

NOTICEBOARD

High Court Notes: August 2004

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

Criminal law - Sentencing - Whether sentencing Judge bound by plea agreement - Sentencing multiple accused where specific criminality unidentified - Whether accused must be sentenced as aider and abettor and receive lesser sentence than principal offender

In *GAS v Q* ([2004] HCA 22; 19.05.2004) the High Court in a joint judgment observed that a sentencing Judge was not constrained by a "plea agreement" which led an accused to plead guilty to a lesser charge save for the practical consequence that the sentencing Judge could only pass sentence on what the Court was informed [30]. Two appellants were charged with the murder of an elderly person where the Crown was unable to say which of them had strangled her. On them each pleading guilty the prosecution withdrew charges of murder in favour of manslaughter. A prosecution appeal against the subsequent sentence was upheld by the Court of Appeal (Vic). The accuseds' appeal to the High Court was rejected. The High Court rejected the submission that authority required that where two persons were convicted of an offence and the evidence did not permit their individual roles to be determined each should be sentenced "at the lowest common denominator" as an aider and abettor and receive a lesser sentence than a principal. Appeal dismissed.

Criminal law - Drug trafficking - Whether acts of drug courier and police officers effecting delivery attributable to appellant - Where offence committed

In *Pinkstone v Q* ([2004] HCA 23; 20.05.2004) the appellant was convicted of supplying a prohibited drug to another contrary to the Misuse of Drugs Act 1981 (WA). On appeal to the Court of Criminal Appeal (WA) P contended that because the delivery at Perth Airport was procured by the combined efforts of a drug courier and undercover police P had not "supplied" the drugs and was therefore liable only for the offence of attempt. The appeal was dismissed. The High Court also concluded the offence occurred in Perth and trial there was authorised by Constitution s80. Appeal dismissed.

Motor vehicles - Whether injury "directly caused by, or by the driving of, a motor vehicle" - Person injured when jack supporting low-loader under repair collapsed

In *Insurance Commissioner WA v Container Handlers Pty Ltd* ([2004] HCA 24; 26.05.2004) the respondent owned a prime mover insured by the appellant in respect of personal injury "directly caused by, or by the driving of, [a] motor vehicle" as required by the Motor Vehicle (Third Party Insurance) Act 1943 (WA). That Act provided in s3(7) that injury to a person was not to have been caused by a vehicle if not a consequence of the driving of the vehicle "or of the vehicle running out of control. S was employed by a company whose crane was being carried on a low loader attached to the prime mover. The driver pulled off the road to effect repairs to a wheel. A was injured when a jack

supporting the low-loader collapsed on him. The Full Court of the Supreme Court (WA) concluded that the injuries suffered by S were within the scope of the indemnity. This Court concluded the driving of the prime mover on desert roads had required repairs to be effected so that the injury was a consequence of the driving of the vehicle within s3(7). This conclusion was reversed by all members of the High Court: McHugh J [39], [67]; Gummow J [91]; Kirby J [114]; Callinan J [135]; Heydon J [153].

Migration - Refugees - Particular social group - Able bodied young men

In *S v MIMA* ([2004] HCA 25; 27.05.2004) the High Court concluded that the RRT had erred in failing to accept that young Afghan males liable for military service could constitute a "particular social group" for the purposes of the Refugees Convention. Appeal allowed.

Income tax - Avoidance - Split loan facility

In *C of T v Hart* ([2004] HCA 26; 27.05.2004) the High Court concluded that Part IVA of ITA 1936 (Cth) operated where the "split loan" facility was entered into for the dominant purpose of obtaining a tax benefit and denied deduction in respect of the repayments of the loan applied solely in satisfaction of the debt acquired which was not used to produce ascertainable income.

Federal Court Notes: August 2004

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

Income tax - Termination of employment - Eligible termination payment - Payment in settlement of litigation by employee

In *Dibb v C of T* ([2004] FCAFC 126; 13.05.2004) a Full Court concluded a sum paid to a former employee in settlement of a claim of unfair dismissal (which arose after a re-distribution of the duties of his position meant the position was redundant) remained one to an employee who received a "bona fide redundancy payment" within s27F(1) of ITAA Act [44]. Consideration of when an employee becomes "redundant".

Migration - Requirement Secretary "give" document to RRT

In *S487 of 2002 v MIMIA* ([2004] FCAFC 125; 13.05.2004) a Full Court applied *Muin v RRT* (2002) 190 ALR 601 to hold that the Secretary did "give" documents to the RRT as required by s418(3) Migration Act by making them publicly available on the relevant database [6].

Administrative law - Constitutional Writs - Discretion to refuse relief - Alternative remedy unknown to Applicant because he had absconded.

In *NAUV v MIMIA* ([2004] FCAFC 124; 14.05.2004) a Full Court concluded that the primary Judge did not err in refusing relief on discretionary grounds on finding jurisdictional error because the appellant had had the right to appeal against the subject decision but did not do so within time because he had absconded.

Migration - Applicant for Constitutional Writ - Delay of five years

In *Applicant M70 of 2002 v MIMIA* ([2004] FCAFC 132;

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17.05.2004) a Full Court referred to authority that a person aware of a decision who delays seeking relief against it would rarely be granted an extension of time to challenge it.

Migration - Tribunals - Statutory requirement to provide applicant notice of adverse information - Except where information "is just about a class of persons" to which applicant belongs

In *VNAA v MIMIA* ([2004] FCAFC 134; 17.05.2004) a Full Court concluded information about religious minorities in Indonesia was information "just" about a class of persons to which the applicant belonged within s424A(3)(a) Migration Act [23].

Industrial law - Jurisdictional error

In *Spotless Services Aust Ltd v SDP Marsh* ([2004] FCAFC 136; 19.05.2004) a Full Court concluded that a Deputy President of the AIRC had no jurisdiction to revoke orders under 170 CF of the Workplace Relations Act after a certificate under s170CF issued with the consequence that there was no statutory obligation arising under s170CE(7) and no jurisdictional error was identified.

Migration - Carer visa - Distinction between reasonably and reasonably obtaining assistance

In *Lin v MIMIA* ([2004] FCA 606; 13.05.2004) Branson J concluded the MRT made a jurisdictional error in failing to recognise a distinction between reasonably providing and reasonably obtaining assistance for the definition of a carer and considered whether cultural perceptions of assistance were relevant.

Migration - "formative years in Australia"

In *Elbrow v MIMIA* ([2004] FCA 595; 14.05.2004) Spender J concluded the MRT erred in determining whether the applicant had before turning eighteen spent the greater part of the period the Minister regards as his formative years in Australia by erroneous reference to the Procedure Advice Manual.

Bankruptcy - Validity of appointment of trustee - Formal defect

In *O'Brien v Sheahan* ([2004] FCA 608; *Birdseye v Sheahan* [2004] FCA 609 14.05.2004) Lander J concluded a failure of a registered trustee to inform the official Receiver of appointment was a formal defect that did not invalidate appointment.

Administrative law - "Hardiman Principle" - Authority performing regulatory role

In *Community Television Sydney Ltd v ABA (No. 2)* ([2004] FCAFC 614; 14.05.2004) Sackville J considered when the Hardiman Principle became appropriate where the statutory authority was performing a regulatory role rather than adjudicating so it was required to defend allegations made against it.

Migration - Detention - No prospect of removal

In *Cinsinski v MIMIA* ([2004] FCA 507; 17.05.2004) Lee J concluded the continued detention of the applicant was unlawful where there was no real prospect of him being removed in the reasonably foreseeable future.

Migration - Validity of provisions preventing further application

In *Akpata v MIMIA* ([2004] FCA 563; 18.05.2004) Mansfield

J dismissed a challenge to provisions in the Migration Act preventing further applications, particularly for protection visas, (ss501E, 501F(3), 48A) as being unconstitutional.

Superannuation - Invalidity - Anxiety

In *Commonwealth Superannuation Scheme Board of Trustees v Kitching* ([2004] FCA 605; 18.05.2004) Lee J set aside a decision of the SCT on the ground that it failed to consider according to law whether the generalised anxiety disorder and depression of a retired worker was "connected with" a bipolar disorder.

Superannuation - Defined Benefits Fund - "equitable share of the plan"

In *Boeing Superannuation P/L v Glanville* ([2004] FCA 623; 19.05.2004) Spender J considered whether the SCT erred in joining an actuary who calculated the benefit payable under a defined benefit fund whether directions it gave to the actuary were beyond power and whether the SCT was obliged to accept the calculation of the actuary.

Migration - Review of findings of facts

In *WAJS v MIMIA* ([2004] FCAFC 139; 21.05.2004) a Full Court concluded that the circumstances expressed in the reasons of the RRT did not enable it to conclude the Tribunal was not satisfied of factual matters as required by law [15].

Migration - Tribunals - Whether jurisdictional error

In *Applicant P116/02 v RRT* ([2004] FCA 645; 20.05.2004) Marshall J concluded jurisdictional error was not established where through no fault of the applicant's legal representative not all evidence relevant to the case was presented.

Child support - Constitutional Validity

In *Torning v Child Support Registrar* ([2004] FCA 631; 21.05.2004) Tamberlin J concluded the child support scheme was constitutionally valid and did not impose a tax.

Industrial relations - Work place polling of employees

In *Seven Network (Operations) Ltd v MEAA* ([2004] FCA 637; 21.05.2004) Gyles J concluded telephone polling of employees by a call centre on behalf of a union was not a breach of the Privacy Act 1998 (Cth) nor, where done during postal voting for an agreement under s170LK of the Workplace Relations Act 1996 (Cth), unlawful in the absence of intent to coerce.

Intellectual property - Plant variety rights

In *Cultivaust P/L v Grain Pool P/L* ([2004] FCA 638; 21.05.2004) Mansfield J considered the operation of the statutory regulation of plant variety rights and plant breeders rights.

Migration - Jurisdictional error - Physical demonstration

In *NAXW v MIMIA* ([2004] FCA 644; 21.05.2004) Tamberlin J concluded jurisdictional error was established where the RRT invited the Applicant to demonstrate exercises practised by Falun Gong but failed to put possible errors to him.

Veterans - When question of fact

In *White v Repatriation Commission* ([2004] FCA 633; 24.05.2004) Spender J concluded questions of whether a veteran was experiencing stressors within the Statement of Principles was a conclusion of fact.

Discrimination - Employment

In *C of A v Evans* ([2004] FCA 654; 25.05.2004) Banson J considered when non-renewal of a contract of employment

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to a person taking carer's leave constituted dismissal on grounds of sex or family responsibilities contrary to Sex Discrimination Act 1984 (Cth).

Migration - Spouse visa - Domestic violence

In *Kozel v MIMIA* ([2004] FCA 658; 26.05.2004) Ryan J concluded the MRT made a jurisdictional error in the way it construed the domestic violence provisions applicable to spouse visas.

Court Library Notes

SURVEY

In late May-early June 2004, several sections within Court Support Services distributed a survey seeking feedback on services provided. The survey for the library was distributed to a random selection of practitioners. If you received a survey but did not return it before the closing date, we urge you to do so as soon as possible so it can be incorporated in the results.

In addition to the survey, comments were sought on the services provided by the library and these are still welcome. Comments can be sent to the Librarian, Law Society representatives (Susan Porter/John Duguid) or to the NT Bar Association representative (Peter McNab).

NT LEGISLATION

Legislative changes in May 2004, notified in the *NT Government Gazette*

New Acts

- 30/2004 Traffic Amendment Act 2004 (s.6 – 4.6.04, Rest – N/C)*
- 31/2004 Higher Education Act 2004 (N/C)*
- 32/2004 Fisheries Amendment Act (N/C)*
- 33/2004 Uncollected Goods Act 2004 (N/C)*
- 34/2004 Uncollected Goods (Consequential Amendments) Act 2004 (N/C)*
- 35/2004 Agricultural and Veterinary Chemicals (Control of Use) Act 2004 (N/C)*

New Regulations

- 12/2004 Associations Regulations (28.4.04)*
- 14/2004 Northern Territory Aboriginal Sacred Sites (28.4.04)*

Commencements

- 18/2003 Legal Practitioners Amendment (Costs and Advertising) Act (ss.7-11 – 1.6.04)*
- 10/2004 Stock Diseases Amendment Act 2003 (1.6.04)*
- 18/2004 Statute Law Revision Act 2004 (Part A – 5.5.04, Part B - N/C, Rest – 15.3.04)*
- 21/2004 Health Practitioners Act 2004 (14.5.04)*

Repealed legislation

- 8/1986 Dental Act 1986 – Repealed by 21/2004*
- 74/1991 Dental Amendment Act 1991 – Repealed by 21/2004*
- 48/1985 Health Practitioners and Allied Professionals Registration Act 1985 – Repealed by 21/2004*
- 3/1989 Health Practitioners and Allied Professionals Registration Amendment Act 1989 – Repealed by 21/2004*
- 5/1993 Health Practitioners and Allied Professionals Registration Amendment Act

- 25/2000 1993 – Repealed by 21/2004*
Health Practitioners and Allied Professionals Registration Amendment Act 2000 – Repealed by 21/2004*
- 7/1995 Medical Act 1995 - Repealed by 21/2004*
- 37/1995 Northern Territory Electoral Act 1995 - Repealed by 11/2004*
- 10/1999 Nursing Act 1999 - Repealed by 21/2004*
- 14/1958 Optometrists Ordinance 1958 - Repealed by 21/2004*
- 20/1983 Optometrists Amendment Act 1983 - Repealed by 21/2004*
- 10/1936 Pharmacy Ordinance 1936 - Repealed by 21/2004*
- 8/1952 Pharmacy Ordinance 1952 - Repealed by 21/2004*
- 7/1957 Pharmacy Ordinance 1957 - Repealed by 21/2004*
- 56/1964 Pharmacy Ordinance 1964 - Repealed by 21/2004*
- 3/1969 Pharmacy Ordinance 1968 - Repealed by 21/2004*
- 8/1973 Pharmacy Ordinance 1973 - Repealed by 21/2004*
- 22/1973 Pharmacy Ordinance (No.2) 1973 - Repealed by 21/2004*
- 2/1976 Pharmacy Ordinance 1975 - Repealed by 21/2004*
- 41/1977 Pharmacy Ordinance 1977 - Repealed by 21/2004*
- 154/1979 Pharmacy Ordinance 1979 - Repealed by 21/2004*
- 92/1982 Pharmacy Ordinance 1982 - Repealed by 21/2004*
- 27/1983 Pharmacy Ordinance 1983 - Repealed by 21/2004*

RECENT ARTICLES

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Sand, Sabine - Sui generis laws for the protection of indigenous expressions of culture and traditional knowledge, *University of Queensland Law Journal*, Vol 22(2) 2003 pp: 188-198

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Blagg, Harry - Self-policing and community safety: the work of Aboriginal Community Patrols in Australia, *Current Issues in Criminal Justice*, Vol 15(3) 2004 pp: 205-219

Aborigines, Aust - women

Huggins, Jackie - Indigenous women and leadership: a personal reflection, *Indigenous Law Bulletin*, Vol 6(1) 2004 pp: 5-7

Griffin, Denese - Our strong women: indigenous women, law and leadership, *Indigenous Law Bulletin*, Vol 6(1) 2004 pp: 8-10

Brown, Nina - Irati wanti: senior aboriginal women fight a nuclear waste dump, *Indigenous Law Bulletin*, Vol 6(1) 2004 pp: 11-12

Griffin, Denese - The National Network of Indigenous Women's Legal Services Inc, *Indigenous Law Bulletin*,