Federal Court Judgments

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May

Administrative and migration law

Legal unreasonableness by failure to exercise statutory discretion – s473DC of the *Migration Act 1958* (Cth)

In D*P117 v Minister for Home Affairs* [2019] FCAFC 43 (15 March 2019) the Full Court allowed an appeal and set aside the decision of the Federal Circuit Court which had dismissed the appellant's application for judicial review of a decision of the Immigration Assessment Authority (IAA). The IAA affirmed a decision by the Minister's delegate to refuse the appellant a Safe Haven Enterprise Visa (SHEV).

The issue in the appeal was whether the primary judge erred in not accepting the appellant's contention that the IAA had acted unreasonably by failing to consider whether to exercise its discretion under s473DC of the *Migration Act 1958* (Cth) to obtain information from the appellant, whether by way of an interview or in writing, for the purposes of its review of the decision made by the Minister's delegate to refuse the appellant an SHEV.

Relevantly, although the delegate refused to grant the appellant an SHEV, the delegate accepted that the appellant had been tortured and sexually assaulted by Sri Lankan officials on at least two occasions. The IAA took a different view on the issue of the sexual assaults and inconsistencies in the appellant's claims apart from those referred to by the delegate. The IAA did not accept that the appellant was a victim of sexual assault as claimed by him.

To the Federal Circuit Court the appellant submitted that the IAA acted unreasonably in not exercising its discretion under s473DC, in circumstances where the IAA made adverse findings against him based on material which was before the delegate, but which the delegate herself had not relied on. In particular, the appellant complained that he should have been interviewed by the IAA and given an opportunity to comment on or explain supposed inconsistencies and this was relevant to the issue whether or not the sexual assault had occurred as claimed by him.

Griffiths and Steward JJ noted an "important concession" by the Minister that the IAA had in fact failed to consider the exercise of the power under s473DC in relation to the issue whether or not the sexual assaults had in fact occurred or in relation to the relevant inconsistencies (at [44]). The joint judgment held that the IAA's failure to consider whether or not to exercise its power under s473DC in respect of either the issue of the sexual assaults or the relevant inconsistencies was legally unreasonable (at [45]-[47]). They stated at [48]: "It is necessary to now determine whether or not the IAA's error in not considering the possible exercise of its power under s473DC in respect of the two relevant matters is material and involves jurisdictional error (see *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 92 ALJR 780 (Hossain) and *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 (SZMTA))". Griffiths and Steward JJ held there was jurisdictional error which was material.

Mortimer J agreed in the result but gave separate reasons for judgment. Her Honour's approach differed on the following points of principle: (1) legal unreasonableness and procedural fairness (at [78]-[95]); (2) procedural fairness and materiality (at [96]-[107]); and (3) how to express the test for legal unreasonableness (at [108]-[112]).

In relation to the second of those issues, in contrast to the approach of the joint judgment at [48] set out above, Mortimer J said at [106]: "However, as the law currently stands, I do not understand that the ratio of the decisions in *Hossain and SZMTA* require that where an exercise of power has been found to be legally unreasonable (a ground not addressed in either of those decisions), the supervising court must conduct a separate assessment of'materiality', before being able to characterise the error as jurisdictional in character".

Legal professional privilege

Holder of legal professional privilege of government advice – whether waiver of privilege by evidence given during hearing

In *Australian Workers' Union v Registered Organisations Commissioner* [2019] FCA 309 (7 March 2019) Wheelahan J refused leave to the Australian Workers' Union (AWU) to uplift and inspect documents produced in answer to a subpoena that were the subject of a claim for legal professional privilege (LPP) at common law. The documents were produced by the Secretary of the Department of Jobs and Small Business (Department) in answer to a subpoena issued by the AWU.

Wheelahan J determined this dispute while the main proceeding was part-heard before another Judge (Bromberg J). The main proceeding is the AWU's claim for relief on grounds including that the decision of the Registered Organisations Commissioner (Commissioner) to conduct an investigation under s331(2) of the *Fair Work (Registered Organisations) Act 2009* into certain donations alleged to have been made by AWU was affected by jurisdictional error, because the decision was made for an improper political purpose.

The documents in dispute were communications for the purpose of legal advice relating to the two letters from Senator the Hon Michaelia Cash to the Commissioner that were sought to be relied on by the AWU to support its claims in the main proceeding.

The issues before the Court were: (1) who was the holder of LPP in the disputed documents (at [13]-[35]); and (2) did Senator Cash or her chief of staff (Mr Davies) effect a waiver of that privilege (at [36]-[62]).

The first issue involved an analysis of who was the holder of privilege in documents that were emails from government lawyers to a Minister's office. That was relevant in order to determining whether (if she did) Senator Cash waived LPP. Possible holders of the privilege were Senator Cash (who was the relevant Minister at the time that legal advice was sought and obtained), Ms Kelly O'Dwyer (who was the relevant current Minister), the office of the Minister or the Commonwealth of Australia. Wheelahan J stated that the identification of the holder of the privilege requires that a natural person, or an entity with a legal personality such as the Crown, be identified (at [34]). The Court held that the Crown was the holder of the privilege because at the time the letters were prepared and sent, Senator Cash was exercising a function of one of the Queen's Ministers of State for the Commonwealth (at [35]).

The second issue concerned which servants or agents of the Commonwealth had authority to waive privilege. The question of implied waiver also arose in circumstances where the Commonwealth was not a party to the proceeding, and nor were Ms O'Dwyer, Senator Cash or Mr Davies with the latter two having attended court and given evidence as a result of the coercive process of a subpoena (at [54]). Wheelahan J held that the evidence of each of Mr Davies and Senator Cash did not give rise to an implied waiver of LPP (at [56] and [66] respectively).

Further, Wheelahan J explained at [61] that Senator Cash did not have authority to waive privilege: ". . . On the evidence such as it is, I would infer that the current Minister is entitled to exercise control over the privileged content of the six documents as an incident of her authority as Minister responsible for administering the *Fair Work Act*, and the *Fair Work (Registered Organisations) Act*. It follows that with that authority, she might waive or authorise the waiver of privilege in the documents. There may be others within the Commonwealth who have authority to waive the privilege. However, on the state of the evidence I am not satisfied that Senator Cash, who no longer holds a portfolio with responsibility for the relevant legislation, had authority in fact to waive privilege in the six documents. Senator Cash did not give evidence on behalf of the Commonwealth: she gave evidence as to events to which she was a witness, and as to her own state of mind. In that respect, she was not in the same position as a party witness. The mere fact that Senator Cash is a Minister of the Crown does not permit me to draw a reasonable and definite inference that Senator Cash had any authority to waive privilege in the six documents . . ."

Bankruptcy and corporations law

Application by trustee in bankruptcy – obligation on trustee to present full picture to the Court

In *Carrafa v Chaplin, in the matter if the bankrupt estate of Michael Chaplin* [2019] FCA 415 (22 March 2019) Colvin J dismissed the application by the trustee in bankruptcy for vacant possession of a property relying on ss30, 77 and 129 of the *Bankruptcy Act 1966* (Cth).

Colvin J stated at [8]: "So it is that more than 12 years after the commencement of his bankruptcy, during which time Mr Chaplin and his children have lived in the Broomehill property as their home, the trustee now seeks orders requiring Mr Chaplin to relinquish vacant possession. In support of the application the trustee condescends to no detail about the circumstances in which Mr Chaplin came to be allowed to remain in the property all this time, the nature and extent of any work undertaken by Mr Chaplin on the property, the circumstances in which the insurance was unable to be obtained, and why there has been such a delay in arranging the sale of the property during which, for a period of many years, Mr Chaplin has maintained the property while living in it as his home. The trustee simply claims that, by reason that he is now the registered proprietor of the Broomehill property in his capacity as trustee of the bankrupt estate, he is entitled to unconditional orders for vacant possession".

The application was refused for two reasons: (1) the residential tenancy of Mr Chaplin had not been terminated (at [24]-[32]); and (2) the trustee had not →

disclosed to the Court all the relevant circumstances (at [33]-[38]).

On the second reason, Colvin J said at [33]: "A trustee in bankruptcy has all the fiduciary duties of a trustee under the general law (as modified by the Act): Re *Fuller* [1996] FCA 523. Further, the trustee is an officer of the court when exercising powers and discretions: Re *Condon; Ex parte James* [1874-80] All ER Rep 388 at 390. So the decision to bring the present application and the manner in which it is to be brought are both matters to which these obligations apply".

June

Administrative and environment law

Judicial review under the EPBC Act

In T*riabunna Investments Pty Ltd v Minister for Environment and Energy* [2019] FCAFC 60 (15 April 2019) the Full Court heard an appeal from the dismissal of a judicial review proceeding in relation to a decision by the delegate of the Minister under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The subject matter of the appeal was an exercise of power by the delegate under s75 of the EPBC Act, which allowed for the establishment and operation of a salmon farm at Okehampton Bay in Tasmania.

Central to the question before the primary judge, and on appeal, was whether the proposal was a "controlled action" for the purposes of the EPBC Act because the establishment and operation of the farm would, or was likely to, have a significant impact on one or more of the matters of national environmental significance set out in Pt 3 of Ch 2 of the EPBC Act (at [116]). The delegate decided, as set out in the Notification of Referral Decision (Notification), that the "proposed action is not a controlled action provided it is undertaken in the manner set out in this decision". By doing so, the delegate decided that the proposed action was not a "controlled action" provided it was undertaken in a "particular manner" within the meaning of s77A of the EPBC Act.

The key issue in the appeal was whether the Notification, given pursuant to s77 of the EPBC Act, complied with s77A of that Act. Mortimer J noted that there had been no other authority where the proper construction and operation of s77A had been determined (at [197]).

The Full Court, in separate reasons given by Besanko J, Flick J and Mortimer J, held that the delegate and primary judge had erred on this issue. The appeal was allowed in part. While relief was not finally decided, the Court's "present view" was that the appropriate relief was to set aside the notice issued under s77 of the EPBC Act and to require a fresh notice to be issued (Mortimer J at [247], which whom Besanko J agreed at [15]).

Administrative and migration law

Jurisdictional error – Whether the discretion to exclude evidence under s138 of the *Evidence Act 1995* (Cth) applies to the Minister in making decisions under the *Migration Act 1958* (Cth)

In *Minister for Home Affairs v Hunt* [2019] FCAFC 58 (11 April 2019) the Full Court allowed the Minister's appeal. In 2017, the Minister decided to exercise his discretion under s501(2) of the *Migration Act 1958* (Cth) to cancel Mr Hunt's visa on the basis that he reasonably suspected that Mr Hunt did not pass the character test and that Mr Hunt had not otherwise satisfied him that he did pass that character test. Mr Hunt challenged this in the Federal Court. The primary judge held that the Minister committed jurisdictional error by failing to have regard to the fact that Mr Hunt's sentence of imprisonment for certain sexual offences for nine months was suspended wholly for two years. The Full Court overturned the primary judge's decision on this point, noting that when regard was had to the totality of the material before the Minister it was not appropriate to draw the inference so as to find as a positive fact that the Minister overlooked the suspension (at [71]).

The Full Court also dismissed Mr Hunt's notice of contention. The notice of contention concerned two documents allegedly obtained by the Home Affairs Department in contravention of the *Information Privacy Act 2009* (Qld). Mr Hunt contended that information as to his prior convictions was obtained by reason of the non-compliance and as his data had been accessed unlawfully, the documents were inadmissible under s138 of the *Evidence Act 1995* (Cth) including in support of the decision to cancel his visa under s502 of the *Migration Act*. The primary judge and the Full Court rejected this ground for a variety of reasons. The Full Court held there is no requirement in Division 2 or elsewhere in the *Migration Act* imposed on the Minister to comply with state (or Commonwealth) privacy laws in the obtaining of information (at [90]). Further, McKerracher, Perry and Banks-Smith JJ said at [72]: "Finally, the discretion under s138 of the *Evidence Act 1995* (Cth) has no application to administrative decision-makers who are not bound to apply the rules of evidence or by the *Evidence Act*, albeit that the rules of evidence may afford guidance to administrative decision-makers: see s4, *Evidence Act*; and eg *Martin v Medical Complaints Tribunal* (2006) 15 Tas R 413 per Evans J (at [15]) and the general discussion in the context of administrative tribunals in *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93 per Flick and Perry JJ (at [88]-[97]). As such, there was no requirement that the Minister undertake the balancing exercise required by s138 of the *Evidence Act* before having regard to the Criminal Record or Sentencing Transcript . . ."

Costs

Consideration of barrister's costs agreement – indemnity principle – uplift fees

In *Mango Boulevard Pty Ltd v Whitton* [2019] FCA 490 (11 April 2019) Rangiah J determined a dispute about the costs previously ordered against the applicants. The applicants had sought judicial review of a decision of the second and third respondents' trustee in bankruptcy and of a resolution passed by their creditors (the Review Proceeding). In an earlier judgment Rangiah J dismissed the proceeding and ordered that the applicants pay the bulk of the respondents' costs. Relevantly, it was the costs of the second and third respondents' Senior Counsel that was now in issue.

The applicants argued that the Senior Counsel entered his costs agreement in contravention of s324(1) of the *Legal Profession Act 2004* (NSW) (repealed) (the LPA (NSW)), that the agreement was void, and that he was not entitled to recover his fees. In the alternative, the applicants argued that the Senior Counsel failed to comply with his obligation under s324(4) of the LPA (NSW) to provide an estimate of his uplift fee, with the consequence that he is only entitled to recover, and they are only required to pay, the fair and reasonable value of his services. The issues in dispute which the Court addressed at [37] were:

- whether the Senior Counsel entered a costs agreement "in relation to a claim for damages"
- whether the Senior Counsel entered a single costs agreement for the whole of the various litigation, or a separate costs agreement for each proceeding, including for the Review Proceeding
- whether the phrase "in the matter to which the costs agreement related" in s327(4) extends to the Review Proceeding, which was not a claim for damages
- whether the Senior Counsel's costs agreement was void under s327(1) because it did not contain an estimate of his uplift fee in contravention of s324(4), and the consequences of such a contravention
- whether the LPA (NSW) applied to the Senior Counsel's costs agreement, or whether the *Legal Profession Act 2007* (Qld) applied instead.

In addressing these issues, Rangiah J considered the connection and distinction between a costs agreement and a retainer agreement (at [65]-[76]).

The costs agreement was held not to be void. However the Senior Counsel's costs agreement did not comply with s324(4) of the LPA (NSW) which required that the agreement contain an estimate of the uplift fee or, if that was not reasonably practicable, a range of estimates of the uplift fee. The effect of s319(1)(c) was that his legal costs were recoverable "according to the fair and reasonable value of the legal services provided" (at [101] and [134]-[135]).

Practice and procedure

Application for temporary stay of proceedings

In O*PENetworks Pty Ltd v Myport Pty Ltd* [2019] FCA 486 (10 April 2019) O'Bryan J dismissed an application by a telecommunications carrier seeking a temporary stay of Court proceedings for declaratory and injunctive relief pending the outcome of objections referred to Telecommunications Industry Ombudsman. The Court summarised the principles applicable to a stay of proceedings (at [10]-[25]) pending the outcome of proceedings before an administrative body.

July

Administrative law

Whether an executive policy is inconsistent with a statute and unlawful

In *Minister for Home Affairs v G* [2019] FCAFC 79 (21 May 2019) the Full Court allowed the Minister's appeal and set aside a declaration by the trial judge that part of the Australian Citizenship Instructions, a policy document, was inconsistent with the *Australian Citizenship Act 2007* (Cth) and unlawful. The trial judge had also 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. There was no appeal from those orders. Note: A summary of the trial judge's decision in *G v Minister for Immigration and Border Protection* [2018] FCA 1229 was published in *Balance* 1|19.

The Full Court addressed the key principles and cases applicable to whether an executive policy is inconsistent with a statute and unlawful at [58]-[62]. The Full Court rejected G's submission that it is not open to the Minister to challenge the declaration because he has not sought to appeal from the orders of the primary judge setting aside the decision of the AAT and remitting the matter for determination according to law. Murphy, Moshinsky and O'Callaghan stated at [76]: "The declaration is a discrete matter and there is no inconsistency between the Minister accepting the correctness of the orders setting aside the decision of the Tribunal and remitting the matter, and challenging the correctness of the declaration".

Practice and procedure – witnesses

Whether Court should make order overriding express confidentiality obligation of potential witnesses

Zantran Pty Limited v Crown Resorts Limited [2019] FCA 641 (8 May 2019) is a securities class action. The essence of the alleged case of Zantran Pty Limited (Zantran) is that the promotional activities of Crown Resorts Limited (Crown) in mainland China directed to recruiting Chinese "high roller" gamblers to gamble in its casinos in Melbourne, Perth and Macau were illegal under Chinese criminal law. It is uncontentious that on 6 February 2015 the Chinese government announced a crackdown on the promotion of overseas gambling →

to Chinese nationals. Nineteen Crown employees were ultimately charged with criminal offences related to the promotion of gambling and pleaded guilty and were convicted in China. Based on these and other matters, Zantran alleges in its class action in the Federal Court that Crown breached its continuous disclosure regime under ASX listing rules and s674 of the *Corporations Act 2001* (Cth) and engaged in misleading or deceptive conduct.

The interlocutory issue before the Court was to whether Zantran's legal representatives should be permitted to confer with 19 named former Crown employees to obtain witness statements or outlines of evidence and/or to obtain copies of documents connected with their criminal prosecution and conviction. The former Crown employees had entered into an agreement with a Crown subsidiary with express confidentiality obligations. Crown accepted that its former employees can give evidence at the trial but argued that they cannot confer with Zantran's legal representatives prior to trial, and that if Zantran wishes to call them to give evidence they must be called "cold".

Murphy J held it was appropriate to make orders to relieve the former Crown employees of their contractual confidentiality obligations for the limited purpose of allowing them to provide witness statements prior to trial and to provide copies of documents produced by the prosecution or the Court in China in connection with their criminal prosecutions and convictions (at [110]). The Court's decision was particularly based on the obligation of the Court under s37M of the Federal Court of *Australia Act 1976* (Cth) (FCA) to exercise its powers in a way that best promotes the overarching purpose of facilitating the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible (at [7] and [116]-[123]). The Court also relied on its power to make such orders under ss21, 23, 37P and 33ZF of the FCA. The class action nature of the proceedings had relevance given the Court's supervisory and protective role in relation to class members' interests (at [145]) and the obligations of Zantran and its legal representatives to class members (at [146]-[148]).

Murphy J said at [154]: "In terms of the competing public interest, I accept that there is a public interest in upholding contractual bargains, including as to confidence. But in my view, in the circumstances I have described, that interest is outweighed by the public interest in the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. In this regard it is relevant that Crown does not argue that it will suffer any commercial disadvantage in the sense of disclosure of trade secrets or confidential information that could be used by a competitor if the proposed orders are made, and relevant that Crown no longer engages in the same promotional activities in China. Relieving the employees of their confidentiality obligations for the limited purpose of providing a witness statement and/or documents regarding their criminal prosecution and conviction will involve the minimum necessary interference with the employees' obligations of confidence".

The Court discussed the principal authorities relevant to whether witnesses should be relieved of contractual obligations of confidence at [70]-[100]. Murphy J explained why he reached different conclusions to those reached in some of those cases or why certain of the cases were distinguishable or similar (at [159]-[161]).

Practice and procedure – litigation guardian

Whether the advice of the applicants' legal representative constitutes advice of an "independent lawyer"

Brindle v The Corporation of the Trustee of the Roman Catholic Archdiocese of Brisbane operating as Brisbane Catholic Education [2019] FCA 609 (2 May 2019) and *Lewis v The State of Victoria (Department of Education and Training)* [2019] FCA 714 (21 May 2019) are two recent examples of applications by a litigation representative for approval of a settlement under r9.70 of the *Federal Court Rules 2011* (Cth). In both cases the settlements were approved.

Rule 9.71(2)(c) provides that the interlocutory application for approval must be accompanied by "an opinion of an independent lawyer that the agreement is in the best interests of the person under a legal incapacity". On this requirement, Kenny J explained in Lewis at [13] (omitting case citations): "In previous decisions, it has been held that the requirement in r9.71(2)(c) for the opinion of an 'independent lawyer' did not necessitate the provision of an opinion from a lawyer who had no previous association with the proceeding. Rather, this required that the lawyer providing the opinion did so 'in furtherance of the lawyer's duty to assist the Court and not in furtherance of any duty the lawyer may have to a party in the proceeding': . . . Other judges have followed the same approach: . . . This does not exclude the possibility that, in the appropriate case, the Court may form the view that the opinion of a lawyer with no previous association with the proceeding is needed, as, for example, happened in *Gray v State of Victoria (Department of Education and Early Childhood Development* [2017] FCA 353 (Murphy J)".

Reeves J had undertaken a similar approach on the "independent lawyer" issue in Brindle at [12].

Statutory interpretation

Interpretation of "necessary or convenient" powers

Legislative provisions which contain "necessary or convenient" or "necessary and expedient" powers are commonplace. The appeal in *Northern Land Council v Quall* [2019] FCAFC 77 (20 May 2019) raised native title and administrative law issues. In that context, the Full Court considered s201BK of the *Native Title Act 1993* (Cth) which provides in sub-s (1): "A representative body has power to do all things necessary or convenient to be done for or in connection with the performance of its functions". Griffiths and White JJ considered the leading authorities and principles on the proper construction of "necessary or convenient" type powers at [106]-[128]. See also Mortimer J at [144].

Information

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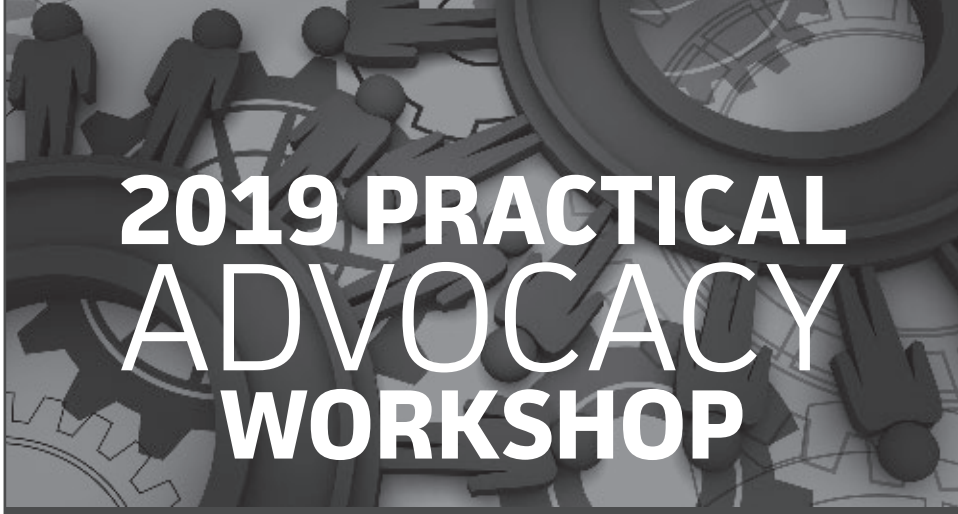

2019 PRACTICAL ADVOCACY WORKSHOP

MANDATORY PRELIMINARY SESSION 5–6:30 pm, 29 August 2019

WORKSHOP STARTS 5 pm, 6 September 2019
CONCLUDES 1 pm, 8 September 2019

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Although the main part of the workshop is based on a sample Supreme Court case, the advocacy principles and skills gained apply to all matters and jurisdictions.

You will have the option of having someone record your performances using your own smartphone as the experience of watching yourself, with the sound on and off, provides valuable feedback!

MANDATORY PRELIMINARY SESSION

A mandatory preliminary session will be conducted 5 to 6:30 pm, Thursday 29 August covering: *how to prepare effectively for a trial; and, how to develop a coherent case theory (this is critical).*

The mandatory preliminary session will be held at the Supreme Court in Darwin. For those outside of Darwin attending the workshop, the session will be streamed to the Supreme Court in Alice Springs and the Local Court in Katherine. Please plan your working week to be able to attend one of the major centres. Participants will be expected to have read workshop materials and commenced preparation **before** the mandatory preliminary session.

LAW SOCIETY NT

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