

NOTICEBOARD

High Court Notes - October 2003

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Migration - Jurisdictional error - Determination of "special need relative" by reference to policy

In *Jackson v. MIMIA* ([2003] FCAFC 203; 27.08.2003) a Full Court concluded the MRT had erred in excluding from consideration of whether the appellant was a "special need relative" to his parents certain assistance because this was required by policy. The Court also concluded error was established for failing to consider whether the assistance given by the appellant satisfied various aspects of the definition at different times.

Administrative law - Unreasonableness - Jurisdictional error

In *Andary v. MIMA* ([2003] FCAFC 211; 28.08.2003) a Full Court concluded that while the decision of the Respondent to cancel the visa of the appellant under s501(2) of the Migration Act would return the appellant to a country he had left at the age of four, in which he did not speak the language, separate him from his Australian wife and children and the rest of his family who are all Australian citizens the decision was not "unreasonable" [19]. The Court concluded there was no reason to consider whether *Wenesbury* unreasonableness constituted jurisdictional error [28].

Administrative law - "no-evidence ground" - Proof

In *VAAW of 2001 v. MIMIA* ([2003] FCAFC 202; 27.08.2003) a Full Court concluded that nothing in the High Court decision in *MIMA v. Rajamanikkam* (2002) 190 ALR 402 altered the effect of earlier authority that it was for the applicant to the Court to demonstrate there was no evidence on which a fact found by an administrative Tribunal could have been found [35].

Federal Court - Appeal - Application to receive fresh evidence

In *Freeman v. NAB* ([2003] FCAFC 200; 26.08.2003) a Full Court observed that the power given by s27 of the Federal Court of Australia Act 1976 (Cth) to receive further evidence in an appeal was a discretion to be exercised judicially [65].

Migration - Visa cancellation - Defects in issues paper

In *Sokourenka v. MIMIA* ([2003] FCA 892; 27.08.2003) Goldberg J concluded criticisms of the way in which the "issues paper" described findings of the AAT concerning the applicant whose visa the respondent subsequently cancelled on character grounds under s501A of the Migration Act did not constitute jurisdictional error.

Migration - Visa cancellation - Reasons - Best interests of children

In *Long v. MIMIA* ([2003] FCAFC 218; 8.09.2003) a Full Court concluded that the "briefing paper" given to

the Minister when he cancelled the visa of the appellant was distinguishable from the considered in *MIMA v. W157/00A* [2000] FCA 281. The Court concluded the briefing paper was the statement of reasons within s501G(1)(e) Migration Act and those reasons revealed the decision was affected by jurisdictional error because the respondent adverted to, but did not address, the best interests of Australian children.

Migration - Whether decision to grant visa

In *SGNB v. MIMIA* ([2003] FCA 885; 22.08.2003) Selway J considered when intimations from a delegate that visa criteria were satisfied meant a visa had been issued and how a decision could properly be transferred from one delegate to another.

Migration - Jurisdictional error - Reliance without notice on event post dating hearing

In *Applicant 168/2002 v. MIMIA* ([2003] FCA 860; 27.08.2003) Finn J set aside the decision of the RRT where the reasoning relied on an event which post-dated the hearing without notice to the applicant.

Industrial law - "employer" - Operations with one company terminated after fire - Operations resumed with labour-hire company

In *AMIEU v. Belandra P/L* ([2003] FCA 910; 29.08.2003) a Full Court considered whether an employer who closed operations following a fire with intention to re-employ the workforce who subsequently obtained labour through a labour-hire company contravened any provisions of the Workplace Relations Act 1996 (Cth).

Banking - Credit cards - Determination by Reserve Bank of access regime between credit cards

In *Visa International Service Association v. Reserve Bank of Australia* ([2003] FCA 977; 19.09.2003) Tamberlain J rejected a submission that the Visa and Master Card scheme were not "payment systems" for the legislative scheme introduced with the Payment Systems (Regulation) Act 1998 (Cth). Further submission that the Reserve Bank had erred in its enquiries before amending the scheme by which credit card schemes were to be regulated based on expert evidence in proceedings under the AD (JR) Act rejected.

Federal Court - Procedure - Suppression order

In *Herald & Weekly Times Ltd v. Gregory D Williams* ([2003] FCAFC 217; 10.09.2003) a Full Court considered whether a suppression order should be made in AAT proceeding under ss35(2)(b) of the AAT Act in relation to taxation proceedings concerning a prominent footballer.

Constitutional law - Free trade - Requirement that racing licensee be incorporated in NSW
In *Sportodds Systems P/L v. NSW* ([2003] FCA 992; 19.09.2003) Gyles J concluded that provisions in NSW Racing Legislation that only corporations registered in NSW were eligible to hold licenses as bookmakers were invalid and the extent to which this invalidity affected other provisions prohibiting connections

NOTICEBOARD

between natural and corporate entities.

Defence - Suspension of Air Force pilot under Defence Instructions - Whether Instructions complied with

In *Bromet v. Odie* ([2003] FCAFC 213; 29.08.2003) a Full Court considered the operation of Defence Instructions in striking a balance between the need to achieve fair treatment of skilled personnel with flexibility with those charged with command. The Full Court concluded any departure from Defence Instructions in suspending an Air Force pilot did not establish legal error.

Income tax - Scheme - Former contractor employed by company owned by himself and Wife

In *C of T v. MacArthur* ([2003] FCA 903; 28.08.2003) Dowsett J concluded the AAT had erred in setting aside a re-assessment by the C of T based on Part IVA of ITAA in relation to a taxpayer employed by a company solely owned by himself and his wife.

Income tax - Validity of amended assessments

In *Puzey v. C of T* ([2003] FCAFC 197; 26.08.2003) a Full Court considered, inter alia, whether the power to issue amended assessments under s170(1) of the ITAA Act was validly exercised where the amended assessments produced the same income and tax although the ingredients in the assessment differed [93].

Trade practices - Abuse of market power - Excusive dealing - Refusal of wholesaler of recorded music to supply retailers who engaged in parallel importation

In *Universal Music Australia P/L v. ACCC* ([2003] FCAFC 193; 22.08.2003) a Full Court concluded that a wholesaler of sound recording who declined to supply them to retailers who engaged in parallel importation of sound recording following 1998 amendments to the Copyright Act 1968 (Cth) had not engaged in abuse of market power contrary to s46 of the TP Act but had engaged in exclusive dealing contrary to s47. The Court concluded the penalty imposed by the primary Judge was inadequate.

Trade practices - Jurisdiction - Internet conduct outside Australia

In *ACCC v. Cheng* [2003] FCA 897; 27.08.2003) Sackville J considered whether it was appropriate to grant a declaration that a Respondent had through the internet from outside Australia engaged in misleading conduct contrary to s52 of the TP Act by maintaining an unauthorised "imitation website" of the Sydney Opera House.

Constitutional law - Claim against State seeking repayment of funds paid under unconstitutional State excise - Whether claim against State for repayment arises under Constitution

In *British American Tobacco Australia Ltd v. W.A.* ([2003] HCA 47; 2.09.2003) the High Court concluded that a claim against a State seeking repayment of

monies paid to the State to satisfy a tobacco licensing system found to be an invalid excise was a claim arising under the Constitution. The Full Court of W.A. had concluded that because the claim against the State was not brought as provided by ss5, 6 of the Crown Suits Act 1947 (W.A.) the State was entitled to summary judgment. This conclusion was reversed by the High Court: Gleeson CJ; McHugh, Gummow, Hayne JJ; Kirby J; Callinan J. The majority concluded that s39(2) of the Judiciary Act 1903 (Cth) gave the Supreme Court of W.A. jurisdiction to determine the claim that the State was obliged to refund the payments made pursuant to a State law that was unconstitutional. Appeal allowed; summary judgment set aside; action remitted.

Negligence - Appeal - Power of appellate Court to determine proceeding on basis not argued at trial

In *Whispaun P/L v. Dixon* ([2003] HCA 48; 3.09.2003) the High Court considered when an intermediate appellate Court could determine an appeal by reference to an issue not raised at trial and whether medical reports had an independent evidentiary value or depended on the credibility the patient. Appeal allowed.

Customs - Standard of proof

In *CEO Customs v. Labrador Liquor Wholesale P/L* ([2003] HCA 49; 5.09.2003) the High Court considered the standard of proof required to obtain conviction for specified offences in the Customs Act 1901 (Cth) and Excise Act 1901 (Cth). The High Court generally answered the questions stated to the effect that to obtain convictions in customs prosecutions for offences against ss33 and 234(1)(a) and (d) of the Customs Act the elements of the offence must be established beyond reasonable doubt but that provisions of the Evidence Act 1977 (Q) which would be applied in civil cases were to be applied in the trial. Appeal allowed in part. Questions answered accordingly.

Defamation (NSW) - Defenses - Fair protective report of Court proceeding - Whether Court or Court officer a "person"

In *Rogers v. Nation Wide News P/L* ([2003] HCA 52; 11.09.2003) the High Court considered when publication of a fair protected reported of Court proceedings could be an answer to a claim in defamation in NSW. Appeal allowed.

Appeal - Appeal against findings of jury - Finding by jury that matter did not convey defamatory imputations

In *John Fairfax Publications P/L v. Rivkin* ([2003] HCA 50; 10.09.2003) the High Court considered the Court of Appeal of NSW had erred in holding that no jury could have found the two publications on which the respondent sued as being defamatory. Appeal allowed. New trial on certain imputations ordered.

continued next page

NOTICEBOARD

Negligence - Breach of duty - Importation of seed including weeds

In *Dovuro P/L v. Wilkins* ([2003] HCA 51; 11.09.2003) the High Court allowed an appeal against findings by the primary Federal Court Judge, and the majority of the Full Court of the Federal Court, that the producer and distributor in Australia of certain seeds containing weeds which were declared prohibited plants, were negligent. The Court considered when a "declaration of liability" could be made on an interlocutory basis in representative proceedings in the Federal Court.

Superannuation - Role of Superannuation Complaints Tribunal

In *Cameron v. Board of Trustees of the State Public Sector Superannuation Scheme* ([2003] FCAFC 214; 5.09.2003) a Full Court considered how the SCT decided whether or not a decision of the trustee or insurer under Superannuation Deed was "unfair or unreasonable".

Social security - Repayment of compensation after damages received - Error by Department

In *Sekhon v. Secretary, DFCS* ([2003] FCAFC 190; 3.09.2003) a Full Court concluded, by majority, that payment of benefits to a person who received damages following the failure of the Department to request payment from the insurer under s1179 of the Social Security Act 1991 (Cth) did not create a debt "attributable solely to an administrative error made by the Commonwealth.." within s1237A of that Act.

Native title - Indigenous land use agreement

In *Murray v. Registrar NNTT* ([2003] FCAFC 220; 24.09.2003) a Full Court concluded that all persons who claim to hold native title in an area are required to be parties to an indigenous land use agreement under s24CD of the Native Title Act 1993 (Cth).

Migration - Protection visa - "protection obligations" - "right" to enter and reside in third country - "effective protection"

In *WAGH v. MIMIA* ([2003] FCAFC 194; 27.08.2003) a Full Court concluded that the reference to the "right" to enter and reside in a third country referred to in s36 of the Migration Act 1958 (Cth) which prevented protection obligations arising in Australia referred to a

right to enter, reside and receive like protection in a third country and more than a mere "capacity" to do so [41], [66], [75].

Migration - Protection visa - Opportunity for reasonable relocation - Whether evidence - Jurisdictional error

In *WAHI v. MIMIA* ([2003] FCA 908; 28.08.2003) French J considered whether findings of the RRT that a Christian convert could on return to Iran relocate was based on no evidence or otherwise subject to jurisdictional error. Appeal from Federal Magistrate allowed.

Migration - Hearing - Applicant unfit

In *NAMJ v. MIMIA* ([2003] FCA 983; 22.09.2003) Branson J concluded no jurisdictional error was established, in the circumstances, where the RRT declined to postpone a hearing because the applicant claimed to be unfit.

Family Court of Australia: Practice Direction: No. 6 of 2003

All divorce applications should be filed in the Federal Magistrates Court.

Parties/Practitioners should ensure that all applications are correctly headed "Federal Magistrates Court at [x] Registry".

The Federal Magistrates Court shares registry facilities with the Family Court of Australia. All divorce applications will continue to be accepted by the joint registries.

Northern Territory of Australia: Local Court Alice Springs

Please note that all prehearing, directions and conciliation conferences which may have been dealt with by a judicial registrar in Darwin will now be held locally in Alice Springs either by a magistrate (Directions Conference) or a registrar (most other matters).

Those matters which have already been adjourned by a JR in Darwin to a future date, will be dealt with in Alice Springs as above.

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