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Litigation notes

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Advertisement of personal injury legal services

A majority of the High Court held that it is constitutionally permissible for state legislation to prohibit lawyers from advertising the provision of personal injury legal services. In reaching this conclusion, the High Court considered the scope of the implied freedom of political communication and the nature of the restraints on legislative action which might be drawn from Chapter III of the Constitution, as well as deciding a range of other constitutional objections to the validity of the challenged NSW legislation.

APLA Limited v Legal Services Commissioner (NSW)
High Court of Australia, 1 September 2005
[2005] HCA 44; (2005) 219 ALR 403

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Background

Professional restrictions on advertising by lawyers in NSW were removed by amendments made to the *Legal Profession Act 1987* (NSW) in 1994. However some restrictions on lawyers advertising the provision of personal injury legal services were recently reimposed by Part 14 of the Legal Profession Regulation 2002 (NSW). Under Part 14 it is both an offence and professional misconduct for a barrister or solicitor to publish an advertisement that includes any reference to personal injury, to the circumstances in which personal injury might occur, or to personal injury legal services (reg 139).

The purpose of Part 14, according to a Ministerial Statement made in 2002 by the then NSW Premier, is to:

> '[push] down the pressure on rising insurance costs ... [including by preventing] lawyers engaging in ambulance chasing advertising ... [which] encourages people to claim for every slip and fall, regardless of the merits ... [and thus to] counteract the trend to excessive litigation which is evident in parts of our society.'

The plaintiffs in this case, the Australian Plaintiff Lawyers Association (APLA), Maurice Blackburn Cashman, and Mr Whyburn, wanted to advertise legal services relating to personal injuries. Their proposed advertisements were to appear in newspapers, journals and on the internet from a computer server located in Melbourne. They brought proceedings in the High Court against the NSW Legal Services Commissioner (who administers Part 14) and NSW, arguing that Part 14 is invalid because it:

— infringes the implied constitutional freedom of political communication

— infringes an alleged freedom derived by implication from Chapter III of the Constitution protecting a right to advertise legal services

— impermissibly burdens freedom of interstate trade, commerce and/or intercourse, contrary to s 92 of the Constitution

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— has an extraterritorial effect that is beyond the legislative competence of NSW

— alters, impairs or detracts from rights conferred and/or jurisdiction invested by Commonwealth legislation so as to render the regulations inconsistent with that legislation and thus invalid under s 109 of the Constitution.

A majority of the High Court found against the plaintiffs, holding that Part 14 of the NSW Regulation is constitutionally valid.

Summary of reasons

Does Part 14 infringe the implied constitutional freedom of political communication?

The Court held 6:1 (Kirby J dissenting) that Part 14 does not infringe the implied freedom of communication about government or political matters. In doing so the Court applied the test set out in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567, as modified by *Coleman v Power* (2004) 209 ALR 182, which relevantly involves the following two questions:

— does the law effectively burden freedom of communication about government or political matters?

— if it does, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the system of representative and responsible government prescribed by the Constitution?

As to the first question, the majority held that the regulations do not, in their terms, prohibit communications about government or political matters. Rather than being of a governmental/political nature, the prohibited communications are of a commercial nature. In this regard the majority drew a distinction between (a) the communication prohibited by Part 14 (advertising personal injury legal services) – which is not political communication, and (b) discussion of the merits of prohibiting such advertising – which may be political communication.

Rather than being of a governmental/political nature, the prohibited communications are of a commercial nature.

The majority noted that Part 14 does not prevent lawyers from making political statements as long as these are separated from the advertisements prohibited by Part 14. The majority went on to hold that an advertisement can validly be prohibited by Part 14 even if it is combined with a political communication. Thus APLA's proposed advertisement could validly be prohibited even though it included the sentence 'Despite the best efforts of Premier Bob Carr and Senator Helen Coonan to stop you, you may still have legal rights to compensation for [injuries]'.

In finding that Part 14 does not infringe the first limb of the *Lange* test, the majority rejected the plaintiffs' argument that the freedom protects not only communications with and about the executive and the legislature, but also communications with and about courts (as the third arm of government). This outcome is consistent with the High Court's focus on the structural and textual origin of the implied freedom of political communication in Chapters I, II and VIII of the Constitution.

The majority's conclusion on the first question from the *Lange* test was sufficient to dispose of the plaintiffs' argument based on the implied freedom of political communication. Some judges did go on to consider the second question (whether any burden on political communication was appropriate and adapted to a legitimate end); however, there was no majority decision on this question.

Does Part 14 infringe any relevant implication derived from Chapter III of the Constitution protecting a right to advertise legal services?

The Court also held 5:2 (McHugh and Kirby JJ dissenting) that no separate implication could be drawn from Chapter III of the Constitution (The Judicature) that would protect a right to advertise legal services. The majority reached this

conclusion on the basis that 'there is nothing in the text or structure of the Constitution, or in the nature of judicial power, which requires that lawyers must be able to advertise their services' (Gleeson CJ and Heydon J [33]).

In this respect the plaintiffs had argued that:

- a separate implication could be drawn from Chapter III of the Constitution and the assumption of the rule of law (on which the Constitution is based), to protect the capacity, ability or freedom of the people of the Commonwealth to ascertain their legal rights and to assert those legal rights in court
- such an implication requires that people have a capacity, ability or freedom to communicate about, and particularly to receive such information or assistance as they may reasonably require to ascertain and assert, their legal rights.

The majority held that the effective exercise of the judicial power of the Commonwealth does not require that legal practitioners be immune from legislative control in marketing their services to prospective clients, noting that federal jurisdiction has always been exercised in the context of state-based regulation of the legal profession. They noted that Part 14 does not prevent prospective litigants from seeking advice or retaining lawyers, and does not otherwise impede communications between lawyers and their clients.

... there is nothing in the text or structure of the Constitution, or in the nature of judicial power, which requires that lawyers must be able to advertise their services.

Does Part 14 impermissibly burden freedom of interstate trade, commerce and/or intercourse contrary to s 92 of the Constitution?

Part 14 prohibits the advertising of personal injury legal services that are to be provided in NSW. The advertising itself need not originate in NSW. So, for example, the second plaintiff, Maurice Blackburn Cashman, proposed to advertise on a website, accessible in NSW, using material uploaded on a computer server in Victoria.

The plaintiffs contended that Part 14, to the extent that it prohibits such advertising across state borders, infringes s 92 of the Constitution. A majority of the High Court rejected this argument (with McHugh and Kirby JJ not deciding).

Section 92 provides:

> ... trade, commerce, and intercourse among the States ... shall be absolutely free.

Since the decision of the High Court in *Cole v Whitfield* (1988) 165 CLR 360 it has been accepted that s 92 contains two limbs, the first of which protects interstate trade and commerce, and the second of which protects interstate intercourse.

With respect to the trade and commerce limb of s 92, the majority held that Part 14, by imposing a burden on *paid* advertising *across state borders*, burdens interstate trade and commerce. However Part 14 does not discriminate against interstate trade and commerce in a protectionist sense and thus passes the test for validity set out in *Cole v Whitfield*.

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With respect to the intercourse limb of s 92, it was accepted that advertising by means of the internet and other electronic methods is a form of communication and can thus constitute 'intercourse'. At least by prohibiting interstate intercourse that is not done in trade and commerce (e.g. not- for-profit advertising), Part 14 imposes a burden on interstate intercourse, raising a question of its validity under the intercourse limb of s 92. However the majority held that Part 14 does not infringe the intercourse limb of s 92 because it is not directed at restricting interstate intercourse and any incidental burden that it imposes on interstate intercourse is no greater than is reasonably required to achieve the object of Part 14, namely the restriction of advertising of personal injury legal services to be provided in NSW.

As to the relationship between the two limbs of s 92, Gummow and Hayne JJ expressly held that the validity of a law relating to activities (such as communications) which have the character of *both* trade and commerce, and intercourse, is to be determined by reference to the trade and commerce limb of s 92 only. The other justices did not decide this issue.

Does Part 14 have an extraterritorial effect that is beyond the legislative competence of NSW?

A majority of the Court (McHugh and Kirby JJ not deciding) held that Part 14 validly operates on conduct such as advertising on the internet that originates outside NSW. In doing so the majority rejected arguments that the operation of Part 14 outside NSW is invalid either because:

— the regulation-making power under which Part 14 is made does not extend to regulations having an extraterritorial operation, or

— if the regulation-making power does so extend, the power is invalid as beyond the legislative competence of NSW.

The circumstance that the advertised legal services were to be provided in NSW provided a direct and substantial territorial connection with NSW.

Does Part 14 alter, impair or detract from rights conferred and/or jurisdiction invested by Commonwealth legislation so as to render the regulations inconsistent with that legislation and invalid?

Finally, the Court held 5:1 that Part 14 was not inconsistent with any law of the Commonwealth identified by the plaintiffs and falling into the following categories (Kirby J dissenting and McHugh J not deciding):

— Commonwealth laws conferring substantive rights and remedies (e.g. provisions of the *Trade Practices Act 1974*)

— Commonwealth laws conferring a right to legal representation and regulating legal representation in federal courts (e.g. provisions in Part VIIIA of the *Judiciary Act 1903*)

— Commonwealth laws conferring and defining the jurisdiction of various courts (e.g. ss 39(2) and 39B of the *Judiciary Act 1903*).

Preventing lawyers from advertising does not impair the enjoyment of federal rights or the exercise of federal jurisdiction.

The plaintiffs argued that the enjoyment of federal rights and the exercise of federal jurisdiction require that potential claimants have the right to seek legal assistance and representation. They argued that Part 14, by inhibiting people from seeking legal advice and assistance, impaired the enjoyment of those rights and exercise of that jurisdiction to an extent inconsistent with their conferral.

The majority held that preventing lawyers from advertising does not impair the relevant Commonwealth legislation. The plaintiffs' argument that s 109 of the Constitution is engaged to invalidate state laws if there is any more than a slight, marginal or *de minimis* impairment of the enjoyment of a federal right was rejected. Rather, the question is always one of fact and degree. Here, the relevant rights, powers and jurisdictions created have full legal effect and operation regardless of whether, at any given time, the states or territories permit or restrict advertising by lawyers.

Commonwealth Solicitor-General, David Bennett AO QC, appeared as senior counsel for the Commonwealth Attorney-General and was instructed by AGS.

http://www.austlii.edu.au/au/cases/cth/high_ct/2005/44.html

The workplace relations advertising case

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In this case the plaintiffs did not establish a basis for declarations or injunctions preventing expenditure on an advertising campaign from the departmental appropriation to the Department of Employment and Workplace Relations (DEWR). The advertising campaign was to promote the Government's workplace relations reforms.

A majority of the High Court found that expenditure for 'departmental items' under annual appropriation Acts is not required to be for any of the stated 'outcomes' for the agency concerned. Instead, all that is required is that the amount paid should be for the 'departmental expenditure' of the agency.

Combet v Commonwealth
High Court of Australia, 29 September 2005 (order), 21 October 2005 (reasons)
[2005] HCA 61

The Australian Government began a print and radio advertising campaign in support of proposed workplace relations reforms in mid-July 2005. The plaintiffs (the Secretary of the ACTU and the Shadow Attorney-General) instituted proceedings seeking to establish that the departmental appropriation to DEWR would not support the expenditure on the advertising campaign, and seeking to prevent the issuing of money from the Treasury of the Commonwealth to pay for the campaign.

Argument before the Court focused on whether the proposed expenditure fell within Outcome 2 of the appropriation to DEWR in *Appropriation Act (No.1) 2005–2006*, namely 'higher productivity, higher pay workplaces'.

Additionally, the question of the standing of the plaintiffs to bring the proceedings was raised.

Decision

Four members of the High Court (Gummow, Hayne, Callinan and Heydon JJ) in a joint judgment, concluded that for departmental items (as opposed to administered items) it was not necessary to demonstrate that the expenditure fell within the terms of a particular outcome (such as outcome 2).

It was sufficient to demonstrate that the amount to be spent was applied for 'departmental expenditure'.

Rather, it was sufficient to demonstrate that the amount to be spent was applied for 'departmental expenditure'. This analysis was based on a construction of s 7(2) of the Appropriation Act (No.1) and on the note to the definition of 'departmental item' in s 3 of the No.1 Act, which, the joint judgment held, together revealed that outcomes do not restrict the scope of the authorised expenditure for departmental items. That expenditure is limited only by the requirement that the amount to be spent is spent for 'departmental expenditure', and by the amount specified in the relevant item. It followed that all the Commonwealth needed to demonstrate was that the advertising expenditure was within the terms of 'departmental expenditure'.

The joint judgment did not give detailed consideration to what might be encompassed by 'departmental expenditure'. In the present case it merely noted that the plaintiffs had not contended that the advertising expenditure was not 'departmental expenditure', and it followed that the plaintiffs could not obtain the relief they sought.

In the course of their reasons, the judges joining in the joint judgment expressed the view that appropriations can be made in extremely general terms, and that it is for Parliament to determine how specific they are. They noted that there is a considerable amount of past practice to show that a very high level of generality is often the option chosen by Parliament.

They also discussed whether the so-called 'Compact of 1965', which is an agreement between the Senate and the Government about what comprises the 'ordinary annual services of the Government' in sections 53 and 54 of the Constitution, was of assistance in construing the content of the Appropriation Act (No.1), and, in particular, whether the appropriations authorised by that Act had to be read down by reference to the terms of the Compact. It had been agreed in the Compact that, among other things, 'new policies' were not ordinary annual services of the Government. The joint judgment concluded that the Compact of 1965, in its original form and as varied by agreement and by practice, shed little light on the question of what falls within a departmental item. They concluded that the Compact is of little relevance as a tool of construction in relation to appropriations legislation.

They concluded that the Compact is of little relevance as a tool of construction in relation to appropriations legislation.

Gleeson CJ agreed in the result, but for different reasons. Both McHugh J and Kirby J held that the expenditure on the advertising was not supported by the identified appropriation.

McHugh and Kirby JJ both expressed the view that Ms Roxon had standing to bring the proceedings. The other judges did not find it necessary to deal with this issue.

Implications

The most important implication of the decision is that, while administered expenditure under annual appropriation Acts is confined by reference to the outcomes contained in those Acts, departmental items are confined only by reference to the concept of 'departmental expenditure'. The joint judgment provides little guidance, however, on what is meant by 'departmental expenditure'.

Questions that agencies may have on the possible implications of the decision for the appropriations framework may be directed to Marc Mowbray d'Arbela at the Department of Finance and Administration, T 6215 3657, marc.mowbray-d'arbela@finance.gov.au.

AGS represented the defendants (the Commonwealth, the Minister for Employment and Workplace Relations, and the Minister for Finance and Administration). AGS Senior General Counsel, Kathryn Graham, appeared with the Commonwealth Solicitor-General, David Bennett AO QC, as one of the junior counsel for the defendants.

http://www.austlii.edu.au/au/cases/cth/high_ct/2005/61.html

Freedom of political speech

These cases considered aspects of the freedom of communication about government and political matters implied in the Constitution. *Coleman* held that a Queensland law prohibiting the use of 'insulting' words did not apply to particular political statements (and perhaps could not validly apply) because in their context those statements were not reasonably likely to cause unlawful physical retaliation. *Mulholland* upheld the validity of certain requirements for registration of political parties under the *Commonwealth Electoral Act 1918*.

Coleman v Power
High Court of Australia, 1 September 2004
[2004] HCA 39; (2004) 209 ALR 182

Mulholland v Australian Electoral Commission
High Court of Australia, 8 September 2004
[2004] HCA 41; (2004) 209 ALR 582

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Coleman v Power

The appellant challenged his convictions for using insulting words in a public place (the Townsville Mall) contrary to s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) (the Vagrants Act) and assaulting and obstructing police in the course of their duties. The convictions arose out of his distribution of pamphlets containing allegations of corruption against several local police officers. The appellant challenged the validity of s 7(1)(d) on the ground that it was contrary to the implied freedom of political communication.

High Court's decision

A majority of the High Court (McHugh, Gummow, Kirby and Hayne JJ) held, for different reasons, that the appellant had not committed an offence under s 7(1)(d) of the Vagrants Act. Gleeson CJ, Callinan and Heydon JJ dissented on this issue. However, all justices except for McHugh J upheld the related convictions for obstructing and assaulting police.

Construction of s 7(1)(d) of the Vagrants Act: 'insulting' words

Section 7(1)(d) prohibits a person from using in a public place 'any threatening, abusive or insulting words to any person'. The Court divided on the proper meaning of 'insulting' words in the statutory context.

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Narrow interpretation – provocation required

Three members of the majority (Gummow and Hayne JJ [183], Kirby J [226]) held that in its context the offence should be given a confined operation to apply to words that are (a) directed to hurting an identified person and (b) provocative, in the sense that they are intended or reasonably likely to provoke unlawful physical retaliation. A requirement of provocation meant that s 7(1)(d) – a criminal offence – would serve public, not private, purposes and it was appropriate to interpret narrowly a provision that limits a traditional common law right such as freedom of expression. The narrower interpretation was also required for s 7(1)(d) to be constitutionally valid.

Broad interpretation – natural meaning

By contrast, the other member of the majority (McHugh J), and the three dissenting justices, said that 'insulting' had its ordinary meaning which did not include a requirement that the language be provocative or likely to occasion a breach of the peace. However, according to Gleeson CJ it was not sufficient that

the language was derogatory; rather it had to be 'contrary to contemporary standards of public good order' [14].

Constitutional validity of s 7(1)(d) of the Vagrants Act

The next issue was whether s 7(1)(d) operated as an invalid burden on political communication. To determine this, the Court applied the two-part test from *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, although the majority justices applied the test in a slightly modified form (McHugh J [92], with Gummow and Hayne JJ and Kirby J agreeing on this point [196], [211]). *Lange* makes clear that the implied freedom of political communication derives from, and is limited by, the provisions of the Commonwealth Constitution which require that federal elections be free and that federal electors have access to information relevant to their choice of candidate, and which prescribe the federal system of responsible government – principally, sections 7, 24, 64 and 128. The *Lange* test as reformulated (by the words in italics, which replaced the words 'the fulfilment of') asks:

— Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

— If yes, is the law reasonably appropriate and adapted to serve a legitimate end *in a manner* which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people?

Federal political communication?

The implied freedom invalidates both Commonwealth and state laws that burden, without justification, communications concerning government and politics at the federal level. On the first part of the *Lange* test, there was an issue whether the appellant's statements (undoubtedly political in some senses) were sufficiently connected with *federal* politics and government to be covered by an implication drawn from the *Commonwealth* Constitution. However, in the course of argument, concessions had been made that s 7(1)(d) could burden 'political' communications and that the particular words used by the appellant concerned matters within the scope of the constitutional implication even though they concerned state police officers. A statement that a state police officer was corrupt could have a sufficient connection with federal politics and government, because of the integrated nature of police enforcement in Australia (see McHugh J [80], Gummow and Hayne JJ ('evident strength' in this proposition, but not deciding) [197], Kirby J [229]; however, Heydon J in particular was critical of this question being determined by a concession [319]). In view of the concessions, the Court did not need to give further consideration to any limits in applying the implied freedom to communications relevant only to government or politics at the state level (compare *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 232, 257 and *Levy v Victoria* (1997) 189 CLR 579, 596–597, 626, cf. 643–644).

In view of the concessions, the Court did not need to give further consideration to any limits in applying the implied freedom to communications relevant only to government or politics at the state level.

Broad prohibition on insulting political statements not appropriate and adapted

On the second part of the *Lange* test, the Court divided sharply on whether s 7(1)(d) was a reasonably appropriate and adapted means of implementing a legitimate end.

McHugh J held that the prohibition in s 7(1)(d) on using insulting words – on his broad construction – was invalid because it was went too far in its restriction on political statements [102]–[106]. As a minimum, an offence designed to maintain public order would need to require proof of a breach of the peace, and an intention to breach the peace. The prohibition on 'insulting' words was therefore to be read down so that it did not apply to political communication [110].

Gummow, Kirby and Hayne JJ held that the reference to 'insulting' words in s 7(1)(d) – construed to require 'provocation' in the sense described above – was valid (Gummow and Hayne JJ [198], Kirby J [256]–[257]). However, these justices indicated that, if 'insulting' were to be interpreted more broadly (as favoured by the other justices), it would be invalid (Gummow and Hayne JJ [199], Kirby J [237]–[239]).

Gleeson CJ, Callinan and Heydon JJ, by contrast, held that the reference to 'insulting' words in s 7(1)(d) was valid, even on their broad interpretation. Gleeson CJ emphasised that s 7(1)(d) was not directed at political communication, but only imposed an incidental burden on it ([27], [31]; see also Heydon J [326]) and was suitable for 'maintaining public order in a manner consistent with an appropriate balance of the various rights, freedoms, and interests, which require consideration' [32]. Callinan and Heydon JJ held that s 7(1)(d) imposed only a very slight burden on political communication, that was appropriate and adapted in any event to a legitimate purpose (Callinan J [298]–[301], Heydon J [330]–[334]).

Second part of Lange test: closer scrutiny of means?

The reformulation by the majority justices of the second part of the *Lange* test asks whether the law is appropriate and adapted to serve a legitimate end *in a manner* which is compatible with the relevant constitutional requirements. This reformulation makes it clear that the Court will review not only the *purpose* of a law, but also the *means* by which the law achieves that purpose. A law will be invalid if it chooses means that impose an unreasonable burden on political communication, given the availability of other alternative means of achieving its purpose (McHugh J [100]).

This reformulation makes it clear that the Court will review not only the purpose *of a law, but also the* means *by which the law achieves that purpose.*

Accordingly, it is possible that, following *Coleman,* courts will be stricter in reviewing legislation. However, McHugh J also emphasised that the constitutional test 'does not call for nice judgments as to whether one course is slightly preferable to another' ([100]; see also Gleeson CJ [31], Heydon J [328]).

Mulholland v Australian Electoral Commission

In this case the High Court, in six separate judgments, unanimously upheld the constitutional validity of the '500 rule' and the 'no overlap rule' for registration of political parties under the *Commonwealth Electoral Act 1918* (Electoral Act). The Court found that the provisions were validly made under s 51(xxxvi) of the Constitution and did not contravene:

- the constitutional requirement that members of the House of Representatives and senators be 'directly chosen by the people'
- the implied constitutional freedom of political communication, or
- any implied freedom of association and/or of privacy of political association.

Background

Registration of political parties was introduced into the Electoral Act in 1983 as part of a package of reforms that included public funding of political parties for election campaigns, printing of party affiliation on ballot papers and the list system for Senate elections (i.e. above the line voting).

In order to be registered, a political party must have at least 500 members (the 500 rule). Two or more parties cannot rely on the same person as a member in calculating the number of members for the purposes of the 500 rule (the no overlap rule). The Australian Electoral Commission (AEC) has the power to review a party's registration, and to request specified information on a party's eligibility to be registered. This includes the names of the 500 members relied upon by the party for registration. The DLP challenged the constitutional validity of the two requirements for registration as a political party.

Constitutional issues

Are the two rules laws with respect to elections?

All members of the Court either expressly or implicitly accepted that the 500 rule and the no overlap rule were within the Commonwealth's power to make laws with respect to elections conferred by s 51(xxxvi) (matters in respect of which the Constitution makes provision until the Parliament otherwise provides), read with certain sections in Chapter I of the Constitution, including ss 10 and 31. Section 51(xxxvi) is, however, expressed to be 'subject to this Constitution', and is therefore subject to the requirements of ss 7 and 24 discussed below. The further issue, then, was whether the challenged provisions infringed express or implied limitations in the Constitution.

Are the two rules contrary to the 'direct choice' requirement of ss 7 and 24 of the Constitution?

Sections 7 and 24 of the Constitution require that the Senate and the House of Representatives be composed of senators and members 'directly chosen by the people' and thus give effect to a principle of representative government. In previous decisions members of the Court had variously said that direct choice requires 'free elections', a 'free choice', an 'informed choice' and 'a true choice … a choice made with access to the available alternatives', and further that this requires that voters have access to information about the candidates among whom they are required to choose. This was the approach adopted in the present case.

The appellant argued that the 500 rule and the no overlap rule infringed the direct choice required by ss 7 and 24. This was particularly because party affiliation is an important piece of information used by voters when making a choice between candidates; however, only candidates of registered parties could have their party affiliation printed on the ballot paper.

In the present case, the Court held that the relevant rules were not contrary to the direct choice requirements of ss 7 and 24 as they preserved full and free choice between the candidates for election.

The Court endorsed the view that 'directly chosen' in ss 7 and 24 meant more than just *directly*, as opposed to *indirectly* chosen, and held that ss 7 and 24, as part of the constitutionally prescribed system of representative government, imposed some minimum requirements in relation to electoral matters. However the Court also held that those sections do not mandate any particular electoral system.

In their joint judgment Gummow and Hayne JJ warned against 'elevating a "direct choice" principle to a broad restraint upon legislative development of the federal system of responsible government', although accepting that *extreme* situations would infringe ss 7 and 24 – giving as an example a law making membership of a particular political party the qualification for election to the House of Representatives [156]. Beyond the minimum requirements of ss 7 and 24 the form of electoral system is left to the Parliament, which has a broad scope to determine what is appropriate.

In the present case, the Court held that the relevant rules were not contrary to the direct choice requirements of ss 7 and 24 as they preserved full and free choice between the candidates for election. Also, the Court rejected the appellant's argument that the challenged provisions were invalid because they unreasonably discriminated in favour of parties with large membership bases to the disadvantage of small parties. The two challenged rules were within the 'allowable measure of legislative choice' (Gummow and Hayne JJ [147]).

In relation to the 500 rule Gleeson CJ referred to the long history in Australia of electoral systems discouraging multiplicity of candidates, which has never been regarded as involving unreasonable discrimination [20]. Gleeson CJ also said that underlying the no overlap rule is a purpose of avoiding confusion, deception and frustration of the democratic process (including, for example,

to avoid the use of 'decoy' or front parties to mislead the voter into indicating a preference for a group ticket which is merely calculated to channel preferences to another party).

Do the challenged provisions infringe the implied freedom of political communication?

The appellant also argued that the 500 rule and no overlap rule infringed the implied freedom of political communication as:

— the ballot paper constituted a political communication (as to party affiliation)

— the challenged provisions burdened that communication by small parties

— the burden was not appropriate to a legitimate end , the fulfilment of which is compatible with representative and responsible government.

For a majority of the Court (McHugh, Gummow and Hayne, Callinan, and Heydon JJ) this argument failed at the second step. For this majority, a law will only be invalid if it relevantly burdens an independently existing right to communicate. In the present case the DLP has no right, that exists independently of the entitlement conferred by the Electoral Act, to communicate the party affiliation of its candidates on a ballot paper (McHugh J [105]–[112], Gummow and Hayne JJ [186]–[192], Callinan J [337], Heydon J [354]; cf. Kirby J [274]–[280]). In relation to the first step, Gleeson CJ [30], McHugh J [94]–[97] and Kirby J [281]–[282] all held that the ballot paper was a political communication between a party and electors protected by the implied freedom. Heydon J expressly held that the ballot paper was not a political communication protected by the implied freedom [355].

For this majority, a law will only be invalid if it relevantly burdens an independently existing right to communicate.

Only Gleeson CJ, Kirby J and Heydon J considered the third step. They all held that the challenged provisions satisfy the relevant test of validity for similar reasons as applied in relation to their conclusions on the requirements of ss 7 and 24: [41], [290]–[292], [360]–[362].

Do the two rules provisions infringe any implied freedom of association and/or privacy?

Finally, the appellant argued that the 500 rule and no overlap rule infringed implied freedoms of association and privacy of political association – largely because of the requirement to disclose to the AEC details of party members. The Court unanimously rejected this argument, but for different reasons. Gleeson CJ considered that, if any such freedoms existed (which he did not decide), they would not be infringed for the same reasons as the implied freedom of political communication was not infringed [42]. McHugh J, who had previously recognised an implied constitutional freedom of political association, held that the challenged provisions did not infringe that freedom on the basis that registration as a political party was voluntary [115]. Gummow and Hayne JJ (Heydon J agreeing) held that there is no freestanding right of association, although a freedom of association to some degree may be a corollary of the freedom of political communication [364]. Kirby J accepted that there is implied in ss 7 and 24 a freedom of political association [284] and a limited measure of implied political privacy [289], but held that any burden on those freedoms in the present case was proportionate to the attainment of Parliament's legitimate ends [290]–[291]. Callinan J rejected the implication of any such freedoms [335].

Commonwealth Solicitor-General, David Bennett AO QC, appeared in both cases as senior counsel for the Commonwealth Attorney-General and was instructed by AGS.

Coleman: http://www.austlii.edu.au/au/cases/cth/HCA/2004/39.html
Mulholland: http://www.austlii.edu.au/au/cases/cth/HCA/2004/41.html

Constitutional validity of mandatory immigration detention provisions

In a series of cases, the High Court upheld the constitutional validity of mandatory immigration detention provisions in the *Migration Act 1958* (Cth).

Al-Kateb v Godwin
High Court of Australia, 6 August 2004
[2004] HCA 37; (2004) 208 ALR 124

Minister for Immigration and Multicultural and Indigenous Affairs (MIMIA) v Al Khafaji
High Court of Australia, 6 August 2004
[2004] HCA 38; (2004) 208 ALR 201

Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs (DIMIA)
High Court of Australia, 6 August 2004
[2004] HCA 36; (2004) 208 ALR 271

Re Woolley; Ex parte Applicants M276/2003
High Court of Australia, 7 October 2004
[2004] HCA 49; (2004) 210 ALR 369

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Background

Al-Kateb and Al Khafaji

Mr Al-Kateb was a stateless Palestinian born in Kuwait. Mr Al Khafaji was born in Iraq but had lived most of his life in Syria. Neither had visas granting permission to remain in Australia and, as 'unlawful non-citizens', were placed in immigration detention. Both had made written requests to be removed from Australia but DIMIA had been unable to effect their removal. They each brought proceedings challenging the validity of their detention, which had continued for more than two years.

In *MIMIA v Al Masri* (2003) 126 FCR 54, 197 ALR 241 the Full Federal Court held that the Migration Act did not, as a matter of construction, authorise immigration detention where there was no real likelihood of removal from Australia in the reasonably foreseeable future. Subsequently, the Federal Court made orders in several cases for the release of persons from detention (including Mr Al-Kateb and Mr Al Khafaji). Mr Al-Kateb and Mr Al Khafaji argued in the High Court that the Full Federal Court in *Al Masri* was correct and that, if provisions of the Act authorised detention where there was no likelihood of removal, they were invalid.

Behrooz

Mr Behrooz, a national of Iran, was placed in immigration detention at Woomera as an unlawful non-citizen. He was alleged to have escaped and was charged with escaping from immigration detention contrary to s 197A of the Migration Act. Mr Behrooz argued that the conditions under which he was detained at Woomera were inhumane and that his detention was therefore illegal, as it was not authorised by the Act, or was punitive and constitutionally invalid. He argued that he therefore could not be convicted of the offence of escaping from (lawful) immigration detention.

Woolley

The applicant children and their parents were nationals of Afghanistan who were placed in immigration detention as unlawful non-citizens. The applicants

argued in the High Court that the Act did not authorise the detention or prolonged detention of children and, if it did, it was invalid.

Legal context

At the time when these cases were decided, the Migration Act:

— required an officer (not a court) to detain an unlawful non-citizen until removed or deported from Australia or granted a visa (ss 189 and 196)

— imposed a duty on an officer to remove an unlawful non-citizen from Australia 'as soon as reasonably practicable' after the person asked in writing to be removed or after, in effect, any visa applications were finally determined (s 198).

Judgments of the High Court

The High Court by majority held that the provisions of the Migration Act required detention until removal became reasonably practicable (including where this involved detention for a long, even indefinite, period because there was no real prospect of removal) or the person was granted a visa. The statutory limitation on the length of detention that had been implied by the Full Federal Court in *Al Masri* was expressly rejected. There was no basis for reading down the mandatory detention provisions in the Act as having a different operation in relation to a child.

The Court also held by majority that the provisions so construed were constitutionally valid. Legislation conferring on the executive government the power to detain aliens, at least for the purposes of visa processing and removal, was authorised by the aliens power in s 51(xix) of the Constitution. Also, as that detention was for a non-punitive purpose the separation of judicial power given effect by Chapter III of the Constitution was not infringed. The fact that the Migration Act authorised prolonged detention where it was not reasonably practicable to remove the detainee from Australia did not mean that the provisions were to that extent punitive. The detention continued for the non-punitive purposes notwithstanding any difficulties in effecting removal. Three justices (McHugh, Hayne and Heydon JJ) also expressly decided that the non-punitive purposes of detention supported by the aliens power extend to include segregation from the Australian community of aliens who do not have permission to remain in Australia, until their removal from Australia is practicable.

The fact that the Migration Act authorised prolonged detention where it was not reasonably practicable to remove the detainee from Australia did not mean that the provisions were to that extent punitive.

The Court accepted the Commonwealth's position that the Migration Act does not purport to authorise detention in inhumane conditions. Although the Act does not expressly deal with conditions of detention, it was enacted against the background of the common law and state and territory law (e.g. negligence and criminal law) which would provide remedies in the event of inhumane treatment of a detainee. The detention provisions were therefore not punitive, and the authority to detain under those provisions could not be invalidated by inhumane treatment.

Aspects of the detention provisions in the Migration Act have recently been amended by the *Migration Amendment (Detention Arrangements) Act 2005*.

Commonwealth Solicitor-General, David Bennett AO QC and AGS Chief General Counsel, Henry Burmester AO QC, appeared as senior counsel for the Commonwealth parties in *Al-Kateb* and *Al Khafaji,* and the Solicitor-General as senior counsel in *Behrooz* and *Woolley.* AGS was solicitor for the Commonwealth parties in each of the cases.

Al-Kateb: http://www.austlii.edu.au/au/cases/cth/HCA/2004/37.html
Al Khafaji: http://www.austlii.edu.au/au/cases/cth/HCA/2004/38.html
Behrooz: http://www.austlii.edu.au/au/cases/cth/HCA/2004/36.html
Woolley: http://www.austlii.edu.au/au/cases/cth/HCA/2004/49.html

Scope of the Kable principle

These cases raised the scope of the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 which precludes the conferral on state courts of functions that are incompatible with their role as courts exercising federal jurisdiction. The decisions confirm that the *Kable* principle is of limited application. *Baker* upheld the validity of a NSW law having the practical effect of restricting the availability of parole for certain prisoners serving life sentences. *Fardon* upheld the validity of a Queensland law authorising the Queensland Supreme Court to order continuing preventative detention of sexual offenders who are a 'serious danger' to the community at the expiry of their sentences.

Baker v The Queen
High Court of Australia, 1 October 2004
[2004] HCA 45; (2004) 210 ALR 1

Fardon v Attorney-General (Qld)
High Court of Australia, 1 October 2004
[2004] HCA 46; (2004) 210 ALR 50

Background

Baker: re-determining life sentences and 'special reasons'

Baker was a challenge to the validity of s 13A(3A) of the *Sentencing Act 1989* (NSW) (the NSW Act). Under s 13A a person could apply to the NSW Supreme Court for redetermination of a previously imposed life sentence, to have fixed instead both a minimum term of imprisonment which the person must serve and an additional term. A prisoner would be eligible for release on parole during the additional term. Section 13A was a transitional measure introduced following the 1989 NSW 'truth in sentencing' legislation which abolished parole for life sentences.

Section 13A(3A) provided that, if the sentencing court had imposed a life sentence and had also recommended that the person should never be released from prison, the Supreme Court could not redetermine the person's life sentence under s 13A unless satisfied there were 'special reasons' to do so. (The Sentencing Act was repealed by the *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW) but applied to the appellant.)

Fardon: dangerous sexual offenders and preventative detention

Fardon involved a challenge to the validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (the Queensland Act). The Queensland Act provides for the Queensland Attorney-General to apply to the Supreme Court for an order for the continued detention in custody or the supervised release of a prisoner despite the expiry of a sentence of imprisonment for a 'serious sexual offence'. The Attorney-General may apply for this order in the last six months of the period of imprisonment (rather than as part of the original sentencing process). The Court can only make an order if it is satisfied that there is an unacceptable risk that the prisoner will commit a serious sexual offence if released, or if released without a supervision order. The Queensland Act provides for regular review of a detention order.

The High Court (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ, with Kirby J dissenting) upheld the validity of both the NSW and Queensland Acts.

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Kable principle

The doctrine of separation of powers, derived from Chapters I, II and III of the Commonwealth Constitution, does not apply to the states. However, in *Kable* the High Court held to be invalid a NSW law which provided for the NSW Supreme Court to order the continued detention of one person named in the law beyond the term of his sentence of imprisonment, if the Court was satisfied that he was more likely than not to commit a serious act of violence, and that it was appropriate, for the protection of a particular person or the community generally, that the person be held in custody. In essence, the majority held that the NSW law was invalid because in conferring a function on the NSW Supreme Court in a context which gave the appearance that the Court was not independent of the state government the NSW law was incompatible with the exercise by the Court of the judicial power of the Commonwealth from time to time. The NSW law was invalid by reason of this incompatibility although an application under it did not itself involve the exercise of federal judicial power.

Baker: the 'special reasons' requirement is valid

In *Baker*, the appellant argued that the 'special reasons' requirement was invalid as:

— in its context, it was devoid of content and the NSW Supreme Court's function of reviewing life sentences of those to whom s 13A(3A) applied was a charade. Given the factors that were ordinarily relevant to a redetermination under s 13A, it was impossible to demonstrate 'special reasons' and the Parliament was using the judicial process to give effect to a legislative decree, contrary to the *Kable* principle; and

— the trigger for the requirement (that the trial judge had recommended that the person never be released) was arbitrary, contrary to the *Kable* principle. At the time these kinds of recommendations were made, they had no legal effect and they were not made according to a uniform practice among judges.

There was nothing repugnant to the notion of judicial power for the NSW Act to use a non-release recommendation as the criterion for the 'special reasons'.

The appellant's arguments were rejected by the majority justices. They held that it was possible to give meaning to the 'special reasons' requirement in the context of the facts in a particular case and the requirement was not one which it was impossible to satisfy. Furthermore, Gleeson CJ considered that using non-release recommendations as a trigger on which the legislation operated was not arbitrary; it was 'at least a good start' in identifying the most serious offenders [8]–[9]. In their joint judgment, McHugh, Gummow, Hayne and Heydon JJ said that generally a Parliament may use whatever factum it wishes as the trigger for a particular legislative consequence [43] and that, given the long history in England and in Australia of trial judges making recommendations to the executive about carrying out sentences, there was nothing repugnant to the notion of judicial power for the NSW Act to use a non-release recommendation as the criterion for the 'special reasons' requirement [47]–[49]. The validity of the NSW Act was also not affected by its application to a limited class of identifiable persons (apparently ten in number) [50].

The joint judgment of McHugh, Gummow, Hayne and Heydon JJ did not need to explore the scope of the *Kable* principle to decide this case. They held that the NSW Act could have been validly enacted by the Commonwealth in compliance with the more stringent requirements for the exercise of federal judicial power under Chapter III of the Constitution, and therefore necessarily met the less strict requirements of the *Kable* principle [23]–[24], [51].

Fardon: preventative detention is valid

In *Fardon*, the appellant argued that the Queensland Act was indistinguishable from the NSW law held invalid in *Kable*. The majority justices rejected this argument. Four justices noted that the Queensland Act was a general law that applied to a class of dangerous sex offenders, unlike the NSW legislation which applied to one named person. Moreover, unlike the NSW law, the Queensland Act preserved features of judicial process, such as a substantial area of judicial discretion, a demanding onus of proof on the Attorney-General, a requirement to provide reasons, and provision for an appeal. There was 'nothing to suggest that the Supreme Court is to act as a mere instrument of government policy' (Gleeson CJ at [19]).

There was 'nothing to suggest that the Supreme Court is to act as a mere instrument of government policy'.

The majority also rejected the appellant's argument that ordering 'preventative' detention (that is, detaining someone for what he or she *might* do) was a function of a kind that was contrary to the *Kable* principle and could never be given to state courts. There was nothing inherent in making a preventative detention order that would impair a court's institutional integrity. However, unlike the approach of the joint judgment in *Baker*, the majority in *Fardon* did not uphold validity by concluding that the Queensland Act would not infringe Chapter III if enacted as a Commonwealth law. Only Gummow J and (in dissent) Kirby J addressed whether the Commonwealth Parliament could have enacted the Queensland Act. Both considered that it could not have done so. Gleeson CJ and Hayne J expressly left this question open.

Kable test: institutional integrity

In *Baker* and *Fardon*, the Commonwealth and the states argued that the High Court should take a narrow view of 'incompatibility' for the purposes of the *Kable* principle and, in particular, should focus on the institutional independence or integrity of state courts, rather than on general notions of public confidence in the judiciary.

Although there is still some variation in how the members of the Court express the test for deciding whether a state law is contrary to the *Kable* principle, the majority justices in *Fardon* (in which the main discussion is to be found) emphasised the need to maintain the 'institutional integrity' of state courts, and it seems clear that a majority of the Court takes a limited view of the scope of the *Kable* principle. Gleeson CJ said that *Kable* establishes that 'since the Constitution established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by state Supreme Courts, state legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid' (at [15]). According to McHugh J the concept of institutional integrity turns on whether a reasonable person might conclude that a court 'might not be an impartial tribunal free of government influence or might not be capable of administering invested federal jurisdiction according to law' [35], [42].

It seems clear that a majority of the Court takes a limited view of the scope of the Kable *principle.*

It follows from the majority approach in *Fardon* that '*Kable* is a decision of very limited application' (McHugh J at 43).

AGS Chief General Counsel, Henry Burmester AO QC, appeared as senior counsel for the Commonwealth Attorney-General and was instructed by AGS.

Baker: http://www.austlii.edu.au/au/cases/cth/HCA/2004/45.html
Fardon: http://www.austlii.edu.au/au/cases/cth/HCA/2004/46.html

Validity of the Mirror Taxes Act

The High Court by majority upheld the validity of the *Commonwealth Places (Mirror Taxes) Act 1998* (Cth) (the Mirror Taxes Act).

Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)
High Court of Australia, 12 November 2004
[2004] HCA 53; (2004) 211 ALR 18

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Background

Permanent Trustee challenged an assessment of stamp duty on an agreement for the development of a hotel at Melbourne Airport. As Melbourne Airport is a Commonwealth place for the purposes of s 52(i) of the Constitution, the usual Victorian stamp duties legislation – the *Stamps Act 1958* (Vic) – could not apply of its own force to the agreement (*Allders International Pty Ltd v Commissioner of State Revenue (Vic)* (1996) 186 CLR 630). The Commonwealth's exclusive legislative power over Commonwealth places under s 52(i) means that the general body of state laws does not apply to Commonwealth places (*Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89).

Instead, the assessment of stamp duty was made pursuant to the Mirror Taxes Act, which was enacted following *Allders*. That Act imposes Commonwealth taxes in relation to a Commonwealth place in a state equivalent to specified taxes imposed by laws of the surrounding state. Revenue collected by the Commonwealth under that Act is returned to the relevant state. Cooperative arrangements between the Commonwealth and Victoria give the Victorian Commissioner powers under the Mirror Taxes Act equivalent to his or her powers under the Victorian Stamps Act. Permanent Trustee argued that the Mirror Taxes Act was invalid, including because it infringed ss 55 and 99 of the Constitution.

Section 55 challenge

Section 55 requires that Commonwealth laws imposing taxation deal only with the imposition of taxation and deal with only one subject of taxation. The Mirror Taxes Act applied as Commonwealth law in Commonwealth places a list of state taxes that were excluded in Commonwealth places only by reason of s 52(i) of the Constitution, including stamp duty, payroll tax and land tax. Moreover, the state laws applied by the Mirror Taxes Act not only impose taxation, but also provide for the assessment, collection and recovery of taxation.

Although holding that the Commonwealth places power in s 52(i) was subject to s 55 of the Constitution, the joint judgment rejected the argument that the Mirror Taxes Act dealt with more than one subject of taxation. It was sufficient, in their Honours' view, that the Act applied state taxes to Commonwealth places in a 'single legislative initiative', rather than a 'collection of distinct and separate matters'; moreover, the Act's 'primary purpose [was] the protection of State revenues' following the decision in *Allders* [54].

The Act applied state taxes to Commonwealth places in a 'single legislative initiative', rather than a 'collection of distinct and separate matters'.

A more difficult question was whether the Mirror Taxes Act – which clearly imposed taxation – dealt only with the imposition of taxation. *Re Dymond* (1959) 101 CLR 11 had suggested that the *Income Tax Assessment Act 1936* (Cth) was not wholly a law dealing with the imposition of taxation. The joint judgment concluded that a provision would 'deal with' the imposition of taxation if it was 'fairly relevant or incidental to the imposition of a tax' or if the provision was 'incidental and auxiliary to the assessment and collection of that tax' [68]–[69]. That construction was supported by the purpose and history of s 55, which was designed to prevent 'tacking' by the House. 'Tacking' was said to be a very different matter from including provisions for assessing, collecting and recovering tax [69].

Accordingly, s 55 of the Constitution does not prevent a Commonwealth law that imposes tax from also including provisions for the assessment, collection and recovery of tax [73]. (And under s 53 of the Constitution, the Senate would not have power to amend proposed laws in this form.) Although there were no detailed submissions on the issue, it appeared to the joint judgment that the state taxing laws applied by the Mirror Taxes Act answered that description, and therefore the Mirror Taxes Act was not contrary to s 55. The joint judgment expressly noted, however, that this expanded interpretation of laws 'dealing with' the imposition of taxation did not prevent the Commonwealth from continuing its current practice of splitting taxing and assessment statutes [71].

Section 55 of the Constitution does not prevent a Commonwealth law that imposes tax from also including provisions for the assessment, collection and recovery of tax.

Section 99 challenge

The High Court held that the Mirror Taxes Act does not give a 'preference' to one state over another contrary to s 99 of the Constitution by its scheme of assimilating the taxation laws in a Commonwealth place with those in the surrounding state, even though the rates of Commonwealth taxes may vary between Commonwealth places, depending on differences in the laws of the surrounding states. 'Preference' in s 99 involved 'discrimination against', and therefore differential treatment did not necessarily establish that there was a preference [88]. Rather, it was necessary to establish that the differential treatment 'is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective' [89]. Stated at this level of generality, the Mirror Taxes Act applied a uniform rule in each state [87], [91]. Here, the Act involved a proper objective, and therefore the differential treatment between Commonwealth places in different states did not amount to a prohibited 'preference' [91], [94].

Commonwealth Solicitor-General, David Bennett AO QC and AGS Special Counsel, George Witynski, appeared for the Commonwealth Attorney-General and were instructed by AGS.

http://www.austlii.edu.au/au/cases/cth/high_ct/2004/53.html

Constitutional decisions in brief

Singh v Commonwealth
[2004] HCA 43; (2004) 209 ALR 355, 9 September 2004

In this case the High Court decided that the Commonwealth may treat a person born in Australia of non-citizen parents as an 'alien' for the purposes of s 51(xix) of the Constitution (the naturalization and aliens power), at least if the person is a citizen of another country.

The plaintiff was born in Australia in 1998. Her parents were born in and were citizens of India. Under s 10(2) of the *Australian Citizenship Act 1948* (Cth), the plaintiff was therefore not an Australian citizen (although she would become a citizen if she was ordinarily resident in Australia for ten years from birth). The plaintiff and her family were in Australia without visas and were therefore 'unlawful non-citizens' liable to removal from Australia under s 198 of the *Migration Act 1958* (Cth). The plaintiff (through her father) challenged the validity of s 198 in its application to her, arguing that her birth in Australia meant that she was not an 'alien' within the meaning of s 51(xix) of the Constitution and that s 198 could not validly apply to her.

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The High Court (Gleeson CJ, Gummow, Hayne, Kirby and Heydon JJ; McHugh and Callinan JJ dissenting) held that the plaintiff was an 'alien' within s 51(xix). Section 198 of the Migration Act validly applied to require her removal from Australia.

Ordinary meaning of alien

The Commonwealth Parliament has a broad but not unqualified power under s 51(xix) to define who is a member of the Australian community. It could not treat someone as an alien if he or she 'could not possibly answer the description of "aliens" in the ordinary understanding of the word' (*Pochi v Macphee* (1982) 151 CLR 101, 109 Gibbs CJ). In previous cases, it had been sufficient for the Court to conclude that an 'alien' included a person (a) born outside Australia (b) to non-Australian parents (c) who had not since been naturalised. In *Singh*, however, feature (a) was not present, because the plaintiff was born in Australia.

Two significant factors

The Court held that birth within Australia did not, in itself, take a person outside the aliens power. There were two significant factors in reaching that conclusion.

First, in 1901, there were differences of approach in the major legal systems in the Western world on how to define citizenship. Broadly, some countries focused on birth within the country ('*jus soli*'), and some countries focused on descent from citizens ('*jus sanguinis*'). The majority in the High Court held that the general reference to 'alien' allowed Parliament to use either criterion (place of birth or descent) as a basis for defining status as a national of Australia. Therefore, it was open to the Commonwealth to treat a person born of foreign citizens as an 'alien', even if born in Australia.

The majority in the High Court held that the general reference to 'alien' allowed Parliament to use either criterion (place of birth or descent) as a basis for defining status as a national of Australia.

Secondly, in this case, it appeared that the plaintiff was a citizen of India under Indian citizenship law. Although Kirby J noted a recent amendment to Indian law that might have altered that position [211], the other majority justices expressly proceeded on the basis that she was a citizen of India. For those justices, the fact that she owed allegiance to another country meant that she was an 'alien' for the purposes of Australian law (Gummow, Hayne and Heydon JJ [190], [205]; see also Gleeson CJ [32]). Only Kirby J expressly decided that the plaintiff was an alien whether or not she was a citizen of India [271]. That is, she would be an alien even if a stateless person as to hold otherwise 'would be to subject this country's basic law to the chance provisions of the statute laws of other countries'. Obiter comments by Gummow, Hayne and Heydon JJ suggest that a person who, being stateless, owes no allegiance to any sovereign power is an alien [190].

In *Koroitamana v Commonwealth* [2005] FCAFC 61 (15 April 2005) the Full Federal Court held that the applicants – who were born in Australia of Fijian parents, were not Australian citizens and were not citizens of Fiji but had a right to apply for Fijian citizenship – were not outside the concept of 'alien' in s 51(xix). On 30 September 2005 an application for special leave to appeal to the High Court was referred by McHugh and Callinan JJ to a Full Court of the High Court. The special leave application raises whether a person born in Australia who is not an Australian citizen but owes no allegiance to a foreign power is an alien.

Commonwealth Solicitor-General, David Bennett AO QC, appeared as senior counsel for the Commonwealth and was instructed by AGS.

http://www.austlii.edu.au/au/cases/cth/HCA/2004/43.html

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame

[2005] HCA 36, 4 August 2005; (2005) 218 ALR 483

The High Court held unanimously that Commonwealth legislation could validly withdraw Australian citizenship of persons born in Papua when those persons acquired citizenship of the newly-independent Papua New Guinea in 1975.

The Minister sought to remove Mr Ame from Australia under s 198 of the *Migration Act 1958* (Cth). Section 198 applies to 'unlawful non-citizens'. Mr Ame argued that he was not an unlawful non-citizen, and in fact was an Australian citizen, by reason of his birth in Papua in 1967.

Between 1948 and the independence of Papua New Guinea in 1975, people born in the former Territory of Papua were granted Australian citizenship under Australian legislation. When Australia granted PNG independence in 1975, it enacted regulations that, from Independence Day, withdrew Australian citizenship from any person who acquired PNG citizenship under the PNG Constitution (reg 4 of the Papua New Guinea Independence (Australian Citizenship) Regulations).

Withdrawal of Australian citizenship

Section 65(1) of the PNG Constitution provides that any person born in the country before Independence Day who has two grandparents born in the country automatically becomes a PNG citizen. Mr Ame fitted this description. However, there were exceptions – relevantly, a person would not become a PNG citizen if he or she had a right to permanent residence in Australia (s 65(4)(a)). Mr Ame argued that he had a right of permanent residence in Australia, because he was an Australian citizen. Therefore (he argued) he never became a PNG citizen, which in turn meant he never lost his Australian citizenship under reg 4.

Mr Ame also argued that a fundamental right such as citizenship could not be withdrawn by regulations, without the clearest authorisation by the head statute (here, the *Papua New Guinea Independence Act 1975* (Cth)). He argued that that Act did not contain the necessary clear authority. Alternatively, he argued that Australia could not validly withdraw Australian citizenship without the participation of the person concerned.

The High Court (six justices in a joint judgment, and Kirby J writing separately) rejected each of Mr Ame's arguments.

First, the Court held that Mr Ame did not have a right of permanent residence in Australia in 1975. Accordingly, he became a PNG citizen in 1975, which in turn meant that his Australian citizenship was withdrawn by reg 4 of the Papua New Guinea Independence (Australian Citizenship) Regulations. Key points in this conclusion were as follows:

— Mr Ame's argument, if correct, would mean that the great proportion of the population in what was Papua would still be Australian citizens, not citizens of PNG. That result was improbable in the extreme, and could not be reconciled with the historical background leading to the PNG Constitution [19]–[21].

— In any event, the Migration Act required a person to have an entry permit to come into 'Australia'. Mr Ame would have required an entry permit, because Papua was not part of 'Australia', as defined for the purposes of that Act [22], [74].

— Whatever the position with Australian citizens who reside in mainland Australia, there was no constitutional obligation for residents of an external territory (who need not be given Australian citizenship) to be given the right to enter mainland Australia [22].

Secondly, the Court held that the regulations withdrawing Mr Ame's citizenship were supported by the regulation-making power in the Papua New Guinea Independence Act.

Thirdly, the Court held that the regulations were constitutionally valid.

The power to acquire territories under s 122 of the Constitution must include power to relinquish those territories [28]. Residents of external territories could be given Australian citizenship, but that was not constitutionally required [33]. At least in relation to external territories, it was clear that the Commonwealth could withdraw the Australian citizenship of residents in a territory that was granted independence [38]. The joint judgment also rejected Mr Ame's argument that Australian citizenship could only be withdrawn with the involvement of the person concerned [36].

It followed that Mr Ame was an 'unlawful non-citizen', and could be removed from Australia [39], [131].

Commonwealth Solicitor-General, David Bennett AO QC, appeared as senior counsel and AGS Senior Lawyer, Graeme Hill, as one of the junior counsel for the Minister, and were instructed by AGS.

http://www.austlii.edu.au/au/cases/cth/high_ct/2005/36.html

Re Colonel Aird; Ex parte Alpert
[2004] HCA 44; (2004) 209 ALR 311, 9 September 2004

The High Court held that a general court martial could validly try an alleged offence of rape committed overseas by a member of the Australian Defence Force who was deployed overseas but on recreation leave at the time of the alleged offence.

Under s 61 of the *Defence Force Discipline Act 1982* (Cth), a member of the Defence Force commits a 'service offence' if he or she does something that would be a criminal offence in the Jervis Bay Territory, had it been done there. Rape is a criminal offence in the Jervis Bay Territory.

The extent to which military tribunals (which are not constituted as courts under Chapter III of the Constitution) may validly try service offences is limited by the separation of judicial power provided for by Chapter III. In three cases beginning with *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, High Court justices have expressed three different views on this issue.

Validity of court martial

- One view (held by Mason CJ, Wilson and Dawson JJ) was that it was open to Parliament to make any conduct by a defence member which constitutes a civil offence to be a service offence triable by a military tribunal. That is because, within broad limits, it is for Parliament to decide what is necessary to maintain the discipline of the defence forces. This is called the 'service status' test.
- A middle view (held by Brennan and Toohey JJ) was that service offences could only validly be tried by a service tribunal if those proceedings could reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline. This is called the 'service connection' test.
- The final view (held by Deane and Gaudron JJ and later supported by McHugh J) was that service offences were only valid if the offence was exclusively disciplinary in nature.

In this case, the High Court held by majority (Gleeson CJ, McHugh, Gummow and Hayne JJ; Kirby, Callinan and Heydon JJ dissenting) that there was a sufficient service connection for Private Alpert to be validly tried by general

court martial for the alleged offence. The grounds for concluding that there was a sufficient service connection included the harmful effects that an offence of rape could have on the discipline and morale of the Defence Force.

According to the minority justices the practical effect of the majority's view was that *every* serious criminal offence could be tried as a service offence in military tribunals, thereby introducing the broad 'service status' view of Mason CJ, Wilson and Dawson JJ. Moreover, any effect on morale in the Defence Force of a person committing an offence such as rape had to be weighed against the effect on morale of Defence Force members being tried for ordinary criminal offences without the usual protections of civilian courts.

Although the High Court held that a general court martial could validly try this offence, the case does not settle the jurisdiction of military tribunals. All members of the majority specifically noted that Private Alpert had not sought to reopen the Chapter III issue addressed in the *Re Tracey* line of cases.

Commonwealth Solicitor-General, David Bennett AO QC, appeared as senior counsel for the Commonwealth and was instructed by AGS.

http://www.austlii.edu.au/au/cases/cth/HCA/2004/44.html

BHP Billiton Ltd v Schultz
[2004] HCA 61; (2004) 211 ALR 523, 7 December 2004

Transfer of proceedings under cross-vesting legislation

The High Court held that the general cross-vesting scheme requires a court to transfer proceedings to the more appropriate or 'natural' forum.

Consequently, the home court ordinarily should not give any weight to the fact that:

— the proceedings were regularly constituted in the home court, or

— the transfer may cause the plaintiff to lose the advantage of special provisions of substantive law available in the home court.

In this respect, a decision whether to transfer proceedings under the cross-vesting legislation is fundamentally different from whether to stay proceedings on the common law grounds of *forum non conveniens* (which requires the court to decide the matter unless it is a 'clearly inappropriate' forum).

Commonwealth Solicitor-General, David Bennett AO QC, appeared as senior counsel for the Commonwealth Attorney-General and was instructed by AGS.

http://www.austlii.edu.au/au/cases/cth/HCA/2004/61.html

Agtrack (NT) Pty Ltd v Hatfield
High Court of Australia, 10 August 2005, [2005] HCA 38; (2005) 218 ALR 677

Paterson v Air Link Pty Ltd
High Court of Australia, 10 August 2005, [2005] HCA 39; (2005) 218 ALR 700

These cases concerned proceedings for damages brought as a result of accidents which occurred during interstate air travel.

In specified circumstances, Part IV of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (the Carriers' Liability Act) imposes liability on an air carrier for death of or personal injury to a passenger. The liability of a carrier under Part IV is in substitution for any civil liability of the carrier under any other law (ss 35(2) and 36). The right of a person to damages under Part IV is extinguished if an action is not brought within two years (s 34). In these cases, proceedings to

recover damages were commenced within the two-year limitation period; however, they did not specifically plead the Carriers' Liability Act and were expressed in terms of claims of liability arising in negligence or contract.

The High Court heard appeals in *Agtrack* and *Airlink* together. Two issues arose:

First, whether the statements of claim as originally filed were sufficient to bring an action under s 34 of the Carriers' Liability Act. The High Court held that the question of whether an 'action' has been 'brought' under Part IV of the Carriers' Liability Act is to be determined by construing that statute and not by the application of state and territory pleading rules. On that basis, although neither action had complied with the relevant state pleading rules, the High Court held that the plaintiffs had 'brought' an action under Part IV because they had pleaded sufficient facts to show that Part IV of the Carriers' Liability Act applied. It was unnecessary to show that a plaintiff had it in his or her mind that they were proceeding under Part IV.

Application of state and territory pleading rules in federal jurisdiction

Secondly, if the statements of claim were not sufficient, could state or territory laws which permit the amendment of pleadings with the effect of reviving a statute-barred cause of action apply to permit amendments being made outside the two-year period with the effect (under the doctrine of 'relation back') of deeming the actions to have been properly pleaded when commenced and so brought within the two-year period. The High Court held that the two-year period in s 34 of the Carriers' Liability Act was 'a prerequisite for the existence of a right to compensation under Part IV of the Carriers Liability Act' and once that period expired the right was 'extinguished'. Therefore, state or territory law that would otherwise have the effect of deeming an action which was not brought under Part IV within the two-year period to have been so brought could not be picked up and applied by s 79 of the *Judiciary Act 1903* (Cth).

AGS Chief General Counsel, Henry Burmester AO QC, appeared as senior counsel for the Commonwealth Attorney-General and was instructed by AGS.

Agtrack: http://www.austlii.edu.au/au/cases/cth/high_ct/2005/38.html
Paterson: http://www.austlii.edu.au/au/cases/cth/high_ct/2005/39.html

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