

Noticeboard

Federal Court notes:

December 2007

Worker's compensation (Cth) – Seafarers – Alteration of benefits - Calculation

ASP Ship Management Pty Ltd v Wood [2007] FCAFC 142; 25 09 07 a Full Court concluded the primary judge correctly found the AAT had erred in not first determining under s 13(6) of the Seafarer's Rehabilitation and Compensation Act 1992 (Cth) the class in which the worker fell before considering the amount change in normal weekly earnings.

Appeals – Whether question of law

Price Street Professional Centre Pty Ltd v C of T [2007] FCAFC 154; 25.09.07 a Full Court considered whether the appeal was one of fact or law.

Administrative law – Delay as a basis for finding jurisdictional error

In Fox v AIRC [2007] FCAFC 150 ;27.09. 07 a Full Court considered that a lengthy delay between a hearing (April 2005) and a decision on credibility grounds (April 2006) could be the basis for finding the decision involved a jurisdictional error based on the difficulty in recollecting evidence after such a long time.

Migration – Protection visa – Albanian blood feud

In MIMA v SZCWF [2007] FCAFC 155; 27.09.07 a Full Court concluded that the FMC erred in finding the RRT erred in finding s 91S of the Migration Act did not apply to the application in question. Appeal by Minister allowed.

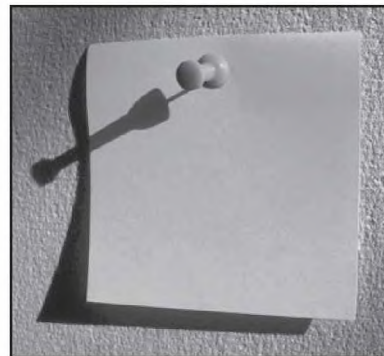
Trade practices – Access to infrastructure

BHP Billiton Iron Ore v National Competition Council [2007] FCAFC 157; 5.10.07 a Full Court dismissed an appeal against the decision of the primary judge that access by miners in Western Australia to a rail link was a step in a production process within Part IIIA of the T P Act that could be the subject of orders by the Respondent.

Statutes – Terms - Attorney –General - Extradition

In Mokbel v A-Gen C of A [2007] FCAFA 161;12.10.07 a Full Court concluded the primary judge did not err in holding an extradition request required by s 40 of the Extradition Act 1988 (Cth) to be made by or with the authority of the Attorney- General was valid where

*Produced for the
Law Council of
Australia and its
constituents by
Thomas Hurley,
Barrister,
Melbourne*



signed by the Minister for Justice.

Migration - RRT –“Information” - Reasons for RRT decision

MIC v Applicant A 125 of 2003 [2007] FCAFC 162; 22.10.07 a Full Court concluded evidence given at an RRT hearing did constitute information given by the applicant within s 424A(3)(b) of Migration Act 1958 (Cth) that was not required to be brought to the Applicant's attention. The court also concluded the RRT did not err in relation to any “omission” by the Applicant in either his application or his evidence at the hearing.

Trade practices – Misleading conduct – Failure of casino to bar addicted gambler

Foroughi v Star City Pty Ltd [2007] FCA 1503; 27.09.07 Jacobson J dismissed a claim by a casino patron for loss on the failure of the casino to refuse him access to the casino under a voluntary exclusion order.

Patents – Termite barrier

Termite Tie (NZ) Pty Ltd v Term-Seal (Aust) Pty Ltd [2007] FCA 1439 Besanko J found the respondents had infringed the applicant's patent for a termite barrier and the patent ought not be revoked as lacking novelty.

Taxation – Extension of time to comply

In BHP Billiton Direct Reduced Iron Ore v Deputy FCT [2007] FCA 1528; 2.10.07 French J considered the application of principles developed in administrative law for extending time in an application to review the refusal of the Commissioner to extend time under s 170-50 of ITAA 1979 (Cth) for making a written agreement on transfer of a loss.

Admiralty – Claim arising out of agreement relating to carriage of goods by ship

In Heilbrunn v Lightwood PLC [2007] FCA 1518; 3.10.07 Allsop J considered that damage to a container caused by a warehouseman acting under an agreement with a freight forwarder prior to the container being

taken to the docks arose out of an agreement relating to carriage of goods by ship within s4(3)(f) of the Admiralty Act 1988 (Cth).

Trade practices – Misleading television broadcast

In *ACCC v Seven Network Ltd* [2007] FCA 1505; 5.10.07 Bennet J considered the respondent broadcast misleading statements on a television show relating to self-made millionairesses that were not protected by the protection given to prescribed information providers in s 65A of the *TP Act*.

Customs – Classification of shoe inserts as orthopaedic appliances

In *CEO Customs v ACB Medical Distributors Pty Ltd* [2007] FCA 11538; 5.10.07 Rares J concluded the AAT had not erred in classifying shoe inserts and was entitled to have recourse to common sense in applying customs legislation.

Legal privilege – Government lawyers

Rilstone v B P Australia Pty Ltd [2007] FCA 1557; 11 10 07 Besanko J considered the evidence necessary to establish in-house lawyers in the Office of Workplace services were independent and their communications privileged. He concluded the lawyers in question were involved in management and their advice was not given for the dominant purpose of giving legal advice.

Trade Practices – “Franchise”

In *ACC v Kylloe Pty Ltd* [2007] FCA 1522; 18 10.07 Tracey J considered agreements for the distribution of crushed ice soft drinks did not constitute a “franchise agreement” for the *Trade Practices Act 1974* (Cth).

Discovery – Confidential exhibits

In *Dale v Veda Advantage Information Services and Solutions Ltd* [2007] FCA 1603; 22.10.07 Lindgren J considered how a party was to proceed when required to file and serve an affidavit on a party that was its commercial competitor and how confidential exhibits were to be handled. He concluded there was no need to require written undertakings of confidentiality from legal representatives.

Fundamental fair trial guarantees in International Humanitarian Law. Footnotes... cont. from page 41

12 Henckaerts and Doswald-Beck above n 11, 355.

13 *Hamdan v Rumsfeld*, Secretary of Defense 548 US (2006) (‘Hamdan case’).

14 *Hamdan case*, 66.

15 *Hamdan case*, 65-67.

16 *Hamdan case*, 70.

17 The specific principles to which the Court referred are that an accused must, absent disruptive conduct or consent, be present for his or her trial and must be privy to the evidence against him or her: per Stevens J at 71, delivering the opinion of the Court.

18 See International Committee of the Red Cross (‘ICRC’) Commentary on Protocol I, 3084; Derek Jinks ‘The Declining Significance of POW Status’ (2004) 45 *Harvard International Law Journal* 367, 429.

19 Protocol I, Article 75(1).

20 See ICRC Commentary to Protocol I, 3011.

21 See *Hamdan*, 70-71; Henckaerts and Doswald-Beck above n 11, rule 100.

22 Protocol I, Article 75(2)(a)(ii) and (b) respectively.

23 Protocol I, Article 75(4)(a).

24 International Covenant on Civil and Political Rights (1966) 999 UNTS 171 (‘ICCPR’).

25 For examples see Henckaerts and Doswald-Beck above n 11, rule 100.

26 Human Rights Committee, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, 8.

27 See eg Third Geneva Convention, Article 103 and Fourth Geneva Convention, Article 71.

28 See eg ICCPR, Articles 9(3) and 14(3)(c).

29 See Henckaerts and Doswald-Beck above n 11, 364 and the state practice referred to therein.

30 Henckaerts and Doswald-Beck above n 11, 364.

31 See eg *Giménez v Argentina*, Case 11.245, Report No. 12/96, Inter-Am.CHR, OEA/Ser.L/V/II.91 Doc. 7 at 33 (1 March 1996), 111.

32 *Sextus v Trinidad and Tobago* HRC Communication No. 818/1998 UN Doc CCPR/C/72/D/818/1998 (16 July 2001); *Brown v Jamaica* HRC Communication No 775/1997, UN Doc. CCPR/C/65/D/775/1997 (Mar 1999), 6.11.

33 Protocol I, Article 75(4).

34 See eg *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, ICJ Reports 2004 (9 July 2004), 106; Human Rights Committee General Comment No. 31 ‘Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) UN Doc. CCPR/C/21/Rev.1/Add.13, 11.

35 See ICCPR, Article 4. See further Human Rights Committee, General Comment No. 29 ‘States of Emergency (Article 4)’ (2001) UN Doc. CCPR/C/21/Rev.1/Add.11.

36 See ICRC Commentary to Protocol I, 3032.

37 See eg Rome Statute of the International Criminal Court (1998) 2187 UNTS 90, Article 8(2)(a)(vi) and 8(2)(c)(iv). For an Australian example, see Commonwealth Criminal Code (being the Schedule to the Criminal Code Act 1995 (Cth)), s268.76.

38 See Protocol I, Article 75(4)(d).

Civility and Professionalism - standards of courtesy...cont. from page 38

It goes beyond tactical aggressiveness to a level of gratuitous insult, intimidation, and degradation of the witness. It is behaviour that brings the legal profession into disrepute." According to the court it did not matter that the conduct took place during a deposition and not in a courtroom. In addition to the above conduct, the lawyer was also disciplined for belittling and insulting a witness who he knew had a history of emotional and physical problems. The lawyer justified his conduct in the latter matter on the basis that he needed to destroy the witness's credibility.

In re First City Bancorporation of Texas, Inc. (282 F 3d 864 (5th Cir 2002), a lawyer was sanctioned for repeatedly insulting opposing counsel and a witness during a bankruptcy proceeding. The lawyer referred to opposing counsel as a "puppet" and a "weak pussyfooting deadhead" who "had been dead mentally for ten years." The lawyer referred to other lawyers as "inept", as "clinks" as "a bunch of starving slob" and as "underling who graduated from a 29th tier law school." The lawyer called the witness a

The members of William Forster Chambers wish you all a Happy Christmas and a prosperous New Year.



(This year the money we would have spent on your Christmas cards will be donated to the Kids Help Line).

"hayseed" and a "washed-up has been." The lawyer defended himself against the sanctions by arguing that his characterisations were accurate and blamed the bankruptcy court and opposing counsel for his behaviour. The bankruptcy court fined the lawyer \$25,000 which was upheld by the appeals court.

CONFERENCES

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