

reporter's mate

**Shapely:** Face like the back of a bus

**Shocking revelation:** Leaked on a slow news day

**Socialite:** Unemployed woman who lives in Toorak

**Source who spoke on condition of anonymity:** PR flack

**Statuesque:** Tits out even further

**Street-wise:** Hasn't been hit by a bus so far

**Strident:** Rude woman

**Stunned:** Couldn't give a decent quote

**Supermodel:** Her picture was printed somewhere

**Superstar:** He has a publicist and an agent

**Tearful:** Could have been crying

**Teen idol:** Reporter is too old to have heard of him

**Towing industry expose:** Editor got a parking ticket

**Troubled youth:** Arsonist

**Unclear, uncertain, unknown at press time:** No one will tell us

**Venerable:** Should be dead but isn't

**War-torn:** We can't find it on a map

**Weeping:** Tear spotted in one eye

**With news wire services:** No original reporting whatsoever

### **Odd laws from around the world**

This list is continued on from Muster Room in the last edition of *Balance*.

**In Florida:** Women may be fined for falling asleep under a hair dryer, as can the salon owner. A special law prohibits unmarried women from parachuting on Sunday or she shall risk arrest, fine, and/or jailing. If an elephant is left tied to a parking meter, the parking fee has to be paid just as it would for a vehicle. It is illegal to sing in a public place while attired in a swimsuit.

**In Rhode Island:** Any marriage where either of the parties is an idiot or lunatic is null and void. -SECTION 11-40-1. It is illegal to coast downhill in your car with your transmission in neutral, or with the clutch disengaged.

**The Netherlands:** It is semi-legal to smoke pot. Prostitution is legal but the prostitutes must pay taxes like any other business. It is not legal to

sell beer and wine on Sunday, but mixed drinks are available by the glass.

**Alabama:** It is illegal to impersonate any type of minister, of any religion

**South Carolina:** Merchandise may not be sold within a half mile of a church unless fruit is being sold

**Fort Madison, Iowa:** The fire department is required to practice fire fighting for fifteen minutes before attending a fire.

**China:** Every office must have a view of the sky, however small. It is illegal to wear a mask. A pillow can be considered a "passive" weapon. You may only have one child, or you will have to pay a fine. To go to college you must be intelligent.

### **Contributions**

If you've got some gossip, heard a good story, or seen something funny, let Muster Room know. Tip-offs and rumors can be sent to Zoe at [publicrelations@lawsocnt.asn.au](mailto:publicrelations@lawsocnt.asn.au).

## **NOTICEBOARD**

### **High Court Notes: August 2005**

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

#### **Migration - Citizenship - Whether PNG national who was an "Australian citizen" prior to Independence of PNG in 1975 is an alien**

In *Re MIMIA; ex p Ame* ([2005] HCA 36; 4.08.2005; A was born in Papua 1967 at a time when the provisions of the *Australian Citizenship Act 1948 (Cth)* granted him citizenship but the *Migration Act 1958 (Cth)* obliged him to obtain an entry permit to enter Australia. He claimed that by virtue of this he was not an "alien" for the purposes of the *Migration Act* from September 1975 when PNG became an independent sovereign state. All members of the High Court concluded that A was an "alien" for the purposes of the *Migration Act* and the provision in Constitution s122 concerning acquisition of external Territories authorised the *Papua New Guinea Independence Act 1975 (Cth)* and Reg 4 of its Regulations to provide that persons such as A ceased to be Australian citizens [37]: Gleeson CJ, McHugh, Gummow, Hayne, Callinan, Heydon JJ jointly; Kirby J sim. Questions in Case Stated answered accordingly.

#### **Criminal law (Cth) - Whether ultimate fact in prosecution can be proved by averment**

In *Chief Executive Officer Customs v El Hajje* ([2005] HCA 35; 3.08.2005) Sec 134(1) of the *Excise Act 1901 (Cth)* provided that in the prosecution of an excise offence the averment of the prosecutor is prima facie evidence of the matters averred. The Respondent was prosecuted by Customs for driving a truck carrying a quantity of cut tobacco and thus being in unlawful possession of excisable goods. In proceedings in the Supreme Court of Victoria seeking a declaration that an offence had been committed Customs filed a statement of claim which averred that the appellant had in his possession a quantity of cut tobacco. The primary Judge found the offence proved. The Court of Appeal (Vic) allowed an appeal concluding that the averment provision did not authorise averring the ultimate fact in issue. The High Court allowed the appeal by Customs concluding that an averment which related to material facts and not the conclusion, or an allegation of law, was permitted [39]: McHugh, Gummow, Hayne, Heydon JJ jointly; Kirby J sim. Appeal allowed,.

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### **Criminal law - Manslaughter - Criminal negligence - Child killed by front end loader**

In *Q v Lavender* ([2005] HCA 37; 4.08.2005) L was convicted of manslaughter after driving a front-end loader in a sand mine at children trespassing in the sand mine to scare them away. L drove the loader after the children into scrub and ran over the deceased child. He was convicted of manslaughter contrary to s18 *Crimes Act 1900 (NSW)*. His appeal to the Court of Criminal Appeal (NSW) was allowed. The appeal by the prosecution to the High Court was allowed: Gleeson CJ, McHugh, Gummow, Hayne JJ jointly; Kirby; Callinan; Heydon JJ. The High Court considered the elements of manslaughter by criminal negligence and involuntary manslaughter. By s18(1) the *Crimes Act (NSW)* provided that murder is to be taken to be committed where the accused by act or omission with reckless indifference to human life with intent to inflict grievous bodily harm causes death. By s18(2) that Act provides that no act or omission "which was not malicious, or for which the accused had lawful cause or excuse shall be within this section". The majority concluded this provision did not alter the common law of unlawful homicide by involuntary manslaughter [54]. Appeal allowed. Order that appeal against conviction be dismissed.

### **Veterans' affairs - Defence service - Injury after attending Mess function - Sufficiency of reasons of AAT**

In *Roncevich v Repat. Comm.* ([2005] HCA 40; 10.08.2005) in 1986 the appellant, an army sergeant, was injured when he fell out of the second floor window in his barracks after attending a Mess function for the RSM of the Army at which alcohol was consumed. His claim on retirement in 1998 for a pension recognising his injury under s70 of the *Veterans' Entitlement Act 1986 (Cth)* as one which was "a defence-caused injury" was rejected and his application for review to the AAT dismissed. The AAT concluded the intoxication did not arise out of any military task. This conclusion was affirmed by the Federal Court at first instance and by a Full Court. R's appeal to the High Court was allowed: McHugh, Gummow, Callinan, Heydon JJ; Kirby J sim. The members of the joint judgment concluded s70(5) and (9) should be given a construction to include injuries other than arising out of serious default, willful act or breach of discipline [25], [27]. The Court rejected a submission that the paucity of reasoning of the AAT constituted an error of law [19]. Appeal allowed.

### **High Court Notes: October 2005**

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

### **Aviation - Liability of carrier to family members of passengers killed in accident - Pleading - Choice of law - Federal claims**

In *Agtrack (NT) P/L v Hatfield* ([2005] HCA 38; 10.08.2005) Mr H died when a light aircraft he was in crashed in August 1997 in NT. His widow, Mrs H, brought proceedings in the Supreme Court of Victoria

in January 1999 in the nature of a widow's claim. The defence by the appellant carrier of March 1999 denied the claim was maintainable. These events occurred within the two years permitted by the *Civil Aviation (Carriers' Liability) Act 1959 (Cth)* for bringing "an action" in respect of a claim for damages for death against a civil aviation carrier. A Judge in the Supreme Court in June 2001 gave Mrs H leave to amend to clearly raise a claim under this Act. An appeal by the carrier to the Court of Appeal (Vic) was refused. The appeal by the carrier to the High Court succeeded on one point but did not overturn the effect of the order of the Court of Appeal. The High Court identified two questions. The first question was whether the claim by Mrs H under the *CA (CL) Act* had been extinguished because an action was not brought within two years of the death. The High Court concluded that notwithstanding the statutory provisions had not been identified the facts alleged and the evidence referred to, particularly the airline ticket, incorporated a claim under the Act [43]. The second question was whether the proceeding could be amended after the statutory two year period to raise a claim if one had not been raised within the period. The High Court concluded this was not possible [14], [60] but the claim had been raised. Appeal by carrier dismissed.

### **Pleadings - Pleading of fact and law - When pleading of facts sufficient to establish questions of law that arose from facts - Claim against aviation carrier - Time limits - Whether statute relied on within time**

In *Air Link P/L v Paterson* ([2005] HCA 39; 10.08.2005) P was injured alighting from an aircraft after it flew from Cobar to Dubbo. P issued proceedings in the District Court of NSW in September 2000. The statement of claim pleaded the ticket which in turn referred to, or implied, the travel was covered by the *Civil Aviation (Carriers) Liability Act 1959 (Cth)*. An application by the appellant carrier to strike-out the proceeding as not complying with the Act was dismissed by a District Court Judge but upheld by the Court of Appeal (NSW). P sought special leave. In the meantime P applied to the District Court to amend statement of claim to particularly plead the *CA (CL) Act*. This application was granted by the District Court and an appeal to the Court of Appeal NSW refused. The carrier sought special leave. The High Court granted the appeal by P (against the striking out orders) and dismissed the appeal by the carrier (against the amendment orders). The Court applied its reasoning in *Agtrack (NT) P/L v Hatfield* [2005] HCA 38. The High Court concluded the statement of claim had alleged facts, such as the airline ticket, from which as a matter of evidence facts would emerge that brought the claim within the provisions of the *CA (CL) Act (Cth)* [29]. Appeal by the carrier dismissed: Gleeson CJ, McHugh, Gummow, Hayne, Heydon JJ; sim Kirby J; Callinan J. Orders accordingly.

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### **Intellectual property - Fraudulent imitation of registered design**

In *Polyaire P/L v K-Aire P/L [No 2]* ([2005] HCA 41; 11.08.2005) all members of the High Court in a supplementary statements of reasons concluded that the conclusion of the trial Judge that the design in question was a fraudulent imitation was correct.

### **Constitutional law - Judicial power - Jurisdiction of High Court to determine appeals from the Supreme Court of Nauru**

In *Ruhani v Director of Police (Nauru)* ([2005] HCA 42; 31.08.2005) all member of the High Court concluded that the *Nauru (High Court Appeals) Act 1976 (Cth)* validly conferred jurisdiction on the Australian High Court to hear and determine appeals from the Supreme Court of Nauru: Gleeson CJ; McHugh J; Gummow with Hayne JJ; Kirby J; Callinan, Heydon JJ. The High Court concluded that while the appeal was not one in its appellate jurisdiction within *Constitution Chp III s73* jurisdiction was validly conferred by the Act as a law of the Parliament (*Constitution s76(ii)*) that was itself supported by *Constitution s51(xxix)* (external affairs) or *s51(xxx)* (relations with Pacific Islands). Objection to competency disallowed.

### **Nauru - Immigration - Status in Nauru of applicants for Australian refugee visas sent to Nauru**

In *Ruhani v Director of Police (Nauru) [No 2]* ([2005] HCA 43; 31.08.2005) the High Court by majority dismissed an appeal from the Chief Justice of the Supreme Court of Nauru who declined applications for habeas corpus in relation to persons who had sought to apply for refugee status in Australia but were sent to and detained by the Government of Nauru: Gleeson CJ; Gummow, Hayne, Heydon JJ; contra Kirby J. Appeal dismissed.

### **Federal Court Notes: August 2005**

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

### **National crime authority - Right of audience of legal practitioners**

In *Hogan v ACC* ([2005] FCA 913; 7.07.2005) Mansfield J concluded that were he unconstrained by authority (*NCA v A (1998) 18 FCR 439*) he would conclude that s25A(3) of the *ACC Act* does not permit an examiner to direct that a legal representative of an examinee may not be present in an examination [29]. He concluded that the circumstance that a legal practitioner had represented one examinee did not prevent the legal practitioner acting for a second examinee [40].

### **Freedom of information - Internal working document - Conclusive certificate - Public interest**

In *McKinnon v Secretary, Department of Treasury* ([2005] FCAFC 142; 2.08.2005) a Full Court considered the operation of s58(5) of the *FOI Act 1982 (Cth)* which required the AAT to decide "whether there exist reasonable grounds for the claim that the disclosure ... would be contrary to the public interest". The Court divided as to whether this provision required the AAT

to evaluate more than whether the ground raised to support the particular facet of public interest was tenable rather than whether it was established [17], [48], [242].

### **Migration - Refugees - Internal flight alternative**

In *SYLB v MIMIA* ([2005] FCA 942; 8.07.2005) Branson J concluded the RRT had unreasonably concluded a female applicant could relocate within Yugoslavia without realistically considering the facilities available at the proposed place.

### **Migration - Inflexibility of Regulations - Whether arrest lawful**

In *MIMIA v Alam* ([2005] FCAFC 132; 22.07.2005) a Full Court dismissed an appeal by the Minister against a decision of the Federal Magistrate quashing a decision of the MRT to cancel a student visa. All members of the Full Court considered the validity and meaning of visa condition 8105 limiting a visa holder to a maximum of twenty hours work "per week". The members of the Court criticised officers for the highhanded detention and interrogation of the respondent.

### **Migration - Refugees - Successive protection visas**

In *QAAH of 2004 v MIMIA* ([2005] FCAFC 136; 27.07.2005) a Full Court considered the effect that the grant of a fresh temporary protection visa in March 2003 had on an application for a permanent protection visa that was rejected in December 2003, and whether the visa holder had ceased to be a refugee.

### **Migration - RRT - Obligation to give information - Information re-supplied to RRT by migration agents**

In *SZBNK v MIMIA* ([2005] FCA 998; 25.07.2005) Lindgren J concluded s424A(3)(b) operated so that the RRT was not obliged to inform an applicant of adverse information where that information had in fact been re-supplied to RRT by the migration agent.

### **Migration - Protection visa - "discreet" practice of religion - Jurisdictional error**

In *SZBNK v MIMIA* ([2005] FCA 995; 27.07.2005) Madgwick J concluded that the RRT had erred by concluding an applicant for a protection visa would not suffer persecution if the person practised the religion "discreetly" or had committed a jurisdictional error by failing to make a finding on the question [44]. He also concluded there was no evidence to support the conclusion that the situation facing those following this religion had improved [57], [71].

### **Migration - Refugees - Whether person has taken "all possible steps" to seek protection elsewhere**

In *NBLB v MIMIA* ([2005] FCA 1051; 1.08.2005) Emmett J considered whether the reference in s36(3) *Migration Act* to a person who "has not taken all possible steps..." to seek protection elsewhere means "all reasonably practicable steps".

### **Migration - Visas - Skilled occupation - Whether occupation required to be specified when decision made**

In *Aomatsu v MIMIA* ([2005] FCAFC 139; 29.07.2005) a Full Court considered whether the skilled occupations specified in the Gazette Notice in force when the

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application for a visa was made determined the application or the Notice in force when the decision was made.

### **Trade practices - Fair trading - Liability of employees**

In *Arms WSA Online Ltd* ([2005] FCA 943; 8.07.2005) Ryan J considered [96]-[109] whether employees could be rendered liable under the *Fair Trading Act* for statements in "trade and commerce" they made as employees.

### **Sex discrimination - Employment - Whether employer vicariously liable for harassment by fellow employees**

In *South Pacific Resort Hotels P/L v Trainor* ([2005] FCAFC 130; 15.07.2005) a Full Court concluded the *Sex Discrimination Act 1984 (Cth)* did apply in Norfolk Island. The Full Court also concluded the Federal Magistrate did not err in finding sexual harassment of one employee by others occurred "in connection with" employment within s106(1) of the *SDA*.

### **Industrial law- "hindering" employee by union organiser**

In *Pine v Doyle* ([2005] FCA 977; 18.07.2005) Merkel J considered what was required before a union officer "hindered" an employee under s285E(1) *Workplace Relations Act* in exercising powers under s285B or 285C.

### **Copyright - Downloading of copyright music recordings from Internet**

In *Universal Music Australia P/L v Cooper* ([2005] FCA 972; 14.07.2005) Tamberlin J concluded respondents who through the Internet occasioned downloading of copyright material from remote websites were liable for infringing copyright and, or, liable as joint tortfeasors.

### **Copyright - Infringement - Implied licence - Bias**

In *Parramatta Design & Developments P/L v Concrete P/L* ([2005] FCAFC 138; 29.07.2005) a Full Court considered that plans prepared by an architect for the development on a site were prepared under an implied condition that permission would be sought by the purchaser to use the plans and in the absence of this copyright in the plans had been infringed. Consideration of whether conduct of primary Judge constituted bias.

### **Veteran's entitlements - Statement of principle**

In *Constable v Repatriation Comm* ([2005] FCA 928; 8.07.2005) Dowsett J considered when the decision by the AAT that facts did not fit within the "statement of principle" constituted a question of law.

### **Environment - "Ramsar Convention"**

In *Greentree v Minister for the Environment and Heritage* ([2005] FCAFC 128; 13.07.2005) a Full Court considered whether clearing of land had a "significant impact on the ecological character ..." of the land within s16(1) of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*.

### **Federal Court - Nature of appeal by rehearing**

In *Poulet Frais P/L v The Silver Fox Co P/L* ([2005] FCAFC 131; 19.07.2005) a Full Court concluded the appeal by way of rehearing given under s24(1) of the

*Federal Court of Australia Act* did not preclude the Full Court reaching different conclusions on the evidence from the primary Judge [46].

### **Aboriginal associations - Dealings with third parties**

In *Jarrman Arts Aboriginal Corp v Tourism Australia* ([2005] FCA 983; 21.07.2005) Mansfield J considered the operation of s48 of the *Aboriginal Councils & Associations Act 1976 (Cth)* which limits the liability of former members of the associations and whether terms of settlements entered into on behalf of Aboriginal corporation was intended to give rise to legal relationships.

### **Bankruptcy - Whether donee of Power of Attorney can present a debtors petition against donor**

In *Orix Australia Corp Ltd v McCormick* ([2005] FCA 1032; 28.07.2005) Graham J concluded that a person appointed under an enduring power of attorney under *Powers of Attorney Act 1998 (Q)* was not authorised to present a debtor's petition against the donor under s55(1) of the *Bankruptcy Act 1966 (Cth)* [69], [76]. Further consideration of the consequences of the failure of Official Receiver to comply with s55(3A) *Bankruptcy Act* before accepting a debtor's petition.

### **Federal Court Notes: October 2005**

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

### **Migration - Credibility issues not raised - Fresh grounds of appeal**

In *NAJT v MIMIA* ([2005] FCAFC 134; 24.08.2005) a Full Court considered in detail the principles on which it was "expedient in the interests of justice" for fresh grounds of appeal to be raised. The majority concluded the appellant should be permitted to raise a challenge to the failure of the decision-maker to acquaint the appellant with credit issues that had not been raised before the primary Judge.

### **Migration - Appeal - Whether error in reasoning of RRT affected result**

In *VCAD v MIMIA* ([2005] FCAFC 1 26.08.2005) a Full Court concluded the primary Judge did not err in holding the error in the RRT's decision did not affect the result.

### **Migration - Refugees - Discrete practice of Falun Gong**

In *MIMIA v VWBA* ([2005] FCAFC 175; 26.08.2005) the majority of a Full Court concluded the primary Judge erred in finding the RRT erred by accepting the respondents could practice Falun Gong discreetly and thus avoid persecution. The Full Court rejected the contention that the requirement for discrete practice evidenced persecution.

### **Migration - Power to revoke cancellation of visa on character grounds**

In *MIMIA v Watson* ([2005] FCAFC 181; 31.08.2005) a Full Court concluded the Minister for Immigration has no power to revoke a decision made under s501 *Migration Act* to cancel a visa on character grounds.

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### **Migration - Protection visa - Failure of RRT to disclose to applicant "list of persons" who constituted delegation**

In *NAUW v MIMIA* ([2005] FCA 1086; 12.08.2005) Moore J concluded a list of persons the RRT found constituted a delegation from the PRC, which did not include the applicant for the protection visa, was a document specifically about the applicant which should have been revealed to him under s424A(1) *Migration Act*.

### **Migration - Tribunals - When hearing "in private"**

In *MIMIA v SZAYW* ([2005] FCAFC 154; 12.08.2005) a Full Court upheld an appeal by the Minister and concluded that a hearing could be "in private" where it was one of several hearings in applications for protection visas based on shared experiences where the applicants all requested the same Tribunal member be allocated to them. The Court concluded the hearing was "in private" within s429 *Migration Act 1958 (Cth)*.

### **Migration - Visa cancellation decision - Review - "protected information"**

In *Peters v AAT* ([2005] FCAFC 159; 12.08.2005) the Full Court concluded the AAT did not err in failing to obtain all the "protected" information which had been before the delegate who decided to cancel the subject visa. The Full Court concluded Parliament must have accepted that merits review could occur where not all the information before the primary decision-maker was before the merits review authority.

### **Migration - Whether visa cancellation punitive**

In *Kinikini v MIMIA* ([2005] FCA 1144; 18.08.2005) Gyles J rejected a submission that the issues paper before the Minister in cancelling the appellant's visa showed he had been singled out for additional punishment.

### **Migration - Refugees - Insufficient findings by RRT**

In *SZBFE v MIMIA* ([2005] FCA 1162; 24.08.2005) Gyles J remitted a matter so that the RRT could find facts relevant to the articulated claims.

### **Migration - Citizenship - Validity of law denying citizenship to children born in Australia**

In *Doumit v Commonwealth* ([2005] FCAFC 166; 19.08.2005) a Full Court concluded that the provisions of the *Australian Citizenship Act 1948 (Cth)* and the *Migration Act 1958 (Cth)* which denied citizenship to infants born in Australia were valid.

### **AAT - Denial of natural justice - Spouse visa**

In *Sneddon v MIMIA* ([2005] FCAFC 170; 22.08.2005) a Full Court allowed an appeal and set aside a decision of the AAT who refused to set aside a spouse's visa on character grounds (s501 *Migration Act*) on the incorrect basis that places for such visas were "limited". The Court considered whether the AAT had given the parties an opportunity to address it on relevant issues.

### **Migration - Notification by "the prescribed way"**

In *Xie v MIMIA* ([2005] FCAFC 172; 23.08.2005) a Full Court considered the operation of provisions providing for notification of decisions by sending them by "pre-paid post".

### **Migration - Visas - Spouse visa - Domestic violence - Proof**

In *Theunissen v MIMIA* ([2005] FCA 1079; 11.08.2005) Sunberg J reviewed what was required in the two statutory declarations required before a person could obtain a spouse visa when separated from the spouse by reason of "domestic violence".

### **Migration - Visas - Overseas near relatives - Divorced relatives**

In *Su v MIMIA* ([2005] FCA 1176; 30.08.2005) Moore J considered how "overseas near relatives" were to be identified and whether the relatives of a spouse could be counted where the party was divorced.

### **Industrial law - Interpretation of awards**

In *Kenoss Contractors P/L v Warren* ([2005] FCA 1175; 24.08.2005) Madgwick J considered principle applicable to the interpretation of industrial awards.

### **Income tax - Deductions- Expenditure in seeking election as mayor**

In *Vance v C of T* ([2005] FCA 1163; 24.08.2005) Spender J dismissed a claim by an unsuccessful candidate for the office of mayor in a municipal election to deduct from income the costs of running for office.

### **Crimes Commission - Whether ACC may disclose to ATO information obtained under compulsion**

In *AA P/L v ACC* ([2005] FCA 1178; 25.08.2005) Finkelstein J concluded the ATO was not an entity to which the ACC could disclose information obtained under its compulsory powers.

### **Bankruptcy - Decision of trustee refusing request for assignment of cause of action**

In *Freeman v Joiner* ([2005] FCAFC 149; 8.08.2005) a Full Court concluded a trustee of a bankrupt was able to refuse a request to agree to an assignment of a cause of action unless provided with sufficient funds to obtain legal advice on the legality of the assignment.

### **Bankruptcy - Creditors petition - Sequestration order made after instalment order made**

In *Klinger v Nicholl* ([2005] FCAFC 153; 10.08.2005) a Full Court concluded that the making of an instalment order against a person could be sufficient cause to decline a subsequent request to make a sequestration order under the *Bankruptcy Act 1966 (Cth)*.

### **Bankruptcy - Trustees - Partiality**

In *Starkey v Rondo Building Services P/L* ([2005] FCA 1081; 5.08.2005) French J considered the requirement that the trustee in bankruptcy of a person be independent and how a trustee respond to allegations of partiality.

### **Bankruptcy - Proceedings by spouse to enforce Family Court orders after spouse bankrupt**

In *Melnik v Melnik* ([2005] FCAFC 160; 16.08.2005) a Full Court concluded that an application by a spouse (wife) to enforce orders made against the husband in the Family Court constituted proceedings in respect of a provable debt or in respect of a non-payment of a provable debt within s58(3), 60(1)(b) *Bankruptcy Act 1966 (Cth)* and was not competent in the absence of leave.

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### **Bankruptcy - Whether severance of joint tenancy a transfer of property**

In *Anderson v Peldan* ([2005] FCA 1179; 25.08.2005) Kiefel J concluded that the severance of a joint tenancy into a tenancy-in-common on the death of one joint tenant was not a transfer of property for the purposes of s121(1) *Bankruptcy Act 1966 (Cth)*.

### **Courts - Service - Substituted service where debtor outside jurisdiction**

In *Battenberg v Restom* ([2005] FCA 1184; 26.08.2005) Gyles J concluded process was validly served pursuant to an order for substituted service even though the debtor/recipient was outside the jurisdiction at the time service was effected.

### **Corporations - Transfer of body incorporated under State incorporated associations laws**

In *ASIC v Medical Defence Association WA Inc* ([2005] FCAFC 173; 25.08.2005) a Full Court concluded that in the absence of a provision in the *Incorporated Associations Act 1987 (WA)* permitting transfer of incorporation under that Act to the *Corporations Act 2001 (Cth)* it was not possible to transfer the incorporation under Part 5B.1 of the *Corporations Act*.

### **Extradition - Role of Australian courts in deciding whether evidence sufficient**

In *Zurowski v Government of NZ* ([2005] FCA 1064; 5.08.2005) North J concluded that it was not appropriate for an Australian court considering a request for extradition to finally determine the accuracy or admissibility of evidence in a request for extradition to New Zealand. Decision of Magistrate to surrender the applicant affirmed.

### **Extradition - Undertaking person will not be executed**

In *McCrea v Minister for Customs and Justice* ([2005] FCAFC 180; 30.08.2005) a Full Court considered the nature of the "undertaking" not to execute a person contemplated by s22 of the *Extradition Act 1988 (Cth)*.

### **Federal Court - Leave to re-open case on appeal**

In *Uddin v MIMIA* ([2005] FCAFC 146; 5.08.2005) a Full Court granted the respondent leave to re-open her case, in deciding whether compliance with the notice provisions in s119 of the *Migration Act* was an essential pre-condition to cancelling a visa under s116, following the decision of a Full Court in *MIMIA v Alam* [2005] FCAFC 132.

### **Income tax - Income - Capital gain**

In *C of T v McNeil* ([2005] FCAFC 147; 8.08.2005) a Full Court considered the operation of the *ITAA* and *CGT Legislation* in relation to Sell Back Rights in the nature of "put options" held by shareholders in a public company.

### **Trade practices - Alleged price fixing of retail petrol prices - Information circulated - No commitment to act on information - Whether parties to price fixing or understanding**

In *Apco Service Stations P/L v ACCC* ([2005] FCAFC 161; 17.08.2005) a Full Court concluded that the fact that information about petrol price increases was circulated between retail petrol outlets did not, in the

absence of proof of a commitment to act on the information, render the recipients parties to price fixing understandings.

### **Patents - Whether method for structuring transaction capable of being the subject of a patent**

In *Grant v Commissioner of Patents* ([2005] FCA 1100; 12.08.2005) Branson J upheld the decision of the respondent to the effect that the method of structuring a financial transaction to protect assets against lawful claims of creditors was not capable of being the subject of a patent under *Patents Act 1990 (Cth)*.

### **International arbitration - Application for stay order**

In *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* ([2005] FCA 1102; 15.08.2005) Allsop J considered an application for a stay order under the *International Arbitration Act 1994 (Cth)*. Consideration of the construction of arbitration clauses.

### **Superannuation - Offences - Penalty**

In *APRA v Derstepanian* ([2005] FCA 1121; 16.08.2005) Weinberg J considered the penalty to be imposed on the manager of superannuation funds for contravening the requirements of ss62(1) and 109(1) of the *Superannuation Industry (Supervision) Act 1993 (Cth)* which required a regulated fund comply with the "sole purpose requirements" (s62) and funds not be invested unless the trustee and other party were "at arm's length" (s109).

### **Income tax - Deductions- Legal advice for managing "tax affairs"**

In *Drummond v C of T* ([2005] FCA 1129; 16.08.2005) Hely J considered whether the AAT should have apportioned under s25-5 of the *ITAA 1936 (Cth)* an amount claimed by the taxpayer for obtaining legal advice for arranging his tax affairs.

### **Trade practices - Unconscionable conduct - Mentally incapacitated customer**

In *ACCC v Radio Rentals Ltd* ([2005] FCA 1144; 17.08.2005) Finn J considered how the courts were to determine unconscionable conduct had occurred contrary to s51AA, 51AB *Trade Practices Act 1974 (Cth)* and the unwritten law. He concluded the claim was not established.

### **AAT - Power of Deputy President of AAT to review decision of Registrar previously reviewed**

In *Johnson v Veteran's Review Board* ([2005] FCA 1136; 19.08.2005) Lander J considered when a Tribunal, and its officers, were functus officio, and concluded a decision of a Deputy President of the AAT to dismiss an application to review a decision of the Registrar which had previously been reviewed did not involve error.

### **Discrimination - "act" of discrimination - Government grants**

In *Baird v Queensland* ([2005] FCA 495; 19.08.2005) Dowsett J considered whether grants by Government to Church-run missions were "acts" under the *Racial Discrimination Act 1975 (Cth)* and when payment of less than award wages constituted racial discrimination.

## NOTICEBOARD

### **Income - Service pension**

In *C of T v Pitcher* ([2005] FCA 1154; 23.08.2005) Ryan J considered whether a lump payment to redeem the value of weekly payments of compensation paid to a serviceman after discharge from the army was an eligible termination payment within s27A ITAA or an invalidity payment under s27G.

### **All Magistrates Courts Practice Direction Form of Address**

#### **Background**

In recent years only experienced legal practitioners have been appointed as magistrates leading to increased professionalism of the Magistrate's Courts. From this and the fact that all jurisdictions acknowledge magistrates as judicial officers it is clear there is a wide recognition of magistrates as judges in the true sense. Many jurisdictions now address magistrates as "Your Honour".

After consultation with the Honourable Justice Martin the Chief Justice of the Northern Territory, the Attorney General, the Law Society and the Bar Association the magistrates of the Northern Territory have determined that it is appropriate to change their mode of address.

#### **Direction**

As from 1 September 2005 magistrates are to be addressed as "Your Honour" and not as "Your Worship". This Practice Direction applies to all Courts and Tribunals in the Northern Territory in which magistrates sit.

Hugh Bradley  
Chief Magistrate

### **Northern Territory Qantas news update**

#### **Checked Baggage Screening**

Australian Government regulations now require the security screening of all checked baggage at Australian domestic airports. As a result, the infrastructure to support the processes is being installed and progressively made operational around the Qantas network.

From 1 September 2005 for domestic flights QF400 and above, acceptance of checked baggage will close **30 minutes** before the scheduled flight departure time. Early check-in is recommended as failure to check-in with baggage by the time indicated may mean that passengers will be unable to travel on their booked flight. For more information about check-in times, visit [www.qantas.com](http://www.qantas.com).

#### **Qantas to Increase Fuel Surcharge**

Qantas announced last week that it would increase its fuel surcharges because of the continued escalation of the price of crude oil and jet fuel.

Qantas Australian and New Zealand Domestic  
From \$20.00 to \$26.00 including GST  
QantasLink  
From \$20.00 to \$22.00 including GST

Qantas Trans-Tasman

From \$40.00 to \$46.00

Qantas and Australian Airlines International

From \$60.00 to \$75.00

At this stage, there will be no increase in the surcharge on Jetstar domestic services, which remains at \$19.00 including GST.

The Chief Executive of Qantas, Mr Geoff Dixon, said the decision has been made reluctantly. The surcharge will be effective on tickets issued on or after **Friday 2 September 2005**, and applies to each flight/sector shown on a ticket.

### **Family Court of Australia Practice Direction No. 1 of 2005**

#### **Applications for Contact/Residence during the Christmas School Holiday Period - National Filing Deadline**

The Court has fixed a national filing deadline to allow the proper and expeditious hearing of contact and/or residence disputes during the 2005/06 summer school holiday period. Subject to numbers being within expected limits, the Court anticipates allocating hearing dates prior to Christmas for applications filed prior to the deadline. The Court cannot guarantee that applications filed after the deadline will be fixed for hearing prior to Christmas.

#### **Which applications:**

All Form 2 or other applications seeking orders relating to contact or a period of residence during the December 2005/January 2006 school holiday period.

Closing date for filing:

4pm on Friday 11 November 2005

#### **Consequences:**

Applications filed after 11 November 2005 will be allocated the next available date in the usual way. That date may be in 2006.

#### **Exceptions:**

After 11 November 2005, applications to abridge times and to list a matter on short notice can be made to Registry staff. The usual criteria for an urgent hearing will apply. The fact that an application related to school holiday contact will not of itself justify a listing before Christmas.

Chief Justice Diana Bryant

Family Court of Australia

30 September 2005

# LSNT AFL footy tipping draw to a close, and the winner is...

This year's Law Society footy tipping finished with a flourish after Lyn Bond used her wildcard round (which is worth double points) to come from several spots down to finish in equal first place with Justice Trevor Riley.

So at the end of Round 22, Justice Trevor Riley and Lyn Bond finished equal first with 244 points each, a close second was Vince Luppino SM on 242 points and sharing equal third place were Peter Walker and Mark Johnson.

## LSNT Footy Tipping Scoreboard

|    |                       |                          |     |
|----|-----------------------|--------------------------|-----|
| 1  | Justice Trevor Riley  | Supreme Court            | 244 |
| 1  | Lyn Bond              | Dept of Chief Minister   | 244 |
| 2  | Vincent Luppino SM    | Magistrates Court        | 242 |
| 3  | Peter Walker          | Self-employed            | 238 |
| 4  | Mark Johnson          | William Forster Chambers | 238 |
| 5  | Brian Johns           | Self-employed            | 236 |
| 6  | Zoe Malone            | Law Society NT           | 232 |
| 7  | Barbara Bradshaw      | Law Society NT           | 230 |
| 8  | Peter Tiffin          | NAALAS                   | 224 |
| 9  | David Winter          | Self-employed            | 222 |
| 10 | Richard Coates        | Dept of Justice          | 216 |
| 11 | Cassandra Tys         | Morgan Buckley           | 214 |
| 12 | Sara Smart            | Law Society NT           | 210 |
| 12 | Robert Bradshaw       | Dept of Justice          | 210 |
| 13 | Sandra van der Meulen | Law Society NT           | 208 |
| 14 | Sally Glass           | Magistrates Court        | 204 |
| 14 | Jodeen Carney         | Shadow Attorney-General  | 204 |
| 15 | Marguerite Bowen      | Cecil Black              | 182 |
| 16 | Judith Dikstein       | Dept of Health           | 172 |

The competition was very close again this year. Congratulations to the winners.

Thanks to all those who participated and to Sara Smart who ran the footy tipping competition for the Law Society this year.



You have to be in it to win it, so we hope to see more of you involved next year.



### Northern Territory Magistrates Courts Website

- FIND COURT LISTS
- GET INFORMATION ABOUT GOING TO COURT
- DOWNLOAD INFORMATION ABOUT SMALL CLAIMS
- FIND LOCAL COURT AND SMALL CLAIMS FORMS
- LEARN HOW TO ACCESS COURT RECORDINGS
- YOU CAN LINK TO COURTS AROUND THE AUSTRALIA AS WELL AS LEGAL AID AGENCIES IN THE NORTHERN TERRITORY
- FIND BOTH COMMONWEALTH AND NORTHERN TERRITORY LEGISLATION
- DOWNLOAD ORDER FORMS FOR TRANSCRIPTS
- LINK TO OTHER AGENCIES ACROSS



[www.magistratescourt.nt.gov.au](http://www.magistratescourt.nt.gov.au)

## DEADLINES

Contributions to Balance are welcome.

Copy should be forwarded to the Editor of Balance, Law Society NT, no later than the 20th of every second month - January, March, May, July, September, November.

Either fax your contributions to the Law Society: 08 8941 1623 or send them via email: [publicrelations@lawsocnt.asn.au](mailto:publicrelations@lawsocnt.asn.au).

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