

High Court Notes May 2003

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

Testators Family Maintenance - Available Estate - Agreement between deceased and spouse to make wills directing property to one child - Whether intention to avoid legislation contrary public policy - Conflicting decisions of Privy Council

In *Barns v. Barns* ([2003] HCA 9; 7.3.2003) a grazier (the deceased) and his wife (the second respondent) entered on advice into a deed in May 1996 agreeing to make mutual wills whereby the first to die would leave their estate to the other who would leave it to their son (the first respondent) to the exclusion of their adopted child (the appellant). On the death of the deceased in August 1998 probate of his will made in accordance with the deed was granted to his executor (the first respondent/son). The appellant made a claim for testator's family maintenance under the *Inheritance (Family Provision) Act 1972 (SA)*. The appellant claimed in these proceedings that the deed was void as an attempt to avoid the operation of the Act. The primary Judge answered preliminary questions to the effect that the deed was void. The Full Court of the Supreme Court SA allowed an appeal. It held the deed had the effect of avoiding the Act by removing assets from the estate but that this was not prevented, or contrary to, the Act and any gap in the law was a matter for Parliament. The proceeding returned to the primary Judge who dismissed it. The appellant appealed against both the decisions of the Full Court and the primary Judge. Her appeals were allowed by the High Court. The majority concluded that the deed and wills made in consequence of it did not have the effect of removing the property from the estate which would have been the effect of a disposition in the life of the deceased: Gleeson CJ [30], [35]; Gummow with Hayne JJ [68]. In dissent Kirby J held that in the absence of statutory revision to introduce "notional estate" the agreement in the deed and consequent specific bequest in favour of the second respondent should be given effect [159]. Appeals allowed.

Administrative law - Power of Court on review - Power to order matter be remitted to same decision-maker to preserve findings of fact

In *MIMA v. Wang* ([2003] HCA 11; 12.30.2003) 481(1)(d) of the *Migration Act 1958 (Cth)* authorised the Federal Court in reviewing a decision to order the matter be referred to the person who made the decision for further consideration and by s481(1)(d) authorised the Court to make an order directing any person to do, or refrain, from doing anything necessary to do justice between the parties. In December 1999 the RRT (composed of Ms. B) dismissed a claim by W for a finding that he was a refugee entitled to protection visa. The RRT made certain findings in favour of W. His application to the Federal Court for review was dismissed by the Primary Judge but in November 2002 a Full Court of the Federal Court allowed an appeal. Members of the Full Court expressed concern that W should retain the benefit of the favorable findings and indicated their preference for the matter to return to Ms. B. The Full Court only ordered the matter be remitted to the RRT. The

Court granted liberty to apply. The Principal Member of the RRT proposed that the rehearing occur in front of a member other than Ms. B and W sought, pursuant to liberty to apply, an order that Ms. B hear the matter. In April 2002 the Full Court made this order. An appeal by the Minister to High Court was allowed by majority: Gleeson CJ, McHugh J, Gummow with Hayne JJ; contra Kirby J. The majority observed that while the order appeared to be within power in the absence of a finding that justice required the order it ought not to have been made. The Court observed that question for the RRT was whether W was a refugee at the date of the final decision and earlier favorable finding were not determinative of this. In dissent Kirby J observed the order was made in the unchallengeable exercise of discretion. Appeal allowed.

Criminal law - Jurisdiction - Whether State procedure applies to determination of interlocutory matters in Federal prosecutions

In *Q v. Gee* ([2003] HCA 12; 13.3.2003) on the trial of G in the District Court of SA for defrauding the Commonwealth the Trial Judge made ruling on admissibility of prosecution evidence, in accordance with State law and practice, after G pleaded not guilty but before a jury was empanelled. The prosecution sought to challenge the ruling by means of a case stated under s350 of the *Criminal Law Consolidation Act 1935 (SA)*. The Full Court of SA concluded s68(2) of the *Judiciary Act 1903 (Cth)* did not confer jurisdiction on it to hear the case stated. An appeal by the prosecution to the High Court was allowed: Gleeson CJ; McHugh, Gummow JJ; Kirby J; Callinan J. The Court generally observed that s68(2) of the *Judiciary Act* expressed a policy that Commonwealth offences were to be treated uniformly in each State with State offences and not uniformly between the States. The Court also held the DDP (Cth) had power to bring the case stated. Appeal allowed.

Criminal law - Procedure - Tender of evidence by prosecution in rebuttal - Whether prosecution permitted to spilt its case - Prior inconsistent statements of accused

In *Q v. Soma* ([2003] HCA 13; 13.3.2003) the High Court considered when the prosecution should be allowed to introduce evidence in rebuttal of sworn evidence by an accused given after the prosecution case had closed. The Court considered when the prosecution could lead evidence which it had not led as part of its case. Appeal by prosecution against orders of the Court of Appeal in Q setting aside the conviction dismissed.

Contract - Damages - Proof - Duty of good faith

In *Placer (Granny Smith) Pty Ltd v. Thiess Contractors Pty Ltd* ([2003] HCA 10; 11.3.2003) from 1989 the appellant and respondent operated an open cut mine in WA on a schedule of rates contract. From 1991 the appellant proposed a "partnering" agreement whereby it would pay the respondent its costs plus a margin for profits. In 1995 the respondent terminated the agreement and sued the appellant who counter-claimed alleging the respondent deceived it as to its costs causing the appellant to make overpayments. The Primary Judge found the appellant had overstated its costs but was unable to calculate the loss so caused and ordered nominal damages to the appellant only. This decision was affirmed by

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the Court of Appeal WA. The appellant's appeal to the High Court was allowed by all members on the ground that an admission in the pleading by the respondent of a breach and an amount of loss had not been drawn to the attention of the Courts below. Consideration of when parties to a contract owe each other a duty of good faith. Appeal allowed.

Federal Court Notes May 2003

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Natural justice - Bias - Comments by member of AIRC
In *Heap; Re Application for Constitutional Writs against AIRC* ([2003] FCAFC 36; 7.3.2003) the Senior Deputy President of the AIRC hearing proceedings for unfair dismissal by a bank officer invited the representative of the bank to confer privately after the submissions of parties were received. The SDP told the representative the bank had "more problems than a man with a wooden leg in a bushfire". The bank subsequently requested the SDP disqualify herself and she refused. A Full Bench quashed the decision of the SDP and ordered she was disqualified. A Full Court of the Federal Court dismissed the application by the bank officer for prerogative writs to quash the decision of the Full Bench. The Full Court concluded the Full Bench was in the position of an expert body and that jurisdictional error had not been established.

Judges - Bias - Whether findings on liability preclude Judge from assessing damages

In *Versace v. Monte* ([2003] FCA 126; 3.3.2003) Tamberlin J concluded the circumstance that he had determined liability did not mean he should disqualify himself on the ground of apprehended bias from assessing consequential damages.

Employment - Estoppel - Whether proceedings in AIRC establish issue estoppel

In *Kowalski v. Trustee, Mitsubishi Motors Australia Ltd Staff Superannuation Pty Ltd* ([2003] FCAFC 18; 28.2.2003) a Full Court concluded [12] that it would not accept that a finding on an issue in an unjust dismissal proceeding established an issue estoppel for Court proceedings.

Patents - Invention - Sufficiency of description

In *Lockwood Security Products P/L v. Doric Products P/L* ([2003] FCAFC 29; 7.3.2003) a Full Court considered whether a claimed invention for which a patent was sought was sufficiently described and whether the claims in the specification were fairly based on the matter described in the specification.

Discrimination - Unwell tertiary student

In *Sluggett v. Flinders University of South Australia* ([2003] FCAFC 27; 7.3.2003) a Full Court dismissed an appeal against orders of a Primary Judge who found HREOC had not erred in its consideration of the claim of the appellant that the first respondent had discriminated against her in marking her academic work because of consequences of childhood polio.

Bankruptcy - Transaction void against Trustee - Transfer of interest in matrimonial home pursuant to consent orders of Family Court

In *Official Trustee in Bankruptcy v. Mateo* ([2003] FCAFC 26;

28.2.2003) a Full Court considered whether s121 of the Bankruptcy Act applied to a transfer by a bankrupt of an interest in a matrimonial home made pursuant to an order of the Family Court. The Full Court also considered the difficulty in relating non-financial matrimonial contributions to the market value of a property, and the relationship between applications under the Bankruptcy Act and applications to set aside orders of the Family Court under s79A of the Family Law Act.

Appeal - Setting aside findings of fact

In *CFMEU v. Hamberger* ([2003] FCAFC 38; 10.3.2003) a Full Court considered when findings of fact after an oral hearing by a Primary Judge could be set aside. The Full Court concluded the Primary Judge erred in finding an industrial association had acted in deliberate disregard and defiance of provisions of the *Workplace Relations Act 1996 (Cth)* because it did not lead evidence to the contrary.

Migration - Tribunals - Open hearing

In *Uranek v. MIMIA* ([2003] FCAFC 37; 11.3.2003) a Full Court concluded that the removal of an applicant's children from the hearing room did not violate the requirement in s365 of the *Migration Act* that the MRT take its evidence in public; the failure to provide an interpret did not contravene s366C; and the failure of the MRT to inform the applicant of certain documentary evidence did not breach the requirements of s359A.

Migration - Whether prohibited immigrant in 1984 entitled to absorbed person Visa

In *Sit v. MIMIA* ([2003] FCAFC 40; 11.3.2003) a Full Court reaffirmed that a person who was a prohibited immigrant on 2 April 1984 could not have ceased to be an immigrant within s34(2)(b) of the *Migration Act*.

Federal Court - Appeal against "judgment" - Direction by a Judge to the Registrar

In *Bizuneh v. MIMIA* ([2003] FCAFC 42; 13.3.2003) a Full Court concluded that a direction by a Judge to a Registrar pursuant to FCR O46 r7A that the Registrar refuse to accept an application because it was an abuse of process was not a judgment from which an appeal lay. A similar conclusion was reached in *Croker v. Philips Electronics Australia Ltd* ([2003] FCAFC 43; 13.3.2003).

Bankruptcy - Whether defect in bankruptcy notice substantial

In *Marshall V. General Motors Acceptance Corp.* ([2003] FCAFC 45; 18.3.2003) a Full Court concluded, by majority, that incorrect calculation of interest in a bankruptcy notice invalidated it.

Migration - Privative clause decision - Decision of AAT

In *Vaitiaki v. MIMIA* ([2003] FCA 114; 28.2.2003) Hely J concluded that if a decision of the AAT was affected by jurisdictional error it would not be made "under" the *Migration Act* and thus not be a privative clause decision within s474(2) of that Act.

Migration - Jurisdictional error

In *SDAO v. MIMIA* ([2003] FCA 132; 4.3.2003) von Doussa J concluded that two decisions of the RRT did not involve jurisdictional error for failure to take into account relevant

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matters. He concluded that the elements or integers of the two claims were considered. He concluded that jurisdictional error could have been established if the RRT failed to ask itself the correct question or failed to take into account relevant considerations being claims justifying a well founded fear of persecution [18]. Appeals from Federal Magistrates' Court dismissed.

Migration - Jurisdictional error - Natural justice - Failure to adjourn hearing for illness

In *Applicant NAHF of 2002 v. MIMIA* ([2003] FCA 140; 5.3.2003) Hely J concluded a decision of the RRT to adjourn a hearing on the ground of illness to a date when the illness still operated, and then conduct the hearing, constituted a breach of the rules of natural justice in relation to the applicant.

Migration - Privative clause decision - Whether applicant misled

In *NADZ v. MIMIA* ([2003] FCA 118; 28.2.2003) Hely J concluded an applicant before the RRT was not misled by correspondence from the RRT as was established in *Muin v. RRT* (2002) 76 ALJR 966.

Migration Act - Visa cancellation - Misdescription of visa - Whether jurisdictional error

In *Schwartz v. MIMIA* ([2003] FCA 169; 7.3.2003) Selway J concluded a decision to cancel a visa constituted a jurisdictional error when the material placed before the Minister informed him he was cancelling a visa of a class other than that held by the applicant.

Trade practices - Misleading and deceptive conduct - Similar product packaging

In *Cat Media P/L v. Opti-Healthcare P/L* ([2003] FCA 133; 4.3.2003) Branson J considered whether two products were so similarly packaged that misleading and deceptive conduct had occurred.

Trade practices - Defective goods - Injury - Pleading

In *Morris v. Alcon Laboratories (Aust.) P/L* ([2003] FCA 151; 6.3.2003) RD Nicholson J considered what particulars were sufficient to plead injury consequent on defective goods within ss75AC, 75AD of *Trade Practices Act*.

Veteran's affairs - Entitlement - Civilian interned in Japan in WWII

In *Parnell-Schoneveld v. Repatriation Commission* ([2003] FCA 153; 6.3.2003) Jacobson J considered the AAT did not err in rejecting a claim for compensation under the *Compensation (Japanese Internment) Act 2001* on finding the internee was not domiciled in Australia immediately before the commencement of the interment.

Courts - Contempt

In *ACCC v. World Netsafe P/L* ([2003] FCA 159; 6.3.2003) Spender J considered whether Ord 37 r2 of the FCR was invalid and what was required to be proved to find a debtor was in contempt of Court orders to pay money. He further considered whether a Director was liable as an accessory to conduct of a company.

Income tax - Assessment - Gambling income

In *Liu v. C of T* ([2003] FCA 124; 28.2.2003) Allsop J concluded the AAT had not erred in affirming assessments of income

generated by the respondent in respect of the tax payer after his affairs were investigated by the NCA.

Bankruptcy - Whether bankrupt may appeal making of sequestration order

In *Kellow v. Dudzinski* ([2003] FCA 143; 3.3.2003) Spender J concluded a bankrupt was able to appeal against an order of the Federal Court making him a bankrupt.

NOTICE

From Philip Kellow, Deputy Registrar, Federal Court of Australia

A precis of the *Federal Court Amendment Rules 2003 (No. 1)* published in the Commonwealth Government Gazette on 24 March 2003 as Statutory Rule No 35 of 2003. The Amendment Rules commence on 24 March 2003.

An official copy of the Amendment Rules is available on the internet from the ScalePlus site at <http://scaleplus.law.gov.au/home.htm>.

The Amendment Rules:

- amend Orders 2 and 3 by omitting the rules in relation to the 'fixed vacation' and inserting a new Order 3 subrule 2(4A) which provides, inter alia, that in calculating the time fixed by these Rules or by an order fixing, extending or abridging time, the period from 24 December to 14 January next following is excluded, unless the Court otherwise orders.
- amend Order 7 rule 11 to allow the registry to serve a document by filing in situations where the document is sent by the Court to a party's proper address but is returned on the basis that the party is no longer residing or working at, or otherwise associated with, that address. Proper address for a person is the address for service of the person in the proceeding, or, if the person has no address for service when the document is left or posted, the person's last know place of business or abode.
- amend Order 11 rule 1B to allow the legal representative's certificate to be incorporated in the pleading being certified, and form 1 SB so that it identifies the pleading being certified;
- amend Order 15 rule 2 to make it clear that the factors set out in subrule 2 (5) may be taken into account by a party when making a reasonable search for the purposes of subrule 2 (3).
- amend Order 28 rule 3 to make it clear that the factors in subrule 3(1) are not intended to circumscribe the broad discretionary power of the Court to make an order for security of costs under section 56 of the Act;
- amend Order 37 by inserting a rule to allow the Court or a Judge to delegate to a registrar the power to issue writs of execution;
- omit Order 55 as it is no longer necessary in light of amendments to the National Health Act 1955
- amend Orders 62 and 63 in relation to the requirement for payment into a Litigants' Fund of an amount as security for

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the costs of any taxation of a bill of costs, and the power of the registrar to direct the release of that money.

As a result of the amendment to Orders 2 and 3, the Chief Justice has issued a revised version of Practice Note No 7.

PRACTICE NOTE

From Philip Kellow, Deputy Registrar, Federal Court of Australia

Please find enclosed a copy of a revised version of Practice Note No 7 made by the Chief Justice on 24 March 2003.

The new Practice Note reflects the changes made to Orders 2 and 3 of the Federal Court Rules by the *Federal Court Amendment Rules 2003 (No. 1)*.

Practice Note No 7 - THE LAW TERM

Practice Note No 7 issued on 8 April 1994 is revoked and the following Practice Note No 7 is substituted.

1. The Law Term is the period beginning on the first Monday in February and ending on the last Friday before 23 December.
2. A matter will not be set down for hearing outside the Law Term, unless the Court otherwise orders.
3. To obtain a hearing outside the Law Term, a party must lodge with the Registry:
 - (a) an affidavit, in addition to any other documentation that the Rules require to be filed, setting out the reasons why a hearing is sought outside the Law Term; and
 - (b) a draft of the order sought for a hearing outside the Law Term.

Mej Black, Chief Justice, Federal Court of Australia

CORRESPONDENCE TO LSNT PRESIDENT

From Theo Tsikouris, Acting Commissioner for Public Employment on 21 March 2003
Re: Inability and Disciplinary Appeal Board chairpersons

As you are aware from time to time it is necessary for the Commissioner for Public Employment to convene an Inability or Disciplinary Appeal Board where an employee who is aggrieved by a Chief Executive Officer's decision to take action under the inability or disciplinary provisions of the *Public Sector Employment and Management Act* (the Act), has the right to appeal that decision.

In accordance with Section 57(4) of the Act these Boards must be chaired by a person enrolled as a legal practitioner of the Supreme Court of the Northern Territory for a period of not less than 5 years.

It has been brought to my attention that some of the people on the current list of potential Chairpersons are no longer available. I would appreciate it if you could canvas your members to identify any private legal practitioners who may be interested in being placed on the list of potential Chairpersons. It is considered that persons serving as a Chairperson of these Boards are performing a community service and such duty is not for the purpose of financial gain.

The Chairperson is paid a rate of \$98 in respect of each hour spent on Board business.

I have enclosed for your information the relevant sections of the Act and a booklet provided to Board members.

PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT ACT

- (a) summon a person whose evidence appears to be material to the appeal;
 - (b) take evidence on oath and, for that purpose, may administer an oath; and
 - (c) require a person to produce documents or records in the person's possession or under the person's control which appear to be material to the appeal.
- (13) A person who, without reasonable excuse (and to whom, where the person is not an employee, payment or tender of reasonable expenses has been made), neglects or fails to attend in obedience to a summons under subsection (12) or to be sworn or make an affirmation, to answer relevant questions or to produce relevant documents when required to do so under that subsection, is guilty of an offence.
- Penalty: \$5,000.
- (14) Nothing in this section shall be construed as compelling a person to answer a question or produce a document that may tend to incriminate the person.
 - (15) An Appeal Board must —
 - (a) give its decisions and the reasons for its decisions in writing; and
 - (b) cause copies of those decisions and reasons to be served on each of the parties.

PART-TIME MEMBER OF THE AUSTRALIAN LAW REFORM COMMISSION

From Daryl Williams, Federal Attorney-General (7 April 2003)

I am pleased to announce the appointment of the Honourable Justice Susan Kiefel as a part-time member of the Australian Law Reform Commission. Justice Kiefel has been a judge of the Federal Court of Australia since 1994 and, prior to that, a judge of the Supreme Court of Queensland.

Justice Kiefel practised from 1975 as a barrister and was appointed as Queensland's first female Queen's Counsel in 1987.

During her career, Justice Kiefel has also been a part-time hearing commissioner of the Human Rights and Equal Opportunity Commission and is currently a deputy president of the Federal Police Disciplinary Tribunal.

I am delighted that Justice Kiefel has agreed to be appointed as a part-time ALRC Commissioner.

Her appointment will ensure that the Commission benefits from her exceptional legal talents and breadth of experience. Justice Kiefel has been appointed for a term of three years.