

## NOTICEBOARD

### Federal Court Notes: November 2003

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

#### **Social security - Whether rent assistance is a "social security payment"**

In *Secretary, DF & CS v. Laurent* ([2003] FCA 1017; 25.09.2003) Cooper J considered whether rent assistance was merely a component of the New Start Allowance rather than "a social security payment" on its own for the purpose of making a decision on an overpayment under s109(1) of the Social Security (Administration) Act 1999 (Cth).

#### **Corporations - Minimum subscription for managed investment scheme not reached - Status of subscription fund**

In *Spangaro v. Corporate Australia Funds Management Ltd* ([2003] FCA 1025; 26.09.2003) Finkelstein J considered the status of funds contributed to a managed investment scheme where the minimum subscription was not reached and whether funds contributed to one party for which there had been a total failure of consideration could be reclaimed after payment to a third party.

#### **Migration - Special need relative - Finding of fact lacking cogency**

In *Truong v. MIMIA* ([2003] FCA 1035; 30.09.2003) Weinberg J considered that absence of cogency in findings of fact by the MRT in refusing an application for a "special need relative" visa did not establish a ground of judicial review.

#### **Companies - Liquidation - Right to be heard on application to Court for approval of litigation funding agreement**

In *Kingsheath Club of the Clubs Ltd (In liq)* ([2003] FCA 1034; 30.09.2003) Goldberg J considered the standing of non-party creditors of a company in liquidation to be heard on an application by the liquidator to the Court for approval of the litigation funding agreement and whether the creditors were entitled to confidential legal advice referred to by the liquidator.

#### **Worker's compensation - Reviewable decisions - Conclusion that employee failed to undertake rehabilitation program**

In *Australian Postal Corp. v. Forgie* ([2003] FCAFC 223; 8.10.2003) a Full Court concluded that the conclusion by the Appellant that an employee had refused or failed to undertake a rehabilitation program so that the employee's rights were suspended under s37(7) of the Safety, Rehabilitation and Compensation Act 1998 (Cth) involved a decision which the AAT had jurisdiction to review.

#### **Migration - Special need relative**

In *Basbas v. MIMIA* ([2003] FCA 1042; 2.10.2003) Gray J concluded the MRT had not erred in finding the assistance the applicant gave his mother was not "substantial".

#### **Bankruptcy - Bankruptcy notice - Notice based on unquantified costs order**

In *Franks v. Warringah Council* ([2003] FCA 1047; 2.10.2003) Branson J considered a bankruptcy notice founded on an unquantified costs order of the NSW Land and Environment Court with a certificate under s208J of the Legal Profession Act 1987 (NSW) was defective. Consideration of whether it is possible to have two final judgments in respect of the one debt.

#### **Practice - Proceeding discontinued by solicitor without instructions**

In *Applicant A26 of 2002 v. MIMIA* ([2003] FCA 1050; 2.10.2003) Mansfield J set aside a notice of discontinuance filed by a lawyer without instructions.

#### **Taxation - Assessment - Whether Commissioner may issue amended assessments after objection decision referred**

to AAT

In *Fabry v. C of T* ([2003] FCA 1043; 3.10.2003) Merkel J dismissed an application asserting that once a decision on a disallowed objection had been referred to the AAT the Commissioner had no power under Part IVA of ITAA to issue an amended assessment.

#### **Migration - Extension of time to seek Constitutional Writs**

In *Thayanathan v. MIMIA* ([2003] FCA 1054; 3.10.2003) Merkel J declined to extend time for an applicant seeking Constitutional Writs.

#### **Federal Court - Practice - Representative proceedings - Content of opt out notice**

In *Petrusevski v. Bulldog Rugby League Club Ltd* ([2003] FCA 1056; 3.10.2003) Sackville J considered the content of the opt out notice to be sent members of a representative proceeding.

#### **Worker's compensation - Reasonable disciplinary action**

In *Schmid v. Comcare* ([2003] FCA 1057; 3.10.2003) Weinberg J considered whether derogatory comments by the commanding officer of a soldier amounted to "a reasonable disciplinary action" for the purposes of the Safety, Rehabilitation and Compensation Act 1988 (Cth).

#### **Criminal law - Whether privilege against self-incrimination abrogated by Australian Crime Commission Act 2002 (Cth)**

In *Mansfield v. Australian Crime Commission* ([2003] FCA 1059; 3.10.2003) Carr J considered the extent to which the Australian Crime Commission Act 2002 (Cth) had abrogated the privilege against self-incrimination and whether an examiner could compel answers to questions which might result in contempt of Court or other interference with the course of justice.

#### **Copyright - Additional damages**

In *Flags 2000 P/L v. Smith* ([2003] FCA 1067; 7.10.2003) Goldberg J concluded the respondent should pay additional damages pursuant to ss115(2) and (4) of the Copyright Act 1968 (Cth) for infringements of Copyright after a declaration as to ownership had been made in proceedings.

#### **Extradition - Bale**

In *UK v. Forsyth (No. 2)* ([2003] FCA 1072; 7.10.2003) French J quashed a decision of a Magistrate to grant bail in proceedings under the Extradition Act 1988 (Cth).

#### **Migration - Natural justice**

In *VFAJ of 2002 v. MIMIA* ([2003] FCA 1081; 8.10.2003) Marshall J concluded ss424A of the Migration Act did not require the MRT to give an applicant particulars of its thought processes prior to making an adverse decision.

### Federal Court Notes: December 2003

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

#### **Migration - Jurisdictional error - Cancellation of unidentified Visa**

In *MIMIA v. Schwart* ([2003] FCAFC 229; 16.10.2003) a Full Court concluded a decision to cancel a visa under s501 of the Migration Act involves a jurisdictional error when it was not clear from the material presented to the Minister what visa it was that was being cancelled.

#### **Migration - Tribunals - Invitation to comment - Interpretation**

In *Appellant P119/2002 v. MIMIA* ([2003] FCAFC 230; 16.10.2003) a Full Court considered when the circumstances of a proceeding in the MRT required it to invite an applicant for a visa to comment under s451 of the Migration Act.

#### **Federal Court - Jurisdiction - Application to enforce settlement of earlier proceedings**

In *Macteldir P/L v. Dimovski* ([2003] FCAFC 228; 17.10.2003) a Full Court concluded that the Court did not have jurisdiction to determine a

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notice of motion seeking to enforce terms of settlement of an earlier proceeding in the Federal Court in relation to events which occurred after the settlement and which could have been the subject of further proceedings.

### **Federal Court - Way in which appeal on question of law framed**

In *Birdseye v. ASIC* ([2003] FCAFC 232; 21.10.2003) a Full Court considered in detailed the way in which an appeal to the Court from the AAT on a question of law should be framed. The Court considered when a decision of the AAT to refuse to extend time to apply a review could involve a question of law.

### **Corporations - Authority of directors after receivers and managers appoint**

In *Ernst & Young v. Tynski* ([2003] FCAFC 233; 21.10.2003) a Full Court considered the validity of the retainer given to solicitors by the directors of a company to institute proceedings after receivers and managers had been appointed to it.

### **Migration - Jurisdictional error - No evidence - Viability of Taliban in Afghanistan**

In *SFGB v. MIMIA* ([2003] FCFAC 231; 24.10.2003) a Full Court allowed an appeal against a decision of the RRT which concluded the Taliban were no longer a threat in Afghanistan when the only evidence before it was that the Taliban was still present in the area from which the appellant came. The Court accepted that if the RRT made a finding which was critical and for which there was no evidence this could constitute jurisdictional error [19], [20].

AAT - Appeal to Federal Court - Relief

In *C of T v. Zoffanies P/L* ([2003] FCAFC 236; 24.10.2003) a Full Court considered whether the AAT had erred in considering a subjective rather than the objective intention of the taxpayer when applying s177D of the ITAA Act. Consideration of whether the Federal Court had power to remit part only of a matter to the AAT.

### **Superannuation - Reasoning of SCT**

In *Hourn v. Farm Plan P/L* ([2003] FCA 1122; 16.10.2003) R D Nicholson J considered whether any failure by the SCT to have regard to, or give sufficient weight to, evidence raised a question of law.

### **Native title - Extension - Vesting of land in Crown for fee simple**

In *Lawson v. Minister for Land & Water Conservation NSW* ([2003] FCA 1127; 17.10.2003) Wilham J considered whether vesting of land in the Crown for an estate in fee simple was a "previous exclusive possession act" within the Native Title Act 1993 (Cth).

### **Trade practices - Misleading conduct - "No establishment fee"**

In *ACCC v. Commonwealth Bank* ([2003] FCA 1129; 17.10.2003) Conti J concluded that an advertisement asserting that "no establishment fee" was payable for a home loan was misleading when charging of less than usual establishment fee occurred for most loans conditional upon acquisition of other products of the bank.

### **Veterans - Entitlements - "inability" to obtain clinical management**

In *Brown v. Repatriation Commission* ([2003] FCA 1130; 17.10.2003) Cooper J considered when a person had an "inability" to obtain appropriate clinical management of sarcoidosis within the Statement of Principles.

### **Migration - Review of decision of Tribunal - Proof**

In *Applicant S33 of 2003 v. MIMIA* ([2003] FCA 1131; 17.10.2003) Jacobson J considered the obligation on an applicant to the Court to provide material in support of a claim that a migration tribunal had failed to deal with a claim.

### **Health - Modification of food standards**

In *Distilled Spirits Industry Council of Australia Inc. v. Food Standards ANZ* ([2003] FCA 1139; 17.10.2003) Madgwick J considered whether the respondent had misconstrued the ANZ Food Authority Act 1991 (Cth) in rejecting an application to modify food standards concerning alcohol labelling requirements.

### **Migration - Remittal to Federal from High Court - Time limits**

In *Applicants A64 of 2002 v. MIMIA* ([2003] FCA 1142; 20.10.2003) Mansfield J considered what time limits applied in the Federal Court where a matter was remitted to it from the High Court having been commenced outside the time prescribed by the High Court Rules. Consideration of whether refusal of extension of time finally determines rights of the parties.

In *M162 of 2002 v. MIMIA* ([2003] FCA 1146; 21.10.2003) Goldberg J considered whether an extension of time should be granted in relation to Writs for Certiorari and Mandamus before the hearing of the substantive application in relation to prohibition.

### **Migration - Absence of logicity - Breach of natural justice**

In *NAPE v. MIMIA* ([2003] FCA 1124; 21.10.2003) Hill J considered whether the absence of logically was a ground of review of the decision of the RRT and whether its decision was in breach of the requirements of the rules on natural justice.

### **Migration - RRT - Whether discretion to refuse to hear a witness**

In *NAQS v. MIMIA* ([2003] FCA 1137; 21.10.2003) Hill J considered when the RRT had a discretion in deciding whether it wished to hear witnesses produced by the applicant. Application for Constitutional Writs allowed.

### **Appeals - Failure of Court to consider submissions of legislative changes post hearing**

In *Applicant VBB v. MIMIA* ([2003] FCA 1141; 21.10.2003) Heerey J considered no breach of natural justice had occurred when a Federal Magistrate failed to consider submission on post hearing legislative changes referred in the judgment.

### **Administrative law - Obligation to consider evidence after Tribunal hearing**

In *NANI v. MIMIA* ([2003] FCA 1082; 10.10.2003) Jacobson J considered whether the RRT had an obligation to consider evidence after the RRT hearing. Application dismissed.

Courts - Jurisdiction - Application by non-citizen parent of child

In *Mashood v. C of A* ([2003] FCA 1147; 21.10.2003) Goldberg J considered the Court had jurisdiction to grant interlocutory relief to restrain the removal of non-citizens under the Migration Act pending determination by various Courts of whether one of their children was an Australian citizen.

### **Designs Act - "a person aggrieved"**

In *Supaproducts P/L v. Alesevic* ([2003] FCA 1145; 22.10.2003) Heerey J concluded that because of undertakings given by the respondent the applicant was no longer a "person aggrieved" aggrieved within s39 of the Designs Act 1906 (Cth).

### **Migration - Typographical error in reasons**

In *S14/2003 v. MIMIA* ([2003] FCA 1153; 22.10.2003) Moore J considered whether it was possible to construe the reasons of the RRT as involving a typographical error and whether the RRT had dealt with the "essential integers" of the claims.

### **Judgment - Interest - Whether statutory entitlement to interest subject to estoppel**

In *Hanave P/L v. LFOT P/L* ([2003] FCA 1154; 22.10.2003) Moore J considered whether the statutory entitlement to interest was

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subject to estoppel arising by delay and when delay be a "good cause" in the exercise of the discretion to order interest under s51A of the Federal Court of Australia Act.

### **Constitutional law - Judicial power - Whether claim by Commonwealth of "right" to claim public interest immunity in another Court gives rise to a justiciable controversy**

In *C of A v. Lyon* ([2003] FCA 1155; 22.10.2003) Moore J concluded a claim by the Commonwealth of a "right" to claim public interest immunity preventing disclosure of documents to a Magistrate in NSW did not give rise to justiciable controversy.

### **Federal Court - Declaratory relief**

In *Direct Factory Outlets P/L v. Westfield Management Ltd* ([2003] FCA 1095; 10.10.2003) Cooper J considered when a justiciable issue arose in relation to an application for declaratory relief alone.

### **Federal Courts - Jurisdiction - "Matter"**

In *Australian Gas Light Co. v. ACCC (No. 2)* ([2003] FCA 1229; 31.10.2003) French J concluded the Federal Court had jurisdiction to entertain an application by the ACCC for a declaration as to the effect of a proposed acquisition of shares in a power station and coal mine and that this involved a "matter" under the Trade Practices Act.

### **Legal professional privilege**

In *ACCC v. FFE Building Services Ltd* ([2003] FCA 1181; 27.10.2003) Wilcox J considered whether draft witness statements and draft affidavits were privileged and whether a distinction existed between documents supplied before and after commencement of legal proceedings.

### **Migration - Visa cancellation - Natural justice**

In *Tuncok v. MIMIA* ([2003] FCA 1069; 10.10.2003) Hely J concluded the non-citizen had not been denied natural justice by not being shown the issues paper presented to the Minister.

### **Trade practices - Misleading conduct - Contract of employment**

In *David Walker v. Salomon Smith Barney Securities P/L* ([2003] FCA 1099; 10.10.2003) Kenny J concluded a person had entered a contract of employment after misleading representations were made.

Federal Court - Representative proceedings - Group

In *Au Domain Administration v. Domain Names Australia P/L* ([2003] FCA 1106; 10.10.2003) Finklestein J considered how a group of seven persons was to be identified as forming a representative action for the purposes of s33C of the Federal Court of Australia Act 1976.

### **Administrative law - Jurisdictional error - "Want of logic"**

In *NACB v. MIMIA* ([2003] FCAFC 235; 31.10.2003) a Full Court accepted that there was an important error in the logic of the RRT but this did not constitute an error of law, still less an error which went to jurisdiction.

### **Migration - Jurisdictional error - Procedural fairness - Appellant denied access to tapes - Country information**

In *WAFV of 2002 v. MIMIA* ([2003] FCAFC 240; 31.10.2003) a Full Court, by majority, dismissed an appeal notwithstanding a breach of procedural fairness by the Tribunal in determining nationality by means of linguistic analysis without providing him with copies of the relevant reports, on the basis that the application for a protection visa was dismissed on an independent ground.

### **Administrative law - Application for workers compensation - Status of agreement as to medical causation**

In *Williams v. Muller* ([2003] FCA 1190; 31.10.2003) Mansfield J considered when a decision-maker, and the AAT on remittal, could be bound to a conclusion on a question of medical causation by an agreement arrived at by the parties.

### **Bankruptcy - Decision by trustee to abandon litigation**

In *Freeman v. NAB* ([2003] FCA 1233; 31.10.2003) Spender J considered whether a trustee had a duty to prosecute litigation and when a decision to abandon it was unjust or inequitable.

### **Migration - Reasons for decision**

In *Nezovic v. MIMIA (No. 2)* ([2003] FCA 1263; 6.11.2003) French J concluded that a substitute set of reasons of the Minister tended to the Court without verification through a third party would not be received into evidence unless verified on oath and where the decision-maker was available for cross-examination.

### **Trade practices - Unconscionable conduct - Seizure of financed motor vehicle**

In *ACCC v. Esanda Finance Corp.* ([2003] FCA 1225; 7.11.2003) Lee J considered when seizure of a motor vehicle subject to a chattel mortgage by a financier could constitute unconscionable conduct or undue harassment. In [2003] FCA 1226 Lee J considered the accessorial liability of companies and individuals involved in the seizure.

### **Constitutional law - Interstate trade - Bookmakers**

In *Sportodds Systems P/L v. NSW* ([2003] FCAFC 237; 29.10.2003) a Full Court considered whether a State requirement that interstate bookmakers advertising in NSW stand at a licensed NSW racecourse contravenes Constitution s92.

### **Federal Magistrates' Court - Extension of time to appeal to Federal Court**

In *Tsimiklis v. Sellers* ([2003] FCA 1257; 7.11.2003) Weinberg J considered what constituted the "special reasons" which would justify the Federal Court granting an extension of time to serve a Notice of Appeal within FCR 052 r15 to appeal against a decision of a Federal Magistrate.

### **Migration - Notification of decisions**

In *Chan Ta Srey v. MIMIA* ([2003] FCA 1292; 12.11.2003) Gray J concluded that a non-citizen had not been correctly notified of a decision and that his detention was therefore not lawful and ordered he be released.

### **Administrative law - Pleading questions of law**

In *ASIC v. Saxby Bridge Financial Planning P/L* ([2003] FCAFC 244; 5.11.2003) a Full Court considered the distinction between an appeal based on a question of law and one based on a question of fact. Consideration of the distinction between questions of law and questions of fact.

### **Migration - Statutory scheme of natural justice**

In *Wu v. MIMA* ([2003] FCA 1249; 13.11.2003) Hely J concluded the provisions of s51A of the Migration Act introduced by the Migration Legislation Amendment (Procedural Fairness) Act 2002 excluded the operation of the common law rules of natural justice and no jurisdictional error was established.

### **Employment - Contract of employment made through agents**

In *Damevski v. Giudice* ([2003] FCAFC 252; 13.11.2003) a Full Court considered when a person was to be regarded as an "employee" rather than a "independent contractor" who services were obtained from his former employer by another company through labour-hire arrangements. The Court considered when a contract of employment could be discerned through agency.

### **Administrative law - Application to stay negative decision**

In *Shi v. Migration Institute of Australia Ltd* ([2003] FCAFC 1304; 14.11.2003) Tamberlin J concluded there was no point issuing an order to stay the operation of a decision which refused registration of an applicant as a migration agent.

### **Defence - Termination of services of soldier**

In *Stuart v. Chief of Army* ([2003] FCA 1291; 13.11.2003) Wilcox J considered an application by a member of the Defence forces for judicial

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review of a decision to terminate her enlistment and a further decision to reject her application for redress of grievance.

### **High Court Notes: November 2003**

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#### **Migration - Tribunals - Procedure - Whether RRT misled applicant to believe it accepted her claim - Role of Brown v. Dunn in inquisitorial proceedings**

In *Re MIMA; ex p Applicant S154/2002* ([2003] HCA 60; 8.10.2003) the prosecutor sought a visa as a refugee. At the hearing of her claim before the Refugee Review Tribunal she revealed for the first time a claim that she had been raped in Sri Lanka. She became upset and the RRT member stated he did not need to ask any further questions about that particular incident. The RRT did not accept the rape claim. An Order Nisi in the original jurisdiction of the High Court was discharged by majority: Gleeson CJ; Gummow with Heydon JJ; Callinan; contra Kirby JJ. The majority observed that the RRT member had not by his comments created the impression that he accepted the rape claim and it had been canvassed subsequently [2], [30], [127]. The Court observed that the rule in *Brown v. Dunn* did not apply to inquisitorial proceedings [57]. Order Nisi discharged.

#### **Administrative law - Requirement for reasons for decision to be given - Whether failure to give reasons for decision constitutes jurisdictional error in making it**

In *MIMIA; ex p Palme* ([2003] HCA 56; 2.10.2003) by s501G the Migration Act 1958 (Cth) authorised the Minister for Immigration to cancel certain visas. By s501G(1) the Act required the respondent to give the person affected a written notice setting out the decision, the provisions under which it was made and the reasons for it. The respondent cancelled the prosecutor's visa after considering a departmental submission. The prosecutor obtained an Order Nisi in the original jurisdiction of the High Court contending the decision involved a breach of natural justice because the briefing note was slanted, the decision was affected by *Wednesbury* unreason and no reasons had been given for it. By s501G(4) the Act provided that a failure to comply with the notification provisions, including giving reasons, did not affect the validity of the decision. The Order Nisi was discharged by majority: Gleeson CJ, Gummow, Heydon JJ; McHugh J sim; contra Kirby J. The Court observed failure to inform the prosecutor of specific parts of the decision involved questions of "pitch" or "balance" and did not amount to a failure to inform him of adverse material [21]. The Court also concluded that the failure to give a statement of reasons involved a step consequent on the decision which could be cured by a Writ of Mandamus were one sought but did not affect the question of whether the decision itself had been made within jurisdiction [44], [48]. Order Nisi discharged.

#### **Industrial law - Superannuation - Liability to pay "Superannuation guarantee charge" dependant on meaning of "ordinary time earnings" - Appeal - Whether appellate court able to interpret contested instrument contrary to argument of parties**

In *Australian Communication Exchange Ltd v. DC of T* ([2003] HCA 55; 1.10.2003) the construction of the relevant Award permitted a narrow construction (for which the appellant contended and the primary judge accepted), a wider construction and an intermediate construction (accepted by the Full Court below) of the liability to pay the Superannuation guarantee charge in relation to the "ordinary time earnings" of different classes of employees. The majority of the High Court (McHugh, Gummow, Callinan, Heydon JJ jointly) concluded the

Full Court had erred in adopting an intermediate position contrary to the submissions of the parties and unwanted by them [41], Hayne J sim. Contra Gleeson CJ [7], Kirby J [89]. Appeal allowed.

#### **Criminal law - Compensation of victims - When shock constitutes "symptoms and disability" - Whether "and" conjunctive or disjunctive**

In *Victims Compensation Fund Corp. v. Brown* ([2003] HCA 54; 30.09.2003) the High Court (in a judgment given by Heydon J with whom McHugh ACJ, Gummow, Kirby and Hayne JJ agreed) considered whether the provisions of the Victims Support and Rehabilitation Act 1996 (NSW) entitling compensation for shock "only if the symptoms and disability" persisted for six weeks used the word "and" in an conjunctive way. The High Court rejected the proposition that the phrase introduced a "composite or portmanteau phrase" [34]. Appeal allowed. Limitation of actions - Extension of limitation period - Whether claimant had full and satisfactory explanation for delay

In *Russo v. Aiello* ([2003] HCA 53; 30.09.2003) the majority of the High Court concluded the Court of Appeal NSW had not erred in finding the District Court had not erred in holding the respondent had established the appellants did not have a "full and satisfactory explanation for the delay" in making a claim governed by the Motor Accidents Act 1988 (NSW). Appeal dismissed.

#### **Negligence - Causation - Whether warning would have altered victims conduct - Role of appellate court assessing credibility**

In *Hoyts P/L v. Burns* ([2003] HCA 61; 9.10.2003) the High Court concluded the Court of Appeal NSW had erred in interfering with the primary Judge's finding that a warning sign attached to cinema seats which retracted automatically would not have altered the conduct of the victim in attempting to sit on a retracted seat: McHugh, Gummow, Hayne, Callinan JJ; Kirby J sim. Appeal allowed.

#### **Trade practices - Restrictive trade practices - Exclusive dealing - Whether non-competition provisions had dual and composite character**

In *Visy Paper P/L v. ACCC* ([2003] HCA 59; 8.10.2003) the High Court determined by majority to dismiss an appeal from a decision of the Full Court of the Federal Court which concluded that the phrase "by reason that" appearing in s45(6) of the Trade Practices Act 1974 (Cth) should be read as equivalent to "if and insofar as" [21]: Gleeson CJ; McHugh, Gummow Hayne JJ; Kirby J sim; contra Callinan J. Appeal dismissed.

#### **Sale of land (NSW) - Notice of termination for failure to pay balance of deposit - Balance paid following day - Equity - Whether unconscientious for vendor to exercise right of termination**

In *Romanos v. Pentagold Investments P/L* ([2003] HCA 58; 7.10.2003) a purchaser sought relief against forfeiture of a contract for the sale of land in NSW where the purchaser had paid the required balance of the deposit a day after notice of termination for this failure had been given by the vendor. The primary Judge dismissed the claim for relief against forfeiture but ordered the return of the deposit. The majority of the Court of Appeal NSW allowed an appeal and granted relief against forfeiture. The appeal by the vendor to the High Court was allowed on the basis that no evidence established why the requirement in the contract that time was of the essence had ceased in equity to be essential [26]: Gleeson, McHugh, Gummow, Hayne, Heydon JJ; sim Kirby and Callinan J.

### **High Court Notes: December 2003**

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### **Discrimination - Disability - Whether disability - Violent disturbed child expelled from State school - Whether disability includes behavioral manifestation of disorder - Whether obligation to accommodate person with disability - Whether comparator for determining less favorable treatment must have characteristics of disabled person - Causation**

In *Purvis v. New South Wales* (Department of Education and Training) ([2003] HCA 6; 11.11.2003) in 1997 a child (P) who had by reason of brain injury behavioral problems and violent disposition was expelled from a NSW State school. The complaint of his foster parents to the Human Rights and Equal Opportunity Commission under the Disability Discrimination Act 1992 (Cth) was upheld in November 2000. The Commissioner concluded P had suffered discrimination because the State had failed to accommodate P's anger by adjusting the relevant welfare and discipline policy, providing teachers with appropriate training and obtaining the assistance of experts. Judicial review under the AD (JR) Act was granted to NSW by a Judge of the Federal Court and this conclusion was upheld by a Full Court of the Federal Court. The appeal by the foster parents to the High Court was rejected by majority: Gleeson CJ; Gummow, Hayne, Heydon JJ; Callinan J; contra McHugh, Kirby JJ. The majority concluded the Commissioner had erred by confusing the consequence of the disability (violence) as being a part of it. The majority concluded the correct comparison for determining discrimination was with a student who did not have the disability being the mental impairment rather than a propensity to violence. Appeal dismissed.

### **Statutes - General and special provisions - Criminal law - Procuring supply of narcotic - Supplier deemed to be consumer**

In *Moroney v. Q* ([2003] HCA 63; 11.11.2003) the Appellant was a prisoner charged under s6 of the Drugs Misuse Act 1986 (Q) that he unlawfully supplied a drug "to another" when he procured the drugs for himself. The High Court concluded the Appellant had been properly convicted on the basis that by s7 of the Criminal Code (Q) he was to be regarded as a principal offender because he had counseled or procured the other person to supply him with narcotics in prison. Appeal dismissed.

### **Criminal law - Murder - Direction concerning manslaughter - Whether miscarriage of justice**

In *Gillard v. (Q)* ([2003] HCA 64; 12.11.2003) G was convicted of murder. He had been the driver for another who murdered a drug dealer. The trial Judge did not direct the jury that a conviction for manslaughter was open. This direction was upheld by the Court of Criminal Appeal (SA). On G's appeal to the High Court the prosecution agreed the direction constituted an error of law but contended no miscarriage of justice had occurred within the proviso to s353(1) of the Criminal Law Consolidation Act 1935 (SA). G's appeal to the High Court was allowed: Gleeson J; Callinan J; Gummow J; Kirby J; Hayne J. The Court considered criticisms of its decision concerning criminal complicity in *McAuliffe v. Q* (1995) 183 CLR 108 but observed that the reconsideration of this case was neither sought nor required. Appeal allowed.

### **Constitutional law - Exclusive powers of Commonwealth Parliament - Commonwealth places - Local council rates**

In *Paliflex P/L v. Chief Commissioner State Revenue* ([2003] HCA 65; 21.11.2003) the High Court considered the operation of the Land Tax Act 1956 (NSW) and the Land Tax Management Act 1956 (NSW) in relation to land that was acquired by the Commonwealth for public

purposes within Constitution s52(i) and subsequently sold into private ownership. The High Court concluded the land tax legislation was not State Legislation with respect to a place acquired by the Commonwealth for public purposes. In *South Sydney CC v. Paliflex P/L* [2003] HCA 66 (12 November 2003) between the same parties the Court considered whether the new owner of the land was liable to pay local Government rates and charges.

### **Statutes - Whether Bill for an Act to repeal an Act is a Bill for an Act to "Amend" it - Whether Bills that have passed Parliament lapsed on it being prorogued**

In *Attorney-General (WA) v. Marquet* ([2003] HCA 67; 13.11.2003) by s13 the Electoral Distribution Act 1947 (WA) sought to entrench its provisions by requiring any Bill for an Act to "amend" it be passed by a certain parliamentary majority. A package of legislation was passed whereby one Act repealed the Act and another Act replaced it. The respondent (the Clerk of the Parliaments of WA) commenced proceedings seeking declarations as to whether it was lawful to present the relevant Bills to the Governor for assent. The majority of the Full Court Supreme Court WA concluded it would not be lawful. The appellant's appeal to the High Court was dismissed by majority: Gleeson CJ, Gummow, Hayne, Heydon JJ; jointly contra Callinan J sim Kirby J. The majority concluded that on its proper construction the Bills forming the package of legislation amounted to legislation to "amend" the Act albeit the immediate effect was to "repeal" it [52]; contra Kirby J [187]. The Court concluded that because the Bills had passed through all parliamentary steps before Parliament was prorogued the Bills did not lapse and it would be otherwise lawful to present them for assent [85]. Appeal dismissed.

