

# High Court and Federal Court Notes

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## Corroboration and Propensity Evidence

### 97/39 Criminal law- sexual offences - evidence of similar sexual conduct - whether corroboration of juvenile victim - whether similar fact evidence.

In *BRS v Q* (25 September 1997) the appellant, a school teacher, was convicted of sexual offences involving a pupil. A fellow pupil gave evidence at trial, without objection, of sexual conduct with the accused. In its address to the jury the crown submitted the evidence of the fellow pupil tended to support and confirm the evidence of the victim. The appellant's conviction was upheld by NSW Court of Criminal Appeal. His appeal to the High Court was allowed: Toohey J, Gaudron J, McHugh J, Kirby J; contra Brennan CJ. The majority concluded the trial judge should have directed the jury as to the use they might make of W's evidence and when evidence rebutting evidence of good character may be used to corroborate the offences. Appeal allowed.

### 97/40 Bankruptcy - "provable debt" in Part X composition - whether contingent liability under a guarantee a provable debt.

In *Pyramid Building Society (In Liq) v Terry* (25 September 1997) in 1988 the respondents guaranteed to the appellant the debts of a debtor. In November 1992 the respondent entered into a composition with their creditors under Part X of the *Bankruptcy Act* 1966 (Cth). The chairman of the meeting of creditors ruled the appellant was not entitled to vote at the meeting. In November 1993 the appellant made demand on the respondents under the guarantee. In an action by the appellant on the guarantee the primary judge concluded the respondents were not released from their obligations by the Part X composition. This decision was reversed by the Court of Appeal (Vic). The appellant's appeal to the High Court was allowed by majority: Gaudron, Gummow JJ; McHugh J; contra Kirby J with Toohey J. The majority concluded that a contingent liability is not capable of resulting in payment of money at the

date of bankruptcy.

### 97/42 Criminal law - issue of warrant for listening device - when issue of warrant by Supreme Court Justice may be challenged in trial before County Court - whether warrant invalid where form fails to comply with provisions of Act.

In *Ousley v Q* (20 October 1997) the appellant was convicted of cultivating a drug of dependence after a trial before a jury in the County Court of Victoria. At that trial evidence was given of conversations recorded by the police through listening devices installed pursuant to a warrant issued by a Supreme Court Justice under the *Listening Devices Act* 1969 (Vic). The County Court Judge declined to consider whether the warrants were invalid on the ground he had no jurisdiction to review an order of the Supreme Court. The appellant's appeal to the Court of Criminal Appeal (Vic) was dismissed. His appeal to the High Court was also dismissed: Toohey J, Gaudron J, McHugh J, Gummow J; contra Kirby J. The majority concluded that the County Court did lack jurisdiction to determine the question of whether the order of the Supreme Court to issue the warrants was valid as otherwise collateral review of the decision of the Supreme Court would occur. The majority observed that as the issue of the warrants was an administrative step, or produced a subordinate instrument, the validity of the warrant as issued could be considered. The court rejected a submission that because the warrant failed to recite on its face that its issue was necessary (as provided in s4A(1)(b) of the Act) the warrant was invalid. The members of the High Court generally observed that the failure to refer to this provision was explained by the form of warrant as found in the Criminal Appeals and Procedure Rules made under the *Supreme Court Act* 1986 (Vic). The High Court concluded the warrant was valid as were the rules requiring its form. Appeal dismissed.

### s97/7 High Court - original jurisdiction - interlocutory order - whether court should grant stay of criminal trial pending accused's action for dec-

### laration of right to legal representation.

In *Frugniet v Victoria* (17 September 1997) the plaintiff commenced an action in the original jurisdiction of the High Court claiming that she would be denied a fair trial before the County Court of Victoria because she had not been granted legal aid. By summons the plaintiff sought an order that the hearing of the trial be stayed pending determination of her action in the High Court. Kirby J declined to grant the order. He observed the plaintiff's claim that she had a constitutional right to a fair trial, as distinct from a rule of practice, was uncertain. Summons dismissed.

## FEDERAL COURT

### Migration - whether RRT biased.

In *Biljin v Minister for Immigration* (VG 766/96, 6 October 1997) Finkelstein J considered authority in determining whether the RRT was actually biased or had not avoided the appearance of disqualifying bias. He concluded the fact that the RRT rejected the evidence of an expert proffered by the applicant by reference to the expert's evidence in other matters and following complaint to the chairperson of the RRT by the expert about the member was not sufficient for the court to find actual bias made out or procedures required by the *Migration Act* had not been complied with.

### Trade practices - abuse of market power - definition of "market".

In *Plume v Federal Airports Corp.* (SG 73/96, 3 October 1997) the applicant claimed, inter alia, that the respondent had improperly exercised market power in the "Alice Springs Transfer Market" by refusing his bus company permission to convey people to and from Alice Springs Airport. He alleged this contravened s.45(2), 46 of TPA. O'Loughlin J. concluded the fact that the respondent had prevented the applicant's company operating in one niche of a market did not constitute a contravention of s45 of TPA and the respondent had not used "market power" but rather its regulatory power and had not contravened s46 of TPA.

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# **F**ocus on Small Business – ASC

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to be worthwhile. Yet, on the other hand, it may be forced to wait and not begin a civil action that it would otherwise commence because the consequence of doing so would be to preclude forever a criminal charge for breach of the same civil penalty provision.

Nevertheless, the ASC is ready and willing to use the courts or its own powers to remove sharks from the water and the NT regional office is always receptive to misconduct reported to it.

## **The Information Focus of the Small Business Program**

The second and perhaps more important aim of the program is to help small business to help themselves.

### **ASC Information Line [1300 300 630]**

The ASC has had its own "infoline" operating since the beginning of 1996 and many Territory practitioners would be aware of it.

The infoline operates in both inquiry mode where any caller can ask for basic information and also complaint mode where a caller may wish to provide the ASC with information about conduct

they are concerned about.

### **ASC data on the Internet [<http://www.asc.gov.au>]**

The ASC's homepage was launched shortly after its infoline service in May, 1996 and has been enhanced to assist small business.

At the most basic level, any Internet user can now confirm the authenticity of the Australian Company Numbers of the corporations they are dealing with. An entity without an ACN may of course turn out to be another type of business organisation and the ASC is keen for small business to be aware of the nature of the legal entities, and hopefully the legal consequences following from a default, that they deal with.

A very useful enhancement to the homepage is a new search mechanism that lists individuals who have been prohibited by the ASC from being involved in the management of a company.

It should be noted however that this search will not disclose individuals who are prohibited for other reasons such as being undischarged bankrupts or hav-

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ing been convicted of a fraud offence.

A small business signpost has been added to the homepage and take the inquirer to ASC public such as "The Company Director's Survival Kit", "Company Essentials" "Getting Your Money Back". It provides an easy link to Con Netsearch which gives inquirers access to information brokers who can provide other useful information such as company profiles and financial information. A version of the "Small Business Guide" that appears as Part 1.5 to the Corporations Law will also shortly join the list of material available.

### **Public Record**

Practitioners will already be aware that more detailed searches of company information, such as the identity of directors, the address of the registered office and the principal place of business, and searches for registered charges over company property are available from the ASC. These services are available for a small fee from the ASC Business Centre at the Harbourview Building in McMinn Street or through the ASC's on-line information broker either by going through the ASC's site, to one of its brokers' sites, or phoning one of the brokers)

### **Presentations**

ASC staff are available to conduct presentations about Corporations topics to small business operators, advisers, and other interested groups. These presentations usually include information about services available from the ASC and how to access them, a director's duties, the dangers of insolvency trading and how to identify or avoid "phoenix companies" (ie companies that rise out of the ashes of old companies using the old company's assets, including the goodwill in a similar name but leaving the debts and liabilities behind).

A number of presentations have already been conducted in the Darwin area and groups interested in an Small Business presentation should contact the small business program manager at the regional office on 89436

## High Court and Federal Court Notes

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### **Practice - discovery - legal professional privilege - operation of Evidence Act 1995 (Cth) - legal advice and fraud.**

In *Zemanek v Commonwealth Bank* (NG 873/96, 2 October 1997) Hill J considered the operation of s117, 118 and 119 of the *Evidence Act 1995* (Cth). He observed that in some respects the statutory definition of legal privilege was broader than the common law and in others narrower. The applicant claimed the document came into existence in furtherance of the crime of making a false or misleading representation by the bank contrary to s53(g) of TPA. Hill J observed that more than a mere allegation was required and the applicant had not established a scintilla of evidence in support of the fraud.

### **Industrial law - whether certified agreement may be enforced by injunction.**

In *CFMEU v Gordonstone Coal Management* (NG 804/97, 30 September 1997)

Burchett J concluded the remedies for breach of a certified agreement specified in s178 of *Workplace Relations Act* constituted a special statutory mode of enforcement not only of awards and orders made under the Act but also of certified agreements. He concluded this scheme excluded the jurisdiction of the court to grant injunctions.

### **Administrative law - migration - reconsidered decision - confidential material.**

In *Chu Sing Wun v Minister for Immigration* (WAG 32/97, 19 September 1997) a Full Court considered when an application remitted from the Federal Court to a decision maker for reconsideration will require a hearing "de novo" or merely a reconsideration of the grounds on which the order to review was granted. The court also considered when a primary judge should consider confidential information withheld from the applicant to ensure that natural justice has been afforded.

