

NOTICEBOARD

High Court Notes April 2003

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

Administrative law - Natural justice - Whether breach without consequence entitles relief

In *Re MIMA; ex p Lam* ([2003] HCA 6; 12.02.03) the prosecutor commenced a proceeding in the original jurisdiction of the High Court under *Constitution* s75(v) seeking to quash a decision to cancel his permanent visa on character grounds under s501(2) of the *Migration Act 1958 (Cth)*. The prosecutor was a father. An officer of the respondent asked for details of the childrens' carers indicating the respondent wished to contact them. The prosecutor provided the details but the carers were never contacted. The application to quash the consequent decision for breach of natural justice was refused. The members of the High Court concluded that the failure to contact the carers did not defeat any expectation of the prosecutor nor cause him to be denied procedural fairness, and the interests of the children were elsewhere addressed in detail: Gleeson CJ [35], [36]; McHugh, Gummow [105]; Hayne [122]; Callinan [149] JJ. The Court considered whether the concept of "legitimate expectation" may constitute an impermissible fetter on statutory power and English authority as to the distinction between legitimate expectation and unreasonableness [72]. The Court considered and qualified the operation of its earlier decision in *MIEA v. Teoh* (1995) 183 CLR 273. Application dismissed.

High Court - Removal of proceeding - Whether claim for adult child maintenance arises under the Constitution - Whether High Court Justice who had practiced in one State biased in relation to applications in that State

In *Bienstein v. Bienstein* ([2003] HCA 7; 13.2.2003) a Full Court of the High Court (McHugh, Kirby, Callinan JJ) concluded a High Court Justice was not biased in relation to matters arising in the State in which the Justice had practiced [33]. The Court concluded questions of entitlement to adult maintenance did not raise a question under the *Constitution* within s40(1) of the *Judiciary Act*.

Land tax - Valuation

In *Maurici v. Chief Commissioner of State Revenue (NSW)* ([2003] HCA 8; 13.2.2003) a Full Court (McHugh, Gummow, Kirby, Hayne, Callinan JJ) considered whether in fixing the unimproved value of an improved parcel of land under the *Land Tax Management Act 1956 (NSW)* in accordance with s6A of the *Valuation of Land Act 1916 (NSW)* it is correct to consider exclusively sales of unimproved parcels of land in the same locality as the relevant land or whether the value may be discovered by calculating value after notionally removing the improvements. The High Court concluded the procedure adopted was unfair because it considered a very small number of sales of unimproved land in the eastern suburbs of Sydney where such land, and sales, were scarce [17]. Appeal allowed.

Federal Court Notes April 2003

Prepared for the Law Council of Australia and its Constituents

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

Migration - Visas - Cancellation on character grounds - Reasons - Whether Full Court may order delivery of reasons

In *Ayan v. MIMIA* ([2003] FCAFC 7; 14.2.2003) a Full Court concluded that a briefing paper signed by the Minister for Immigration in cancelling a visa on character grounds under s501(2) of the *Migration Act* was not a statement of reasons. The Full Court decided that notwithstanding the point had not been taken below it would order the Minister give the Appellant a statement of reasons referred to in s501G(1)(e) of the *Migration Act* for the decision to cancel the visa.

Trade Practices - Penalty - Relevance of size of corporation

In *Schneider Electric (Australia) P/L v. ACCC* ([2003] FCAFC 2; 14.2.2003) a Full Court considered the extent to which the size of a corporation, and its capacity to pay, may be taken into account in assessing penalties under the *TP Act* and the relevance of the resources of the parent company.

Constitutional law - Jurisdiction of Courts - Claim raising acts of State

In *Petrotimor Companhia de Petroleos S.A.R.L. v. C of A* ([2003] FCAFC 3; 3.2.2003) a Full Court concluded that claims by the Appellant for a declaration that it was entitled to payment for loss caused by an agreement between Australia and Portugal concerning exploration for oil in the Timor Sea was not justiciable. Consideration of when a Court has jurisdiction to entertain a claim requiring consideration of validity of acts of foreign States.

Migration - Refugees - Real chance of persecution

In *Shumilov v. MIMA* ([2002] FCAFC 1; 5.2.2003) a Full Court concluded the RRT had not erred in rejecting a claim for refugee status where material before it suggested that the Uzbekistani police might subject the entire relevant population to attention. The Full Court concluded there was no basis to infer from this that the Appellants faced a real chance of persecution.

Costs - Costs against non-party

In *Kebaro P/L v. Saunders* ([2003] FCAFC 5; 10.2.2003) a Full Court considered when the Court may make an order for costs against a non-party who stood to benefit from successful litigation conducted by persons of straw.

Migration - Refugees - Failure of RRT to reject evidence in rejecting application

In *MIMA v. W64/01A* ([2003] FCAFC 12; 19.2.2003) a Full Court allowed an appeal by the Minister against a conclusion of a trial judge that the RRT had erred in rejecting a claim for refugee status without making adverse findings on the credibility of the Respondent.

Immigration - Release from detention pending appeal

In *Untan v. MIMIA* ([2003] FCAFC 8; 19.2.2003) a Full Court discharged an earlier order it had made effecting the release of the Appellant from detention pending hearing of the appeal after the Appellant made a threat against the life of the Minister.

Income tax - Arrangements

In *C of T v. Mochkin* ([2003] FCAFC 15; 21.2.2003) a Full

NOTICEBOARD

Court considered when arrangements made to cause a share broking business conducted by a person to be carried on by a company contravened *Part IVA* of *ITAA* notwithstanding that the scheme had objective benefits.

Industrial law - Unfair dismissal - Reinstatement

In *Ramsey Butchering Services P/L v. Blackadder* ([2003] *FCAFC* 20; 21.2.2003) a Full Court considered whether an employee ordered to be reinstated was required to be given merely a contract or actual work. The appeal arose in proceedings alleging breach of the reinstatement orders of the AIRC.

Federal Court - Jurisdiction - Claim solely for damages for fraud

In *Wride v. IP Australia* ([2003] *FCA* 86; 3.2.2003) von Doussa J considered the Federal Court had no jurisdiction to determine a claim against the entity responsible for the Patent Office claiming damages for fraud where no claim was brought under a law of the Federal Parliament giving jurisdiction to the Federal Court.

Trade practices - Consumer protection - Representative proceedings

In *Courtney v. Medtel P/L* ([2003] *FCA* 36; 5.2.2003) Sackville J determined applicants in a class of persons who received pacemakers were entitled to damages where the pacemakers were made of a solder which rendered them of unmerchantable quality.

Practice - Security for costs - Whether Applicant ordinarily resident in Australia

In *Logue v. Hanson Technologies Ltd* ([2003] *FCA* 81; 17.2.2003) Weinberg J considered when a person who had tenuous links with Australia could be said to be "ordinary resident outside Australia" for FCR O. 28 r3.

Superannuation - Extent of review

In *Military Superannuation & Benefits Board of Trustees No. 1 v. Drake* ([2003] *FCA* 78; 18.2.2003) Merkel J considered whether the Superannuation Complaints Tribunal had jurisdiction to make a decision in substitution for that of the trustees if the decision was not authorised by the rules of the Trust Fund.

Statutes - Great Barrier Reef

In *Ashton v. C of A* ([2003] *FCA* 92; 21.2.2003) Kiefel J concluded a regulation made under the *Great Barrier Reef Marine Park Act 1975 (Cth)* which prohibited trawling in the Mission Beach area was valid.

Social security - Overpayment - Whether attributable solely to error of the Commonwealth

In *Secretary, DFCS v. Sekhon* ([2003] *FCA* 76; 14.2.2003) Wilcox J considered whether monies paid to a person during a preclusion period were paid solely due to an administrative error made by the Commonwealth within *Social Security Act 1991 (Cth)* Part 3.14.

Corporations - Retrospective notice of registrable charge

In *Re ACE Funding Ltd* ([2003] *FCA* 59; 6.2.2003) Conti J considered whether it was appropriate to give an extension of time to retrospectively lodge notice of a registerable charge

within *Corporations Act 2001 (Cth)* ss263(1), 264(1).

Migration - Natural justice

In *Tran v. MIMIA* ([2003] *FCA* 44; 7.2.2003) Finklestein J set aside a decision of the MRT as being in breach of natural justice where the MRT rejected evidence of witnesses who were present in the hearing room without giving a warning that the witnesses should leave the room.

Migration - Cancellation of student visa

In *Singh v. MIMIA* ([2003] *FCA* 52; 7.2.2003) Heerey J considered a visa of a student cancelled for failing to comply with satisfactory academic performance conditions had been cancelled lawfully.

Native title - Practice - Non-legally qualified representative

In *Rubibi v. WA* ([2003] *FCA* 63; 10.2.2003) Merkel J granted conditional leave under s85 of the *Native Title Act 1993 (Cth)* to a non-lawyer to represent a group.

Administrative law - Review of policy

In *Humane Society International Inc. v. Minister for the Environment & Heritage* ([2003] *FCA* 64; 12.2.2003) Kiefel J concluded that a purported exemption in respect of the grey-headed flying-fox from protection under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* was unlawful. Consideration of when an exemption by a Commonwealth Minister to holders of State permits from requiring to apply under Commonwealth legislation constitutes a decision of an administrative character reviewable under the *AD (JR) Act*. Consideration of when a public duty remained unperformed under s39B of the *Judiciary Act*, validity of policy and appropriateness of declaratory relief.

Superannuation - Functions of Superannuation Complaints Tribunal

In *Cameron v. Board Trustees of the State Public Sector Superannuation Scheme* ([2003] *FCA* 63; 14.2.2003) Spender J considered the nature and function of the Superannuation Complaints Tribunal and how it was to determine the disability of the Applicant and give adequate reasons.

Federal Court - Appeal from Federal Magistrates Court

In *SGDB v. MIMIA* ([2003] *FCA* 74; 14.2.2003) Mansfield J considered whether the Full Court of the Federal Court, constituted by a single judge to determine appeals from the Federal Magistrates Court, should remit a matter to the Magistrate on finding the Magistrate had incorrectly approached question of jurisdictional error. Matter remitted.

NOTICE

From Chris Cox, Acting Director, Office of
Courts Administration

Transcripts of facts and submissions on Supreme Court guilty pleas will no longer automatically be prepared. Transcripts of facts and submissions will only be prepared upon request.

continued back page

Noticeboard, from page 25

The following is the amended current transcription fees:

CURRENT TRANSCRIPT FEES (GST is not payable)

Magistrates Court proceedings – 7.00 per page (Note: Multiple order charges may apply to transcript of Coronial proceedings)

- certification – \$10.00 per transcript

Supreme Court proceedings

- running (daily) charge – \$9.83 per page*
- delayed charge – \$9.36 per page*
- multiple order charge (where ordered by two parties at commencement of proceedings) – \$5.00 per page*
- multiple order charge (where ordered by three parties at commencement) – \$10.00 per transcript
- additional copy rate per page – \$1.00 per page

From the Family Law Section, Law Council of Australia, 5 March 2003

1. Information required where no splitting order sought

The Family Court had intended to issue a Practice Direction confirming that no superannuation valuation was required for a Form 12A application for consent orders if the parties were not seeking splitting orders. This was consistent with the decision by Chisholm J in *Jovanovic*.

FLS understands that a contrary decision has been made by another Family Court Judge and a Practice Direction is now unlikely. The conflicting interpretations of the legislation may shortly be considered by a Full Court.

2. New superannuation information form

The Family Court has issued a new approved superannuation form to replace that which has been in use for the past two months. FLS understands that:

- a) The old form is likely to be suitable for use in almost all instances but practitioners should check that the information sought in the old form complies with the regulatory requirements in relation to the particular type of superannuation for which the form was issued.

b) Although the form is “approved” by the Court the accompanying kit explains that it need not be used if the trustee prefers to provide the relevant information in another form. Some trustees have developed systems which produce the information required by the regulations but it will not be set out in the same manner as the Form 6.

c) The new form cures a deficiency in the old form where the subject was a partially-vested accumulation fund. Practitioners seeking information on this type of fund using the old form should ensure that all the information required in the regulations is obtained.

3. Trustee information provided direct to solicitor

FLS understands that some trustees have declined to send superannuation information to the solicitor for a spouse.

The Attorney-General’s Department has prepared a legal opinion to the effect that, by operation of common law principles in relation to agency, a trustee of a superannuation fund can provide information, as required under Section 90MZB, to a legal practitioner acting for an “eligible person”.

From Murray Hancock, NT Commissioner of Taxes

Stamp Duty Lodgement Guide

As you are probably aware various amendments to the *Stamp Duty Act* (SDA) have recently come into effect. As a result the *Stamp Duty Lodgement Guide* has been updated to reflect these changes.

The Guide is a comprehensive reference point for all stamp duty related issues and provides information on Territory Revenue Management’s requirements for the assessment of the various types of duties administered under the SDA.

A PDF version of *The Guide* is available for download from our website – www.revenue.nt.gov.au. Follow the links from the front page.

2003 CLE Program

16 Apr	Juvenile Court Issues	Chief Magistrate
21 May	Family Law for First Years	Stuart Barr
18 Jun	Bits & Pieces of Legislation	Ian Morris
30 Jul	Administrative Appeals	Justice Mansfield
20 Aug	Sentencing Act	John Lowndes SM
12 Sep	TBA	Jenny Blokland SM
22 Oct	AustraAsia Railway Project - Challenges Overcome	Alastair Shields
19 Nov	TBA	Justice Angel

Prices are \$22 members, \$27.50 non-members, \$5.50 students (all include GST).

The CLE presentations are videoconferenced to venues in Alice Springs and Katherine. Unless otherwise notified, the CLEs are presented in Darwin at Cridlands’ boardroom.

DEADLINES

Contributions to Balance are welcome.

Copy should be forwarded to the Editor of Balance, Law Society NT, no later than the 5th of each month.

Either fax your contributions to the Law Society: 08 8941 1623 or send them via email: lfonglim@lawsocnt.asn.au.

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