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# Noticeboard

## High Court judgments March 09

### Family law

#### Property – Right of wife to due administration of trust

In *Kennon v Spry* [2008] HCA 56 (3 December 2008) the High Court considered that the right of the wife to the due administration of a trust established by the husband where the children of the marriage were the beneficiaries was property in respect of which the Family Court could make orders under s79 of the *Family Law Act 1975 (Cth)*. Appeal by wife allowed by majority: French CJ; Gummow with Hayne JJ; Kiefel J; contra Heydon J.

### Contract terms

#### Construction – Requirement that payment be “punctual” – What constitutes waiver – Residual category of unfairness

In *Agricultural and Rural Finance Ltd v Gardiner* [2008] HCA 57 (11 December 2008) the High Court considered loan agreements that required the borrower pay instalments “punctually” and found he had not. The Court considered a contention that the lender had “waived” the term which was expressed in terms of election, forbearance and renunciation. The High Court considered each of these and allowed the appeal by the lender: Gummow, Hayne, Kiefel jointly; Kirby J and Heydon J sim. In the joint judgment Gummow, Hayne and Kiefel JJ observed that the silence of the Court on the existence of a residual principle of “unfairness” in contract law was not to be taken as endorsement of it [98]. Appeal allowed.

### Administrative law

#### Collateral challenge in AD(JR) proceedings

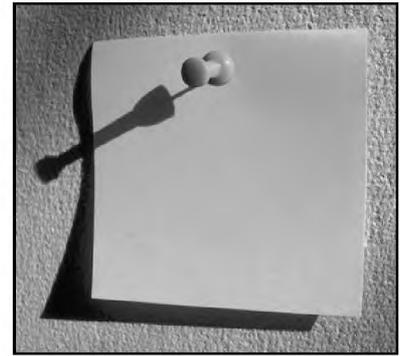
In *Priestley v Godwin* [2008] HCA 59 (17 December 2008) French J dismissed an application for prerogative writs sought against judges of the Federal Court hearing an application.

### Criminal law

#### Special leave – Bail pending special leave – Exceptional circumstances – Delay

In *Tilley v Q* [2008] HCA 58 (19 December 2008) Hayne J refused bail to T who sought special leave to appeal against a decision to affirm a conviction which due to delay was delivered four years into his five-year term of imprisonment.

*Produced for the  
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Australia and its  
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## Federal Court judgments March 09

### Industrial law

#### Demand for wages during industrial action – Penalty for minor contravention of WR Act – Declarations

In *Cruse v Multiplex Ltd* [2008] FCAFC 179 (5 November 2008) a Full Court by majority allowed an appeal against a decision of a single judge who declined to impose a penalty on a union for demanding payment for workers who took industrial action following a death on a building site. He found the shop stewards who arranged the action were not aware it was unlawful. The Full Court concluded a penalty was appropriate. Consideration of when a court should make a declaration that reflects an agreement of the parties rather than the court’s conclusion. Appeal allowed.

### Patents

#### Infringement – Terms in claims not defined – Disagreement by experts as to terms

In *Nufarm Ltd v Jurox Pty Ltd* [2008] FCAFC 180 (11 November 2008) a Full Court dismissed an appeal against a finding that a patent for veterinary medicine had not been infringed where the respondent’s product was arguably within a class of product excluded by examples in the patent.

### Trade practices

#### Tort – Misleading conduct and passing off

In *Hansen Beverage Co v Bickfords (Aust) Pty Ltd* [2008] FCAFC 181 (14 November 2008) a Full Court concluded the primary judge had erred in considering whether an energy drink had acquired a reputation in Australia by reference to a mark used overseas so that use of the mark in Australia by a competitor was misleading.

### Patents

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## **Nature of opposition proceedings – Appeal to Federal Court – Evidence**

In *Commissioner of Patents v Sherman* [2008] FCAFC 182 (20 November 2008) a Full Court considered whether in an appeal against a decision of the Commissioner in opposition proceedings the evidence that was before the Commissioner was irrelevant. Consideration of the nature of the appeal to the Federal Court under s60(4) *Patents Act*.

## **Practice**

### **Vexatious proceedings**

In *Manolakis v Carter* [2008] FCAFC 183 (21 November 2008) a Full Court reviewed authority as to when a proceeding should be dismissed as frivolous, vexatious or an abuse.

## **Taxation**

### **Powers of FCT – Garnishee – Power to require third party pay to FCT money due to creditor**

In *C of T v Bruton Holdings Pty Ltd (In Liq)* [2008] FCAFC 184 (1 December 2008) a Full Court considered the operation of s 260-5 of Schedule 1 of the *Taxation Administration Act 1953 (Cth)* and concluded this authorised the Commissioner to require a third party (a firm of solicitors) holding trust funds on behalf of a taxpayer to pay them to the Commissioner.

## **Taxation**

### **Review of decisions**

In *Perdikaris v Deputy C of T* [2008] FCAFC 186 (5 December 2008) a Full Court concluded a decision by the Commissioner that money had not been deducted by a PAYE or PAYG employer as claimed by the employee/taxpayer was not amendable to review under the *AD(JR) Act*.

## **Bankruptcy**

### **Whether bankruptcy notice misled debtor**

In *Cumins v Deputy C of T* [2008] FCAFC 185 (9 December 2008) a Full Court concluded a bankruptcy notice did not contain statements that would mislead the debtor, when an extension of time under s33(1) (c) of the *Bankruptcy Act 1966 (Cth)* should be given to dispute the bankruptcy notice and when arguments could be raised on appeal that were not raised below.

## **Freedom of information**

### **Cabinet documents – Purpose for which document prepared – Findings of fact by AAT**

In *Fisse v Secretary, Department of Treasury* [2008] FCAFC 188 (11 December 2008) a Full Court considered how the purpose for which a document claimed to have been prepared for Cabinet was to be proved under s36 of the *FoI Act (Cth)*. The appellant sought

access to documents concerning amendments to the *Trade Practices Act*. Before the AAT the respondent relied on correspondence and the evidence of a public servant familiar with the operation of Cabinet to establish the purpose for which the documents were prepared. The Full Court concluded this gave the AAT evidence from which it could find the purpose for which the documents were prepared and this finding of fact by the AAT could not be disturbed.

## **Biodiversity Act**

### **Approval of controlled action – Relevant matters**

In *Lansen v Minister for Environment and Heritage* [2008] FCAFC 189 (17 December 2008) a Full Court allowed an appeal and concluded the minister had not considered the matters required by s134(4)(a) and (b) of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* before approving a controlled action.

## **Copyright**

### **When a logo is a label**

In *Polo/Lauren Co LP v Ziliani Holdings Pty Ltd* [2008] FCAFC 195 (18 December 2008) a Full Court considered when a logo was a “label” incorporated into the surface of an article so that reproduction of it was deemed by s44C of the *Copyright Act 1968 (Cth)* not to be infringement.

## **Income tax**

### **Income – Damages to corporation for defamation**

In *C of T v Sydney Refractive Surgery Centre Pty Ltd* [2008] FCAFC 190 (18 December 2008) a Full Court concluded damages paid to a corporation for injury to business reputation by defamatory publications were not assessable as income.

## **Superannuation**

### **Military superannuation – Date death benefit payable**

In *Nowicka v Superannuation Complaints Tribunal* [2008] FCAFC 191 (19 December 2008) a Full Court considered when a death benefit under the *Military Superannuation and Benefits Act 1991 (Cth)* was payable and the consequences of delay in payment.

## **Private international law**

### **Ownership of film – Australian copyright – proceedings in American courts**

In *TS Production LLC v Drew Pictures Pty Ltd* [2008] FCAFC 194 (19 December 2008) a Full Court set aside orders of the primary judge to stay a proceeding in the Federal Court concerning ownership of copyright in Australia of a film. The Full Court decided the fact that the parties were in litigation in America about ownership of the film did not mean the Australian

*Continued page 40*

rights were not to be decided. Anti-suit order to restrain the American proceedings not granted.

## Copyright

### **T-shirt design – Where literary or artistic work – Whether a dichotomy between idea and expression of idea**

In *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* [2008] FCAFC 197 (23 December 2008) a Full Court concluded a design on a T-shirt of words, numerals and logos was a drawing and thus an artistic and not a literary work. It also concluded that by taking a layout that reproduced a look and feel the respondents had taken an original artistic element and thus a substantial part of the artistic work. The Court considered whether there was a distinction between the idea and the expression of the idea.

## Trade practices

### **Misleading conduct – “Was/now” prices in catalogue**

In *ACCC v Prouds Jewellers Pty Ltd* [2008] FCAFC 199 (23 December 2008) a Full Court generally accepted that a consumer confronted by a catalogue that contrasted “was/now” prices would be misled into thinking the items had a usual price, the difference was a saving even where the items had not previously been offered for sale or larger savings were available by discounting.

## **Federal Court of Australia - Revised Practice Note No 17 – The use of technology in the management of discovery and the conduct of litigation**

On 29 January 2009, the Chief Justice issued a new Practice Note No 17 – The use of technology in the management of discovery and the conduct of litigation which replaces the Practice Note No 17 – Guidelines for the Use of Information Technology in Litigation in Any Civil Matter issued in April 2000. A copy of the Practice Note is available from the Court’s website.

The new Practice Note sets out the framework for the use of electronic documents in proceedings before the Federal Court and directs litigants and practitioners to a number of protocols and checklists (the related materials).

The aim of the Practice Note is to encourage and facilitate the effective use of technology in proceedings before the Court by:

- (a) setting out the Court’s expectations as to how technology should be used in the conduct of proceedings before the Court; and
- (b) recommending a framework for the management of documents electronically in the discovery process and the conduct of trials.

The Practice Note will apply, unless the Court otherwise orders, to proceedings in which the Court has ordered that discovery be given using electronic documents, or the hearing is to be conducted using electronic documents. It is expected that the Practice Note will apply in any proceeding in which:

- (a) a significant number (in most cases, 200 or more) of the documents relevant to the proceeding have been created or are stored in an electronic format; and
- (b) the use of technology in the management of documents and conduct of the proceeding will help facilitate the quick, inexpensive and efficient resolution of the matter.

The related materials mentioned in the Practice Note comprise:

- a Default Document Management Protocol (suitable for matters involving from 200 to 5,000 documents in electronic format);
- an Example of an Advanced Document Management Protocol (suitable for matters involving more than 5,000 documents in electronic format);
- a Pre-discovery Conference Checklist (setting out matters that the parties are expected to consider when reaching an agreement on the protocols to be used for the electronic exchange of documents and other issues relating to efficient document management in a proceeding);
- a Pre-trial Checklist (setting out matters that the parties are expected to consider in order to help ensure that technology is used efficiently and effectively in preparation for, and conduct of, the trial);
- a Glossary of technical expressions used in the Practice Note and related materials.

A copy of the related materials may be obtained from the Court’s web site.

The aim of the document management protocols is to ensure that parties and their lawyers have sufficient information to be able to manage documents and related technology issues in light of what is expected by the Court. If the protocols are not suitable in the circumstances of a particular proceeding, it is open to the parties to agree to alternative protocols subject to the Court being satisfied that they are appropriate to its needs as well.

In each registry, one or more registrars have been nominated to provide advice and assistance in relation to the implementation of the Practice Note. These registrars are referred to as ‘eRegistrars’. Lawyers or parties requiring information or assistance about the application of the Practice Note or the use of technology in litigation in the Court are encouraged to contact an eRegistrar. Contact details for the eRegistrars can be found at <http://www.fedcourt.gov.au>.