SHORT PARTICULARS OF CASES
APPEALS

CANBERRA
OCTOBER SITTINGS 2008

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WONG v COMMONWEALTH OF AUSTRALIA & ANOR (S362/2008)

SELIM v LELE, TAN & RIVETT (CONSTITUTING THE PROFESSIONAL SERVICES REVIEW COMMITTEE NO. 309 & ORS (S363/2008)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 27 February 2008

Date of grant of special leave: 1 August 2008

Of the two matters before this Court, the first ("Wong") was a matter that was remitted to the Federal Court by Chief Justice Gleeson on 11 October 2006. It then proceeded by way of referral of questions of law to a Full Court. The second matter ("Selim") was commenced as an application to the Federal Court to review the decisions of the respective First and Fourth Respondents. Both matters were dealt with by the Full Federal Court together. The Attorney-General for the Commonwealth intervened in Selim and the Respondents in that matter adopted his submissions.

In both matters the Appellants have challenged the validity of the Professional Services Review ("PSR") Scheme in Pt VAA of *Health Insurance Act 1973* (Cth) ("the Act"). Drs Selim, Dimian and Wong are general practitioners who have been found by a PSR Committee to have engaged in inappropriate practices. The consequence of such a finding is that each doctor may be subject to sanctions, including reprimand, counselling and disqualification from participation in the Medicare Scheme for up to three years. The Determining Authority, whose responsibility it is to decide upon the appropriate sanctions, has undertaken not to make determinations pending the outcome of these proceedings.

The doctors contended that the PSR Scheme and certain other key provisions of the Act offended the prohibition on civil conscription in section 51(xxiiiA) of the Constitution. They also submitted that the Act impermissibly conferred judicial power of the Commonwealth onto the Determining Authority. Those arguments however were rejected by Justice Stone in Selim.

With respect to Wong, on 27 February 2008 the Full Federal Court (Black CJ, Finn & Lander JJ) unanimously held that none of sections 10, 20, 20A or any provision of Part VAA of the Act amounted to civil conscription within the meaning of the Constitution. Furthermore, those provisions were not outside the legislative power of the Commonwealth. Their Honours also held that section 106(4) of the Act did not purport to confer the judicial power of the Commonwealth on persons who have not been appointed pursuant to section 72 of the Constitution and was therefore valid. With respect to Selim, their Honours dismissed the appeal with costs.

Their Honours held that sections 10, 20 and 20A of the Act did not compel a medical practitioner to render any professional service to any person. Those sections provide for the payment of a medical practitioner's fee for a professional service when that professional service has been rendered in response to an eligible person's request. Part VAA also did not compel a medical practitioner to perform any professional service. The purpose of Part VAA was to regulate the manner in which any professional service for which a Medicare benefit is payable is performed.

Their Honours held that what the Medicare Scheme does compel is for practitioners to conduct themselves with appropriate care and skill. Such a condition however is "clearly necessary to the effective exercise of the power conferred by section 51(xxiiiA)". The Act did not therefore authorise civil conscription.

In both matters, section 78B notices have been filed.

On 12 September 2008 the Attorney-General of the Commonwealth advised this Court that he is intervening on behalf of the Respondents in the Selim matter.

The grounds of appeal (in both matters) include:

- The Full Court erred in not finding that sections 10, 20, 20A and Part VAA (or any provision of Part VAA) of the Act amount to "civil conscription" within the meaning of section 51 (xxiiiA) of the Constitution, and are outside the legislative powers of the Commonwealth and invalid.

- The Full Court erred in finding (reasons at [44]) that regulation of medical services by the Act placed a condition on the provision of such services and did not amount to "civil conscription" within the meaning of section 51(xxiiiA) of the Constitution.

ICETV PTY LIMITED & ANOR v NINE NETWORK AUSTRALIA PTY LIMITED (S415/2008)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 8 May 2008

Date of grant of special leave: 26 August 2008

The Nine Network Australia Pty Limited ("Nine") is a major television broadcaster in Australia. The First Appellant, IceTV Limited ("IceTV"), produced an interactive electronic programming guide called the "IceGuide". It provided information to subscribers about forthcoming free-to-air television broadcasts, including those of Nine's. (The Second Appellant, IceTV Holdings Pty Limited, is the parent company of IceTV.)

Nine sued both Appellants for infringement of copyright in its television program schedule. It claimed that IceTV had indirectly copied the time and title information from its "Weekly Schedule". Nine alleged that IceTV had done this by filling in, or otherwise confirming, the incomplete draft programming schedules from the information incorporated in the "Aggregated Guides". Those guides were prepared by "Aggregators" from sources which include the "Weekly Schedule." Nine submitted that IceTV's use of information contained in published guides issued by third parties constituted indirect copying of its work. (IceTV otherwise had no direct access to Nine's works.)

On 9 August 2007 Justice Bennett rejected Nine's claims. Her Honour held that there were significant differences in both content and form between the "Weekly Schedule", the "Aggregated Guides" and the "IceGuide". She found that the "IceGuide" did not take the content, arrangement or form of the "Weekly Schedule" and it therefore did not substantially reproduce it.

Upon appeal, the main issue was whether Justice Bennett had correctly rejected Nine's claim that IceTV had infringed Nine’s copyright in its television program schedules. On 8 May 2008 the Full Federal Court (Black CJ, Lindgren & Sackville JJ) unanimously allowed Nine's appeal. Their Honours overturned Justice Bennett's findings on substantiality. This was on the basis that the time and title information included in the "Weekly Schedule" was a crucial element of the compilation. They also found that the requisite causal connection existed because IceTV had indirectly copied the information from the "Weekly Schedule" by using the "Aggregated Guides".

On 23 September 2008 the Australian Digital Alliance and Telstra Corportation Limited filed separate summonses, seeking leave to intervene in this matter.

The grounds of appeal include:

- The Full Federal Court erred in its conclusion that IceTV had infringed Nine's copyright in its "Weekly Schedule".
- The Full Federal Court erred in its conclusion that IceTV, in preparing its "IceGuide", had copied the "Weekly Schedule" by using time and title information from published Aggregated Guides.