

High Court Notes July 2003

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

Insurance - Obligations of insured - Disclosure - Whether insured required to disclose decision "probably not" to renew policy

In *Permanent Trustee Australia Ltd v. FAI General Insurance Co. Ltd* ([2003] HCA 25; 8.05.2003) the High Court concluded, by majority, that an insured who renewed a policy of insurance with an insurer was not obliged by s21 of the *Insurance Contracts Act 1984 (Cth)* to disclose to the existing insurer a decision "probably not" to renew the policy afterwards: McHugh, Kirby, Callinan JJ; contra Gummow, Hayne JJ. The majority concluded the commercial decision of the insured was not relevant to a decision by the insurer to "accept the risk" within s21(1)(a), (2) [32], [35]. The minority concluded this factor was relevant to the decision of the insurer being the fulcrum on which the provisions turned [70]. The Court agreed that the Court of Appeal NSW had erred in finding an alleged misrepresentation was "fraudulent" [37], [94]. Appeal allowed.

Appeal - Review of findings of fact - Issue not raised at appeal - When re-trial appropriate

In *Fox v. Percy* ([2003] HCA 22; 30.04.2003) the appellant was riding a horse in the company of another horse rider (M) in April 1992 when the horses were hit by a car driven by the respondent. In an action by the appellant for damages for personal injuries the Primary Judge found the respondent had negligently been on the incorrect side of the road. The Primary Judge based this conclusion on accepted the evidence of both the appellant and M and the evidence of a traffic engineer who explain why the skid marks and the evidence of a traffic engineer who explained why the skid marks on the respondent's correct side of the road did not mean the accident did not occur on the other side of the road. The Court of Appeal (NSW), by majority, allowed an appeal. It held the skid marks were incontrovertible. It declined to order a retrial. The appellant's appeal to the High Court was dismissed: Gleeson CJ with Gummow, Kirby JJ; McHugh; Callinan J. The Court considered when the advantages of trial judges on questions of credibility yielded to facts which were almost "incontrovertible" [37]. The High Court also concluded there was no error in failing to order a retrial [46]. Appeal dismissed.

Criminal law - Offences - Fraudulent application of company by company officer

In *Macleod v. Q* ([2003] HCA 24; 7.05.2003) the High Court considered defences made by a company officer to a charge under s173 of the *Crimes Act 1900 (NSW)* that as a director the appellant had fraudulently taken or applied for his own benefit property of the company. The Court concluded that a defence of "consent" on the part of the company was inappropriate [30], [93] and the nature of the term "fraudulent" [38], [100], [129]. The High Court concluded a claim of "right" was not made out and was distinct from a claim of honest belief [46], [107], [133]: Gleeson, Gummow, Hayne JJ, McHugh J, Callinan J. Callinan observed the decision of *R v. Roffel* [1985]

VR 511 was overruled. Appeal dismissed.

Administrative law - Constitutional Writs - Jurisdictional error - RRT - Failure to appreciate claim made by applicant

In *Dranichnikov v. MIMA* ([2003] HCA 26; 8.05.2003) a Full Court concluded, by majority, the RRT had denied the appellant procedural fairness when it failed to appreciate that his claim for refugee status was based on fear as a businessman in Russia who exposed corrupt practices rather than being a "Russian businessman": Gummow with Callinan J; Kirby J; Hayne J; contra Gleeson CJ. The majority made absolute an Order Nisi in the original jurisdiction of the Court but dismissed the appeal from a Full Court of the Federal Court limited by the former provisions in Part 8 of the *Migration Act*. Constitutional Writ issued.

Stamp duties (Q) - Dutiable documents - Transfer pursuant to contract - Duty paid on contract - Whether transfer liable to duty

In *Trust Company of Australia Ltd v. Commissioner of State Revenue* ([2003] HCA 25; 1.5.2003) a company ("Cromwell") was licensed to engage in activities under the *Managed Investments Act 1998 (Cth)*. A condition of its licence required Cromwell not to hold property of a registered scheme and to appoint another person to hold such properties. Cromwell appointed the appellant as "custodian" of a particular scheme. In November 1999 Cromwell (as purchaser) entered into a contract to purchase land from a vendor. The contract referred to roles of the appellant as "custodian". The contract provided for the vendor to be paid on completion of a transfer from the vendor to the appellant (custodian). The respondent assessed both the contract of sale (between the vendor and Cromwell) and the transfer (between the vendor and the appellant to duty under the *Stamp Act 1894 (Q)*. The Court of Appeal (Q) answered questions in favour of the validity of the assessment. An appeal by the appellant was allowed by the High Court by majority: Gleeson CJ; Gummow, Hayne JJ; Callinan J; contra Kirby J. The majority concluded the reference in the legislation to "the purchaser" was sufficiently flexible to identify the party who was in substance "the purchaser" under the entire transaction. Appeal allowed; questions answered accordingly.

Criminal law - Enquiry after conviction - Whether doubt arises as to guilt

In *Eastman v. DPP (ACT)* ([2003] HCA 28; 28.05.2003) the High Court agreed with separate judgments given by McHugh J and Heydon J that the power given in s475 of the *Crimes Act 1900 (ACT)* to hold an enquiry where after conviction there was any doubt or question arising as to his guilt, authorised an enquiry into the question of whether an accused person had been fit to plead. Appeal against contrary construction by Full Court of the Federal Court allowed.

Criminal law - Willful murder - Alternative verdicts of murder and manslaughter - Directions

In *Stanton v. Q* ([2003] HCA 29; 29.05.2003) the High Court considered how a jury should be directed on a charge of willful murder where alternative verdicts of murder and manslaughter

NOTICEBOARD

may have been available.

Federal Court Notes July 2003

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Administrative law - Constitutional Writ - Application of High Court decision

In *Scargill v. MIMIA* ([2003] FCAFC 116; 3.06.2003) a Full Court concluded that a correct understanding of the criterion for a visa was a condition precedent to the valid exercise of jurisdiction by the MRT. The Court concluded that where the MRT misunderstood the concept of "usually resident" it made a jurisdictional error as explained by the High Court and no question of "reconciling" types of errors arose.

Constitutional law - Implied terms - Freedom of association - Registration of political parties

In *Mulholland v. Australian Electoral Commission* ([2003] FCAFC 91; 13.05.2003) a Full Court concluded that provisions in the Commonwealth Electoral Act 1918 (Cth) providing for the registration of political parties was a burden on political communication because it gave privileges to registered parties [22]. The Court concluded the burden was reasonably adapted to a legitimate end therefore lawful within *Lange v. ABC* (1997) 189 CLR 520 [40].

Veterans' affairs - Review - Procedure - Notice to proceed

In *Johnson v. VRB* ([2003] FCAFC 89; 9.05.2003) by s155AA(4) the Veterans' Entitlements Act 1986 (Cth) provided the principal Member of VRB was to give an Applicant a notice at the end of the standard review period to establish the applicant was ready to proceed. A Full Court concluded the notice could be given a reasonable time after the expiry of the relevant period [48].

Migration - Refugees - Specific claims of persecution

In *VKAV v. MIMIA* ([2003] FCAFC 87; 9.05.2003) a Full Court concluded that a person who made claims that he generally feared persecution in Sri Lanka had not made "specific claims" of persecution and the application was not valid.

Migration - Refugees - Whether RRT failed to consider integer of claims - Psychological harm

In *SCAT v. MIMIA* ([2003] FCAFC 80; 30.04.2003) a Full Court concluded the RRT and Primary Judge had erred in failing to appreciate a claim for potential psychological harm could found a claim for persecution. The Court concluded, by majority, failing to appreciate this integer of the claim constituted a jurisdictional error [29].

Patents - Application for extension of method claim patent - Whether product itself within scope of patent

In *Prejay Holdings Ltd v. Commissioner of Patents* ([2003] FCAFC 77 30.04.2003) a Full Court considered whether a claim for a pharmaceutical substance fell within the scope of the claims made in a patent specification for a patent protecting

a method of production.

Federal Court - Jurisdiction - Whether claim in associated jurisdiction survives dismissal of primary claim

In *Petrotimor Companhia di Pertoleos S.A.R.L. v. C of A* ([2003] FCAFC 83; 6.05.2003) a Full Court concluded that once it was accepted a claim asserting a "matter" under the Constitution brought under s39B(1)(a) of the Judiciary Act was dismissed the Court had no jurisdiction to entertain the proceeding further in the absence of a common factual basis of claims in either its accrued or associated jurisdiction. In [2003] FCAFC 82 the same Full Court refused to stay other orders pending an application for special leave to appeal.

Trade Practices - Trade and commerce - Documentary film

In *Hearn v. O' Rourke* ([2003] FCAFC 78; 2.05.2003) a Full Court concluded that the conduct of the respondent film director in obtaining interviews from young persons for a proposed documentary about racism could, in a strike-out context, be found to be "in" trade or commerce as explained in *Concrete Constructions (NSW) P/L v. Nelson* (1990) 169 CLR 594.

Migration - Privative clause

In *Koulaxazov v. MIMIA* ([2003] FCAFC 75; 2.05.2003) a Full Court considered, per dicta, the role of the privative clause in s474 of the Migration Act following the decisions of the Federal Court in *NAAV v. MIMIA* (2002) 195 ALR 449 and the decision of the High Court in *Plaintiff S157/2002 v. C of A* (2003) 195 ALR. Madgwick J observed that the reasoning of *NAAV* could not stand after the decision of the High Court [13]. Gyles J [14] agreed with Conti J who concluded that s474 must be given some effect and followed the decision of Gyles J in *LOBO v. MIMIA* [2003] FCA 144.

Migration - Unpersuasive reasoning - Whether jurisdictional error

In *VGAO of 2002 v. MIMIA* ([2003] FCAFC 68; 23.04.2003) a Full Court concluded that unpersuasive factual conclusions and reasoning in a decision of the RRT did not cross the line between failing to deal with claims made and failing to give what the Court thinks should be appropriate weight or consideration to privative and logically relevant material [56].

Migration - Special need relative

In *Chow v. MIMIA* ([2003] FCAFC 88; 9.05.2003) a Full Court concluded neither the MRT nor the Primary Judge had erred in concluding the appellant had not established a "permanent or long-term need" for "substantial and continuing assistance" as required by the relevant visa class.

Administrative law - Bad faith - Poor standard of decision-making.

In *WAFV of 2002 v. RRT* ([2003] FCA 16; 17.01.2003) French J considered, per dicta, whether "bad faith" in administrative law was tied to questions of moral turpitude and extended to poor or erratic decision-making.

continued next page

NOTICEBOARD

continued from previous page

Sales tax - Whether yacht applied to own use

In *C of T (Cth) v. Baxter* ([2003] FCAFC 119; 30.05.2003) a Full Court considered whether the purchase of a yacht was exempt from tax under the Sales Tax Assessment Act 1992 (Cth) because it was applied to the owner's own use where it was subject of a lease entered into before it arrived in Australia.

Migration - Notice of adverse material

In *NATL v. MIMIA* ([2003] FCAFC 112; 28.05.2003) a Full Court concluded the requirements of s424A of the Migration Act had been satisfied where the substance of adverse material was brought to the notice of the applicant.

Federal Court - Proceedings by minor where Minister guardian

In *SFTB v. MIMIA* ([2003] FCAFC 108; 27.05.2003) a Full Court considered whether the RRT made jurisdictional error in refusing a claim for refugee status by a minor for whom the respondent was guardian by virtue of the Immigration (Guardianship of Children) Act 1946 (Cth).

Bankruptcy - Void transactions - Payment to spouse

In *Official Trustee in Bankruptcy v. Lopatinsky* ([2003] FCAFC 109; 30.05.2003) a Full Court considered whether payments by a bankrupt of more than one-half interest in the matrimonial home to a spouse pursuant to an informal agreement between them was pursuant to an implied agreement by the wife to forebear to sue.

Migration - Special need relative - Need for assistance

In *Chow v. MIMIA* ([2003] FCAFC 88; 9.05.2003) a Full Court considered no error was established in the meaning given by the MRT to the regulation identifying "special need relatives".

American Department of Defense responds

Following up on an article published in the May edition of *Balance*, "*The David Hicks saga - the Federal A-G responds to LSNT*" (page 17), below is a response from the American Department of Defense on the same issue.

Paul W Cobb, Jr., Deputy General Counsel for the Office of General Counsel in the American Department of Defense, responded to a letter from LSNT President Mr Ian Morris.

In his response, Mr Cobb wrote: "Under the law of armed conflict, enemy combatants may be detained until the cessation of hostilities."

"Furthermore, US courts consistently have held that the US military may properly detain anyone who takes up arms against the United States and is captured during combat, regardless of citizenship (including US citizenship). The reason behind these rulings is not only to further the military's ability to gather information, but also to prevent detainees from taking up arms and rejoining hostilities against the United States.

"Most recently, on March 11, 2003, the US Court of Appeals for the District of Columbia Circuit reiterated this holding with regard to certain enemy combatants captured during hostilities between US forces and members of the al Qaeda terrorist network and the Taliban regime.

In this case, twelve Kuwaiti, two British and two Australian nationals (Messrs. Hicks and Habib) claimed that the US government was detaining them without due process of law, in violation of the US constitution and international law. The court, following well-settled law, held that the US courts lacked jurisdiction.

"Notwithstanding the legal permissibility of these detentions, the US Department of Defense has paroled some detainees who have been assessed not to pose a threat against the United States or its allies, and may parole others like them in the future." ①

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