High Court Notes June 2003

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

Trade practices - Unconscionable conduct - Economic inequality

In *ACCC v. CG Berbatis Holdings P/L ([2002] HCA 18; 9.04.2003)* a tenant held a lease until February 1997 of a shop in the shopping centre owned by the respondents. The tenant, and other tenants, began proceedings in the WA Commercial Tribunal and Supreme Court alleging they had been required by the respondent to make payments in excess of that required by their leases. The proceedings were generally successful. In October 1996 the tenant found a purchaser for its business prepared to enter into a new lease with the respondent. The respondent agreed to enter into the new lease, enabling the tenant to sell the business, on the tenant agreeing to release the respondent from the other litigation. The tenant reluctantly agreed to this. In April 1998 the ACCC commenced proceedings alleging that the respondent had by the agreement with the tenant contravened, inter alia, ss51AA in Part IV A of *TPA Act*. The Primary Federal Court Judge found for the tenant and ordered it be released from that term of the agreement. This decision was reversed by a Full Court of the Federal Court. The appeal by the ACCC to the High Court was dismissed by majority: Gleeson CJ, Gummow with Hayne JJ; sim Callinan J; contra Kirby J. The majority concluded that the tenant had made a commercial decision and economic inequality did not constitute a party as being under a "special disability" amounting to unconscionable conduct within s51AA(1) as recognised in the equitable doctrine incorporated in the "unwritten law" of the States and Territories. Appeal dismissed.

Criminal law - Sentencing - Whether person with no prior convictions may be sentenced other than as first offender

In *Weininger v. Q ([2003] HCA 14; 2.04.2003)* the appellant had no previous convictions when convicted of two federal and one state offence concerning possession of narcotics. The Primary Judge was given an "agreed" statements of facts which asserted the appellant had by his offences been involved in a "continuing" cocaine importation syndicate which had encountered problems using an "established" method of bringing the drug into Australia. In sentencing the appellant to eighteen years imprisonment the Primary Judge observed that while the appellant was a first offender there was strong evidence establishing his participation in drug trafficking before the offences in question. The Court of Appeal (NSW) dismissed W's appeal by majority. His appeal to the High Court was also dismissed by majority: Gleeson CJ, McHugh, Gummow, Hayne JJ; sim Callinan J; contra Kirby J. The majority concluded that taken overall the comments of the Primary Judge did not disclose error. Kirby J concluded the remarks could not be divorced from their context and did disclose error [92]. Consideration of the degree to which facts involved in sentencing must be proved.

Trust - Breach of trust - Causation of loss - Damages

In *Youyang P/L v. Minter Ellison Morris Fletcher ([2003] HCA 15; 3.04.2003)* a firm of solicitors (the respondent) acted for a company (ECCCL) when in 1993 where the appellant deposited $500,000.00 with the firm to subscribe for shares in ECCCL. The funds were invested pursuant to an Information Memorandum which stated investors would receive a deposit certificate issued by a bank. The firm allowed the funds to be dispersed from its trust account otherwise than provided in the *Information Memorandum*. In May 1997 ECCCL was placed in liquidation. The appellant's action for breach of trust succeeded before the Primary Judge who entered judgment in August 2000 in the sum of $414,009.00 (being the sum which would yield $500,000.00 on the redemption date of the preference shares to which the appellant had subscribed). On appeal the NSW Court of Appeal concluded, by majority, acceptance of the defective deposit certificate was a breach of trust but it caused no loss. The appellant's appeal to the High Court was allowed: Gleeson CJ, McHugh, Gummow, Kirby, Hayne JJ jointly. The Court considered the nature of compensation in equity. The High Court concluded the Court of Appeal had erred in finding intervening events broke the train of causation [63]. The appeal was allowed and the effect of the primary judgment restored.

Constitutional law - Trial by jury - Reserve jurors

In *Fittock v. Q ([2003] HCA 19; 10.04.2003)* a Full Court concluded that provisions in the NT allowing for reserve jurors to be empanelled and for the actual jury to be determined by ballot did not prevent a Commonwealth offence tried by such a jury being tried other than *"by a jury"* as required by *Constitution* s80. In *Ng v. Q [2003] HCA 20; 10.04.2003* a Full Court of the High Court concluded the reserve juror provision in the *Juries Act 1967 (Vic)* (that required the final jury to be selected by ballot to exclude reserve jurors) did not constitute a trial other than *"by jury"* within s80 of the *Constitution*.

Extradition - Executive power

In *Oates v. A-G (Cth) ([2003] HCA 21; 10.04.2003)* a Full Court concluded that the executive power of the Commonwealth remained enabling it to request surrender of a fugitive notwithstanding that the offence in question was not one recognised in the treaty under the *Extradition Act 1988 (Cth)* between Australia and the other country. The Court concluded a request by Australia that Poland surrender a person to answer charges under the *Companies (WA) Code* was a valid exercise of executive power notwithstanding that the 1932 treaty did not specify the offences as extradition offences.

High Court - Special leave - Point not taken below

In *Heron v. Q ([2003] HCA 17; 19.04.2003)* the High Court reiterated that it would only be in exceptional circumstances that it would entertain granting special leave on grounds not considered by the Trial or Intermediate Appeal Court.

Federal Court Notes June 2003

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

Migration - Lawfulness of indefinite detention of removees

In *MIMIA v. AL Masri ([2003] FCAFC 70; 15.04.2003)* a Full Court in a joint judgment observed that while the presumption against exceeding the bounds set by the Constitution suggested

Parliament had no power to order individuals be detained indefinitely the Court was not required to express a final opinion on this [81]. The Court concluded that detention of a non-citizen who had requested that he be removed from Australia in circumstances where that removal was not possible was not lawful detention. The Court observed this conclusion arose from applying orthodox principals of statutory construction such as R v. Governor of Darhum Prison; ex p Hardial Singh [1984] 1 WLR 704 to warrant the conclusion that Parliament intended the power to detain to exist only while removal was "reasonably practicable" [122]; [132].

Migration - Effect of Plaintiff S157 etc. on prior Federal Court decisions

In Bax v. MIMIA ([2003] FCAFC 55; 37.03.2003); a Full Court concluded that where an application to the Federal Court had been decided before *Plaintiff S157 v. C of A (2003) 195 ALR 24,* and no consideration had occurred as to whether a jurisdictional error was involved, a Full Court should ordinarily allow the appeal and remit the matter to the Prmary Judge.

Statutory construction - Notice - Period "commencing at the time specified in the notice" - Whether time in notice included

In *Tio V. MIMIA ([2003] FCAFC 53; 27.03.2003)* by s135(4)(b) of the *Migration Act* the Minister must send a visa holder a notice inviting representations before cancelling the visa and the Minister is prevented from cancelling the visa pending the receipt of the representations. A Full Court concluded, by majority, that a notice requiring a submission "by 7 March 2002" had the effect that the period did not include 7 March 2002.

Industrial law - Awards - Parties - Business transmitted

In Gribbles Radiology P/L v. HSU ([2003] FCAFC 56; 28.03.2003) a Full Court considered whether a licence granted to an employer (which was party to an industrial award) to provide radiology services at a medical clinic was a successor to part of the business by which the employer had previously been licensed to conduct radiology services for the purposes of s149(1)(d) of the *Workplace Relations Act 1996 (Cth).* In *Amcor Ltd v. CFMEU [2003] FCAFC 57; 28.03.2003* the same Full Court considered whether employees transferred as a result of a part restructure of the employer's business were made redundant or retrenched within s170MB, 178(6) *Workplace Relations Act.*

Migration - Natural justice - Interpreter difficulties at MRT hearing - Letter promised by RRT member to resolve uncertainties not written - Whether denial of natural justice

In *NAFF of 2002 v. MIMIA ([2003] FCAFC 52; 31.03.2003)* a Full Court concluded a breach of natural justice had not been made out where the RRT failed to write to an applicant before it to give the applicant an opportunity to comment on interpreting difficulties notwithstanding the RRT decided the review on the basis of "inconsistencies" in the evidence of the applicant.

Customs - Diesel fuel rebate - Whether "mining operations"

In *BHP Billiton Petroleum P/L v. Chief Executive Officer of Customs ([2003] FCAFC 61; 7.04.2003)* a Full Court considered whether the AAT erred in determining whether the appellant engaged in exploration and production of oil and gas within the definition of "mining operations" under s164(7) of the *Custom Act 1901 (Cth)* and whether the definition of "mining operations" contemplated the operations being carried at one "place" only.

Federal Court - Appeal - Procedure - Leave to re-open before orders entered

In MIMIA v. WAAG ([2003] FCAFC 60; 9.04.2003) a Full Court declined to allow the respondent to re-open the appeal, prior to entry of final orders in the appeal, following a High Court decision, as the Full Court was not satisfied a different result would have been brought about.

Mortgages - Whether two mortgagees of adjoining property with common mortgagor can in good faith agree to jointly sell properties

In *Commonwealth Bank of Australia v. Duggan ([2003] FCAFC 64; 9.04.2003)* a Full Court considered whether two mortgagees of adjoining properties owned by a common mortgagor could in good faith sell the properties together and if so how the proceeds were to be divided.

Migration - Jurisdictional error - Two surplace claims made but inly one considered

In *SAAD v. MIMIA ([2003] FCAFC 65; 11.04.2003)* a Full Court concluded that when the RRT was aware of two sur place claims, but only dealt with one, a jurisdictional error had been established.

Migration - Visa cancellation - Whether disappointment of expectation breach of procedural fairness

In *Untan v. MIMIA ([2003] FCAFC 69; 11.04.2003)* a Full Court concluded that any failure by DIMA to contact the appellant, as indicated, before the Minister decided to cancel his visa was overtaken by events and did not cause any breach of natural justice.

Migration - Jurisdictional error - Unpersuasive factual conclusion

In *VGAO of 2002 v. MIMIA ([2003] FCA 68; 23.04.2003)* a Full Court concluded that notwithstanding that the conclusion and reasoning of the RRT was unpersuasive it never the less involved questions of fact which fell short of jurisdictional error.

Migration - Jurisdictional error - Failure to inform of adverse information - Migration Act s424A

In *VAAC v. MIMIA ([2003] FCAFC 74; 17.04.2003)* a Full Court allowed an appellant leave to raise a fresh ground of appeal and found a decision of the RRT involved jurisdictional error where it failed to inform the appellant of a letter from the relevant consulate advising a visa could be issued to the appellant.

LETTER

From Phiip Kellow, Deputy Registrar, Federal Court of Australia, 30 April 2003

Please find enclosed an unofficial copy of the *Federal Court Amendment Rules 2003 (No. 2)* which will be published in the

continued next page

Commonwealth Government Gazette on 5 May 2003 as Statutory Rule No. 78 of 2003. The Amendment Rules commence on 12 May 2003.

A copy of the Amendment Rules will be available on the Internet from the ScalePlus site at http://scaleplus.law.gov.au/home.htm.

The Amendment Rules make a number of amendments consequential to:

- the amendments made to the *Workplace Relations Act 1996* by the *Workplace Relations Amendment (Registration and Accountability of Organ isations) Act 2002* and the *Workplace Relations Legislation Amendment (Registration and Accountability of Organ isations) (Consequential Provisions) Act 2002*;
- the *Workplace Relations (Registration and Accountability of Organisations) Regulations 2003;* and
- the amendments made to the *Workplace Relations Regulations 1996* by the *Workplace Relations Amendment Regulations 2003.*

The *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002* and the *Workplace Relations Legislation Amendment (Regis tration and Accountability of Organisations) (Consequential Provisions) Act 2002* establish a comprehensive statutory regime for the regulation of registered organisations. The provisions relating to registered organisations in the Workplace Relations Act have been replaced with a new Schedule IB to that Act. Schedule IB also replaces many of the existing offence provisions with civil penalties. The new statutory regime commences on 12 May 2003.

Almost all the changes in the Amendment Rules deal with replacing the references to certain provisions of the *Workplace Relations Act 1996* and *Workplace Relations Regulations 1996* with references to the equivalent provisions of Schedule IB and the *Workplace Relations (Registration and Accountability of Organisations) Regulations 2003.*

The major change is that, unlike the Workplace Relations Regulations, the Workplace Relations (Registration and Accountability of Organisations) Regulations do not prescribe the form of:

- an application for an inquiry into alleged irregularities that are claimed to have occurred in relation to an election for an office in an organisation;
- an application for an inquiry into alleged irregularities that are claimed to have occurred in relation to a ballot to decide whether 2 or more organisations should be amalgamated; or
- an application under for an inquiry into alleged irregularities that are claimed to have occurred in relation to a ballot to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation.

These forms are prescribed by the Rules, and will appear as Form 50A, Form 50B and Form SOC in Schedule 1 to the Rules.

From the Family Law Section, Law Council of Australia

The Chief Justice has advised FLS that he intends the commencment of the attached Practice Direction on 1 July 2003. Please forward your comments. (A copy of "Practice Direction: Guidelines for Expert Witnesses and those instructing them in the proceedings in the Family Court of Australia" can be obtained through the Law Society NT Secretariat.

Various press release announcements by the Federal Attorney-General

17 April - New Appointments to the Administrative Appeals Tribunal. Mr Deane Graham Jarvis appointed as a Deputy President of the Administrative Appeals Tribunal; Associate Professor Glenton Anthony Barton appointed as a part-time member of the Administrative Appeals Tribunal; Mrs Linda Savage Davis appointed as a part-time member of the Administrative Appeals Tribunal.

16 May - Appointment of members to the Australian Law Reform Commission. I am pleased to announce that the honourable Justice Susan Kenny has been appointed as a part-time member and Associate Professor Brian Opeskin has been re-appointed as a full-time member of the Australian Law Reform Commission.

16 May - New judge appointed to Family Court of Australia. Mr Tim Carmody SC appointed as a judge of the Family Court of Australia.

22 May - Four new federal magistrates appointed. The magistrates will be appointed to the Federal Magistrates Service in Newcastle, south-east Queensland, Adelaide and Melbourne.