Dan Star QC Federal Court Judgments

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Numbers in square brackets refer to a paragraph number in the judgment.

NOVEMBER

ADMINISTRATIVE LAW – JUDICAL REVIEW

Whether inflexible application of government policy – whether aspects of the policy unlawful

In *G v Minister for Immigration and Border Protection* [2018] FCA 1229 (17 August 2018) the Court held that the decision of the Administrative Appeals Tribunal (AAT) to refuse the applicant's application for Australian citizenship should be set aside and remitted for determination according to law.

The applicant (who has a severe language disability, borderline low IQ and Austism Spectrum Disorder) was a child born in Australia to Albanian parents. His parents unsuccessfully applied for protection visas, however, the applicant himself was granted a protection visa many years later. The applicant became a permanent resident even though the migration status of his parents was uncertain and his father was being held in immigration detention. The permanent residence status of the applicant meant he was eligible to apply for Australian citizenship, which he did. His application for citizenship was refused by a delegate of the Minister and, on review, the AAT affirmed the delegate's decision.

The challenge to the AAT's decision in the Federal Court focussed on the AAT's use and application of a government policy set out in a lengthy document entitled "Australian Citizenship Instructions" which was made in an exercise of executive power (at [34]). A central question was whether the AAT simply followed the Citizenship Instructions as if they formed a framework constraining its discretionary decision-making function under s 24(2) of the *Australian Citizenship Act 2007* (Cth) (the Act). Upon a close analysis of it, Mortimer J characterised the policy as overly prescriptive, stating at [49]: "decision-makers are in reality directed that they are required to make their decision in the framework set by the policy guidelines". For example,

on a comparison of the detail of the policy compared to the broad discretion under the Act, her Honour was of the view that "the Citizenship Instructions, by their structure, content and language, effectively reverse the operation of the statutory scheme established by the Parliament" (at [68]).

On an examination of the AAT's reasons, the Court held that its task had miscarried in various respects because of the structure and content of the Citizenship Instructions, together with the AAT's strict adherence to them (at [71]-[122]). The applicant succeeded on all of his grounds (at [125]-[135]), which included that aspects of the policy contained in the Citizenship Instructions were unlawful (at [244]-[262]) and that the AAT inflexibly applied the policy in the Citizenship Instructions (at [263]-[272]).

Mortimer J undertook a close analysis of the seminal authorities on the role of executive policy, especially in the AAT (at [139]-[199]). After doing so, her Honour explained at [200]: "The structure, nature and content of a particular executive policy may increase the risk that in applying it, a decision-maker may cross the boundary between lawful and unlawful use of executive policy in exercising a statutory power. The more general a policy, the more likely it is to invite consideration of the "fullness … of relevant circumstances" and leave an "unaffected range of discretion" for exercise, to use the words of Brennan J in *Drake (No 2)*. The more prescriptive and rule-like the policy, the more likely it is to encourage decision-makers to feel compelled to adhere to each part of it, follow its structure with strictness and approach the policy as if it formed part of the statute. Further, the more likely the policy is to stray into directing decision-makers as to the outcome, or "usual" outcome, of an exercise of power".

BANKRUPTCY – VALIDITY OF BANKRUPTCY NOTICE

Whether a bankruptcy notice is a nullity where it uses pseudonyms instead of the debtor's and creditor's names

In *LFDB v MS S M* [2018] FCA 1397 (13 September 2018) Markovic J dismissed an application to have a bankruptcy notice set aside.

The bankruptcy notice used the pseudonyms of Ms S M for the creditor's name and LFDB for the debtor's name. These pseudonyms had been used to describe the parties in a number of proceedings before the courts in New Zealand, in the Federal Circuit Court of Australia and in the Federal Court of Australia (at [7]).

Based on the use of the pseudonyms instead of their names, LFDB argued that the bankruptcy notice was a nullity for two reasons (at [25]). The first basis was that the way in which the addressee and creditor are named in the bankruptcy notice rendered it a nullity because of the public interest policy which underpins bankruptcy; namely, to inform other creditors and the public of the debtor's status and to prevent a multiplicity of proceedings. The second basis was that the addressee, LFDB, was likely to be misled as to the identity of the creditor named in the bankruptcy notice.

The Court rejected both arguments. On the first issue, Markovic J held that the concerns raised by LFDB did not arise at the stage of service of a bankruptcy notice (at [30]). Her Honour explained "at the point of its issue, a bankruptcy notice operates only as between the addressee and the creditor … The creditor makes the application and the bankruptcy notice is issued to it. The creditor will then serve it on the debtor. At that stage it is not a public document and no other creditor of the same debtor can rely on that bankruptcy notice". The Court went on to note that it will be different once a creditor's petition is filed, where the need to be able to identify the parties and, in particular, the debtor is brought into sharp focus. Markovic J stated at [31]: "Although not in issue on this application, at that stage the issues raised by LFDB take on a different complexion and would lead one to conclude that the use of acronyms or pseudonyms in a creditor's petition would not be appropriate given the policy behind, and scheme of, the Act".

On the second issue, the Court rejected that LFDB could be misled about the identity of the creditor described as "MS S M" (at [35]-[42]).

CONSUMER LAW – UNCONSCIONABILITY

Proving an unconscionable system of conduct or pattern of behaviour

In *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155 (19 September 2018) the Full Court (Allsop CJ, Middleton and Mortimer JJ) allowed an appeal and set aside the primary judge's declaration that it engaged in a system of conduct or a pattern of behaviour in connection with the supply of online vocational education courses to consumers, and that the system or pattern of behaviour was unconscionable in contravention of s 21 of the Australian Consumer Law (ACL).

At first instance, Perram J held that Unique International College (Unique) had contravened multiple sections of the ACL: ss 18 and 29 relating to misleading and deceptive conduct; ss 74, 78, 78 and 79 relating to unsolicited consumer agreements; and s21 relating to unconscionable conduct. The unconscionable conduct case had two distinct elements. One focussed on Unique's enrolment practices (the systems case) and the other focussed on Unique's conduct to six named consumers (individual consumer case). The primary judge found for the ACCC on both unconscionable conduct cases, however the appeal was confined to only the systems case.

The Full Court held that the primary judge erred and that the evidence was insufficient to prove the system case on the balance of probabilities, both as to the conduct said to constitute the system or pattern of behaviour, and as to the characterisation of that conduct as unconscionable (at [92]).

The Full Court undertook a detailed analysis of the current state of authority concerning contraventions of s 21 of the ACL by reason of a system of conduct or pattern of behaviour (at [103]-[153]), noting however that there had previously been "comparatively little consideration of the function and operation of s 21(4) in a principled way" (at [105]).

Allsop CJ, Middleton and Mortimer JJ said at [104]: "A system of conduct requires, to a degree, an abstraction of a generalisation as to method or structure of working or of approaching something. If s 21(4)(b) is to be engaged, it is the system that is to be unconscionable. Nevertheless, the concept of unconscionability (even of a system) is a characterisation related to human conduct by reference to conscience, informed by values taken from the statute".

The Full Court's analysis emphasised that the nature of the allegations of unconscionable conduct will govern how probative the evidence of individual consumers will be stating at [135]: "The more generic the alleged conduct, and the less the unconscionability depends on the attributes of consumers, the more probative evidence about what happened to a number of consumers may be". The Full Court's consideration of previous cases showed that importance of the particular forensic choices of the parties in seeking to prove (or explain) the existence of the alleged system (at [150]).

In concluding that that there was insufficient evidence in the case of an unconscionable system of conduct or pattern of behaviour, the Full Court specificied the evidence that the ACCC could have but did not bring to support the systems case (at [167]-[171] and [254]).

The ACCC's cross-appeal was dismissed.

DECEMBER

ADMINISTRATIVE LAW – MIGRATION LAW

Procedural fairness – whether practical, direct and non-misleading advice as to how material disclosed might be used by the decision-maker

In *Stowers v Minister for Immigration and Border Protection* [2018] FCAFC 174 (12 October 2018) the Full Court allowed the appeal and set aside the primary judge's decision. The appellant is a citizen of New Zealand. His visa was mandatorily cancelled under s 501(3A) of the *Migration Act 1958* (Cth) because he had a "substantial criminal record" under s 501(7)(c) and consequently did not pass the "character test" in s 501(6)(a). The assistant minister decided not to revoke the visa cancellation decision. The primary judge dismissed a challenge to the assistant minister's on the ground of procedural fairness. The sole ground of appeal to the Full Court was that the primary judge erred in failing to find that the assistant minister made a jurisdictional error by denying the appellant procedural fairness (at [34]).

Flick, Griffiths and Derrington JJ stated at [52]: "... Mr Stowers was put on notice by the relevant terms in Part C of Direction 65 that any 'serious conduct' on his part as defined in the Direction, as well as any criminal conduct, was potentially relevant to the primary consideration of protecting the Australian community. Five months after Mr Stowers' attention was drawn to the potential

relevance of Part C, he was provided with additional documentary material and was told that it might be taken into account. The central issue in this appeal is whether it was procedurally unfair not to give Mr Stowers greater specification of that additional material … which put him on notice as to which parts of that material might be relied upon in finding that he had engaged in 'serious conduct' and that this might be relied upon in refusing his revocation request".

The Full Court held that Mr Stowers was not given practical, direct and non-misleading advice about the "factors critical" to the assistant minister's revocation decision (at [53]-[59]). Their Honours explained at [49]: "The learned authors of Australia's leading text, *Judicial Review of Administrative Action and Government Liability*, 6th ed, state at p 545 that the approach of 'practical, direct and honest' advice of the 'factors critical' to a decision provides 'a useful general guide to disclosure'. We respectfully agree but believe that the word 'non-misleading' is more appropriate than the word 'honest', noting that there was no evidence of dishonesty in *NBNB* or here. 'Honesty' on the part of those administering legislation should be assumed."

COSTS

Application for order for costs against non-parties to a proceeding

In *Popeye Bido Pty Limited (Receivers and Managers Appointed) v Intermediate Capital Asia Pacific 2008 GP Limited* (No 3) [2018] FCA 1597 (24 October 2018) the Court dismissed the respondents' application under s 43 of the *Federal Court of Australia Act 1976* (Cth) for costs against non-parties. The respondents' application was for a considerable sum of costs for an interim injunction obtained by the applicants ex parte, and the unsuccessful attempt by the applicants to have the injunction continued as an interlocutory injunction. The non-parties against whom the costs orders were sought were directors of the four companies of the applicants. Besanko J considered the relevant principles at [13]-[18] and, in particular, the principles stated in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 192-193 per Mason CJ and Deane J (with whom Gaudron J agreed).

Industrial law – orders accompanying pecuniary penalties

Whether power to order advertising of the fact that the contraventions have been found and the penalties imposed

In Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The BKH Contractors Case) (No 2) [2018] FCA 1563 (18 October 2018) the Court imposed pecuniary penalties on the union and individuals in relation to contraventions of ss 340, 343, 494 and 500 of the Fair Work Act 2009 (Cth) (FW Act). Flick J also held that the Court had power under s 545 of the FW Act, and it was appropriate in the exercise of discretion, to make an order for advertising of the fact that contraventions have been found to have been made out and the penalties imposed (at [146]-[157]).

Flick J explained at [152]: "The purpose achieved by making such an order is to inform (inter alia) those members of the building industry engaged in construction work of a like kind to that in the present proceeding of the outcome of the proceeding and to inform them of the kind of conduct which constitutes a contravention of the Fair Work Act. It also achieves the purpose of informing members of the Respondent Union of the kind of conduct that has been held to constitute a contravention. The making of such an order, it is considered, falls naturally within the ambit of the power conferred by s 545 to 'make any order the court considers appropriate' in respect to the contraventions. If necessary, it is further considered that such an order can accurately be characterised as 'preventative' Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] HCA 3 at [104], (2018) 273 IR 211 at 237 per Keane, Nettle and Gordon JJ. Advertisements of the kind presently envisaged will hopefully go some way to 'preventing' further like contraventions of the Fair Work Act. At the very least, advertisements may cause individual union members to pause before pursuing unlawful conduct …"

His Honour noted that the Full Federal Court is reserved in an appeal from another judgment (which was by his Honour) concerning orders for advertising of contraventions (at [156]).

Whether personal payment order should be made

In *Australian Building and Construction Commissioner v Gava* [2018] FCA 1480 (2 October 2018) the Court imposed pecuniary penalties on Mr Gava and the CFMEU for contraventions of s 503 of the *Fair Work Act 2009* (Cth). White J was not persuaded by the regulator to make an order for the union official to personally pay a pecuniary penalty imposed on him without the union doing so (that is, a personal payment order) (at [79]-[93]).

White J observed at [90]: "The existence or absence of a history of contraventions by an official is very relevant to the discretion concerning the making of a personal payment order but, in my opinion, it would be inappropriate for the Court to proceed on the basis that such an order should be made only when an official has such a history. The overriding consideration is whether the making of the order is appropriate so that the contravener will feel the burden or sting of the penalty. Such an order may be appropriate in a case of a first time contravener. Equally, the Court may be satisfied in the circumstances of a particular case that it is not appropriate even though the official has a history of contraventions."

MISFEASANCE IN PUBLIC OFFICE

Damages for misfeasance

The Full Federal Court had previously allowed an appeal in which it held that a local council had engaged in misfeasance in public office: *Nyoni v Shire of Kellerberrin* (2017) 248 FCR 311 (summarised in *LIJ*, July 2017). Subsequently the High Court refused the Shire's application for special leave to appeal to the High Court: [2018] HCATrans 027. In *Nyoni v Shire of Kellerberrin (No 10)* [2018] FCA 1576 (19 October 2018), on remitter from the Full Court, Barker J determined the assessment of damages for misfeasance. The Shire and its chief executive officer were ordered to pay the applicant damages of $30 000, comprising $15 000 general damages, $5000 aggravated damages and $10 000 exemplary damages, to be paid by them on a joint and several basis.

PRACTICE AND PROCEDURE

Preliminary discovery

In *Aristocrat Technologies Australia Pty Limited v Ainsworth Game Technology Limited* [2018] FCA 1511 (11 October 2018) the Court held that it would make orders for preliminary discovery under r 7.23 of the *Federal Court Rules 2011* (Cth). The application arose in the context of a prospective claim for misuse of confidential information and infringement of copyright. The Court summarised the principles to be applied in an application for preliminary discovery (which were not in dispute) at [41]-[47].

SOMETHING NEW, JUST FOR YOU!

On Wednesday 13 February 2019, the Society's Health & Wellbeing Program and logo was officially launched at a breakfast CPD event held at Oaks Elan, Darwin. We thank the Hon. Chief Judge John Lowndes for officially launching the program and logo as well as special guest speaker, Dominic Upton (Dean, College of Health and Human Sciences, Charles Darwin University).

Even for the most resilient of us, life can be challenging and full of ups-and-downs. Health and wellbeing isn't solely about mental health—it's about your overall health—emotional, physical, social, familial and environmental.

The program hopes to raise awareness of health and wellbeing within the NT legal profession and to give practitioners the tools and coping mechanisms to assist in managing their day-to-day lives to create a healthier work/life balance.

A series of CPDs will be held in the Darwin, Katherine and Alice Springs regions throughout the year covering a range of topics.

If you have any ideas for CPD topics that fall into the area of health and wellbeing or are interested in presenting a CPD, please contact pdo@lawsocietynt.asn.au.

The annual Walk for Wellness and the Mental Health Breakfast are still planned to occur during Mental Health Week (6-13 October)—save the date!

Balance will now include a column as part of the program. If you are interested in contributing please email balance@lawsocietynt.asn.au.

Don't forget to follow us on social media for updates as they occur. Updates will also be posted in the *Practitioner* e-newsletter, so be sure to have a read.

facebook.com/lawsocietynt

twitter.com/lawsocietynt

There is only one YOU. Take care of yourself and please take advantage of the activities and events that the Health & Wellbeing Program presents throughout the year.

The Health & Wellbeing Program is an initiative of the Society's Council and the Legal Education Committee.

Health & Wellbeing PROGRAM

This logo will accompany any event or activity associated with the Health & Wellbeing Program.

The spiral is a symbol of many ancient cultures and is one of the oldest shapes found in the world. Most commonly, the spiral represents a universal journey, evolution, energy, creation and growth.

Spirals are also a natural phenomenon, for example, seashells, whirlpools, cyclones and galaxies.

The logo's spiral represents the journey of self and development.

The 'dots' represent hurdles and the challenges that we experience throughout our lives—they are the stepping stones of life.

Blue:	**Green:**
Positivity	Balance
Reflection	Awareness
Calm	Harmony
Strength	Restoration
Stability	Growth

Please contact the Society's CEO if you would like to discuss the program ceo@lawsocietynt.asn.au.

National & International Conferences and Events

Dates, location and time subject to change.

12–19 May 2019

LAW WEEK NORTHERN TERRITORY

Location: Darwin

- 13 May – NTYL Great Debate
- 14 May – Tug of Law
- 16 May – Law Week Lunch, Darwin
- 17 May – Law Week Dinner, Alice Springs
- 18 May – Trivia Night
- 19 May – Marsh Cricket Match

Information will be released soon!

21 June 2019 – save the date

LAW SOCIETY ANNUAL DINNER

Location: Darwin

22–28 June 2019

CLANT BALI CONFERENCE

Location: Bali
For more information: www.clant.org.au

6–8 September 2019

PRACTICAL ADVOCACY WORKSHOP

Location: Darwin
For more information, email: pdo@lawsocietynt.asn.au

14 November 2019 – save the date

LAW SOCIETY NT AGM

Location: Darwin

6 December 2019 – save the date

LAW SOCIETY NT MEMBERS XMAS DRINKS, DARWIN

Location: Darwin

12 December 2019 – save the date

LAW SOCIETY NT MEMBERS XMAS DRINKS, ALICE SPRINGS

Location: Alice Springs

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SMALL LAW INDUSTRY INDEX

Small Law Industry Index

Predictions for 2019 and Beyond

Australia's inaugural and only industry-wide outlook for the small law arena provides a benchmark for measuring the key issues and trends facing the legal market.

Our must-read Index measures key issues, including:

- **1 in 2** indicated increased compliance as one of their greatest challenges
- **3 in 5** will seek future employees skilled in both the law and technology
- **3 in 10** have been sexually harassed or bullied in the workplace
- **6 in 10** believe legal professionals are not adequately resourced to cope with mental health in 2019 and beyond

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