HUMAN RIGHTS LAW BULLETIN

Inside this issue **March 2007 – May 2007**

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1. Human Rights Law Bulletin Seminar

Native Title: developments in case law and practice
4th June 2007, 1:00-2:30pm

The HREOC Legal Section is pleased to present its next Human Rights Law Bulletin Seminar entitled 'Native Title: developments in case law and practice'. The Seminar will feature two distinguished speakers:

1. Mr Sean Brennan, University of New South Wales. Mr Brennan will discuss the developments in recent case law on Native Title; and

2. Mr Kevin Smith, Queensland State Manager, National Native Title Tribunal. Mr Smith will discuss some of the developments in the practice of Native Title determination, including the increasing prevalence of land use agreements.

The Seminar will be chaired by Mr Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner and Acting Race Discrimination Commissioner.

The Seminar will take place on **4th June 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 .

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2. Selected general Australian law

Hicks v Ruddock [2007] FCA 299

The Attorney General, the Minister for Foreign Affairs and Trade and the Commonwealth (the respondents) made an application to dismiss proceedings brought by Mr Hicks (the applicant) on the ground that, as a matter of law, the applicant's claims had no reasonable prospects of success. At the time of the application for summary judgment, the applicant, an Australian citizen, had been detained at Guantanamo Bay by United States authorities for over five years without valid charges being brought.

The proceedings brought by the applicant sought:

- An order of habeas corpus on the grounds that the applicant was unlawfully detained and the respondents had sufficient control over the applicant to seek his return to Australia.
- Judicial review of the respondents' decision not to request his release from the United States and his return to Australia on the grounds that this decision was infected by irrelevant considerations, namely the inability to prosecute the applicant under Australian law and the willingness to waive mandated trial standards.

The respondents submitted these proceedings should be summarily dismissed because:

- adjudicating the applicant's claims would contravene the Act of State doctrine, which requires the court of one nation to abstain from hearing proceedings which might require it to find the action of foreign state unlawful; and
- the proceedings gave rise to non-justiciable questions.

In dismissing the application for summary judgment, his Honour held:

- The Act of State doctrine and the principle of non-justiciability were developing areas of law and did not justify summary judgment.
- The applicant's claim that he was in the control of the Commonwealth and his detention was unlawful had reasonable prospects of success. Therefore, the availability of an order of habeas corpus should be determined at the hearing.

In delivering his judgment, Tamberlin J emphasised: 'it must be firmly kept in mind that this case concerns the fundamental right to have cause shown as to why a citizen is deprived of liberty for more than five years in a place where he has not had access to the benefit of a duly constituted court without valid charge'.

You can read the full case at http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/299.html

The Queen v Taufahema [2007] HCA 11

Mr Taufahema, had been convicted of the murder of a police officer on the basis of being party to a joint criminal enterprise to avoid arrest. The NSW Court of Criminal Appeal (NSWCCA) subsequently held that avoiding arrest was not, in fact, illegal and acquitted Taufahema. The Crown appealed to the High Court, seeking a new trial to argue that the accused had been party to a joint criminal enterprise of armed robbery.

Although the issue of double jeopardy did not directly arise (as the acquittal was entered on appeal) similar considerations applied in determining the fairness of allowing a new trial for the prosecution to put forward a different case. The majority (Gummow, Hayne, Heydon and Crennan JJ) allowed the appeal, holding that:

- The reason Taufahema's appeal succeeded was not because of insufficient evidence in the prosecution's case.

- There would have to be a *substantial* difference between the case relied on in the first trial and the case to be relied on in a second if it was to stand as a bar to an order for a second trial. This was not the case here.
- Had the NSWCCA been asked to exercise its discretion on the basis now relied on (i.e. the different criminal enterprise), the correct order would have been for a new trial.

On the other hand, Gleeson CJ and Callinan J held that the prosecution should only be granted a new trial to correct an error within the appellant process itself. Here, the NSWCCA made no error that required correction. Similarly, Kirby J emphasised that the court should 'appreciate the strength and persistence of this Court's repeated statements that the prosecution should not be given an opportunity to make a new case'.

You can read the full decision at: http://www.austlii.edu.au/au/cases/cth/HCA/2007/11.html

ACMA finding against Jones and 2GB (Investigation Report No. 1485)

In this decision the Australian Communications and Media Authority (ACMA) ruled that certain on-air comments by Alan Jones during the Cronulla Riots breached the Commercial Radio Australia Codes of Practice 2004 ('the Code'). In particular, ACMA concluded that comments by Mr Jones on 7 and 8 December 2005 were likely to:

- encourage violence or brutality (clause 1.3(a)); and
- vilify people of Lebanese and Middle-Eastern background on the basis of ethnicity (1.3(e)).

ACMA did not accept that any of the relevant comments were reasonable or in good faith, which operates as a defence under the Code.

You can read the full decision at:
www.acma.gov.au/webwr/_assets/main/lib101068/2gb_%20report1485.pdf

Gumana v Northern Territory of Australia [2007] FCAFC 23 (2 March 2007)

The Full Federal Court in *Gumana* held that the grant of land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('the Act') includes the right to exclude people from that land up to the low water mark. This gives the land owners exclusive access to the column of water above the inter-tidal zone and power to regulate entry to that water. The Court did not follow the decision in *Commonwealth v Yarmirr* (2000) 101 FCR 171, which implicitly held that a grant made under the Act did not include the foreshore.

As a result of this finding, the Court concluded that the licensing system under the *Fisheries Act 1988* (NT) does not apply to commercial fishing in tidal waters overlying Aboriginal land (i.e. the inter-tidal zone and tidal rivers). Rather, the power to grant commercial (and recreational) fishing licences regarding these waters was vested in the Aboriginal Land Trusts under the Act.

The applicant's claim of Native Title over the land granted under the Act was, however, dismissed by the Court.

The Northern Territory Government is seeking special leave to appeal to the High Court.

You can read the full decision at: http://www.austlii.edu.au/au/cases/cth/FCAFC/2007/23.html

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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: www.hreoc.gov.au/legal/fed_discrimination_law_05/.

Lee v Smith & Ors **[2007] FMCA 59**

In *Lee v Smith & Ors* [2007] FMCA 59,, the Australian Defence Force ('ADF') was held vicariously liable under section 106(1) of the Sex Discrimination Act (SDA) for the rape, sexual discrimination, harassment, and victimisation of Cassandra Lee, a civilian administration officer at a Cairns naval base. Ms Lee was sexually harassed, intimidated and, ultimately, raped by a colleague, following a dinner party at another colleague's house.

Central to the Court's finding that the ADF was vicariously liable was its conclusion that the rape 'arose out of a work situation' and, in fact, 'was the culmination of a series of sexual harassments that took place in the workplace'.

You can read the full decision at: www.austlii.edu.au/au/cases/cth/FMCA/2007/59.html

Clarke v Oceania Judo Union **[2007] FMCA 292**

In *Clarke v Oceania Judo Union*, the applicant claimed that the respondent discriminated against him, contrary to s 28 of the Disability Discrimination Act (DDA), on the basis of his disability, being blindness. The respondent prohibited Mr Clarke from competing in a judo tournament held in Queensland. Mr Clarke alleged he was also effectively excluded from participating in the training camp which followed the tournament, as the respondent required him to attend with a carer, which he refused to do.

The respondent made an interlocutory application objecting to the Court's jurisdiction. The respondent argued that the appropriate jurisdiction to hear the matter was that of New Zealand, where the respondent is incorporated and where the relevant decision to exclude Mr Clarke from the contest was made.

The Court dismissed the respondent's application holding that where relevant act/s of discrimination occurred within Australia, it is irrelevant where the actual decision to exclude the applicant from the competition was made. In reaching this finding, the Court agreed with the submissions of the Acting Disability Discrimination Commissioner, who appeared at the interlocutory hearing as *amicus curiae*.

The substantive matter was subsequently resolved at mediation.

You can read the full decision at: www.austlii.edu.au/au/cases/cth/FMCA/2007/292.html

Bella Bropho v State of Western Australia **[2007] FCA 519**

This decision concerns a complaint that the *Reserves (Reserve 43131) Act 2003* (WA) ('the Act') and actions taken under it in relation to Reserve 43131 ('the reserve') were contrary to the *Race Discrimination Act 1975* ('RDA') (namely ss 9 and 10).

The applicant, Bella Bropho, is a member of the Swan Valley Nyungah Community (SVC) and brought the claim on behalf of all Aboriginal persons of Nyungah origin who were inhabitants of the reserve.

The Act was introduced following widespread allegations of violence, sexual assaults, substance abuse and difficulties encountered by various government and community

organisations, including the police, to gain access to the Reserve. The Act revoked the SVC's power to manage the reserve and pursuant to the Act, the appointed Administrator directed some of the inhabitants of the reserve to leave.

In dismissing the complaint, the Court held that the applicants were unable to establish that they had a human right of ownership of the Reserve pursuant to the RDA, as their rights derived from a statutory source. They held that even if they were able to establish a right of ownership, the Act was a special measure taken to advance the rights of Aboriginal individuals, namely women and children, requiring protection. Therefore no inconsistency with ss 9 or 10 of the RDA could be established. The Court also found that as both Aboriginal and non-Aboriginal persons were ordered to leave the reserve, it could not be established that the decision to refuse occupation was made on the basis of race, contrary to s 12(1)(d) of the RDA. The Court emphasised that whilst the Act affects persons of a particular race, it does not necessarily mean that it affects them *by reason* of their race, if there is another true rationale or basis of the law.

You can read the full decision at: www.austlii.edu.au/au/cases/cth/federal_ct/2007/519.html

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4. HREOC Legal Submissions

Senate Standing Committee on Finance and Public Administration inquiry into the Human Services (Enhanced Service Delivery) Bill 2007

The Human Services (Enhanced Service Delivery) Bill 2007 relates to the introduction of an 'access card' for the provision of human services by the Commonwealth government.

HREOC made a written submission which drew the Committee's attention to how the access card might impact upon Indigenous Australians and made related recommendations. In particular, HREOC observed:

- As a result of their disadvantaged socio-economic status, most Indigenous Australians will be required to register for the access card in order to gain or maintain access to social welfare payments, Medicare services, and the Pharmaceutical Benefits Scheme;
- A potentially significant number of Indigenous people will have difficulty providing the documents required to establish their 'legal name';
- A potentially significant number of Indigenous people will have difficulty meeting one or more of the requirements of the registration process for the access card, as a result of cultural reasons or their disadvantaged socio-economic status. Special consideration should be given to their circumstances and appropriate exemptions granted or special arrangements made.
- To ensure that the registration requirements for the access card do not unnecessarily disadvantage Indigenous Australians, it is important that they are consulted about the development of guidelines and other mechanisms that will determine eligibility.

You can read HREOC's full submission at:
www.aph.gov.au/Senate/committee/fapa_ctte/access_card/submissions/sub55.pdf

Parliamentary Joint Committee on Intelligence and Security Review of the power to proscribe terrorist organisations

HREOC's submission to the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') review of the power to proscribe terrorist organisations ('the PJCIS review') expresses concern that that the Attorney-General's power to proscribe or de-list a terrorist organisation does not satisfy the international human rights law requirement that any interference with ICCPR rights (in this case, the right to freedom of association and freedom of expression) be prescribed by law and be proportionate and necessary to achieve a legitimate end.

The submission argues that inadequate safeguards in the current proscription process create the potential for arbitrary and disproportionate decision-making. HREOC's key concerns are:

- the absence of criteria for the exercise of the Attorney-General's discretion to proscribe or de-list a terrorist organisation;
- the lack of opportunities for organisations or individuals to oppose the proposed proscription of an organisation;
- the absence of merits review of the Attorney-General's decision to proscribe a terrorist organisation a terrorist organisation.

HREOC's submission endorses the Security Legislation Review Committee's recommendations to create a more transparent proscription process. The fact that, as a result of proscription, a person associated with an organisation may be charged and convicted of serious criminal offences reinforces the need for a fairer proscription process.

HREOC recommends that the proscription process should be a judicial rather than executive process. In the event that a judicial proscription process is not adopted, HREOC recommends existing proscription provisions should be amended to include the criteria to be taken into account by the Attorney-General in determining whether to proscribe or de-list a terrorist organisation and allow merits review of the Attorney-General's decision to proscribe an organisation

You can read HREOC's full submission at:
www.aph.gov.au/house/committee/pjcis/proscription/submissions/sub14.pdf

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5. Recent Parliamentary Committee reports

Senate Standing Committee on Legal and Constitutional Affairs inquiry into the AusCheck Bill 2006

The AusCheck Bill gives AusCheck authority to coordinate background checks for applicants of the Aviation Security Identity Card and the Maritime Security Identity Card. It also provides authority for AusCheck to maintain a database of applicants and cardholders; to collect, use and disclose information and to recover costs for conducting background checks.

The majority of submissions made to the Committee supported the Bill and its objectives. However, they raised a number of concerns (shared by the Committee), such as:

- the extent of the Bill's regulation making power;
- privacy issues concerning personal information collected, used, disclosed and stored by AusCheck;
- the lack of transparency, natural justice and independent review mechanisms of the Bill;
- practical issues concerning implementation of the Bill.

In its report, the Committee emphasises the necessity for Parliament to have the opportunity to consider the particulars of any future screening regimes to ensure that they are appropriate and proportionate to their purpose and that delegated legislation should not be used to extend the scope of primary legislation. The Committee also concludes that several of the Bill's provisions dealing with the collection and retention of information are too broad and could potentially impact adversely on an individual's right to privacy.

The report suggests ways that the use of personal information can be better protected and makes a number of recommendations on how the Bill can be amended to address the above concerns, namely by:

- specifying a period of time which personal information can be stored in AusCheck's database;
- inserting a provision in the Bill that requires AusCheck to delete any information from its database that is not relevant to the background check for which it has been collected, used or disclosed; and
- placing limits on the use and disclosure of personal information by a third party agency.

You can find the Committee's full report at:
www.aph.gov.au/Senate/committee/legcon_ctte/auscheck/index.htm

Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Native Title Amendment Bill 2006

The Bill contains reforms to a number of aspects of the native title system, contained in the four schedules of the Bill: (1) Native Title Representative Bodies (NTRBs); (2) Claims Resolution Review; (3) Prescribed Bodies Corporate (PBCs); and (4) Funding of non-claimant parties.

HREOC made submissions to the Committee that argued either against, or for changes to, the amendments proposed in the first three of these areas.

In its report, the Committee broadly supports the amendments in the schedules and, subject to nine substantive recommendations, it supports the Bill being passed.

You can find the Committee's full report at:
www.aph.gov.au/Senate/committee/legcon_ctte/native_title/report/index.htm

HREOC's submissions can be found at:
www.humanrights.gov.au/legal/submissions/nta_bill_250107.html

Senate Legal and Constitutional Affairs Committee inquiry into the Migration Amendment (Review Provisions) Bill 2006

The Bill amends the Migration Act to limit the obligations of the Migration Review Tribunal ('MRT') and the Refugee Review Tribunal ('RRT') in affording applicants procedural fairness. In particular, the Bill sought to amend the circumstances in which the MRT and RRT must give an applicant adverse information in writing and invite a response.

HREOC made submissions to the Committee, opposing the changes proposed by the Bill.

In its report, the Committee recommends that the Bill be passed, subject to an amendment (suggested by HREOC) that adverse information should only be provided to applicants orally in the MRT and RRT, where an applicant chooses this course.

The Committee also recommends that the Senate pass the proposed amendments exempting the RRT and MRT from having to provide an applicant with information given by the applicant during the process leading to the decision under review. HREOC made oral submissions at the Inquiry to the effect that the Senate should not pass these amendments. In particular, HREOC expressed concern that the proposed provisions are likely to impact unfairly on applicants before the RRT and MRT who may not have the chance to comment on information which forms the basis of an adverse decision against them.

You can find the Committee's full report at:
www.aph.gov.au/Senate/committee/legcon_ctte/mig_review_provisions/report/index.htm

6. International Developments

Disability Convention opened for signature

On 30 March 2007, the *Convention on the Rights of Persons with Disabilities* and Optional Protocol (for individual complaints) were opened for signature. Australia was among 81 countries (as well as the European Council) to sign up to the Convention, although Australia is yet to also sign the Optional Protocol. At present one country (Jamaica) has ratified the Convention and 44 countries have also signed the Optional Protocol. The Convention requires the ratification of 20 countries and the Optional Protocol requires the ratification of 10 countries for each to come into effect.

The Convention is the first binding international instrument dealing exclusively with disability rights. It covers a broad range of rights and issues, including:

- equality, non-discrimination and equal recognition before the law;
- liberty and security of the person;
- accessibility, personal mobility and independent living;
- right to health, work and education; and
- participation in political and cultural life.

Graeme Innes, Commissioner Responsible for Disability, led the Australian government delegation in the drafting of the Convention.

You can find the full text of the Convention at:
www.ohchr.org/english/issues/disability/docs/conventiontextfinaleng.doc

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7. Upcoming Human Rights Events

Harmony Lost: why multicultural Australia needs a Human Rights Act in the era of anti-terror

Date: 16 May 2007
Time: 6:30-8:00pm
Further information: email nsw_hrsteam@amnesty.org.au

Amnesty International presents 'Harmony Lost: why multicultural Australia needs a Human Rights Act in the era of anti-terror'. Speakers include: Robin Banks, Chief Executive Officer of PIAC and Director of PILCH; Dr Danielle Celemarjer, Director of Global Studies at the University of Sydney; Professor George Williams, Director of Gilbert + Tobin Centre of Public Law; Suraya Turk, Deputy Chair of the Youth Advisory Council of New South Wales.

Disability Discrimination: an accessible human right?

Date: 17 May 2007
Time: 2:00pm
Further information: visit http://www.communitylaw.org.au/ddls/

The Disability Discrimination Legal Service Inc presents 'Disability Discrimination: an accessible human right?' as part of Law Week 2007. Learn about disability discrimination law and how 'accessibility' sits within the anti-discrimination framework at state, federal and international levels at this community legal education forum.

Does Australian Need a Charter of Rights?

Date: 24 May 2007
Time: 6:30pm
Further information: visit www.gleebooks.com.au/events

New Matilda will presents George Williams, who will discuss his new book, A Charter of Rights for Australia, with SMH columnist and Justinian editor Richard Ackland and Susan Ryan AO, former Hawke government Minister, architect of the Sex Discrimination Act and head of the New Matilda Human Rights Act Campaign. Former Premier of WA and now Director of the Graduate School of Government at the University of Sydney, Geoff Gallop, will moderate.

Rights of Resettlement: refugees' perspectives and realities

Date: 30 May 2007
Time: 5:30pm
Further information: visit www.latrobe.edu.au/rhrc/conferences

The Refugee Health Research Centre at La Trobe University presents its monthly seminar series on research into human rights, asylum processes and refugee resettlement. The speaker will be Dr Apollo Nsubuga-Kyobe, School of Business, La Trobe University.

Law and Liberty in the war on terror

Date: 4 - 6 July 2007
Further information: visit www.llwt.unsw.edu.au

The Gilbert + Tobin Centre of Public Law, University of New South Wales, presents this symposium exploring the challenges that responding to the threat of terrorism present to the rule of law. It will bring together experts from Australia, Canada, the United Kingdom and the United States to provide in-depth analysis of these laws and debate the complex issues raised by them, such as torture, freedom of speech and detention without trial.
