High Court Notes

Prepared for the Law Council of Australia and its Constituents by Thomas Hurley, Barrister, Vic., NSW, ACT
(Editor, Victorian Administrative Reports)

HIGH COURT NOTES

Suggested Title: Equity and Perils in the Family and at Sea

Equity - unconscionable conduct - undue influence.

In ***Bridgewater v Leahy*** ([1998] HCA 66, 22 October 1998) the High Court considered the distinction between undue influence and unconscionable conduct as the basis for equitable relief. It divided upon the application of the doctrine of unconscionable conduct. The appellants were the wife and daughters of a Queensland pastoralist who in his 1985 Will bequeathed to them his pastoral interests subject to an option in favour of the pastoralist's male nephew (the respondent) to purchase the interests. In 1988 the pastoralist sold some of his holdings to the respondent for $696,811. At settlement of this sale the pastoralist forgave the nephew all bar $150,000. The pastoralist died in April 1989. The respondent exercised the option to purchase the interests of the pastoralist. The primary judge dismissed a claim by the appellants to set aside the 1988 transaction. He found the pastoralist, though aged, had his full mental faculties and rejected a claim based on undue influence. An appeal to the Supreme Court of Queensland was dismissed by majority. The appellants' appeal to the High Court was allowed by majority: Gaudron, Gummow, Kirby JJ; contra Gleeson CJ; Callinan J. The majority observed that the doctrine of undue influence was concerned primarily with the weakness of one party whereas the doctrine of unconscionable conduct considered the conduct of the defendant [72]-[74]. The majority concluded the evidence established the pastoralist was emotionally dependent on the respondent [122] and the 1988 transaction should be set aside as a result of unconscionable conduct by the respondent passively accepting a grossly improvident transaction [122], [125]. Gleeson CJ and Callinan J concluded the claim based on unconscionability should fail [49]. The majority concluded equity would do practical justice [126] and deduct from the respondent's benefit under the pastoralist's Will an amount akin to that which would have been granted to the appellants on a successful TFM application. The majority observed that the fact that a TFM application made by the appellants in January 1990 was struck out for want of prosecution in May 1991 did not create an estoppel preventing equitable remedy [137]-[139]. Appeal allowed; determination of quantum of relief remitted to Supreme Court Qld.

Family law - appeals - parenting orders - further evidence on appeal.
Appeals - further evidence.

In ***CDJ v VAJ*** ([1998] HCA 67, 22 October 1998) by s65E the *Family Law Act* provides that in deciding whether to make a particular parenting order in relation to a child a court must regard the best interests of the child as the paramount consideration. By s93A(2) the Act confers on the Full Court a discretionary power to receive further evidence in an appeal. The primary Family Court Judge made parenting orders which awarded the husband effective custody of the children of the marriage and made findings critical of the wife. The wife's appeal was allowed by the Full Court, Family Court. This court concluded that due to the unsatisfactory way in which the case had proceeded at trial, it was one of the rare cases where fresh evidence should be admitted. The husband's appeal to the High Court was allowed by majority: McHugh, Gummow, Callinan JJ jointly; contra Gaudron J; Kirby J. The court observed that the "paramount principle" of s65E of *FLA* applied in appeals from parenting orders [88]. The court further observed that common law principles concerning receipt of fresh evidence did not apply in respect of a statutory power to admit fresh evidence on appeal [97]. The court considered the various factors which influence the exercise of the discretion given by s93A(2) of *FLA*. The majority concluded examination of the proceeding did not support the conclusion that it was a case where further evidence should have been received on appeal [135]. The majority concluded the Full Court had also erred because the evidence was admitted without the court considering whether it would have caused the Primary Judge to make a different order [145] or whether receipt of the evidence would procure an improvement in the children's circumstances allowing for the pain and uncertainty of further proceedings [154]. In dissent Gaudron J found late receipt of the husband's material surprised the wife at trial and warranted reception of fresh evidence on appeal [61]. Appeal allowed; relevant orders of the Full Court Family Court set aside.

Shipping - sea carriage of goods - Hague Rules - damage to goods - excluded damage - perils of the sea.

In ***Great China Metal Industries Co. Ltd v Malaysian International Shipping Corp Berhad*** ([1998] HCA 65, 22 October 1998) the respondent carrier issued a bill of lading acknowledging receipt on its ship of goods to be carried from Sydney to Taiwan to be delivered to the appellant consignee as owner. The bill of lading was by operation of the *Sea-Carriage of Goods Act* 1924 (Cth) subject to the Hague Rules which by Art IV r2(c) provided that the carrier was not responsible for loss to goods arising from the "perils of the sea". The goods were damaged when rough weather struck the ship. The action by the appellant (owner/consignee) against the respondent (carrier) failed at trial where the trial judge found the carrier made out the defence of Art IV r2(c). The appellant's appeal to the NSW Court of Appeal failed. Its further appeal to the High Court was also dismissed. All members of the High Court agreed that the term "perils of the sea" was not limited to an event that was wholly unforeseen or unpredicted (Gaudron, Gummow, Hayne JJ [42]; McHugh J [58]; Kirby [147], Callinan [226]). The High Court considered the construction of the Hague Rules and proof of the "perils of the sea". Appeal dismissed.

Criminal law - trial before Judge alone - failure of reasons to address warning which would have had to be given to jury - unsafe or unsatisfactory conviction.

In ***Fleming v Q*** ([1998] HCA 68, 11 November 1998) the appellant was convicted after a trial before a Judge alone for sexual offences. In his Reasons for Judgment the trial Judge concluded the matter was one of "oath against oath". He did not state that he had scrutinised the sole prosecution witness in the way he would have been required to direct a jury to: *Longman v Q* (1989) 168 CLR 79. The appellant's appeal to NSW Court of Criminal Appeal failed because this court concluded, by majority, the verdicts were not "unsafe and unsatisfactory" within s6(1) *Criminal Appeal Act* 1912 (NSW). The appellant's appeal to the High Court was allowed: Gleeson CJ, McHugh, Gummow, Kirby, Callinan JJ jointly. The High Court concluded the provisions of s32, 33 of *Criminal Procedure Act* 1977 (NSW), authorising trials by a Judge alone, which referred in s33(3) to the Judge taking into account warnings that ought be given to a jury, required the obligation be discharged and be seen to be discharged [32].

Continued on page 24

Continued from page 23

The court concluded the error led to a miscarriage of justice [39]. Appeal allowed.

Trade practices - damages.
In ***Marks v GIO Australia Holdings*** ([1998] HCA 69, 11 November 1998) the appellants borrowed money from the respondents under agreements which provided that interest was to be charged at a specified base rate plus a fixed margin of 1.25 per cent. The margin was subsequently varied to 2.25 per cent. It was not in issue that the representation leading to the agreement contravened s52 of *TPA*. The trial Judge awarded the appellants damages equivalent to the 1 per cent difference over a period ending at trial. The respondent's appeal to the Full Court Federal Court was allowed. This court held damages under s82 of *TPA* and relief under s87 was only for "consequential" loss and not "expectation" loss and the difference of 1 per cent was "expectation" loss. The appellant's appeal to the High Court was dismissed by majority: Gaudron J; McHugh, Hayne, Callinan JJ jointly; Gummow J; contra Kirby J. The court considered that loss was discerned by comparing the position of the misled party and the position that it would have obtained but for the contravening conduct [42] and that while common law concepts of damage were of assistance, the remedies given by *TPA* were discreet [38-41]. The court held that the reference in s4K of *TPA* to "injury" was not intended to refer to injury constituted by a hopeful advantage that does not materialise [53]. The court held that the bare fact of making a contract different from that which was represented was not ipso facto loss or damage. The majority concluded that while the appellants were misled they entered into loan agreements which cost less than any other loan available to them in the market and suffered no loss or damage [59]. In dissent Kirby J concluded that because the *TP Act* was intended to achieve economic objectives, the concepts of loss and damage should be construed broadly to effect a remedial purpose. Appeal dismissed.

and its Constituents by Thomas Hurley, Barrister, Vic., NSW, ACT
(Editor, Victorian Administrative Reports)

FEDERAL COURT NOTES
Suggested Title: Amendment Post-*Weldon v Neal*

Practice - amendment - cause of action available at commencement of proceedings but not when amendment sought.
In ***Rodgers v C of T*** ([1998] 1296 FCA, 16 October 1998) by s59(2B) the *Federal Court of Australia Act* permits Rules of Court that allow amendment to introduce a cause of action not barred when the proceeding was commenced but barred at the time of amendment; see *FCR* O.13 r.2(7). By s59(3) the Rules are subject to the provisions in any other Act with respect to practice. By s588FF(3) the Corporations Law requires that an application for an order that a voidable transaction be refunded must be commenced within three years of the relation-back day. A Full Court held a creditor could rely on FCR O.13 r.2(7) to seek in January 1998 to amend an application made on 19 June 1997 to claim for additional payments made on 1 and 15 June 1994 where the relation-back day was 20 June 1994. The court rejected the submission that s59(3) *Federal Court Act* subordinated s59(2B) to s588FF(3) of *Corporations Law*.

Administrative law - when nominated Minister may delegate statutory function to other Minister.
In ***Foster v A-G of C of A*** ([1998] 1299 FCA, 12 October 1998) the *Extradition Act* 1988 (Cth) (in s22(3), 23) refers to the Attorney-General performing functions. By s19 the *Acts Interpretation Act* 1901 provides that in any Act the reference to any Minister includes any Minister or member of the Executive Council acting for or on behalf of the Minister. Spender J concluded s19 of the *Acts Interpretation Act* did not authorise the Minister for Justice to take the steps which the *Extradition Act* required be taken by the Attorney-General.

Negligence - solicitor - failure to prepare mining agreement with assignment clause.
In ***Montague Mining P/L v Gore*** ([1998] 1334 FCA, 23 October 1998) Wilcox J found a firm of solicitors liable in negligence where it caused a memorandum of agreement to be prepared without an assignment clause. Wilcox J found the agreement was legally binding and that as the solicitors exercised and professed special expertise they should have foreseen a risk of economic loss on failing to structure the agreement to enable assignment.

Administrative law - administrative procedure under *Environment Protection (Impact of Proposals) Act*.

In ***Botany Bay City Council v Minister for Transport*** ([1998] 1390, 3 November 1998); ***Randwick City Council v Minister for Environment*** ([1998] 1376 FCA, 3 November 1998) Finn J dismissed challenges to decisions that neither an environment impact statement nor a public environmental report within the *Environment Protection (Impact of Proposals) Act* was required prior to the adoption of the long-term operating plan for Sydney's Kingford-Smith Airport. He considered the admissibility as submission only of evidence given by an "expert" with inappropriate expertise (ss79, 80 *Evidence Act* 1995 (Cth)) and whether the Administrative Procedures provided under the *Environment Protection (Impact of Proposals) Act* created obligations and the extent of obligations to provide information relating to "feasible and prudent alternatives". He rejected a submission that the decision not to require environmental impact statements prior to the adoption of the long-term operating plan for Sydney Airport was unlawful or unreasonable.

Trade practices - secondary boycott - "hinder".
In ***Gisborne Garden & Building Supplies P/L v AWU*** ([1998] 1323 FCA, 16 October 1998) Marshall J concluded an applicant had not made out an arguable case that a picket line created by the respondent in front of its business "hindered" the supply of goods contrary to s45D(1)(a) of *TPA* where the applicant did not show that the picketers caused traders to refrain from passing through the picket line.

Trade practices - misuse of market power - refusal of publisher to supply street directories.
In ***Robert Hicks P/L v Melway Publishing P/L*** ([1998] 1379 FCA, 30 October 1998) Merkel J found the publisher of metropolitan street directories had contravened s46(1) of *TP Act* in deciding to not supply them to a wholesaler of motor vehicle spare parts. He concluded that a market in street directories for Melbourne exists (s4E of *TPA*), the respondent had taken advantage of its market power and the failure to supply the directories was for the proscribed purpose of pre-

Continued on page 25

Continued from page 24

venting the applicant distributing them in competition with the respondent's distributors (s46(1)(c)). He granted an injunction. Merkel J observed that the hearing was expedited where two experts were given an opportunity, having been sworn in at the Bar Table, to modify their views in light of the evidence of the other.

Trade practices - abuse of market power - market for travel to Vietnam - pleading.
In ***Ausviet Travel v Direct Flights International*** ([1998] 1286 FCA, 14 October 1998) Lehane J observed that while authority revealed a modern tendency towards narrative pleading because technical pleading did not disclose to the court the nature of opposing cases in complex matters, pleading nevertheless must be adequate to disclose the case (*Beach Petroleum NL v Johnson* (1991) 105 ALR 456 at 466). The applicant, a travel agent, complained that the two airlines which flew directly from Australia to Vietnam contravened the *Trade Practices Act* by entering into charter arrangements and "consolidator arrangements" with other companies so that seats could only be purchased from preferred travel agents. Lehane J concluded the pleading failed to allege the purpose of the arrangement fell within s45(2)(a)(ii) of *TPA* or that the applicant had pleaded the respondents had "a substantial degree of power in the market" within s46. He further concluded that insofar as the pleading alleged the charterers supplied certain travel agents with seats, but not the applicant, this did not infringe s47(2) of *TPA* because the supply of seats was not on the basis of an exclusive dealing to exclude the applicant. Statement of Claim struck out.

Trade marks - whether deceptively similar.
In ***Woolworths Ltd v Registrar of Trade Marks*** ([1998] 1268 FCA, 9 October 1998) Wilcox J concluded the composite mark "WOOLWORTHS metro" was not deceptively similar within ss10, 14, 44(2) *Trade Marks Act* 1995 (Cth) with other marks using the word "metropolitan". He concluded the mark did not so nearly resemble any of the cited marks as to be likely to deceive or cause confusion.

Corporations - investigation - all reasonable assistance.
In ***Smith v Papamihail*** ([1998] 1310 FCA, 16 October 1998) by s19(2) the *ASIC Law* enables the ASC to require a person give it all reasonable assistance. Carr J concluded this provision authorised a notice requiring a person sign authorities addressed to an overseas bank and trustee company.

Aborigines - Aboriginal corporations - appointment of administrator.
In ***Kazar v Duus*** ([1998] 1378 FCA, 30 October 1998) Merkel J concluded that s62 of the *Aboriginal Councils and Associations Act (Cth)* incorporates the provisions of the Corporations Law permitting the appointment of an administrator. However he concluded that on the appointment of an administrator under s71 of the *ACA Act* the administrator ceased to be entitled to exercise any substantive powers or functions as an administrator under Part 5.3A of the Corporations Law. He concluded that appointment of the administrator was invalid because the governing committee failed to form the opinion that the company was insolvent as required by s436A *Corporations Law* and further because the appointment was for the improper purpose of preventing the Registrar exercising his power to appoint an administrator under s71 of the *ACA Act*.

Corporations - share capital - "greenmailing".
In ***Re Elders Australia Ltd*** ([1998] 1377 FCA, 30 October 1998) Foster J considered in general terms whether conduct of minority shareholders insisting on their literal rights could amount to "greenmail" which provided a discretionary bar to reliance on s701(6) Corporations Law.

Corporations - directors - prohibition for managing of corporation.
In ***Kardas v ASC*** ([1998] 1381 FCA, 29 October 1998) Heerey J set aside a decision of the ASC under s600 of *Corporations Law* disqualifying the applicant from participating in management of the corporation for two years. He concluded there was no warrant to construe the power granted by s600 of *Corporations Law* as requiring "gross incompetence" but concluded the decision was so delayed that exercise of the power nearly four years after the relevant liquidator's report was unreasonable.

Patent - amendment of patent in proceedings.
In ***RGC Mineral Sands Ltd v Wimmera Industrial Minerals*** ([1998] 1358 FCA, 23 October 1998) a Full Court concluded orders by a judge under s105(1) of *Patents Act* 1990 (Cth) to amend a patent in relevant proceedings before the court was an interlocutory order. The court concluded that the trial Judge had not erred in rejecting a submission that because of the amendments the specification as amended would claim matter not disclosed in the specification as filed contrary to s102(1) of *Patents Act*. In ***Gambro P/L v Fresenius Medical Care, South East Asia*** ([1998] 1355 FCA, 15 October 1998) Tamberlin J considered whether the specification of a patent without an amendment sought under s155 of *Patents Act* was framed in good faith and with reasonable skill and knowledge.

Industrial law - registered organisation - election inquiry - whether union employee an "officer".
In ***Re Election in AFMEPKIU*** ([1998] 1282 FCA, 12 October 1998) Von Doussa J concluded that an "administration officer" within the union could be an "officer" of the union and eligible under its rules to stand for election.

Industrial law - dismissal - failure to retain public servant beyond retirement age.
In ***Peacock v C of A*** ([1998] 1297 FCA, 16 October 1998) Wilcox J held that the decision of a Departmental Secretary not to exercise the discretionary power given by s76V(2) of *Public Service Act* 1977 (Cth) to determine that the maximum retiring age not apply to a public servant did not constitute termination of that public servant's employment at the initiative of the employer.

Industrial law - breach of award - whether employee who fails to work as directed entitled to pay.
In ***United Firefighters' Union v MFB*** ([1998] 1298 FCA, 14 October 1998) Ryan J considered when a term in an award enabling an employer to deduct payment from an employee for time "absent from duty" authorised the employer to deduct pay in respect of a period when employees at work refuse to perform duties as directed. He concluded the obligation to pay salary was conditional on work performance and distinguished *Gapes v Commercial Bank* (1981) 41 FLR 27.

Continued on page 26

High Court Notes

Continued from page 25

Income tax - collection - notice to creditor to pay to commissioner "money" due to taxpayer.
In ***Deputy C of T v Conley*** ([1998] 1321 FCA, 21 October 1998) by s218 of *ITAA* the Commissioner may serve a notice on a person by whom "money" is due to a taxpayer requiring the person to pay to the Commissioner so much of the "money" as is sufficient to pay the amount of tax due by the taxpayer. A Full Court concluded that "money" in s218 of *ITAA* refers to Australian currency only.

Sales tax - refund.
In ***Amway of Australia P/L v C of A*** ([1998] 1311 FCA, 20 October 1998) Foster J concluded that Amway had not established that it was entitled to a refund of sales tax as a result of being classed as a "wholesale merchant" by 1985 amendments to sales tax legislation which included in that concept those who sold goods by "indirect marketing arrangements".

Customs tariff - government policy.
In ***BHP Direct Reduced Iron P/L v Chief Officer, Customs*** ([1998] 1346 FCA, 23 October 1998) Carr J concluded a delegate who decided not to make a determination under s273(1) of *Customs Act* in respect of plant for manufacturing steel erred in law. Carr J found the delegate failed to consider whether government policy should in the instant case not be applied and further misapprehended policy as to when factors such as time of delivery and the uniqueness of the requested plant warranted grant of a tariff concession notwithstanding the existence of local manufacturers.

Customs Act - material seized under search warrant - material to be returned "60 days" after seizure.
In ***Buresti v Beveridge*** ([1998] 1336 FCA, 23 October 1998) by s203R(1) the *Customs Act* 1901 (Cth) requires things seized as evidence under a search warrant to be returned "60 days after its seizure" if certain proceedings have not otherwise commenced. Hill J concluded the word "day" was used in its ordinary sense and not subject to the exclusion of holidays or Sundays found in the definition of "day" in s4(1) of the Act.

Criminal law - whether investigative powers may be used when charges contemplated.
In ***Health Insurance Commission v Freeman*** ([1998] 1340 FCA, 23 October 1998) a Full Court considered when investigative powers may be used by an agency after it has decided to lay charges. The court generally concluded legal advice given by a legal officer of the DPP (Cth) to other Commonwealth investigative agencies was subject to legal professional privilege. The Full Court concluded the primary Judge erred in finding use of Commonwealth warrants to retain control over evidentiary material in the possession of State police constituted an abuse of power and that legal advice given in respect of the procedure ceased to be privileged.

Income tax - recovery - whether by serving s218 of *ITAA* notices Commissioner to be treated as secured creditor.
In ***C of T v Macquarie Health Corp*** ([1998] 1365 FCA, 29 October 1998) Emmett J concluded that the Commissioner of Taxation on service of notices to a debtor of the taxpayer under s218 of *ITAA* had become entitled to payment in respect of tax. He considered whether payment to a taxpayer by an agent in breach of the agent's fiduciary duty meant that the moneys were held by the taxpayer on a constructive trust, and whether the trust could be enforced when its subject had been intermingled with the taxpayer's funds.

Workers compensation - injury - occlusion related to diseased heart valve causing stroke in course of employment.
In ***Petkovska v Kennedy Cleaning Services*** ([1998] 1289 FCA, 12 October 1998) a Full Court concluded that while the *Workers Compensation Act (ACT)* treated the terms "injury" and "disease" as being different in nature, a disease may create a pre-disposing physical condition such that a later physical incident is more likely to occur and constitute an "injury" which is thereby attributable to an event rather than to the underlying predisposing disease.

Human rights - exclusion of States from HREOC Act.
In ***Minogue v HREO Commission*** ([1998] 1283 FCA, 12 October 1998) Marshall J concluded that the exclusion of the Crown in right of the States from the purview of the HREOC by s6(1) of the *HREOC Act* was not inconsistent with the International Covenant on Civil and Political Rights implemented by the Act.

Discrimination - age limit for applicants seeking to become army pilots.
In ***C of A v HREOC*** ([1998] 1295 FCA, 16 October 1998) Wilcox J dismissed a challenge to a finding by HREOC that an age limit for applicants for appointment as specialist army pilots constituted discrimination in employment which was not based on the ability to fulfil the inherent requirements of the job within the *HREOC Act*.

Town planning - whether preliminary determination by Planning Tribunal appellable.
In ***Canberra Tradesmen's Union Club v Minister for the Environment, Land & Planning ACT*** ([1998] 1188 FCA, 18 September 1998 a Full Court concluded provisional findings by the AAT of the ACT in a planning appeal was not a decision which could be the subject of an appeal to the ACT Supreme Court.

Practice - extension of time to appeal.
In ***Minister for Immigration v Kabail*** ([1998] 1320 FCA, 20 October 1998) by *FCR* O.52 r15(1) a Notice of Appeal to a Full Court shall be filed within 21 days after the judgment or later where "special reasons" have been shown. Tamberlin J concluded "special reasons" were not shown warranting the grant to the Minister for leave to appeal on 1 October 1998 against judgment given on 3 September 1998.

Criminal law - validity of search warrant.
In ***Malubel v Elder*** ([1998] 1305 FCA, 16 October 1998) a Full Court concluded a search warrant issued under *Crimes Act* 1914 (Cth) was not invalid on the basis that persons authorised were inadequately described nor for ulterior or collateral purpose.

Admiralty - maritime agency agreement - right to freight collected after termination of agreement.
In ***Opal Maritime Agencies P/L v Baltic Shipping Co.*** ([1998] 1343 FCA, 15 October 1998) Tamberlin J considered a trader was not entitled to funds collected by the other party to a "running account" in respect of services provided after the account had been terminated. He concluded the trader was not entitled to the funds by contractual set-off nor was it so unjust or inequitable that an equitable set-off be recognised.

Social security - lump sum preclusion period.
In ***Secretary DSS v Jackson*** ([1998] 1329 FCA, 22 October 1998) by s1165(3) the *Social Security Act* 1991 (Cth) provides a lump sum preclusion period beginning after the last day of "the periodic payment period". A worker was injured in 1990 and received payments of compensation until April 1991. He resumed work until February 1993. He received further workers compensation payments until June 1993 after which he received unemployment benefits until his common law action settled in May 1995. A Full Court concluded the reference to "the" periodic payments period referred to all such periods. The court concluded the preclusion period commenced in June 1993 and did not consist of the periods April 1991 to January 1993 combined with the period June 1993 to March 1994 as accepted by the trial Judge.