *Altinta LGA Ltd v Mine Subsidence Board* [2008] HCA 17; 24.04.08 the High Court in a joint judgement concluded the NSW Court of Appeal was correct in concluding the Land and Environment Court of NSW did not have jurisdiction to hear an appeal from the Mine Subsidence Board to refuse to entertain an application where the right of appeal related only to the amount of compensation. Appeal dismissed.

Constitutional law – Relationship between Commonwealth and States – Extradition – Whether State Magistrates may elect not to accept Commonwealth power

In *O'Donoghue v Ireland* [2008] HCA 14; 23; 04.08 the High Court considered whether State Magistrates could decide not to accept the power conferred on them under the *Extradition Act 1914 (Cth)* or whether acceptance was to be inferred from State legislation and course of dealing. Appeal dismissed.

Criminal law – Practice – Directions to deadlocked jury – Whether miscarriage of justice

In *Grassy v Q* [2008] HCA 18; 14 May 08 the High Court considered whether directions given to a deadlocked

jury by the trial judge had caused a miscarriage of justice. Appeal allowed; retrial ordered.

Native title – Compulsory acquisition of land subject to native title claim

Griffiths v Min for lands, Planning and Environment [2008] HCA 20; 15 May 08 the High Court considered whether Northern Territory legislation enabling compulsory acquisition of land authorised the compulsory acquisition of vacant crown land subject to a native title claim under the *Native Title Act 1993 (Cth)* to enable it to be sold for private use. Appeal dismissed.

Crime – Sentencing – Commercial quantity of drug

Adams v Q [2008] HCA 15; 23 .04.08 the High Court considered an assertion that in sentencing a person for importing “commercial “quantities of MDMA it was permissible to consider the different value this had to heroin. Appeal dismissed.

Negligence – Causation

In Roads and Traffic Authority v Royal [2008] HCA 19; 14.05.08 the High Court considered how multiple possible causes of negligence were to be analysed in considering whether highway design contributed to a vehicle collision. Appeal allowed.

FEDERAL COURT DECISIONS

Parliament – Elections – Court of Disputed Returns – Production of ballot papers to parties

In Mitchell v Bailey [2008] FCA 426; 22.04.08 Tracey J concluded the Court of Disputed Returns did not have to produce the disputed ballot papers to the parties.

Income tax – Statutory income

In Fowler v C of T [2008] FCA 528; 21 .04 .08 Lindgren J considered when income from a company owned by a taxpayer was included in the “Statutory income” of the taxpayer.

Income tax – Classification of trust

In ConnectEast Management Ltd v C of T [2008] FCA 557; 29.04.07 Heerey J considered whether a trust owned by a another trust at a higher level of income was to be classified at the level of the other trust.

Native title – Proof of continuous connection with the land

In Bodney v Bennell [2008] FCAFC 63; 23.04.08 a Full Court concluded the trial judge had erred in accepting a land rights claim in the vicinity of Perth by failing to consider whether the claimants had shown continuous acknowledgement of their laws and customs and a connection with the area.

Criminal law – Request for assistance

Strachans Sa v Att-Gen [2008] FCA 553; and Dunn v ACC [2008] FCA 424; 24 04.08 Tracey J considered the operation of the Mutual Assistance in *Criminal Matters Act 1987 (Cth)*

Migration – Canceleation of visa

In Zhong v MIC [2008] FCA 507; 21 04.08 Lander J allowed an appeal against decision affirming a visa cancellation where the notice relied on did not comply with s 107 Of the *Migration Act*

Migration - Business visa

In Ibrahim v MIC [2008] FCA 503; 21.04.08 Lander J allowed an appeal where the MRT had incorrectly valued the business of the applicant.

Migration – Protection visa – Group

In SZBJH v MIC [2008] FCA 501; 21.04.08 Lander allowed an appeal from the RRT where it incorrectly described the social group to which the Applicant claimed to belong.

Income tax – Superannuation “judge”

In Clark v C of T [2008] FCAFC 51; 3.04.08 a Full Court considered whether a South Australian Magistrate was a “judge of a court or a State”

Trade Practices – Medical college

In Shadid v Australian College of Dermatologists [2008] FCAFC 72; 9 05 08 a Full Court considered whether in setting standards for membership a Medical Specialist College engaged in trade or commerce for the *TP Act*.

Copyright – Schedule of TV programs

In Nine Network v IceTV Pty Ltd [2008] FCAFC 71; 8 05 08 a Full Court considered whether copyright existed in a schedule of TV programs.

Statues – Whether notice issued for improper purpose

In Korean Airlines v ACCC [2008] FCA 701; 15.05.08 Jacobson J considered how an allegation that the ACC had issued a notice under s155 of the *Trade Practices Act* consequent to a settlement offer being rejected was to be determined.

High Court and Federal Court Judgments for June 2008

Contracts

Termination – Damages – When covenants touch the land

In *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* [2008] HCA 10 (27 March 2008) the High Court in a joint judgment considered what damages could be recovered for termination of a lease for failure to comply with a term that was not expressly rendered essential. Further consideration of what covenants in a lease touch and concern the land and when the assignee of the leasehold reversion is entitled to terminate a lease and recover damages from the lessee without privity of contract between them. Appeal allowed: Gummow, Kirby, Heydon, Crennan and Kiefel JJ.

Constitutional law

Restraint of free trade

In *Betfair Pty Ltd v Western Australia* [2008] HCA 11 (27 March 2008) sub-s42(1aa) of the Betting Control Act 1954 (WA) made it an offence in Western Australia to bet through the use of a betting exchange and s27D(1) made it an offence for unlicensed persons to publish details of forthcoming horse races in Western Australia. One plaintiff was a Tasmanian company that conducted a betting exchange and another was a Western Australian punter. They contended the provisions were invalid as preventing interstate betting. All members of the High Court found that the provisions were invalid for being a burden on interstate trade contrary to s92 of the Constitution: Gleeson CJ, Gummow, Kirby, Crennan with Kiefel JJ; sim Heydon J. Questions in special case answered accordingly.

Family Court

Children – Order for return of child from foreign country – Whether father was living with mother as de facto partner when child born

In *MW v Director-General, Department of Community Services* [2008] HCA 12 (28 March 2008) the High Court considered the operation of reg 6 of the Family Law (Child Abduction Convention) Regulations 1986 (Cth) in relation to a child removed by the father to New Zealand. Appeal allowed: Gummow, Heydon, Crennan JJ jointly; contra Gleeson CJ; Kirby J.

Accident Compensation Act (Vic)

Procedure for determining an injury a “serious” injury – Nature of appeal from decision of County Court

In *Dwyer v Calco Timbers Pty Ltd* [2008] HCA 13 (16 April 2008) the High Court considered the nature of an “appeal”. In a joint judgment the High Court concluded the Victorian Court of Appeal had erred by considering that in appeals to that court from the County Court as to whether a worker had suffered a serious injury, the Court of Appeal was to defer to the expertise of the County Court as akin to a specialist tribunal.

Federal Court judgments

Native title

Reasons of tribunal – Confidential evidence

In *Parker v WA* [2008] FCAFC 23 (7 March 2008) a Full Court concluded the National Native Title Tribunal had not erred in finding a “future act” was before it and its reasons set out the material facts and satisfactorily dealt with confidential evidence.

Bankruptcy

Review of sequestration order

In *Totev v Sfar* [2008] FCAFC 35 (12 March 2008) a Full Court considered how the requirements to be satisfied for obtaining a sequestration order were to be satisfied in a de-novo hearing to review the refusal to make one.

Migration

When view that information is reliable is “information”

In *MIC v SZHXF* [2008] FCAFC 36 (13 March 2008) a Full Court concluded that the opinion of the RRT that a source of information was reliable was not itself information that had to be disclosed under s424A(3)(a) of the *Migration Act*.

Migration

MRT – Duty to inquire

In *Bunnag v MIC* [2008] FCA 357 (18 March 2008) McKerracher J concluded the MRT did not err in failing to make inquiries as to the situation of the nominating spouse where it was informed she was unable to give evidence as she was an involuntary patient in a mental health facility.

Migration

MRT – Allegation that migration agent was fraudulent

SZIVK v MIC [2008] FCA 334 (13 March 2008) Finkelstein J concluded the FMC had erred in declining to consider an allegation that a migration agent had conducted himself fraudulently (see *SZFDE v MIC* (2007) 237 ALR 64) without that agent being heard in the client’s judicial review proceeding.

Freedom of information

Commercial activities of the CSIRO

In *Bell v CSIRO* [2008] FCAFC 40 (20 March 2008) a Full Court considered when the internal research activities of the CSIRO were carried out for commercial purposes so as to be exempt from release under the *FOI Act*.

Contract

Tender – Natural justice

In *Eden Construction Pty Ltd v State of NSW* [2008] FCA 376 (20 March 2008) Lindgren J concluded a person considering accepting a tender was under no obligation to inform a party tendering that it had received adverse information about that party.

Intellectual property

Ownership of invention by university employee

In *University of WA v Gray (No 2)* [2008] FCA 489 (17 April 2008) French J concluded there was no implied term in the contract of employment of an academic that any invention made in the course of his employment would be the property of the university.

Industrial law

Injunctions – Interim and interlocutory injunctions

In *Police Federation of Australia v Nixon* [2008] FCA 467 (18 April 2008) Ryan J considered how the presumption created by s809(1) of the Workplace Relations Act as to the reason why conduct was occurring was to be applied and whether there was any difference between an interim and an interlocutory injunction.

Federal Court

Orders – Whether order on part of claim final

In *Jefferson Ford Pty Ltd v Ford Motor Company* [2008] FCAFC 60 (15 April 2008) a Full Court concluded that orders disposing of part of a claim were final and an appeal lay from them as of right.

Full Court of the Federal Court sitting dates for 2009

The Acting Chief Justice has approved the dates for the sitting of the Full Court in 2009.

Subject to there being sufficient business, sittings of a Full Court of the Federal Court of Australia during 2009 will be held in all capital cities within the periods indicated below:

- 9 February – 6 March 2009
- 4-29 May 2009
- 3-26 August 2009
- 2-27 November 2009

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 to hear appeals on dates other than those listed.

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

A Judge's viewpoint: The role of pleading...cont.

an allegation that the NRMA had an “overall plan” of conduct dating back to early 2002.

However, no material facts were given that inform the Court as to when, where, how, by whom and in what terms the “overall plan” was formulated or implemented. The Amended Statement of Claim consisted of a series of random alleged actions said to have been taken from time to time with a particular purpose by the NRMA Board, and the general conclusion, by reference to a multitude of paragraphs, was drawn that this was pursuant to some comprehensive “overall plan” formulated before the first meeting and being maintained throughout the period, with the replacement directors over this time being inducted and in order to entrench control in the existing Board.

The nature of the connection between the directors, the understanding on which the majority are said to act in unison were not stated and the specific meetings, events or tactics were not particularised. Nor was there any allegation to support a finding that members of the NRMA had suffered any disadvantage, disability or unfair burden according to ordinary standards of reasonableness and fair-dealing.

There was an allegation that the NRMA made misrepresentations in the course of its publicity claim leading up to the 2003 AGM. That pleading read like an emotive address rather than a setting out of any conduct or facts capable of judicial determination. For example, times, substance, places and victims of the misrepresentations were not specified. Nor were any details given of how the members would have voted in the absence of these representations.

Another useful example of elaborate but fouled up pleadings is *Aquashelf Sales and Rentals Pty Ltd v CSR Limited* (1998) FCA 1752.

Conclusion

Keep in mind that the pleading is the foundation of your case at trial and on appeal. Give the proposed case a great deal of thought before drafting the pleading to make sure what causes of action you can responsibly allege and will be likely to be able to prove. Make sure all the necessary elements of each cause of action are alleged. Make sure, so far as possible, at the pleading stage that you are all able to prove what you allege. Keep the pleading understandable, clear and short, then leave it. Stand back. Look at it again and come back to it and revise it if necessary.