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Litigation notes

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Reinstatement where the employment relationship has irrevocably broken down

A recent Full Bench decision of the Australian Industrial Relations Commission establishes that the Commission is unlikely to order reinstatement of an APS employee where the employment relationship has irrevocably broken down. The decision has significant implications for APS employers as it suggests that, even if the Commission finds that the termination of an employee's employment was harsh, unjust or unreasonable, the Commission will refuse to order the employee's reinstatement if it considers that the employee could not return to a harmonious working environment.

Walsh v Australian Taxation Office

Australian Industrial Relations Commission, 4 March 2005
Full Bench, PR 956205

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Decision at first instance

In March 2004 Ms Walsh sought relief in the Australian Industrial Relations Commission under s 170CE of the *Workplace Relations Act 1996* (the WR Act), following the termination of her employment by the Australian Taxation Office (ATO) for breaching the APS Code of Conduct. Alleging that the termination of her employment was harsh, unjust or unreasonable, Ms Walsh sought reinstatement to the position in which she was employed immediately before the termination and also sought compensation for lost earnings.

Although at first instance the Commission found (PR951810) that there was a valid reason for the ATO to terminate Ms Walsh's employment, Commissioner Eames found that the termination was harsh because, amongst other things, it was disproportionate to the gravity of Ms Walsh's misconduct. This finding was triggered by the fact that in making its decision to terminate Ms Walsh's employment, the ATO had not complied with its own policies and procedures and had taken into account a record of previous misconduct by Ms Walsh that should have been removed from her file. The Commission considered that it had been inappropriate for the ATO to rely on the prior misconduct in concluding that Ms Walsh had engaged in a 'pattern of behaviour', which was a key reason for the ATO's decision to terminate Ms Walsh's employment.

Despite this finding, Commissioner Eames refused to reinstate Ms Walsh to her former position within the ATO. Considering Ms Walsh's proven misconduct, documented unsuitability for her employment and persistent behaviour of making inappropriate 'jokes' and offers of 'inducement' to supervisors,

This issue

Commissioner Eames found that there was no basis on which Ms Walsh could return to the ATO on harmonious terms. Finding that Ms Walsh's employment relationship with the ATO was incapable of being repaired, the Commissioner refused to order Ms Walsh's reinstatement and instead awarded Ms Walsh compensation equivalent to six months' salary for her unfair dismissal.

Full Bench decision

On 26 October 2004, Ms Walsh sought leave to appeal to a Full Bench of the Commission against Commissioner Eames' decision, claiming that the Commissioner had erred in the exercise of his discretion concerning reinstatement by making findings of fact which were either not open or which were based on a mistaken view of the relevant facts. Ms Walsh also argued that Commissioner Eames had erred in law by failing to take account of each of the considerations set out in s 170CH of the WR Act and in finding that there was a valid reason for termination.

The Full Bench rejected all of these arguments and refused leave to appeal on the basis that the application disclosed no appellable error and no public interest consideration required that leave be granted.

In upholding Commissioner Eames' refusal to order Ms Walsh's reinstatement under s 170CH of the WR Act, the Full Bench placed considerable emphasis on the breadth of the discretion conferred under subsections (3) and (6) of s 170CH of the WR Act and the fact that Commissioners must exercise their discretion having regard to the evidence and material before them.

The Full Bench (Senior Deputy Presidents Duncan and Lloyd, Commissioner Cribb) expressly endorsed the Commissioner's 'apparently contradictory' findings that a valid reason for termination had existed due to Ms Walsh's breach of the Code of Conduct, but that the termination was harsh due to its disproportionate nature.

The Full Bench noted that in addressing the question of whether or not it was appropriate to reinstate Ms Walsh, Commissioner Eames was required to have regard to all of the factors enumerated in s 170CH(2) of the WR Act. The Full Bench was satisfied that evidence of an irrevocably broken down employment relationship could be a relevant factor arising under the 'any other matters' consideration in s 170CH(2)(e) and was in fact critical in this case. The Full Bench noted that this approach was consistent with the established principle that the restoration of trust is a relevant factor when reinstatement is considered.

Evidence of an irrevocably broken down employment relationship could be a relevant factor arising under the 'any other matters' consideration ... and was in fact critical in this case.

Conclusion

The significance of the *Walsh* decisions for APS agencies is that they confirm that even a large agency can resist a reinstatement order when the Commission has determined that the termination of an employee's employment was harsh, unjust or unreasonable, if there is sufficient evidence that the relationship of trust has broken down. In preparing for arbitration of unfair dismissal cases, agencies should ensure that they consider applying this line of argument.

The decision is also a salutary reminder of the importance of APS agencies complying with their own policies and procedures.

Text of the Full Bench decision is available at: <http://www.airc.gov.au/decisionssigned/html/PR956205.htm>.

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Admissibility of expert evidence

The New South Wales Court of Appeal on 20 May 2005 overturned a decision of Austin J made on 7 March 2005 in respect of expert evidence. The court held that for expert evidence to be admissible it need only disclose the facts and reasoning process used by the expert, rather than the true factual basis upon which the expert's opinion was formed.

Additionally, the court held that the probative value of expert evidence needs to be assessed when the Court is exercising discretionary powers to exclude evidence.

Australian Securities & Investments Commission v Rich & Ors
New South Wales Court of Appeal, 20 May 2005, [2005] NSWCA 152

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Background

On 7 March 2005 Austin J in *ASIC v Rich & Ors* [2005] NSWSC 149 handed down a decision that expert evidence tendered on behalf of ASIC ('the Carter Report') was inadmissible because it failed to disclose the real factual basis and true reasoning process of the opinions expressed. This arose because of the expert's involvement with ASIC prior to his engagement to provide expert evidence.

Alternatively, Austin J held that as a matter of discretion the Carter Report should be excluded because of the risk that the expert had taken account of information he had not disclosed. Austin J held that this created a risk that his evidence would be unfairly prejudicial to the defendants and mitigated against its probative value.

ASIC appealed this decision and on 20 May 2005 the Court of Appeal ruled in its favour.

The court held that the trial judge, once he had found that the Carter Report set out the facts asserted by the expert to support his opinions and his reasoning process, should have found the Carter Report admissible under s 79 of the *Evidence Act 1995* (NSW) ('Evidence Act'). It was not necessary that the Carter Report disclose the true factual basis on which it was formed, although the existence of undisclosed facts would be a matter going to the weight to be given to the expert's evidence. The court said:

> The mere fact that the expert's opinion is based on facts that are assumed (and not proved) at the time the expert gives evidence is no reason to exclude the evidence at that stage. The assumed facts may be proved later by other evidence. The fact that the opinion was initially formed or later reinforced by reference to other facts, not said by the expert in his evidence to be proved or assumed, is irrelevant to the question of admissibility. [136]

The mere fact that the expert's opinion is based on facts that are assumed (and not proved) at the time the expert gives evidence is no reason to exclude the evidence at that stage.

The court also found that the discretionary power to exclude evidence provided by s 135 of the Evidence Act required the trial judge to weigh up the probative value of the Carter Report against the risk it would be unfairly prejudicial, misleading or confusing, or cause or result in undue waste of time. The court found that the trial judge did not conduct a systematic analysis of the Carter Report's probative value and that this was a fundamental error. Determining the impact of an expert's access to material not before the court requires a 'process of assessment' by the trial judge. It is not a matter which can be determined in the abstract. [168] The court said:

> The mere fact that there must have been use of some extraneous material ... does not of itself necessarily lead to a conclusion that the evidence is of low probative value. [170]

The court set aside the trial judge's ruling that the Carter Report was inadmissible or should be excluded.

Implications

This Court of Appeal decision assists in clarifying the circumstances under which expert evidence will be admissible (the corresponding provisions of the *Evidence Act* 1995 (Cth) are in relevant terms the same as those considered in this decision).

However, it also highlights the risks of engaging a person to provide expert evidence where that person has a prior relationship with the party engaging the expert. Agencies should exercise caution when engaging expert witnesses in these circumstances.

Text of the decision is available at: <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2005/152.html>.

The decision highlights the risks of engaging a person to provide expert evidence where that person has a prior relationship with the party engaging the expert.

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Implications of providing misleading information in the security clearance process

A recent decision of the Australian Industrial Relations Commission confirms that an APS employee who provides false and misleading information in the security clearance process can be dismissed for breach of the APS Code of Conduct.

Corey v Attorney-General's Department

Australian Industrial Relations Commission, 25 February 2005
Deegan C, PR956106

The Australian Industrial Relations Commission upheld the termination of Mr Corey's employment. He was dismissed for:

— providing false and misleading information in security clearance interviews

— failing to advise his superiors of a sexual relationship conducted with an employee he was managing

— engaging in excessive and inappropriate use of the department's email.

Background

Mr Corey was an ongoing Executive Level 1 within the Protective Security Coordination Centre Watch Office. He required a 'Top Secret' security clearance to hold that position. A clearance was granted after an initial security clearance interview was conducted but Mr Corey was placed on an 'after care' program, which required regular review of his fitness to hold a clearance.

After concerns were raised about the content and volume of personal emails sent by Mr Corey, a Code of Conduct investigation commenced, Mr Corey was suspended and his security clearance was reviewed.

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Doubts were raised about the accuracy of information provided by Mr Corey during his initial and 'after care' security interview. The department determined that he had breached the APS Code of Conduct and his employment was terminated.

The hearing

The hearing explored the following issues:

— whether Mr Corey had provided false and misleading information to his vetting officer at his initial security clearance interview and the 'after-care' interview

— whether Mr Corey breached the department's policy concerning appropriate email content and volume

— whether Mr Corey continued to supervise a subordinate employee, despite having established an intimate relationship with her, and whether Mr Corey had actively concealed that relationship.

The false and misleading information related to Mr Corey's answers to questions from the vetting officer about extramarital relationships, the state of his marriage, drinking habits and circumstances during his prior employment.

Mr Corey contended that he did not tell the vetting officer of his extramarital affairs because 'he did not consider the relationships in which he had been involved outside his marriage constituted affairs'. He also denied giving misleading answers about the state of his marriage.

In respect of his previous employment, Mr Corey had failed to mention misconduct which led to termination of his employment at the Australian Federal Police, where a 16-year-old boy in his custody was made to get on the ground and 'oink like a pig'. He also failed to disclose that more recently he had been accused of falsely claiming flex credits, prior to resigning from the Child Support Agency.

Doubts were raised about the accuracy of information provided by the employee during his initial and 'after care' security interview.

Findings

Commissioner Deegan concluded that there were a number of valid reasons for the termination of Mr Corey's employment. She observed:

> ... the applicant committed what I consider the worst breach of the Code of Conduct at the very commencement of his EL1 employment when he provided false and misleading information as part of his security interview. [155]

Commissioner Deegan found that Mr Corey did not provide information to the vetting officer that was relevant to the security vetting process even though asked direct questions, and that many of the answers he gave were dishonest and misleading. She concluded:

> Given the nature of the employment and seniority of the position the Department could not be expected to retain in employment a person with such a blatant disregard for the truth. [149]

The Commission also upheld the department's findings that the employee had a clear conflict of interest in continuing to supervise an employee with whom he had formed a intimate relationship and that excessive use of the email system constituted an improper use of departmental resources, in breach of the APS Code of Conduct.

Implications

The decision is significant because of its strong statements about the importance of employees being truthful in the security clearance process. There is a high onus of disclosure on employees to ensure answers are honest and not misleading. The decision illustrates that serious consequences will follow where an employee who has been granted a clearance is found not to possess qualities of honesty, integrity and trustworthiness. Failure to volunteer critical information may be regarded as seriously as providing positively false answers.

This decision demonstrates that the security clearance process and the APS Code of Conduct can operate interdependently. The *Protective Security Manual* (PSM) lists integrity, honesty and trustworthiness as key suitability indicators for employees who hold a security clearance while the APS Code of Conduct specifies 'an APS employee must behave honestly and with integrity in the course of APS employment': section 13(1) of the *Public Service Act 1999*. Failure to provide honest answers would normally justify a refusal to grant a clearance, and would also amount to a breach of the Code of Conduct, and provide a ground for termination: section 29(3)(f) of the *Public Service Act 1999*.

Failure to volunteer critical information may be regarded as seriously as providing positively false answers.

Alternatively, if an agency becomes aware that an employee has provided false or misleading information in a security clearance process, the employee's security clearance may be withdrawn in accordance with the PSM. It may then be possible to terminate employment on the ground that 'the employee lacks, or has lost, an essential qualification for performing his or her duties': section 29(3)(b) of the *Public Service Act 1999*.

Text of the decision is available at: <http://www.airc.gov.au/decisionssigned/html/PR956106.htm>.

Damien O'Donovan appeared as counsel and Virginia Masters acted as solicitor for the Attorney-General's Department.

Damien O'Donovan *is regularly briefed as counsel in the Administrative Appeals Tribunal, Federal Court, ACT Supreme Court and the Australian Industrial Relations Commission. He regularly acts in and advises in employment law matters arising under the* Public Service Act 1999*, and the* Safety, Rehabilitation and Compensation Act 1988 *and appears in the AIRC on matters arising under the* Workplace Relations Act 1996*.*

Virginia Masters *acts for and advises a range of government clients in relation to employment-related disputes including workers' compensation claims, disciplinary proceedings, discrimination complaints and unfair dismissal applications.*

High Court Rules 2004

The High Court has adopted new procedural rules, the High Court Rules 2004, which came into effect on 1 January 2005. This note highlights the main changes.

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Outline of the High Court Rules 2004

The High Court Rules 2004 (SR No 304 of 2004) were notified in a Special Gazette on 14 October 2004 ('the Rules'). The Rules comprise five chapters, which are organised according to subject matter. Chapter 1 contains general rules applicable to all proceedings in the Court. Chapter 2 deals with proceedings in the original jurisdiction of the Court. Election petitions are dealt with in Chapter 3 and proceedings in the appellate jurisdiction of the Court in Chapter 4. Chapter 5 deals with costs. All forms are found in Schedule 1 to the Rules.

It is intended that the rule number will identify the chapter and part to which the rule belongs. For example, rule 25.03 is found in Chapter 2, Part 25. The end of each chapter is clearly denoted and includes a note advising with which part the next chapter commences.

Commencement

The Rules became effective from 1 January 2005, at which time the High Court Rules 1952 were repealed. For proceedings commenced before 1 January 2005, the new Rules govern all steps taken on or after 1 January 2005, unless the Court orders otherwise.

Changes to note

Most of the changes to the Rules may merely be noted. Some changes of note include the abolition of the distinction between a Justice sitting in Court and sitting in Chambers (see rule 6.04.3) and the rule that amendment will now always require the leave of the Court or a Justice (rule 3.01). Under rule 5.03(b), parties raising a constitutional matter within the meaning of section 78B of the *Judiciary Act 1903* are now required to provide relevant documents to interveners. Practitioners should also be aware of rule 1.08, which prescribes the requirements for all documents filed with the Court, and rule 1.05, which deals with the procedure after remittal. It should also be noted that the Rules do not permit electronic filing of documents.

Chapter 3 contains the rules regarding election petitions. They are largely unchanged from the rules provided by the High Court Rules 1952.

Practice Directions No 3 of 1996, No 1 of 2000 and No 2 of 2001, which deal with written submissions and lists of authorities, will continue to apply.

For proceedings commenced before 1 January 2005, the new Rules govern all steps taken on or after 1 January 2005, unless the Court orders otherwise.

Part 25 – Mandamus, prohibition, certiorari, habeas corpus and quo warranto

Part 25 governs applications for writs of mandamus, prohibition, certiorari, habeas corpus and quo warranto. In accordance with the principles of plain English, the Rules no longer refer to an 'order nisi'. Instead, the term 'order to show cause' is used.

All applications for an order to show cause relating to these writs must now be made on notice (rule 25.03.1). Therefore, all hearings will be held *inter partes* and the parties will be referred to as plaintiff and defendant (rule 25.02.1).

If an order to show cause is granted, the Rules provide that the plaintiff is confined to the relief sought and grounds stated in that order (rule 25.04). Therefore, applicants may not raise new grounds during the application for final relief.

The time limits for applications for writs of mandamus and certiorari under the High Court Rules 1952 are retained. That is, applications for a writ of mandamus must be filed within 2 months of the refusal to determine a matter and applications for a writ of certiorari must be filed within 6 months of the judgment or decision (rules 25.06.1, 25.07.2).

Outline of submissions

When an application for a writ under Part 25 is served, a summons and an outline of submissions must be filed and served with it. This outline must state why the matter should not be remitted to another court, or, if the plaintiff submits that it should be remitted, identifying the court to which it should be remitted. The outline should also indicate what the future conduct of the case should be. That is, the plaintiff is required to make submissions on what, if any, further steps should be taken in the Court and the times by which, and the manner in which, such further steps are to be taken (see rule 25.03.2). The summons, returnable before a Justice, is to specify the orders sought by the plaintiff on the future conduct of the case (to which the outline of submissions will relate).

The outline should also indicate what the future conduct of the case should be.

In the case of applications for a writ under Part 25, these documents must be served with the application, which may not be served more than 90 days after the date on which it was issued unless an order of the Court or a Justice allows further time (rules 25.01(g), 25.03.1, 25.03.2).

When a plaintiff serves a writ of summons under Part 27, a similar outline of submissions must be filed and served together with a summons for directions returnable before a Justice concerning the future conduct of the case (see rule 27.06). The time for filing the summons for directions is no later than 14 days after the time prescribed for an appearance (see rules 27.01(d), 27.06). The writ may not be served more than 12 months after the date on which it was issued unless an order of the Court or a Justice allows further time (see rule 27.01(f)).

Part 41 – Applications for leave or special leave to appeal

Among the significant changes are those to the procedure governing applications for leave or special leave to appeal.

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Procedures for unrepresented applicants

To relieve respondents of the time and expense involved in responding to unmeritorious applications, applications by unrepresented applicants will now first be considered on the papers filed by the applicant. Unrepresented applicants will be required to present their argument to the Court by filing a draft notice of appeal and written case. These documents are filed in place of the applicant's summary of argument under rule 41.05 and are not to be served on a respondent unless directed by the Court or a Justice (rule 41.10.1). If the written case is not filed within 28 days of filing the application, the application shall be deemed to be abandoned unless the Court or a Justice has otherwise ordered (rule 41.10.4).

Once a written case has been filed by an unrepresented applicant, two Justices may determine to dismiss the application on the papers (rule 41.10.5). If the Justices do not make a direction to dismiss the application, then a direction will be given to the applicant to serve a copy of the written case on the respondent.

This written case will operate as the applicant's summary of argument. The procedure of Part 41 in relation to the respondent's summary of argument, reply, application book, etc., will be followed from this point, as though the applicant was represented (rule 41.10.6).

It should be noted that the rules regarding the application for leave or special leave to appeal (rules 41.01 – 41.03) and notices of appearance (rule 41.04) do not distinguish between represented and unrepresented applicants. Therefore, unrepresented applicants will still be required to file an application within 28 days of judgment, and serve the application, with the documents prescribed in rule 41.01.2, within 7 days of filing the application. Within this time, a copy of the application must also be lodged with the Prothonotary, Registrar or other proper officer of the court below (rule 41.03.2). Notices of appearance (Form 7) must be filed and served within 14 days of service of the application (rule 41.04).

Determining applications on the papers

Rule 41.11.1 provides that any application for leave or special leave to appeal may be determined by any two Justices on the papers. This applies to represented and unrepresented parties. The rule is stated in permissive, not mandatory, terms.

The rules regarding the application for leave or special leave to appeal and notices of appearance do not distinguish between represented and unrepresented applicants.

Deemed abandonment of applications

Applications can be deemed to have been abandoned (unless the Court or a Justice has otherwise ordered) in the following circumstances:

— failure to serve on the respondent a copy of the application and documents filed under rule 41.01.2, or failure to lodge with the court below a copy of the application, within 3 months of filing the application; or

— failure to file and serve a summary of argument and draft notice of appeal under rule 41.05.1, or failure to file and supply the required copies of the application book under rule 41.09.11 within 6 months of filing the application (see rule 41.13.1).

Costs consequences of deemed abandonment

If an application is deemed to be abandoned under rule 41.13.1, the Registrar shall provide a certificate of deemed abandonment, if requested to do so by the respondent. Once this certificate is issued, rules 41.12.2, 41.12.3 and 41.12.4 apply. Therefore, unless the Court or a Justice has otherwise ordered, the applicant shall pay the respondent's costs in respect of the application and such costs shall be taxed, unless otherwise agreed (rule 41.12.2).

Rule 41.12.2 is not applied to applications by unrepresented applicants which are deemed to be abandoned under rule 41.10.4. Presumably this is because the respondent is unlikely to have incurred costs beyond those associated with filing a notice of appearance.

Costs

Parties may now request that a Taxing Officer make an estimate of the bill of costs, if it were taxed. In response to such a request, the Taxing Officer will make an estimate and notify each party in writing of the estimate. A party has 14 days in which to file and serve a notice of objection to the estimate under rule 57.02. If no such notice is filed and served, the bill will not be taxed and a Certificate of Taxation shall be issued for the amount of the estimate. If a notice of objection is filed, the filing party is first required to pay $1,250 into Court as security for the costs of the taxation (see generally rule 57.01).

Costs of, and incidental to, the taxation shall be ordered against the party filing a notice of objection if that party fails to reduce the estimate by 1/6 or more (rule 58.02.1). If on taxation the amount of the bill of costs is reduced by 1/6 or more, the party entitled to the costs will not be allowed costs for drawing or copying the bill or for attending the taxation (rule 58.03(a)).

Text of the new rules is available at: <http://www.austlii.edu.au/au/legis/cth/consol_reg/hcr2004170/>.

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A municipal council's duty of care to swimmers at surf beach

The High Court by a majority of 3 to 2, allowed the plaintiff's appeal, restoring the jury verdict at first instance in the plaintiff's favour. The verdict was that the defendant municipal council, which managed a surf beach open to the public, was negligent in failing to protect the plaintiff from underwater sand build-up that constituted a concealed hazard in an area the council had designated for swimming by the use of marker flags.

The decision shows that a civil jury verdict on an issue of liability can be more difficult to overturn on appeal than a judgment on the same issue given by a judge sitting without a jury and delivering reasons.

Swain v Waverley Municipal Council
High Court of Australia, 9 February 2005
[2005] HCA 4; (2005) 213 ALR 249

Facts

In November 1997 the plaintiff was surfing at Bondi Beach, which was under the defendant council's management. He was in an area marked for swimming by flags. He dived into a wave not realising that the water ahead of him was more shallow than expected on account of the natural movement of sand on the seabed. The plaintiff struck the seabed 'head first' sustaining serious injury rendering him a quadriplegic.

Proceedings below

The jury verdict in favour of the plaintiff was subject to a finding of 25% contributory negligence. The plaintiff was awarded $3.75 million in damages. This verdict was overturned by a majority of the NSW Court of Appeal (see [2003] NSWCA 61, 3 April 2003). The Court of Appeal majority found that there was no evidence upon which a reasonable jury could have based the verdict. The plaintiff was given special leave to appeal to the High Court.

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Main issues in the decision

The majority judgments (Gleeson CJ, Gummow and Kirby JJ) did not address the applicable principles of negligence law. Rather they concentrated on whether the Court of Appeal majority below had been correct in ruling that there was no evidence on which the jury could have reasonably made a finding of negligence.

Majority judgments

Gleeson CJ observed that the ability of an appeal court to discern error in a jury finding of liability was, in practical terms, more limited than it was with the same finding made by a judge sitting without a jury and delivering reasons for judgment. He said:

> Juries give no reasons for their decisions ... The jury will reach [its] verdict after receiving directions from the trial judge as to the relevant principles of law, and their relationship to the evidence in the case and the arguments of opposing counsel. ... So long as individual jurors act in accordance with the directions they are given, different jurors might be impressed by different parts of the evidence, or by different arguments of counsel. ... They may arrive at their joint conclusion by different paths. There may be no single process of reasoning which accounts for a jury verdict. [3]

Gleeson CJ went on to point out that the case of the defendant council at the trial had been that, irrespective of the submerged sand conditions either side of the marker flags, the submerged sand bank which the plaintiff struck 'did not constitute a sufficient danger to warrant moving, or even considering moving, the flags'. That was a case which the jury rejected. He concluded:

> Many judges, and many juries, might have accepted the [council's case]. ... However, under the procedure that was adopted at this trial, the assessment of the reasonableness of the respondent's conduct was committed to the verdict of a jury. The question for an appellate court is whether it was reasonably open to the jury to make an assessment unfavourable to the respondent, not whether the appellate court agrees with it. The Court of Appeal should have answered that question in the affirmative. [19]

The question for an appellate court is whether it was reasonably open to the jury to make an assessment unfavourable to the respondent, not whether the appellate court agrees with it. Gleeson CJ

Gummow J rested his decision on s 108(3) of the *Supreme Court Act 1970* (NSW) which provides that a civil trial verdict could only be set aside on appeal if the appellant was entitled to a verdict as a matter of law. There had been an insufficient basis for the Court of Appeal majority finding that such an entitlement existed.

The third member of the High Court majority, Kirby J, said:

> What the jury made of the evidence was, within very large boundaries, a matter for them. It was so, as long as they acted within the ultimate legal requirement of reasonableness as established in the cases. They were not obliged to accept the Council's evidence or argument. They were entitled to conclude that the lifeguards on duty had the capacity to perceive a trough adjacent to a sandbank. They could then conclude that this represented a hazard on the particular day that misled the appellant as to the water's depth and contours and caused his injury. Yet, the lifeguards on duty had failed to shift the flags to a position where that hazard was not present. And they gave no evidence, although they had every reason to do so if it had been the case, that there was no safer place for the flags than that maintained by them throughout the fateful day. [230]

Kirby J concluded that, while the jury's verdict was in some senses 'a surprising one', he was 'not convinced that the jury's conclusion was such that no jury performing their functions properly could reasonably have been satisfied of the facts necessary to sustain the verdict in favour of the [plaintiff]' (see [234]).

Minority judgments

In dissent, McHugh J said that a plaintiff bears 'the legal and evidentiary burden of establishing a prima facie case of negligence'. He said that the plaintiff must be able to point to 'a reasonably practicable precaution or alternative course of conduct that could have avoided, or reduced the consequences of, the injury to the plaintiff.' It was not sufficient for a plaintiff to prove the existence of the risk and then allege that the defendant took no steps to guard the plaintiff against that risk. What was required in the present case was evidence that 'the conditions at some part of the beach to the north or south of or even in a section of the centre flagged area were such that the risk of injury from the sandbank, rips and guttering was much lower than the risk existing at the point where [the plaintiff] suffered his injury'. McHugh J noted that no such evidence was led. He concluded:

> In my opinion, there was no evidence upon which the jury could reasonably find that the Council was guilty of negligence and, as a result, caused Mr Swain's injury. [104]

In my opinion, there was no evidence upon which the jury could reasonably find that the Council was guilty of negligence and, as a result, caused Mr Swain's injury. McHugh J

Heydon J agreed with McHugh J on this point, but went further stating:

> the factual question whether it was reasonably foreseeable that there was a risk of injury to the plaintiff of the kind he suffered in the circumstances should also be answered in the negative. [236]

Text of the decision is available at: <http://www.austlii.edu.au/au/cases/cth/high_ct/2005/4.html>.

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AAT awards compensation for breach of privacy

For the first time, the Administrative Appeals Tribunal has considered and upheld an application for a review of a determination of the Federal Privacy Commissioner not to award damages for breach of privacy. In a unanimous decision, AAT President Justice Downes and the other members set out the principles relevant to assessment of compensation under the *Privacy Act 1988*. The Tribunal held the complainant was entitled to 'a restrained but not minimal' award of compensation of $8,000 for injury to his feelings and humiliation.

Rummery and Federal Privacy Commissioner and Department of Justice and Community Safety

Administrative Appeals Tribunal, 22 November 2004
[2004] AATA 1221

In *Rummery* the applicant sought review of a determination of the Privacy Commissioner as to the amount of compensation. The Privacy Commissioner determined (Determination No 5 of 2004) that Mr Rummery's privacy had been interfered with by the ACT Department of Justice and Community Safety (JACS) when personal information concerning his work performance and former employment was disclosed to the Ombudsman's office in the course of

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an investigation of a complaint made to that office by Mr Rummery. The Privacy Commissioner held that the personal information disclosed was not relevant to the complaint being investigated and said that JACS should apologise. However, the Privacy Commissioner decided that Mr Rummery was not entitled to any financial compensation.

The AAT noted that the Privacy Act specifically provides that compensable loss or damage includes injury to the complainant's feelings and humiliation. The AAT considered the approach to compensation awards under the Commonwealth *Sex Discrimination Act 1984* and in other jurisdictions and decided in the circumstances that an award of $8,000 should be made. In reaching its decision, the AAT set out the principles that it considered should apply in determining whether financial compensation is appropriate in a particular case:

— where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course

— awards should be restrained but not minimal

— in measuring compensation the principles of damages applied in tort law will assist, although the words of the statute are the ultimate guide

— in an appropriate case, aggravated damages may be awarded

— compensation should be assessed having regard to the complainant's reaction and not to the perceived reaction of the majority of the community or of a reasonable person in similar circumstances.

Compensation should be assessed having regard to the complainant's reaction and not to the perceived reaction of the majority of the community or of a reasonable person in similar circumstances.

The claim that disclosure of the personal information was necessary to show that Mr Rummery's complaint to the Ombudsman was frivolous and vexatious, was rejected by the Privacy Commissioner and quoted with approval by the Tribunal. The Tribunal also noted (without taking it into account) that JACS had persisted during evidence before the Tribunal in maintaining that Mr Rummery's conduct was not bona fide and commented that JACS had incurred considerable expense in maintaining that position, a position that 'was always doomed to failure'. The Tribunal was critical of the department's apology saying it was 'as limited as it could be and would not convey any real sense of regret to a reasonable reader' [45].

Agencies should take close note of this decision particularly:

— the large sum of damages awarded (Privacy Commissioner awards for 'hurt feelings' have been mostly in the range of $500 to $1000)

— the amount of compensation is to reflect the perception and reaction of the complaint to the breach and not the notional reaction of the 'reasonable person'

— apologies need to be more than mere platitudes as in another case this could influence the quantum of damages awarded.

Text of the decision is available at: <http://www.austlii.edu.au/au/cases/cth/aat/2004/1221.html>.

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Misuse of market power and price fixing

On 10 September 2004 the High Court refused to grant special leave to appeal to both the Australian Competition & Consumer Commission (ACCC) and also to Australian Safeway Stores (Safeway) and Mark Jones (Jones) in respect of the judgment of the Full Federal Court. Consequently, the decision of the Full Federal Court stands. The ACCC has succeeded in establishing four contraventions of the misuse of market power provisions of the Trade Practices Act and one instance of price fixing.

ACCC v Australian Safeway Stores and Mark Jones

Federal Court of Australia, Full Court, 30 June 2003
[2003] FCAFC 149; (2003) 198 ALR 657

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Background

This note is an update of an earlier *AGS Casenote* (15 August 2003) that discussed the proceeding in detail and the decision of the Full Federal Court. On nine occasions Safeway refused to accept supplies of bread products of a major plant baker (e.g. Tip Top Bakeries) at one of its supermarkets while that plant baker supplied *secondary* branded bread sold at a discounted price by an independent retailer located in the vicinity of the Safeway supermarket. Jones was Safeway's bread category manager responsible for arranging the supply of bread.

The deletion of bread was alleged to be intended to deter the baker from supplying cheap bread and to damage the independent retailers. The conduct was alleged to be a misuse of market power in contravention of s 46 of the *Trade Practices Act 1974* (TPA). The ACCC also alleged that Safeway and Tip Top had made a price fixing agreement as to the type of bread products to be sold at Tip Top's Preston Market stall and the price of products, in contravention of s 45 of the TPA.

Safeway denied the allegations. Safeway's primary defence was that it only deleted bread products having first made a request for a case deal from the plant baker for the supply of *proprietary* brand bread and the request had been refused. Safeway had to delete the bread as it was seen by consumers to be uncompetitive on price.

The deletion of bread was alleged to be intended to deter the baker from supplying cheap bread and to damage the independent retailers.

Trial judge

At first instance, Goldberg J dismissed all claims of the ACCC: *ACCC v Safeway (No 2)* [2001] FCA 1861; (2001) 119 FCR 1. Goldberg J held that Safeway had not breached s 46, on the grounds that there had not been a taking advantage of market power. Safeway would have acted in the same manner without market power. Secondly, a case deal was sought in five incidents, which was considered to be inconsistent with Safeway having an anti-competitive purpose.

In relation to the Preston Market price fixing allegations, on the evidence Goldberg J was not satisfied that the participants to discussions had a meeting of minds in order to give rise to a proscribed arrangement.

Since Safeway was not found to have contravened the Act, the Judge did not consider it necessary to deal with the issue of Jones's liability as an accessory.

Full Federal Court on appeal

The Full Federal Court, by majority, held that Safeway had contravened s 46 in relation to four incidents where there had been a deletion of bread products: *ACCC v Safeway* [2003] FCAFC 149; (2003) 198 ALR 657.

Also, the Full Court was unanimously of the view that a price fixing arrangement had been made in relation to the Preston Market incident.

The Full Court made declaratory orders against Safeway in relation to the four incidents found to contravene s 46 and ordered Safeway to pay 80 per cent of the ACCC's costs of the appeal: *ACCC v Safeway (No 2)* [2003] FCA 811.

High Court special leave applications

The ACCC, Safeway and Mark Jones each filed separate applications seeking special leave to appeal to the High Court. The applications were heard on 10 September 2004. The High Court refused to grant special leave in respect of all applications. The Court stated that the issues of fact and law raised did not warrant the grant of special leave. Further, as the conduct in issue occurred some years ago, it was not considered in the interests of justice to further extend the litigation.

Outcome

The refusal of special leave means that the declaratory orders of the Full Federal Court stand.

The Court stated that the issues of fact and law raised did not warrant the grant of special leave.

This is the first case in which the ACCC has succeed in obtaining as a final outcome in a contested proceeding, declaratory orders of contravention of s 46. (Earlier cases where the ACCC has succeeded in obtaining declarations of contravention of s 46 have been set aside on appeal. See, for example, the decisions in *Boral, Rural Press* and *Universal Music*.)

Important points to emerge from the Full Federal Court judgment are:

— the focus on the conduct of the respondent and inferences arising in ascertaining whether there has been a contravention

— pleading a policy based on a course of conduct can give rise to scope for argument

— the purpose asserted by the respondent is not necessarily determinative of whether a proscribed purpose exists

— a defence based on the fact that a request had been made for a similar deal to that provided to a competitor is not necessarily inconsistent with a purpose of damaging the competitor or deterring competitive conduct.

Under the orders of the Full Federal Court, the proceeding is remitted to Goldberg J to hear and determine the pecuniary penalties to be imposed, injunctive relief, the liability of Mark Jones and costs of the trial.

The judgment of the Full Federal Court is available at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2003/149.html>.

Graham Thorley and Gavin Carroll of AGS Melbourne acted on behalf of the ACCC in conduct of the proceeding.

Graham Thorley *specialises in trade practices and commercial litigation and acted for the ACCC in the Safeway proceeding.*

Quoting the substance of legal advice in negotiations may make it subject to FOI

The Full Federal Court has confirmed that quoting the substance of legal advice in negotiation can waive legal professional privilege. As a result agencies might be required to make the full text of their legal advice and opinion available under Freedom of Information or court related discovery.

Bennett v Chief Executive Officer of the Australian Customs Service
Federal Court of Australia, Full Court, 25 August 2004
[2004] FCAFC 237; (2004) 210 ALR 220

Mr Bennett was in dispute with Customs over certain public comments he had made about Customs' operations and subsequent disciplinary action that had been taken. In the course of the dispute, various statements were made on behalf of Customs about legal advice it had obtained; for example, that it had obtained legal advice that Mr Bennett:

> is not correct in asserting that he is not subject to the Act and Regulations if he makes public statements about Customs-related matters in his capacity as President of COA [the Customs Officers' Association]. It is a matter for [Mr Bennett], in the light (perhaps) of legal advice ... whether he adheres to or moderates his position on this question ... [5]

At some later time, Mr Bennett made an FOI request to Customs. That request, among other documents, covered the legal advice to Customs. Customs refused access to documents containing the advice, claiming that they were exempt under s 42 of the *Freedom of Information Act 1982* as being privileged from production in legal proceedings on the ground of legal professional privilege.

AAT and Federal Court at first instance

Mr Bennett challenged this exemption on review to the AAT, claiming that the reference to the advice constituted a waiver of legal professional privilege. The AAT, purporting to apply *Mann v Carnell* (1999) 201 CLR 1, ruled that the privilege had not been waived. Mr Bennett appealed to the Federal Court on the issue, as raising a question of law. The primary judge also ruled that there had been no waiver. Only the conclusion of the advice had been disclosed, not the reasoning underlying that conclusion. No inconsistency was involved in these circumstances in continuing to maintain the privilege.

On appeal, Full Court found the privilege waived

On appeal, the Full Court (Tamberlin and Gyles JJ, Emmett J dissenting) overturned the primary judge's decision on this point whilst upholding the primary judge's decision on several FOI specific points. On the waiver of privilege point, Gyles J said:

> Each of the Tribunal and the primary Judge correctly identified the decision in *Mann v Carnell* as providing appropriate guidance as to the law to be applied. However, in my respectful opinion, the test has been misunderstood at least in part. The test looks to inconsistency between the disclosure that has been made by the client on the one hand and the purpose of confidentiality that underpins legal professional privilege on the other. It is not a matter simply of applying general notions of fairness as assessed by the individual judge. The authorities to which I have referred show that it is well established that for a client to deploy the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege. [68]

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The test looks to inconsistency between the disclosure that has been made by the client on the one hand and the purpose of confidentiality that underpins legal professional privilege on the other.

Tamberlin J, who agreed with the judgment of Gyles J, added:

> It may perhaps have been different if it had been simply asserted that the client has taken legal advice and that the position which was adopted having considered the advice, is that certain action will be taken or not taken. In those circumstances, the substance of the advice is not disclosed but merely the fact that there was some advice and that it was considered. However, once the conclusion in the advice is stated, together with the effect of it, then in my view, there is imputed waiver of the privilege. The whole point of an advice is the final conclusion. This is the situation in this case. [6]

Emmett J differed from the majority in holding that the challenge to the correctness of the AAT's decision on waiver of legal professional privilege involved a question of fact rather than one of law [36]. Section 44 of the *Administrative Appeals Tribunal Act 1975* confines appeals from the AAT to the Federal Court to questions of law. As he saw it, the question of waiver had been a matter of judgment for the AAT.

Conclusion

Use of legal advice needs to be carefully managed if you wish to ensure that the advice will be protected by legal professional privilege and not have to be disclosed under Freedom of Information requests or under court disclosure processes such as pre-trial discovery.

The decision increases the odds that a disclosure of the substance or effect of legal advice to a third party (by expressing the conclusion of the advice) will be found to constitute a waiver of legal professional privilege in the whole advice. A statement as simple as 'in accordance with legal advice received, the decision maker came to the decision that ... ' may be sufficient to waive privilege.

A statement as simple as 'in accordance with legal advice received, the decision-maker came to the decision that ...' may be sufficient to waive privilege.

Following this decision, the application of the test for waiver of common law legal professional privilege, in factual situations such as occurred here, may have similar effect to that for waiver of client privilege under section 122 of the *Evidence Act 1995* (Cth) (and its identical counterpart in the *Evidence Act 1995* (NSW)). The relevant part of the section states:

> (2) Subject to subsection (5), this Division does not prevent the adducing of evidence if a client or party has knowingly and voluntarily disclosed to another person the substance of the evidence ...

However, the requirement that the disclosure be done 'knowingly and voluntarily' arguably still imposes a stricter test for waiver under s 122, excluding those cases sometimes described as involving 'imputed waiver'. (The difference in these waiver tests – noted in *Mann v Carnell* at [23] – is one issue under consideration by the Australian Law Reform Commission in its examination of the operation of the *Evidence Act 1995* (Cth) under a reference of July 2004 from the Attorney-General.)

Inappropriate use of legal advice in negotiations is only one of many ways in which privilege can be waived. Agencies seeking or making use of legal advice should be familiar with the consequences and what needs to be done to ensure legal professional privilege is maintained wherever that is desirable. To assist agencies in achieving this, AGS has developed a range of training programs and follow up material which can be customised to their specific needs.

Text of the decision is available at: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2004/237.html>.

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Decisions in brief

Griffith University v Tang

[2005] HCA 7; (2005) 213 ALR 724, 3 March 2005

In this decision the High Court (Gleeson CJ, Gummow, Callinan and Heydon JJ, Kirby J dissenting) upheld the traditional interpretation of the words 'a decision of an administrative character made ... under an enactment' as they appear in the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and corresponding State legislation.

Under this interpretation, extending back to the decision of the Full Court of the Federal Court in *Australian National University v Burns* (1982) 43 ALR 25, a decision affecting the employment of a member of a university's academic staff engaged under a contract was not, on account of the university being incorporated under Commonwealth legislation, an administrative decision made under an enactment for the purposes of the ADJR Act. In the present case, the courts below had given the corresponding words in the *Judicial Review Act 1991* (Qld) a broader interpretation, conferring upon a PhD student dismissed from her course for academic misconduct by a university incorporated under Queensland legislation, a right to judicial review under the Judicial Review Act. The High Court majority rejected this broader interpretation.

'A decision of an administrative character ... made under an enactment'

Gleeson CJ said:

> The question in the present case turns upon the characterisation of the decision in question, and of its legal force or effect. That question is answered in terms of the termination of the relationship between the appellant [the university] and the respondent [the student]. That termination occurred under the general law and under the terms and conditions on which the appellant was willing to enter a relationship with the respondent. The power to formulate those terms and conditions, to decide to enter the relationship, and to decide to end it, was conferred in general terms by the *Griffith University Act*, but the decision to end the relationship was not given legal force or effect by that Act. [23]

Likewise, in their joint judgment, Gummow, Callinan and Heydon JJ said:

> If the decision derives its capacity to bind from contract or some other private law source, then the decision is not "made under" the enactment in question. [81]

Kirby J, in dissent, opened his judgment with the observation:

> For the second time in less than two years, this Court adopts an unduly narrow approach to the availability of statutory judicial review directed to the deployment of public power. The Court did so earlier in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179. Now it does so in the present case. [99] *

http://www.austlii.edu.au/au/cases/cth/high_ct/2005/7.html
* For a discussion on *Neat* see AGS *Litigation Notes* No. 10, 30 October 2003 <*http://www.ags.gov.au/publications/agspubs/index.htm*>.

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Commissioner of Taxation v Sleight

[2004] FCAFC 94, (2004) 206 ALR 511, 4 May 2004

On 4 February 2005 the High Court (Gleeson CJ and Hayne J) refused Kevin Sleight special leave to appeal from the Full Federal Court's decision in *Commissioner of Taxation v Sleight* upholding the application of Part IVA of the *Income tax Assessment Act 1936* to the Northern Rivers Tea Tree tax scheme in which Mr Sleight was an investor.

Mr Sleight sought to raise two special leave points:

— that the Full Court's decision that Part IVA applied was inconsistent with the earlier Full Court decision in *Commissioner of Taxation v Cooke* 2004 ATC 4268 as there was little factual distinction between the two schemes involved in these cases

— that the Full Court's finding that it was not open to an applicant to challenge an assessment giving effect to a Part IVA determination in a tax appeal by showing an error in the exercise of the discretion to make the particular determination was wrong.

The Court was not attracted by either argument and decided to refuse to grant special leave without hearing from Counsel for the Commissioner.

The decision preserves the full force of the Full Federal Court's judgment in Sleight *upholding the application of Part IVA to the Northern Rivers Tea Tree tax scheme.*

The decision preserves the full force of the Full Federal Court's judgment in *Sleight* which is expected to be relevant for remaining cases before the Federal Court and the AAT involving mass marketed tax schemes with similar features to those considered by the Full Court in *Sleight.*

http://www.austlii.edu.au/au/cases/cth/FCAFC/2004/94.html

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Seven Network (Operations) Limited v Media Entertainment and Arts Alliance

[2004] FCA 637, 21 May 2004

The Federal Court held that individuals who believe their privacy has been, is being, or may be breached by a Commonwealth agency or a private sector organisation may, without first making a complaint to the Privacy Commissioner, go directly in the Federal Court or the Federal Magistrates Court for an injunction restraining the agency or organisation from engaging in the conduct that is, or would constitute, a breach of privacy.

Privacy complainants can go directly to the Federal Court.

In this decision, among other things, the High Court held that Seven Network (Operations) Limited (Seven) was entitled take action in the Federal Court under section 98 of the *Privacy Act 1988*, without first making a complaint to the Privacy Commissioner. Seven could seek an injunction restraining MEAA (a union representing workers at Seven) from engaging in conduct that would constitute a contravention of the National Privacy Principles in the Privacy Act to which MEAA was bound [35–40].

In so holding, the Court said there was no reason to think that the position would be any different if Seven had been taking action against an (public sector) agency in relation to an alleged breach of the Information Privacy Principles, and after examining the merits of Seven's claim, and considering whether MEAA had breached certain of the National Privacy Principles, Seven was entitled to an injunction.

The court also indicated that it would grant positive orders requiring MEAA to take certain actions, in terms to be agreed at a later date.

http://www.austlii.edu.au/au/cases/cth/federal_ct/2004/637.html

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