

HUMAN RIGHTS LAW BULLETIN

Inside this issue

November 2006 – February 2007

- 1. Human Rights Law Bulletin Seminar**
- 2. Selected general Australian law**
- 3. Developments in Australian Federal Discrimination Law**
- 4. HREOC Legal Submission**
- 5. Recent Parliamentary Committee reports**
- 6. International developments**
- 7. Upcoming Human Rights Events**

1. Human Rights Law Bulletin Seminar

Stolen Wages – the way forward

9 March 2007, 1:00-2:30pm

The HREOC Legal Section is pleased to present a forum entitled 'Stolen Wages – the way forward'. The Forum will feature a distinguished panel of three speakers:

1. Senator Russell Trood, Member of the Senate Standing Committee on Legal and Constitutional Affairs Inquiry 'Unfinished business: Indigenous stolen wages'. Senator Trood will speak about the Inquiry's report.
2. Ms Robynne Quiggin, Panel Member, Aboriginal Trust Fund Repayment Scheme. Ms Quiggin will discuss the operation of the New South Wales Aboriginal Trust Fund Repayment Scheme.
3. Mr Jonathon Hunyor, Acting Director, HREOC Legal Section. Mr Hunyor will discuss the Federal Court's decision in *Baird v Queensland*.

The forum will be chaired by the Hon. John von Doussa QC, President of the Human Rights and Equal Opportunity Commission.

The forum will take place on **9th March 2007** from 1:00–2:30pm at:

The Hearing Room, Level 8
Human Rights and Equal Opportunity Commission
Level 8 Piccadilly Tower
133 Castlereagh Street Sydney

Entry is free but places are limited. Please RSVP to Associate@humanrights.gov.au.

2. Selected general Australian law

Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 [2006] HCA 53 (15 November 2006)

QAAH, an Afghani national, was originally granted a temporary protection visa (TPV) on the grounds that he had a well-founded fear of persecution by the Taliban. After the fall of the Taliban government, the Minister's delegate refused QAAH's application for a permanent protection visa. This decision was upheld by the Refugee Review Tribunal, before being set aside by the Full Court of the Federal Court. The Federal Court held that the Minister (or the Minister's delegate or the Tribunal) must establish that the changes in the applicant's country of origin were 'substantial, effective and durable' and 'incompatible with a real chance of future Taliban persecution' before refusing to grant a permanent protection visa.

On appeal, the majority of the High Court (Gummow ACJ, Callinan, Heydon and Crennan JJ; Kirby J dissenting) held there is no burden of proof on the Minister to establish that the basis for a well founded fear no longer exists when a TPV holder seeks further protection. The Court held that if a conflict arises between the Refugee Convention and Australian law, Australian law prevails. In this case, the Court found neither section 36 of the *Migration Act 1958*(Cth) nor article 1C(5) of the *Refugee Convention* require that protection should be regarded as necessary or continuing once a threat passes. The Court held that the Act provides that once a TPV expires, the person who held the TPV has no ongoing entitlement to remain in Australia, and must make a fresh application for a protection visa. Further, the Act does not require that the Minister establish whether changes in the applicant's country were 'substantial effective and durable', before refusing to grant a further protection visa.

You can read the full decision at: <http://www.austlii.edu.au/au/cases/cth/HCA/2006/53.html>

- ***NBGM v Minister for Immigration and Multicultural Affairs [2006] HCA 54 (15 November 2006)***

In this case the majority of the High Court applied the High Court's decision in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 [2006] HCA 53* (see above). The majority (Callinan, Heydon and Crennan JJ) emphasized that section 36 of the Migration Act 1958 (Cth), read in context with the other provisions of the Migration Act, make it clear that the grant of a protection visa does not entitle the visa holder to ongoing protection, whether permanent or otherwise, if the circumstances in their country of origin have changed.

3. Developments in Australian Federal Discrimination Law

A detailed summary of developments in Federal Discrimination Law can be found in the periodical supplements to HREOC's publication *Federal Discrimination Law 2005*. See: http://www.hreoc.gov.au/legal/fed_discrimination_law_05/.

- ***Baird v State of Queensland [2006] FCAFC 162***

This case concerned the underpayment of wages to Aboriginal people living in the Hope Vale and Wujal Wujal communities in Queensland. Those communities were managed, in the relevant period, by the Lutheran Church ('the Church') which was funded by the Queensland Government ('the Government') for this purpose.

It was alleged that the payment of under-award wages was racially discriminatory, contrary to the *Racial Discrimination Act 1975* (Cth) ('RDA'). The claim covered the period from 1975 (when the RDA commenced) until 1986 (after which time Aboriginal people living on Government and church-run communities were paid award wages).

At first instance, Dowsett J found against the appellants. The Full Court overturned this decision and found that the Government had discriminated against the appellants contrary to section 9(1) of the RDA. The Church was not a party to the litigation.

The Full Court found that the acts of calculating and paying the grants by the Government clearly involved a distinction between award wages and below-award wages. Such distinction was made by reference to the Aboriginality of the persons on reserves who were to be paid out of those grants. The acts of the Government had the effect of breaching the human rights of the appellants, namely the right to equal pay for equal work.

Following the decision of the Full Court, the parties agreed to orders which included the payment of damages to individual appellants of between \$17-85,000 (including interest) and an apology from the Minister for Communities, Disability Services, Seniors and Youth.¹

You can read the full case at: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2006/162.html>

You can read the Commission's submissions as intervener at: <http://www.hreoc.gov.au/legal/intervention/baird.html>

- ***Foster v State of Queensland [2006] FCA 1680***

This case arises out of litigation concerning the underpayment of wages to Indigenous people working in the Doomadgee community in Queensland between 1975 and the mid-1980's.

In this decision, Greenwood J granted leave to appeal against the decision of the trial judge, Collier J, in *Douglas v State of Queensland (No.2) [2006] FCA 1288*, in which her Honour ordered a permanent stay of significant aspects of the proceedings.

¹ *Baird v State of Queensland No 2 [2006] FCAFC 198*.

Collier J had held, applying *Batistatos v Road Traffic Authority of New South Wales* [2006] HCA 27, that the passage of time since the events the subject of the proceedings was such that the proceedings were an abuse of process. Greenwood J held that this decision was attended by sufficient doubt that it should be reconsidered by the Full Court.

It is understood that the Full Court will hear the appeal in March 2007.

You can read the full decision at:

http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/1680.html

- *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767 (8 December 2006)

The applicant, William Gama, was employed by Qantas as a licensed aircraft mechanical engineer. He alleged that he was discriminated against on the grounds of his race (Mr Gama is Goan) and disability (physical injuries sustained at work and depression) by co-workers and superiors and that Qantas was vicariously liable for the actions of its employees.

The particulars of the race discrimination complaint included the use of racist comments, the reporting requirements he was subjected to and his general treatment with respect to sick leave and work attendance. He also alleged that Qantas failed to offer him the same conditions of work and opportunities for training and promotion that were afforded to other employees.

The particulars of the disability discrimination complaint included comments made by Mr Gama's supervisor that he was familiar with and knew how to manipulate the Workers Compensation System, a comment made by a co-worker (in the presence of his supervisor) that Mr Gama was walking up the stairs 'like a monkey' (as a result of his injuries) and allegations that Qantas denied him access to or limited his access to opportunities for promotions, transfer or training.

Whilst not finding all of the allegations substantiated, Federal Magistrate Raphael held that Qantas discriminated against Mr Gama on the grounds of his race and disability. Magistrate Raphael awarded Mr Gama a total of \$71,692 in damages \$40,000 of which was for general damages.

You can read the full decision at: <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FMCA/2006/1767.html?query=gama%20and%20qantas>

4. HREOC Legal Submissions

- **Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry on the Migration Amendment (Review Provisions) Bill 2006**

The Commission made a submission to the Committee's Inquiry into this Bill and appeared before the Committee at a hearing in Sydney on 31 January 2007.

The Commission is concerned that the Bill creates an unfair process for determining refugee and migration cases, which may breach the human rights of applicants by:

- breaching applicants' right to a fair hearing as protected by the ICCPR; and/or
- leading to incorrect decisions which increases the likelihood of 'refoulement' of asylum seekers.

The Commission also submitted that, while the Bill may give tribunals greater flexibility, it may not improve their efficiency. However, even if it does, efficiency is not justified if it comes at the expense of applicants' human rights.

You can read the full submission at:

http://www.humanrights.gov.au/legal/submissions/migration_amendment_bill_06.htm

- **Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry on the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006**

The Commission's submission expresses concern that the AML/CTF Bill 2006 does not do enough to ensure that financial institutions adopt non-discriminatory criteria when determining the 'money laundering/ terrorism financing risk' (ML/TF risk) of providing a designated service to a customer.

This is primarily because the Bill:

- fails to provide any objective criteria for financial institutions to use in determining 'risk' and gives a broad discretion to them; and
- exempts financial institutions from liability under discrimination laws for conduct done in good faith and in compliance or purported compliance with the AML/TF regime.

You can read the full submission at:

http://www.hreoc.gov.au/legal/submissions/anti_money_laundering_counter_terrorism.html

- **Submission to the Tasmanian Law Reform Institute in response to its Discussion Paper *A Charter of Rights for Tasmania?***

The Commission made a submission to the Tasmanian Law Reform Institute in response to its Discussion paper (*A Charter of Rights for Tasmania?*). The Commission's submission stated that a statutory Charter of Rights could, depending on its form and content, significantly improve human rights protection in Tasmania. The submission stated that a Tasmanian Charter of Rights should:

- Protect the rights set out in the *International Covenant of Civil and Political Rights* (ICCPR) and take steps to achieve the progressive realisation of rights set out in the *International Covenant of Economic Social and Cultural Rights* (ICESCR).
- Protect the rights of every person in Tasmania's jurisdiction, regardless of immigration status.
- Create a culture of human rights compliance in law and policy making by providing that:
 - bills must be accompanied by a human rights compatibility statement;
 - submissions to Cabinet with a direct or significant impact on human rights be accompanied by a human rights impact statement.
- Give courts the power to:
 - interpret legislation consistently with the Charter;
 - make a declaration of incompatibility if legislation is incompatible with the Charter;
 - hear and determine actions brought against public authorities for acting unlawfully under the Charter.
- Establish an independent Tasmanian Human Rights Commission to monitor human rights protection under the Charter, advise the government on Charter compliance, and promote public understanding and awareness of the Charter.

5. Recent Parliamentary reports

- **'Unfinished business: Indigenous stolen wages', report by the Senate Standing Committee on Legal and Constitutional Affairs**

The Committee released its report into Indigenous stolen wages in December 2006. The report provides an overview of the protection regimes in each State and Territory and highlights the potential for the non-payment or underpayment of wages to Indigenous people.

The Committee's recommendations included that:

- Governments provide unhindered access to archives for the purposes of researching the stolen wages issue as a matter of urgency;
- Funding be made available for
 - education and awareness in Indigenous communities about; and
 - preliminary legal research into stolen wages issues.
- The Western Australian Government establish a compensation scheme using the NSW scheme as a model;
- Consultation and research be undertaken by the Federal and State Governments into stolen wages in the Northern Territory, Australian Capital Territory, South Australia, Tasmania and Victoria with a view to establishing compensation schemes where appropriate.
- The Queensland government significantly revise the terms of its existing reparation offer to indigenous people.

See the report:

http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_wages/report/index.htm

See the Commission's submission to the Committee:

http://www.hreoc.gov.au/legal/submissions/stolen_wages_2006.html

6. International developments

- ***Communication No. 1324/2004: Australia 13/11/2006 CCPR/C/88/D/1324 (Jurisprudence)***

Danyal Shafiq, a Bangladeshi national, claims to have been unwittingly recruited into an illegal political organisation known as the Sharbahara Party, when he was 15 years of age. He claims that he was unknowingly involved in delivering information to Party activists about assassination and extortion attempts, and that he later became involved, again unknowingly, in the smuggling of arms and drugs across the Indian border.

Mr Shafiq left Bangladesh and arrived in Australia in 1999. He has been in detention, as an unlawful non-citizen, since his arrival.

Mr Shafiq lodged a complaint with the United Nations Human Rights Committee ('the Committee'), alleging violations of articles 7, 9 and 10 of the ICCPR.

The Committee concluded that there has been a violation of article 9, paragraphs 1 and 4. It concluded that the review of the lawfulness of detention is not limited to mere formal compliance of the detention with domestic law and that the notion of 'arbitrariness' must not be equated with 'against the law'. The Committee stated that the notion of 'arbitrariness' must be interpreted broadly so as to include elements such as inappropriateness and injustice.

The Committee further stated that 'every decision to keep a person in detention should be open to periodical review, in order to reassess the necessity of detention and detention should not continue beyond the period for which a State party can provide appropriate justification.'

In accordance with article 2, paragraph 3(a) of the ICCPR, the Committee determined that the State is under an obligation to provide Mr Shafiq with an effective remedy, including release and appropriate compensation.

You can read the full decision at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/32cae9a7f6c3e94ec125723a005826ff?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/32cae9a7f6c3e94ec125723a005826ff?Opendocument)

7. Upcoming Human Rights Events

- **2007 Human Rights Dinner**

On Friday, 23 February 2007 the Human Rights Law Resource Centre is hosting the 2007 Human Rights Dinner with Sir Nigel Rodley KBE, Vice-Chair, UN Human Rights Committee, and Debbie Kilroy OAM, founding Director of Sisters Inside. Further information can be found at <http://www.hrlrc.org.au/>

- **Human Rights Charters: Reflections for Victoria from the UK and the UN**

On the 26 February 2007 the Human Rights Law Resource Centre presents a seminar with Sir Nigel Rodley KBE to offer some thoughts on the likely implications and impacts of the Victorian *Charter of Human Rights and Responsibilities 2006*. RSVP by 19 February 2007. Further information can be found at <http://www.hrlrc.org.au/>

- **Freedom, Respect, Equality, Dignity: Human Rights Conference**

On the 27 February 2007 the Victorian Equal Opportunity and Human Rights Commission are hosting a major human rights conference at ANZ Pavilion, Melbourne Arts Centre, St Kilda Road. Further information can be found at www.eoc.vic.gov.au/conference/

- **Launch of new HREOC publication *It's About Time: Women, men, work and family* Final Paper 2007.**

On 7 March HREOC is launching a new Commission publication *It's About Time: Women, men, work and family* Final Paper 2007. The launch will be held at 10:30am Blake Dawson Waldron, Grosvenor Place, Level 36, 225 George Street, Sydney NSW 2000. To RSVP please contact Penny Dordoy on 02 9284 9608.

If you have a human rights event that you wish to publicise in the *Human Rights Law Bulletin* please email associate@humanrights.gov.au