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Litigation notes

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ANTI-TERRORISM CONTROL ORDERS AND THE DEFENCE POWER

The High Court, by a 5:2 majority (Kirby and Hayne JJ dissenting), upheld the validity of Div 104, subdiv B, of the Criminal Code (Cth), which allows the making of interim control orders to protect the public from terrorist acts. The Court held that the provisions are supported by the defence power[1] (supplemented by the external affairs power[2] for some justices) and do not infringe the separation of powers required under Ch III of the Constitution. Gummow and Crennan JJ delivered a joint judgment, and all the other justices delivered separate judgments.

Thomas v Mowbray
High Court of Australia, 2 August 2007
[2007] HCA 33; (2007) 237 ALR 194

Background

Mr Thomas, the plaintiff, undertook paramilitary training in the use of firearms and explosives in Afghanistan in 2001. Mr Thomas was convicted in the Supreme Court of Victoria of terrorism-related offences. Subsequently, his convictions were set aside and a new trial was ordered.

Mowbray FM (the first defendant and a federal magistrate) made an interim control order in relation to Mr Thomas under s 104.4 of the Criminal Code, on the ex parte application of the Manager, Counter-Terrorism, Domestic, Australian Federal Police (the second defendant). Among other things, the order required Mr Thomas to remain at his home (or another place notified to the police) between midnight and 5 am each night and to report to police three times a week; restricted his access to communication devices (for example, he could have only one home phone, one mobile phone, and one internet service provider); and prevented him from leaving Australia without approval.

In seeking the interim control order, the second defendant contended that, at the training camp in Afghanistan, Mr Thomas received training from Al Qa'ida and saw and heard Usama Bin Laden (the leader of Al Qa'ida) several times; and that, after the Al Qa'ida terrorist attack on 11 September 2001, Mr Thomas attempted to join the Taliban forces fighting the USA in Afghanistan.

Mr Thomas was not present or represented at the interim control order proceedings. The correctness of the contentions made at that hearing could be challenged at the later hearing required by the Criminal Code if the Australian Federal Police were to seek confirmation of the interim control order.

David Lewis
Senior Lawyer

Simon Thornton
Lawyer

For further information on this matter, please contact:

David Bennett QC
T *02 6253 7036* ***F*** *02 6253 7303*
david.bennett@ags.gov.au

This issue

Mr Thomas brought these proceedings in the High Court challenging the validity of the provisions in Div 104 of the Criminal Code for control orders.

Interim control order provisions

Under s 104.4(1)(c) of the Criminal Code, a court may make an interim control order **only if it is satisfied, on the balance of probabilities, either:**

> (i) that making the order would substantially assist in preventing a terrorist act; or
>
> (ii) that the person has provided training to, or received training from, a listed terrorist organisation; ...

Also, the court must be satisfied, on the balance of probabilities, that each of the obligations, prohibitions and restrictions to be imposed by the order is 'reasonably necessary' and 'reasonably appropriate and adapted' for the purpose of protecting the public from a terrorist act (s 104.4(1)(d)). 'Terrorist act' has a lengthy definition ([44], [566]–[567]). In outline, an action or threat of action is a terrorist act if:

- the action causes death or serious harm to people or property or creates a serious risk to the health or safety of the public or a section of it (and is not advocacy or protest not intended to cause serious harm or risk)
- the action is done or the threat is made with the intention of advancing a political, religious or ideological cause
- the action is done or the threat is made with the intention of coercing an Australian or foreign government or intimidating the public or a section of the public (of Australia or a foreign country).

Defence power

Putting judicial power issues aside, all justices except Kirby J (see [220]–[268]) held that the interim control order provisions were supported by the defence power ([6], [132]–[148], [268], [444]), although Hayne J limited his reasons to the facts of this case ([590], [611], [649]; see also 'External affairs power', below). That is, the defence power supported legislation for the protection of the public from a terrorist act.

The Court rejected arguments that the defence power was restricted to:

- defending against attacks by foreign nations or at least external threats ([6]–[7], [135]–[141], [250]–[251], [434]–[438], [583], [585], [611]), or
- protection of the Commonwealth or the states as polities as distinct from the protection of people or property ([6]–[7], [142]–[143], [440]–[441], [588], [611]; cf [251]–[252]).

The relatively wide view of the defence power taken by the Court is indicated by the following statement of Gleeson CJ (at [7]):

> The power to make laws with respect to the naval and military defence of the Commonwealth and of the several states, and the control of the forces to execute and maintain the laws of the Commonwealth, is not limited to defence against aggression from a foreign nation; it is not limited to external threats; it is not confined to waging war in a conventional sense of combat between forces of nations; and it is not limited to protection of bodies politic as distinct from the public, or sections of the public.

'The power to make laws with respect to the naval and military defence of the Commonwealth and of the several states ... is not limited to defence against aggression from a foreign nation ...'

Implied power to protect the nation

In some of the older cases such as *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, *Burns v Ransley* (1949) 79 CLR 101, and *R v Sharkey* (1949) 79 CLR 121, it was recognised that there is an implied power to protect the nation from subversion and attack.

Gummow and Crennan JJ, with Gleeson CJ agreeing, found that (at least in this case) the defence power was sufficient by itself to support the legislation without the need for recourse to any implied power to protect the nation ([6], [144]–[145]). Hayne, Callinan, and Heydon JJ also took this approach ([407], [582], [650]). Kirby J held that the provisions were not supported by this power ([233], [268]).

... the defence power was sufficient ... without the need for recourse to any implied power to protect the nation.

External affairs power

Gummow and Crennan JJ said that the defence power might not support the challenged provisions in their application to terrorist acts or threats against foreign governments or the public of a foreign country. However, they held that, in those situations, the provisions were supported by the external affairs power for two reasons ([149]–[153]).

First, the commission of terrorist acts is a matter affecting Australia's relations with other countries ([151]–[152]). Secondly, a law preventing terrorist acts intended to influence by intimidation a foreign government or the public or a section of the public of a foreign country is a law with respect to a 'matter or thing' which lies outside the geographical limits of Australia ([153]). Gleeson CJ agreed with Gummow and Crennan JJ on the external affairs power ([6], [9]).

Hayne, Callinan, and Heydon JJ each found it unnecessary to consider the external affairs power ([407], [582], [650]). Kirby J held the provisions were not supported by this power ([269]–[294].

Reference from the states

Under s 51(xxxvii) of the Constitution, the parliament of a state may refer a matter to the Commonwealth Parliament, and the Commonwealth Parliament may then enact laws on that matter extending to each state whose parliament referred the matter or which afterwards adopts the law.

All of the states have referred certain powers to the Commonwealth Parliament in relation to terrorist acts under s 51(xxxvii) ([167]).

Again putting judicial power issues aside, Hayne J would have held that the interim control order provisions were supported by the reference power (apart from judicial power issues), and Kirby J held that they were not ([455], [219]). The remaining justices found it unnecessary to decide this issue, although Callinan J expressed some reservations ([6], [154], [582], [601]–[608] [650].

Judicial power

Gleeson CJ and Gummow, Callinan, Heydon and Crennan JJ found that the interim control order provisions did not:

— confer non-judicial power on a federal court contrary to the separation of legislative, executive and judicial powers reflected in the Constitution, particularly Ch III, or

— purport to authorise the exercise of judicial power by a federal court in a manner contrary to Ch III (which provides for the creation of federal courts and the conferral of federal jurisdiction on courts). (See [32], [126], [600], [651].)

Kirby J found the interim control order provisions invalid on both of those grounds ([360]–[361], [371]). Hayne J found the control order provisions invalid on the first ground and therefore did not consider the second ground ([406], [517]–[518]).

Non-judicial power

The Court rejected Mr Thomas's argument that the characteristics of control orders meant that the power to make them was exclusively legislative or executive and not judicial and so could not be conferred on a court. According to Gleeson CJ (at [15]):

> The power to restrict or interfere with a person's liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what the person has done, which involves interfering with legal rights, and creating new legal obligations, rather than resolving a dispute about existing rights and obligations, is in truth a power that has been, and is, exercised by courts in a variety of circumstances. It is not intrinsically a power that may be exercised only legislatively, or only administratively.

In reaching this conclusion, the Court had regard to historical and contemporary examples of powers exercised by courts that were similar in some ways to the power to issue an interim control order, including:

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— the power of justices of the peace to bind a person over to keep the peace (involving restrictions on liberty based on predictions of future risk) ([16], [79], [116]–[121], [595]; cf [334]–[338])

— apprehended violence orders (involving restrictions on liberty based on predictions of future risk) ([16], [28], [79], [595]; cf [331], [337]–[338])

— orders made in matrimonial causes, bankruptcy, probate, business regulation, and winding up companies (involving creation of new rights and obligations and/or application of broad standards) ([15]–[16], [22], [74]–[75], [119]; cf [331], [476]–[477])

— sentencing (involving protection of the public and predictions) ([28], [109], [595])

— bail (involving creation of new rights and obligations restricting liberty, or being temporary in nature) ([16], [520]; cf [331], [337]–[338]).

Also, the majority held that the broad criteria to be applied by the court in making an interim control order (such as 'substantially assist in preventing a terrorist act' and 'reasonably necessary ... for the purpose of protecting the public from a terrorist act') were not too vague and were capable of strictly judicial application. A court can make inferences and predictions about danger to the public in the context of terrorist threats in the same way that it does in other contexts such as sentencing and apprehended violence orders. The criteria expressed adequate objective (legal) standards for the exercise of the court's jurisdiction and did not entail consideration of subjective and political questions ([19]–[28], [71]–[76], [94]–[103], [108]–[110], [596]).

As well, the restrictions that could be imposed by control orders did not amount to 'detention in custody' for the purposes of any principle that, exceptional cases aside, 'detention in custody' can only be imposed by a court as an incident of adjudging and punishing criminal guilt ([18], [114]–[121]; cf [350]–[359]).

Several justices noted that a consequence of the plaintiff's argument that a federal court cannot make an interim control order may be that the executive can ([17], [592]; cf [349], [506]–[513]). In that regard, Gleeson CJ said that it would not advance the protection of human rights to preclude the exercise of the power to make control orders 'independently, impartially and judicially' (ie by a judge) (at [17]). Similarly Callinan J said that risks to democracy and to the freedoms of citizens are matters that the courts are likely to have a higher consciousness of (at [599]).

Kirby and Hayne JJ both held that the power conferred by Div 104 of the Criminal Code was non-judicial because the legislation required the court to determine what is reasonably necessary for the protection of the public from a terrorist act and this was not an ascertainable test or standard that could be applied by a court ([317]–[322], [361], [406], [475]–[476], [502]–[504], [515]). Rather, the court would be required to act non-judicially and 'apply its own idiosyncratic notion as to what is just' ([322], [516]).

This conclusion was reinforced by the fact that the legislation operated exclusively by reference to a prediction of future conduct, which might involve what third parties (including the executive through police, security, and other agencies) not subject to the order might do and which might not involve unlawful conduct ([337]–[338], [357], [494]; cf [93]).

Manner of exercise of judicial power

Gummow and Crennan JJ accepted that 'legislation which requires a court exercising federal jurisdiction to depart to a significant degree from the methods and standards which have characterised judicial activities in the past may be repugnant to Ch III' (at [111]). However, the Court rejected Mr Thomas's arguments that the interim control order provisions authorised the exercise of judicial power in a manner contrary to Ch III.

... the Court rejected Mr Thomas's arguments that the interim control order provisions authorised the exercise of judicial power in a manner contrary to Ch III.

The Court said that the interim control order provisions provided for or assumed all the usual indicia of the exercise of judicial power (for example, evidence; legal representation; cross-examination; a generally open hearing; and the application of law to facts, argument and appeals) ([30], [55], [59], [599]). There was nothing novel or impermissible about an ex parte hearing (particularly where the matter is urgent), as had occurred in this case ([30], [112], [598]). Further, Parliament's selection of the balance of probabilities as the applicable standard of proof was consistent with Ch III ([113], [598]).

Gleeson CJ concluded (at [30]):[3]

> The outcome of each case is to be determined on its individual merits. There is nothing to suggest that the issuing court is to act as a mere instrument of government policy. On the contrary, the evident purpose of conferring this function on a court is to submit control orders to the judicial process, with its essential commitment to impartiality and its focus on the justice of the individual case. In particular, the requirements of s 104.4, which include an obligation to take into account the impact of the order on the subject's personal circumstances, are plainly designed to avoid the kind of overkill that is sometimes involved in administrative decision-making. Giving attention to the particular circumstances of individual cases is a characteristic that sometimes distinguishes judicial from administrative action.

Mr Thomas also argued that Div 104 allowed the court to disregard procedural fairness. The argument related to provisions concerning the later confirmation hearing, which had not yet occurred. The Court did not consider this argument in any detail and instead confined its answers to the provisions of Div 104 relating to interim control orders ([122]–[125]; see also [6], [62]).

In dissent, Kirby J held that, if Div 104 did confer judicial power, the manner of its exercise was contrary to Ch III because of the ex parte nature of interim control order hearings; the uniform procedure for the hearings that minimises the rights of the subject of the order; the withholding of certain evidence from the subject; and the lack of an alternative system of providing the evidence to him or her ([364]–[371]).

AGS (David Lewis and David Bennett from the Constitutional Litigation Unit) acted for the Commonwealth, with the Commonwealth Solicitor-General David Bennett AO QC, AGS Chief General Counsel Henry Burmester AO QC, AGS Chief Counsel Litigation Tom Howe, Stephen Donaghue and Gim Del Villar as counsel. AGS (Declan Roche and Simon Thornton) also acted for the second defendant, with AGS Chief Counsel Litigation, Tom Howe, as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2007/33.html

Notes

1 Constitution, s 51(vi). The defence power empowers the Parliament to make laws with respect to 'the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth'.

2 The Constitution, s 51(xxix), empowers the Parliament to make laws with respect to external affairs.

3 See also Gummow and Crennan JJ at [59].

DISCIPLINARY PROCEEDINGS AND JUDICIAL POWER

In two decisions the High Court has unanimously upheld the validity of Commonwealth laws conferring power on administrative bodies to take disciplinary action against company directors and liquidators. Validity was upheld on the basis that the provisions did not confer judicial power on the bodies contrary to the separation of powers mandated by Ch III of the Constitution.

Susie Brown *Senior Lawyer*
T *02 6253 7132* ***F*** *02 6253 7303*
susie.brown@ags.gov.au

Andrew Buckland
Senior Executive Lawyer
T *02 6253 7024* ***F*** *02 6253 7303*
andrew.buckland@ags.gov.au

Visnic v Australian Securities and Investments Commission
High Court of Australia, 24 May 2007
[2007] HCA 24; (2007) 234 ALR 413

Background

Mr Visnic was a director of 14 companies that had been wound up. A liquidator had lodged a report with the Australian Securities and Investments Commission (ASIC) under s 533(1) of the *Corporations Act 2001* (Cth) about the inability of each corporation to pay its debts. ASIC subsequently exercised its power under s 206F of the Corporations Act to disqualify Mr Visnic from managing a corporation for a period of five years.

Mr Visnic challenged the constitutional validity of s 206F on the basis that it involved an impermissible conferral of the judicial power of the Commonwealth on ASIC, contrary to Ch III of the Constitution. Chapter III requires that Commonwealth judicial power be exercised by courts and not by administrative bodies such as ASIC. The matter was heard together with *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* and *Gould v Magarey*, which raised similar constitutional issues (see below at p 9).

Decision

All members of the Court upheld the validity of s 206F of the Corporations Act. Gleeson CJ and Gummow, Hayne, Callinan, Heydon and Crennan JJ delivered a joint judgment. Kirby J delivered a separate judgment.

Joint judgment

The joint judgment identified the central issue as being whether s 206F purported to confer on ASIC a function or power that was *exclusively* judicial. If it did, s 206F would be invalid, as ASIC was not a court for the purposes of Ch III of the Constitution ([10]).

However, their Honours accepted the Commonwealth Attorney-General's submission that ASIC was not exercising judicial power under s 206F. Section 206F conferred on ASIC 'a power to be exercised for the purpose of maintaining professional standards in the public interest' and there was 'nothing inherently judicial in such a power' (at [11]).

Mr Visnic's main argument was that the power conferred on ASIC under s 206F was, at least in some respects, the same as the powers conferred on courts to disqualify directors under ss 206C, 206D and 206E of the Corporations Act. He argued that it was not permissible for the Commonwealth Parliament to confer the same power on both a court and an administrative body.

The joint judgment rejected this argument. It was inconsistent with earlier High Court authority, *R v Quinn; Ex parte Consolidated Foods Corp* (1977) 138 CLR 1, which upheld the validity of a provision concurrently conferring

a power on the High Court and the Registrar of Trade Marks to remove trademarks from the register.

In any event, the statutory criteria for the exercise of the power by ASIC and by the courts differ to a significant degree. In particular, ASIC may have regard to the public interest in a disqualification, whereas there is no reference to the public interest in the sections conferring a disqualification power on the courts. Their Honours held that the following passage from *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 was determinative of this case (at [14]–[15]):

> ... where, as here, the function of making orders creating new rights and obligations is reposed in a tribunal which is not a court and considerations of policy have an important part to play in the determination to be made by the tribunal, there is no acceptable foundation for the contention that the tribunal ... is entrusted with the exercise of judicial power.

Here, ASIC was empowered to determine, for the future, that a person not manage corporations by reference to criteria including the public interest. A power to *create* rights by reference to criteria of this kind is not characteristic of judicial power. Judicial power involves the determination of existing rights by reference to judicially ascertainable standards.

ASIC was empowered to determine, for the future, that a person not manage corporations by reference to criteria including the public interest.

Their Honours also observed that, although ASIC may examine the conduct of the person in relation to the management of any corporation, it does not determine whether the person is guilty of any offence (which would be an exclusively judicial function). Rather, although ASIC may take into account whether a director has breached provisions of the Corporations Act, this is only a step in concluding whether he or she should be disqualified.

Judgment of Kirby J

Kirby J concluded that s 206F conferred on ASIC an administrative power and not a power that could only be vested in a court under Ch III of the Constitution. However, in upholding validity, Kirby J warned (at [40]–[42]) about the potential for the 'chameleon principle' (that powers that are not inherently judicial or inherently non-judicial take their character according to whether they are conferred on a court or on an administrative body) to destroy the objectives of the constitutional separation of powers. His Honour expressed his conclusion narrowly ([46]) as resting on a combination of:

- the disciplinary character of ASIC's power under s 206F
- the distinction between that power and the more open-ended powers conferred by the Corporations Act on the courts
- the fact that ASIC's decision is not, by itself, conclusive or enforceable, but forms a basis, where necessary, for rights and liabilities to be enforced by a court
- the fact that ASIC's powers could not fairly be characterised as determining 'basic legal rights' of the kind that must always be reserved to a Ch III court.

AGS (Susie Brown and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, who intervened to support the validity of s 206F, with AGS Chief General Counsel Henry Burmester AO QC and Guy Aitken from AGS as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2007/24.html

Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board and *Gould v Magarey*

High Court of Australia, 24 May 2007
[2007] HCA 23; (2007) 234 ALR 618

Background

Mr Albarran and Mr Gould (the appellants) were both registered liquidators. ASIC made applications to the Companies Auditors and Liquidators Disciplinary Board (the Board) under s 1292(2) of the *Corporations Act 2001* (Cth) to suspend Mr Gould's registration and to cancel Mr Albarran's registration. Section 1292(2) empowers the Board to cancel or suspend registration on grounds which include that the person has failed to carry out or perform adequately and properly any duties or functions required by an Australian law to be carried out or performed by a registered liquidator.

The Board determined that this ground had been made out in each case and that Mr Albarran's registration should be suspended for nine months and Mr Gould's registration should be suspended for three months.

The appellants challenged the validity of s 1292(2) on the basis that it involved an impermissible conferral of the judicial power of the Commonwealth on the Board, an administrative body, contrary to Ch III of the Constitution. The Full Court of the Federal Court upheld validity. The appellants appealed that decision.

Decision

All members of the Court upheld the validity of s 1292(2) of the Corporations Act. Gleeson CJ and Gummow, Hayne, Callinan, Heydon and Crennan JJ delivered a joint judgment. Kirby J delivered a separate judgment.

Joint judgment

The joint judgment referred to a general description of judicial power as the power engaged in 'determining a dispute inter partes as to the existence of a right or obligation in law and in applying the law to the facts as determined' (at [16]). Their Honours held that the power conferred on the Board by s 1292(2) did not involve the exercise of judicial power in particular because the Board did not settle disputes about existing rights or liabilities.

... the power conferred on the Board ... did not involve the exercise of judicial power in particular because the Board did not settle disputes about existing rights or liabilities.

— The Board's determination under s 1292(2) did not involve an adjudication of criminal guilt or impose punishment for an offence, which would be an exercise of judicial power. The joint judgment endorsed the distinction drawn in previous cases between disciplinary proceedings and criminal proceedings. In disciplinary proceedings, 'no offence was specified and no declaration of guilt made' (at [17]) and so they did not engage judicial power. The Board was a body representative of the commercial and accounting communities with the function of deciding whether a liquidator had 'adequately and properly' carried out duties, which was to 'import notions of judgment by reference to professional standards rather than pure questions of law' (at [24]). It was not to the point that the Board's determination had 'an adverse and stigmatising consequence' (at [15]).

— More generally, the purpose of the Board's inquiry under s 1292(2) was not the 'ascertainment or enforcement of any existing right or liability'

(at [25]) but an assessment of whether a person's skill and integrity were such that they should not remain registered. Their Honours observed (at [28]):

> The Attorney-General correctly submits that, to the extent that with respect to Mr Gould and Mr Albarran the Board was required to form an opinion as to existing rights, that was no more than a step necessary to its ultimate conclusion. This was whether, in terms of par (d)(ii) of s 1292(2), the performance of duties or functions required by Australian law had been carried out or performed 'adequately and properly'.

The joint judgment also observed that the Board lacked the power to enforce its decisions, its decisions were not 'conclusive' because 'enforcement of a suspension or cancellation order made by the Board requires the exercise by a court' of jurisdiction in criminal matters arising under the Act, and the Board's decisions were subject to merits review by the Administrative Appeals Tribunal ([4]–[6]).

The joint judgment also observed that the Board lacked the power to enforce its decisions, its decisions were not 'conclusive' ... and were subject to merits review...

The joint judgment rejected an argument seeking to distinguish disciplinary cases involving punishment for breach of a law of general application (which, it was argued, included s 1292(2) and would engage judicial power) and domestic (or internal) disciplinary actions (which would not). Their Honours held that this was not an appropriate basis on which to distinguish between judicial and non-judicial power under Ch III, for which the focus is 'the manner in which and subject matter upon which the body purportedly exercising judicial power operates and the purposes and consequences of any decisions it makes' (at [35]).

Judgment of Kirby J

In separate reasons Kirby J reached similar conclusions. His Honour addressed the underlying rationale for the separation of powers, concluding (at [67]) that:

> If anything, the growth of the modern regulatory state, and of powerful and opinionated officials in the executive government answerable to political ministers, has increased and not diminished the importance of safeguarding this separation.

His Honour again expressed caution about the application of the 'chameleon principle' (at [70]–[72]). However, in concluding that the 'functions vested in the Board were not of such a character that they required judicial performance', his Honour also said that '(s)tructured in a slightly different way, similar functions might possibly have been vested in a Ch III court' (at [101]).

AGS (Susie Brown and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, who intervened to support the validity of s 1292(2), with AGS Chief General Counsel Henry Burmester AO QC and Kate Eastman as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2007/23.html

ACQUISITION OF PROPERTY: REDUCTION IN WORKERS COMPENSATION

The High Court has decided that Northern Territory legislation validly decreased a person's vested statutory entitlement to workers compensation as it did not constitute an acquisition of property contrary to s 50(1) of the *Northern Territory (Self-Government) Act 1978* (Cth) (the Self-Government Act). The High Court's decision is relevant to the application of s 51(xxxi) of the Constitution (acquisition of property on just terms) to Commonwealth legislation modifying or extinguishing statutory rights.

Susie Brown *Senior Lawyer*
T *02 6253 7132* ***F*** *02 6253 7303*
susie.brown@ags.gov.au

Attorney-General (NT) v Chaffey; Santos Limited v Chaffey
High Court of Australia, 2 August 2007
[2007] HCA 34; (2007) 237 ALR 373

Background

This case involved a challenge to the validity of amendments to the *Work Health Act* (NT), which had the effect of decreasing a person's vested statutory entitlement to workers compensation. Mr Chaffey argued that the amendments were invalid as they constituted an acquisition of property contrary to s 50(1) of the Self-Government Act. Section 50(1) provides that the power of the Legislative Assembly to make laws 'does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms' and thereby limits the law-making power of the Northern Territory Legislative Assembly in terms similar to s 51(xxxi) of the Constitution. The High Court proceeded on the basis that the principles to be applied were the same as for s 51(xxxi).

Under the Work Health Act, the amount of compensation to which an injured worker is entitled is calculated by reference to the worker's 'remuneration'. The Northern Territory Court of Appeal decided in 2004 that 'remuneration' included superannuation contributions made by an employer. Amendments were made to the Work Health Act to reverse the effect of the Court of Appeal's decision by excluding employer superannuation contributions from 'remuneration'. The amendments had retrospective effect. Compensation payments for both past and future periods were therefore to be calculated on the basis that superannuation contributions were excluded.

Mr Chaffey sustained an injury in 2003, prior to the commencement of the legislative amendments, for which Santos Ltd had been paying him compensation under the Work Health Act. The compensation payments had been calculated excluding employer superannuation contributions. The effect of the amendments was therefore to prevent him from recovering additional compensation, calculated by reference to the superannuation contributions, both prior to the amendments and into the future.

The Full Court of the Northern Territory Supreme Court held (by a 2:1 majority) that the amendments gave rise to an acquisition of property without just terms and were invalid. Both the Northern Territory Attorney-General and Santos Ltd appealed to the High Court. The Commonwealth Attorney-General intervened in the appeals to support validity.

David Bennett QC
Deputy Government Solicitor
T *02 6253 7063* ***F*** *02 6253 7303*
david.bennett@ags.gov.au

Decision

The Court unanimously allowed the appeals and held the amendments to the Work Health Act were valid. Gleeson CJ and Gummow, Hayne, and Crennan JJ delivered a joint judgment. Kirby, Callinan and Heydon JJ each delivered separate judgments.

Joint judgment

The joint judgment based its decision on the nature of the 'property'—in this case, a statutory right, to which s 50 of the Self-Government Act was said to apply ([21]).

Central to their consideration was the construction of s 53 of the Work Health Act—the provision that obliged employers to make compensation payments to workers. That obligation was expressed (in s 53) to be 'subject to', and 'in accordance with', the relevant part of the Act and as an obligation to provide 'such compensation as is prescribed'.

Their Honours accepted the appellants' arguments that these references were naturally construed as applying 'from time to time' so that the method for calculating the amount of compensation payable was not fixed at the time of injury but 'was always subject to variation' (at [18]). As the 'property' involved (the rights to compensation under the Work Health Act) was liable to variation by subsequent legislation, there was no 'acquisition' for the purposes of s 50 of the Self-Government Act (at [30]).

The joint judgment made clear that 'the contingency of subsequent legislative modification or extinguishment' does not mean that all statutory rights and interests are withdrawn from the protection of s 51(xxxi). The mining interests considered in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 or the rights of copyright and patent owners are examples of where s 51(xxxi) applies. However, in the case of Pt V of the Work Health Act, their Honours said that 'by express legislative stipulation in existence at the time of the creation of the statutory "right", its continued and fixed content depended upon the will from time to time of the legislature which created that "right"' (at [24]–[25]).

'[The] continued and fixed content [of the statutory right] depended upon the will from time to time of the legislature which created that "right".'

Their Honours noted that the Northern Territory Attorney-General had accepted that an amendment might remove the content of the right to compensation and therefore go beyond what was contemplated by s 53, and that this would amount to abolition of that right. But their Honours said that it was unnecessary to consider that possibility here (at [31]).

Separate judgments

The separate judgments of Kirby J, Callinan J and Heydon J each agreed that, on the proper construction of the Work Health Act, the right to compensation in s 53 was inherently susceptible to variation and that therefore there was no acquisition. However, the judgments gave more attention to the overall statutory context. Callinan J emphasised the nature of workers compensation as a 'unique form of benefit', which is closely associated with working conditions generally and may fluctuate as the economy fluctuates. These considerations distinguished workers compensation from other interests ([55]).

In construing s 53, Kirby J and Heydon J had regard to the fact that, historically, workers compensation laws have been subject to frequent and extensive amendment. Therefore, it was unlikely that a person affected by

workers compensation legislation would expect that existing rights would remain unaltered ([47], [60]). Also, the Work Health Act reflects a particular balance between the interests of worker, employers and insurers and the legislation contemplates that that balance would be adjusted from time to time ([46], [61]–[66]).

AGS (Susie Brown and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General who intervened, with Commonwealth Solicitor-General David Bennett AO QC, Melissa Perry QC and Guy Aitken from AGS as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2007/34.html

PRISONERS VOTING IN FEDERAL ELECTIONS

The High Court, by a 4:2 majority, has decided that certain provisions of the *Commonwealth Electoral Act 1918* (Cth) (the Act) which were enacted in 2006 are invalid. The provisions prevented people from voting in a federal election if, on election day, they were in full-time imprisonment for an offence (the 2006 regime).

However, the legislative regime in force immediately before the 2006 regime was held to be in force and valid. Under that previous regime, prisoners 'serving a sentence of 3 years or longer for an offence against the law of the Commonwealth or of a State or Territory' were not entitled to vote (the three year regime).

Therefore, the present position under the Act is that, while some prisoners can vote in federal elections, prisoners serving a sentence of three years or longer cannot do so.

Roach v Electoral Commissioner & Commonwealth
High Court of Australia, 26 September 2007
[2007] HCA 43; (2007) 239 ALR 1

Legislation and constitutional provisions

Under the 2006 regime, a 'person who is serving a sentence of imprisonment for an offence against the law of the Commonwealth or of a State or Territory is not entitled to vote at any Senate election or House of Representatives election' (s 93(8AA) of the Act). A person was serving a 'sentence of imprisonment' only if 'the person is in detention on a full-time basis for an offence against a law of the Commonwealth or a State or Territory', and 'that detention [was] attributable to the sentence of imprisonment concerned' (s 4(1A) of the Act).

The Constitution provides, in part, that the Senate shall be composed of senators for each state 'directly chosen by the people of the State' (s 7). Similarly, s 24 provides in part that the House of Representatives shall be composed of members 'directly chosen by the people of the Commonwealth'. In combination, ss 30 and 51(xxxvi) of the Constitution empower the Parliament to provide for the 'qualification of electors of members of the House of Representatives'. By virtue of s 8 of the Constitution, that qualification is also the qualification for electors of senators.

David Lewis *Senior Lawyer*
(Currently on extended leave)

David Bennett QC
Deputy Government Solicitor
T *02 6253 7063* ***F*** *02 6253 7303*
david.bennett@ags.gov.au

Decision

Gleeson CJ, and, in a joint judgment, Gummow, Kirby and Crennan JJ, held that the 2006 regime was invalid but that the previous three year regime was still in force and valid. In dissent, Hayne J and Heydon J held that the 2006 regime was valid.

The 2006 regime

The majority justices held that the 2006 regime contravened constitutional requirements. Gleeson CJ found the 2006 regime invalid because it did not meet the requirement imposed by ss 7 and 24 of the Constitution that parliamentarians be 'directly chosen by the people' (at [6]). His Honour said that, by 'abandoning any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for the offence', the Parliament had broken 'the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people' (at [24]).

Gummow, Kirby and Crennan JJ looked more generally to the system of representative and responsible government mandated by the Constitution, including limits arising from ss 7 and 24 ([40], [43], [49]). They said that the case concerned 'not the existence of an individual right, but rather the extent of [a] limitation on legislative power' ([86]). They found the 2006 regime invalid because it was not reasonably appropriate and adapted, or proportionate, to the maintenance of the constitutionally prescribed system of representative government ([95]).

All of the majority justices noted the central importance of the franchise or voting to citizenship and to the system of representative government established by the Constitution ([7], [81], [83]). Also, the majority justices accepted that the Constitution allows for changes in representative government, particularly by allowing the Parliament considerable scope to prescribe aspects of the form of representative government ([4]–[6], [45], [77]). However, Gummow, Kirby and Crennan JJ noted that, although the scope of the franchise involves matters of legislative and political choice, there is also a 'constitutional bedrock' ([82]).

All of the majority justices noted the central importance of the franchise or voting to citizenship and to the system of representative government established by the Constitution.

Gleeson CJ said that, because of changed historical circumstances including legislative history and its long-established universal adult suffrage, the evolution in representative government has now reached a stage where the words of ss 7 and 24 have become a constitutional protection of the right to vote, although allowing exceptions ([7]). While the Constitution leaves it to Parliament to define the exceptions, 'its power to do so is not unconstrained' ([7]):

> Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.

Similarly, Gummow, Kirby and Crennan JJ said the question is whether any legislative disqualification from voting is for a 'substantial reason' ([85]).

Gleeson CJ concluded that exclusion from voting based on the rationale that those imprisoned for *serious* criminal offences should suffer a temporary suspension of their connection with the community, both physically and through participation by voting in the political process,

was consistent with the constitutional requirement of choice by the people ([19]). However, his Honour held that, at the level of short-term prisoners (serving a sentence of six months or less), the criterion for disenfranchisement (serving a sentence of imprisonment) was 'arbitrary', and there was no 'rational connection' between the disenfranchisement and the constitutional imperative of choice by the people ([23]–[24]). For such prisoners, the fact of imprisonment may depend on factors such as the availability of other sentencing options and on considerations such as their personal situation or their location ([21]–[22]).

Gummow, Kirby and Crennan JJ said that a disqualification from voting will be for a 'substantial reason' if it is 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government' (at [85]). As they noted, this formulation is similar to part of the test for determining whether the implied freedom of political communication has been infringed, as set out in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (at [86]). They also observed that there is little difference between this formulation and the notion of 'proportionality'—what is disproportionate or arbitrary may not satisfy the formulation (at [85]).

Gummow, Kirby and Crennan JJ referred to the history of colonial franchise provisions and the drafting of the Constitution. They particularly noted the disharmony between the 2006 regime and the less stringent provisions of s 44(ii) of the Constitution, which disqualifies from being chosen or sitting as a parliamentarian persons convicted and under sentence or subject to be sentenced for an offence punishable by imprisonment for one year or longer.

They concluded that the 2006 regime was not appropriate and adapted (or proportionate) to the maintenance of representative government as it cast the net of disqualification too wide ([95]). The 2006 regime operated 'without regard to the nature of the offence committed, the length of the term of imprisonment imposed, or the personal circumstances of the offender' ([90]). It had 'no regard to culpability' other than 'that which can be attributed to prisoners in general as a section of society' ([90], [93]). The notions of citizenship and membership of the Australian body politic reflected in the franchise 'were not extinguished by the mere fact of imprisonment' ([84]).

The three year regime

Gummow, Kirby and Crennan JJ held that both the provisions of the amending Act that *inserted* s 93(8AA) and related provisions and the provisions of that Act that *repealed* the provisions of the previous three year regime were invalid ([97])—that is, there was no parliamentary 'intention' to remove the old provisions independently of the adoption of the new provisions and thereby leave a gap in the Act ([97]). The efficacy of the insertion of the new provisions was a condition of the repeal of the old provisions ([97]). The result was that, while the 2006 regime was invalid, the three year regime effectively revived. Gleeson CJ agreed ([25]).

Gleeson CJ held that the three year regime was valid, as that prevented from voting only those involved in serious criminal offending ([19]).

Similarly, Gummow, Kirby and Crennan JJ held that the three year regime was valid ([102]). Having regard to the colonial history and the drafting history of the Constitution, and the use of the length of the sentence as a criterion of culpability, it could not be said that at federation such a system was incompatible with the maintenance of the prescribed system of representative government (or disproportionate) ([102]).

Gleeson CJ held that the three year regime was valid, as that prevented from voting only those involved in serious criminal offending.

Further, the legislative development of representative government since federation had not subsequently given rise to any incompatibility ([102]). The three year regime did 'distinguish between serious lawlessness and less serious but still reprehensible conduct', and this indicium of culpability and temporary unfitness to participate in the electoral process was within the permissible area of legislative choice ([82], [98], [102]). The three year disqualification reflected the primacy of the electoral cycle that the Constitution provides for ([102]).

Hayne and Heydon JJ (dissenting)

In dissent, Hayne J held that the 2006 regime was valid and Heydon J agreed with him. Hayne J held that the phrase 'directly chosen by the people' was an 'expression of generality' and was not intended to impose a requirement for universal adult suffrage without exceptions ([111]–[112], [122]–[127]). He referred to the history of colonial and state franchise provisions—particularly the NSW provisions, which disqualified any person in prison under any conviction ([134]–[138]).

Hayne J held that the phrase 'directly chosen by the people' was an 'expression of generality' and was not intended to impose a requirement for universal adult suffrage without exceptions.

Along with other state provisions, these NSW provisions were picked up and applied by s 30 of the Constitution for federal elections until the Parliament otherwise provided. They therefore applied in New South Wales in the first federal election. Accordingly, each House of the Parliament was and is directly chosen by the people where persons in prison under sentence are excluded from voting ([139]).

AGS (David Lewis, Thomas John and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth, with the Commonwealth Solicitor-General David Bennett AO QC and Lisa De Ferrari as counsel. AGS (Ross McClure and Alice Crowe) also acted for the Electoral Commissioner, with Peter Hanks QC and Peter Gray as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2007/43.html

CONSTITUTIONAL DECISIONS IN BRIEF

Time limit on applications to High Court for judicial review of executive decisions

Bodruddaza v Minister for Immigration and Multicultural Affairs
High Court of Australia, 18 April 2007
[2007] HCA 14; (2007) 234 ALR 114

Joint authors

David Bennett QC
Deputy Government Solicitor

Andrew Buckland
Senior Executive Lawyer

The High Court unanimously held (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ in a joint judgment, and Callinan J generally agreeing) that s 486A of the *Migration Act 1958* (Cth), which imposed a maximum 84-day time limit on applications to the High Court for judicial review of 'migration decisions', was invalid.

The plaintiff was refused a student visa by a delegate of the Minister. The plaintiff's agent missed by one day the 21-day time limit under the Migration Act for applying for review of the decision by the Migration Review Tribunal. After the Tribunal held it did not have jurisdiction, the plaintiff brought these proceedings in the original jurisdiction of the High Court for judicial review of the decision, asserting jurisdictional error. The High Court application was made under s 75(v) of the Constitution, which confers original jurisdiction on

the High Court in all matters 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.

However, the plaintiff had commenced the High Court action outside the statutory time limit under s 486A of the Migration Act for applications to the High Court. Section 486A required that a High Court application be brought within 28 days of actual notification of the decision and gave the Court a discretion to extend that period by up to 56 days. If a decision is constitutionally valid, s 486A denied to the High Court jurisdiction to deal with the plaintiff's application. The plaintiff challenged the validity of the section.

The Court first addressed the proper construction of s 486A and held that it was directed to the competency of applications to the Court and did not purport to 'validate' decisions otherwise affected by jurisdictional error upon expiry of the 84-day period ([27]–[30]).

In addressing the validity of s 486A, the joint judgment referred to the 'high constitutional purposes' of the remedies provided by s 75(v) ([37]). Section 75(v) entrenches a minimum availability of judicial review to ensure that the judicial power of the Commonwealth can be engaged to enforce observance both of constitutional limits on the exercise of Commonwealth executive and legislative power and of 'the limits of the power conferred by statute upon administrative decision-makers' (in the latter case, in the sense of controlling jurisdictional error). The jurisdiction protects both the position of the states as parties to the federal compact and the interests of people affected in ensuring that Commonwealth officers 'obey the law and neither exceed nor neglect any jurisdiction which the law confers on them' ([37], [46]).

The Commonwealth argued that s 486A was valid as a reasonable regulation of the right to institute proceedings under s 75(v) and that it did not operate to deprive the High Court of part of its entrenched jurisdiction under s 75(v). The Court left open the question of whether a fixed time limit on the exercise of s 75(v) jurisdiction could ever be valid ([53]). It was sufficient to conclude that the particular restriction imposed by s 486A was inconsistent with the position of s 75(v) in the constitutional structure as explained. This was because, by fixing upon the time of actual notification of the decision in question, s 486A did 'not allow for the range of vitiating factors which may affect administrative decision making' ([55]).

As a result, the time limit 'subverts the constitutional purpose of the remedy provided by s 75(v)' ([58]). So, for example, the time of notification of a decision (on which the time limit in s 486A operated) 'may be very different from the time when a person becomes aware of the circumstances giving rise to a possible challenge to the decision' ([56]) and would not allow for supervening events which lead to a failure (without fault) to meet the time limit, such as physical incapacitation of the applicant ([57]).

In light of these examples and the characterisation of the s 75(v) remedies as discretionary, the Court, although not deciding that fixed time limits would always be invalid, warned that 'any attempt to follow that path is bound to encounter constitutional difficulties' ([59]).

... the Court, although not deciding that fixed time limits would always be invalid, warned that 'any attempt to follow that path is bound to encounter constitutional difficulties'.

The only remedies expressly provided for in s 75(v) are mandamus, prohibition and injunction. This raised the issue whether s 486A could validly apply insofar as the plaintiff sought relief in the form of certiorari. The joint judgment found it unnecessary to decide whether 'it would be open to the Parliament to legislate to withdraw from this Court any power

to grant certiorari as the principal relief in the original jurisdiction of the Court' ([62]). This was because, in the present case, the remedy of certiorari was ancillary to the principal relief (prohibition and mandamus) included in s 75(v) that was sought by the plaintiff. As it was necessary to grant certiorari so as effectively to determine the 'matter' in respect of which jurisdiction was conferred by s 75(v), s 486A could not validly diminish the authority of the Court to grant certiorari ([62]–[64]). In contrast, Callinan J referred to his judgment in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, in which he held that Parliament could legislate to prevent the grant of certiorari against officers of the Commonwealth ([80]).

Having ruled that s 486A did not prevent the exercise of jurisdiction under s 75(v), the Court went on to consider and dismiss the plaintiff's challenge to the delegate's decision on the ground of jurisdictional error.

AGS (Andras Markus, and Graeme Hill and Andrew Buckland from the Constitutional Litigation Unit) acted for the Minister and for the Commonwealth Attorney-General who intervened, with the Commonwealth Solicitor-General David Bennett AO QC, and Geoffrey Kennett as counsel.

http://www.austlii.edu.au/au/cases/cth/HCA/2007/14.html

Validity of Norfolk Island electoral laws: section 122 of the Constitution

Bennett v Commonwealth

High Court of Australia, 27 April 2007
[2007] HCA 18, (2007) 235 ALR 1

The High Court unanimously held that the *Norfolk Island Amendment Act 2004* (Cth) (the NI Amendment Act), which prescribes Australian citizenship as a qualification to vote or stand for election for the Norfolk Island Legislative Assembly, was valid under s 122 of the Constitution. Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ delivered a joint judgment. Kirby J and Callinan J delivered separate judgments agreeing with the orders of the joint judgment.

The NI Amendment Act amended provisions of the *Norfolk Island Act 1979* governing elections for the Norfolk Island Legislative Assembly. The amendments have the effect that a person must be an Australian citizen in order to stand for election to, or vote in elections for, the Legislative Assembly. Nearly 20 per cent of the members of the Norfolk Island community were not Australian citizens.

The plaintiffs argued that the amendments were beyond the Commonwealth's legislative power in s 122 of the Constitution ...

The plaintiffs argued that the amendments were beyond the Commonwealth's legislative power in s 122 of the Constitution (under which the Parliament 'may make laws for the government of any territory'), including because of the historical circumstances of Norfolk Island. It was argued that Parliament could not impose an electoral qualification requirement that did not relate to membership of the Norfolk Island community and that a law providing for self-government of a territory must provide for 'democratic representation'.

On 1 July 1914, Norfolk Island became a territory 'placed by the Queen under the authority of and accepted by the Commonwealth' within the meaning of s 122. In relation to history, relevant to the first aspect of the plaintiffs' argument, their submissions emphasised their view that Norfolk Island had not thereby become a 'part of the Commonwealth' in any relevant sense and was placed under the authority of the Commonwealth on the footing that it had been, since 1856, a 'distinct and separate settlement'.

The High Court rejected the plaintiffs' arguments and held that, in relation to the electoral provisions in question, there was no relevant qualification on the Commonwealth's legislative power under s 122 derived from the historical circumstances of Norfolk Island or its status as a territory. The joint judgment began by emphasising that, consistent with past authority, the interpretation of s 122 must take account of the generality of its language which covers 'the entire legal situation' of a territory.

That generality is explained by the circumstance that 'the territories, dealt with compendiously and briefly in s 122 of the Constitution, have differed greatly in size, population, and development' ([10]). There was no basis under s 122 for treating Norfolk Island differently from any other territory because of its peculiar historical or social circumstances. The wisdom of an exercise of legislative power under s 122 in relation to a particular territory by reference to those circumstances was a political question and there was no relevant limitation on constitutional power. There was no constitutional necessity to establish any form of self-government in a territory and no constitutional prohibition against discriminating in territory electoral laws on the basis of Australian citizenship. According to the joint judgment:

> Bearing in mind the diversity of territories, the Parliament, if it decides to establish institutions of representative government within a territory, is not bound to conform to any particular model of representative government. There is nothing in the Constitution, and there is nothing inherent in the concept of representative government, that requires the Parliament, if it chooses to legislate for self-government, to enfranchise residents of Norfolk Island who are not Australian citizens. (At [42].)

There was no basis ... for treating Norfolk Island differently from any other territory because of its peculiar historical or social circumstances.

AGS (Iain Gentle, Graeme Hill and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth, with the Commonwealth Solicitor-General David Bennett AO QC and Kate Eastman as counsel.

http://www.austlii.edu.au/au/cases/cth/HCA/2007/18.html

Application of state procedural laws to proceedings in federal jurisdiction

Gordon v Tolcher

High Court of Australia, 15 December 2006
[2006] HCA 62, (2006) 231 ALR 582

This case again involved the High Court in considering the application of state laws to proceedings in federal jurisdiction. Where proceedings in a state court are in federal jurisdiction because they involve a 'matter' under ss 75 or 76 of the Constitution, state laws (including procedural laws) cannot apply of their own force. Instead, they will apply only if picked up by s 79 of the *Judiciary Act 1903* (Cth), which provides:

> The laws of each State and Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, *except as otherwise provided by the Constitution or the laws of the Commonwealth*, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable. [Emphasis added.]

The particular issue here arose in the context of proceedings in the New South Wales District Court, in which orders were sought under s 588FF(1) of the *Corporations Act 2001* (Cth) that the appellant repay the proceeds of alleged 'voidable transactions' in a company liquidation. The proceedings were therefore in federal jurisdiction (s 76(ii) of the Constitution and s 1337E of the Corporations Act).

Under s 588FF(3) of the Corporations Act, the proceedings had to be commenced within a three-year period. Here, the proceedings were commenced within that period by the filing of a statement of liquidated claim, but the statement of liquidated claim was not served on the defendant. By operation of the Rules of the New South Wales District Court, after a certain period of time had elapsed, the proceedings were treated as dormant and 'taken to be dismissed'.

Subsequently, after the expiry of the three-year period in s 588FF(3), the respondents sought orders from the District Court 'which would have the effect of rescinding the deemed dismissal' ([20]).

The question for decision was whether the provisions of the New South Wales District Court Rules under which those orders were sought after expiry of the three-year period were not picked up and applied by s 79 of the Judiciary Act to the proceedings in the District Court because s 588FF(3) of the Corporations Act 'otherwise provided'.

In a joint judgment (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ), the High Court concluded that s 588FF did not 'otherwise provide' in relation to the procedural rules in issue ([41]). Here, the time stipulation in s 588FF(3) had been met when the application was filed. Thereafter, s 588FF did not deal with the manner of exercise of the federal jurisdiction to which it related but evinced an intention that 'after the institution of an application the procedural regulation of the conduct of a matter is left for that particular State or territorial procedural law which is to be picked up by s 79 of the Judiciary Act' ([32]).

... the High Court concluded that s 588F did not 'otherwise provide' in relation to the procedural rules in issue ...

AGS (Iain Gentle and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, who intervened and put submissions supporting the result upheld by the High Court. AGS Chief General Counsel Henry Burmester AO QC and Graeme Hill appeared as counsel.

http://www.austlii.edu.au/au/cases/cth/HCA/2006/62.html

Judicial power and the Takeovers Panel

Attorney-General (Cth) v Alinta Limited

High Court of Australia, 13 December 2007
[2008] HCA 2

In *Australian Pipeline Ltd v Alinta Ltd* (2007) 240 ALR 294, the Full Court of the Federal Court held that s 657A(2)(b) of the *Corporations Act 2001* (Cth) was invalid on the ground that it purported to confer the judicial power of the Commonwealth on the Takeovers Panel. The Takeovers Panel is established under the Corporations Act as the body with the primary role in resolving takeover disputes. The Commonwealth Attorney-General had intervened in the Full Federal Court and appealed against its decision to the High Court.

On 13 December 2007, the High Court announced its orders unanimously reversing the decision of the Full Federal Court and upholding the validity of s 657A(2)(b). The Court's reasons were published on 31 January 2008 and will be the subject of the next edition of *Litigation Notes*.

http://www.austlii.edu.au/au/cases/cth/HCA/2008/2.html

State insurance

Attorney-General (Vic) v Andrews

High Court of Australia, 21 March 2007
[2007] HCA 9; (2007) 233 ALR 389

The High Court held that a Commonwealth law providing for a constitutional corporation to move from a compulsory state-based workers compensation scheme to the Commonwealth workers compensation scheme did not infringe the 'State insurance' proviso in s 51(xiv) of the Constitution.

Optus Administration Pty Ltd (Optus) sought and was granted a Commonwealth licence to operate as a self-insurer under the Commonwealth workers compensation scheme contained in the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act). Part VIII of the SRC Act, which is relevantly supported by the corporations power (s 51(xx) of the Constitution), provides that corporations licensed to operate as self-insurers under that Act are not subject to any state or territory laws 'relating to workers compensation'. As a result, Optus was no longer subject to Victorian legislation that imposed workers compensation liabilities on employers in Victoria and required such employers to insure those liabilities with the Victorian WorkCover Authority (VWA).

Section 51(xiv) of the Constitution relevantly confers power on the Commonwealth Parliament to legislate with respect to 'insurance, *other than State insurance* ...'. In proceedings brought in the Federal Court, the Attorney-General for Victoria and the VWA argued that Pt VIII of the SRC Act invalidly infringed the 'State insurance' proviso in s 51(xiv) by removing a licensed corporation such as Optus from the state's workers compensation scheme, including the requirement to insure with VWA. This argument was rejected at first instance by Selway J. The Victorian Attorney-General appealed to the Full Federal Court and that appeal was then removed into the High Court.

In dismissing the appeal, the majority judgments took two different approaches. Gleeson CJ focused directly on the application of the 'State insurance' proviso in s 51(xiv). State insurance, his Honour held, 'means the business of insurance conducted by an insurer owned or controlled by a State'. While the business conducted by VWA was 'State insurance', Pt VIII of the SRC Act did not seek to regulate the insurance business conducted by VWA and did not prohibit or substantially impair Victoria's capacity to conduct insurance business. Gleeson CJ concluded that the proviso to s 51(xiv) does not protect state legislation that establishes a state *monopoly* requiring that insurance of a particular kind be taken out with a state insurer.

The other majority judgment was that of Gummow, Hayne, Heydon and Crennan JJ. Their Honours held that the direct effect of Pt VIII of the SRC Act was to invalidate those provisions of the Victorian legislation imposing workers compensation liabilities on Optus. In doing so, Pt VIII did not bear the character of a law with respect to insurance or State insurance, notwithstanding that the effect of Pt VIII was to relieve Optus of any liabilities that the Victorian legislation would otherwise have required it to insure with the VWA.

Part VIII of the SRC Act did not bear the character of a law with respect to insurance or State insurance ...

The minority justices (Kirby J and Callinan J) were critical of the approach of both majority judgments and appear to have concluded that a state monopoly of insurance business is, in its operation as a monopoly, protected by the 'State insurance' proviso in s 51(xiv).

AGS (Iain Gentle and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General who intervened, with the Commonwealth Solicitor-General David Bennett AO QC and Daniel Star as counsel. AGS (Craig Rawson) also acted for the Minister for Employment and Workplace Relations, with Daniel Star as counsel.

http://www.austlii.edu.au/au/cases/cth/HCA/2007/9.html

Validity of military tribunals that are not federal courts

White v Director of Military Prosecutions

High Court of Australia, 19 June 2007
[2007] HCA 29; (2007) 235 ALR 455

The High Court has unanimously confirmed that service tribunals (that is, military tribunals) that are not federal courts may try members of the Australian Defence Force and impose punishment for at least some service offences.

The *Defence Force Discipline Act 1982* (Cth) established a series of service tribunals, including courts martial and defence force magistrates, to try 'service offences' created by the Act. Some service offences are created by the Act by reference to the ordinary criminal law applicable in the Jervis Bay Territory. The plaintiff was charged with several such offences. She challenged the jurisdiction of a service tribunal to try her, on two grounds:

— First, she argued that 'it is contrary to the Constitution, and beyond the power of the Parliament, to establish a system of military justice involving trial and punishment of service offences, being a form of Commonwealth-made criminal law, by tribunals operating outside of Ch III of the Constitution' ([2]). That was said to follow because, pursuant to s 71 of the Constitution, the only federal bodies that can exercise the 'judicial power of the Commonwealth' are federal courts created in accordance with Ch III, and the service tribunals were not established as Ch III federal courts.

— Alternatively, she argued that service tribunals can only try 'exclusively disciplinary offences' which she defined to mean offences constituted by conduct that would not also amount to an offence under the general law.

The High Court unanimously rejected the plaintiff's first argument, holding that, although service tribunals exercise judicial power, it is not the judicial power *of the Commonwealth* within the meaning of s 71 of the Constitution. The reasons for this conclusion varied but included the fact that it was supported by a line of earlier High Court authority that the Court refused to overrule; that there was a long history of service tribunals operating outside of Ch III of the Constitution; and the nature of the defence force as a disciplined force.

... although service tribunals exercise judicial power, it is not the judicial power of the Commonwealth *within the meaning of s 71 of the Constitution.*

In relation to the plaintiff's second argument, previous High Court decisions had given rise to three competing views on the conduct that can be made a service offence triable by a service tribunal. The plaintiff's second argument was based on the view, primarily advanced by Deane J in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, that service offences can validly be tried by a service tribunal only if they are exclusively or essentially disciplinary in nature.

Although, as the joint judgment of Gummow, Hayne and Crennan JJ recognised, 'difficult questions may arise in considering the significance for a particular case of that overlap [between civilian and service offences]' ([76]),

a majority of the High Court (Kirby J dissenting) rejected the argument that service tribunals can try only offences constituted by conduct that would not amount to an offence under the general law. As Gleeson CJ stated (citing Brennan and Toohey JJ in *Re Tracey*) (at [21]):

> ... whether an offence is more properly to be regarded as an offence against military discipline or a breach of civil order will often depend, not upon the elements of the offence, but upon the circumstances in which it is committed.

... the majority justices did not need to decide what service offences may validly be dealt with by a service tribunal outside Ch III ...

However, because of a concession made by the plaintiff, the majority justices did not need to decide what service offences may validly be dealt with by a service tribunal outside Ch III, and in particular did not decide between what are known as the 'service status' and the 'service connection' tests (see, for example, *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308, discussed in *Litigation Notes* No 13 (29 November 2005)).

Following the hearing of this matter, the Act was amended to replace courts martial and defence force magistrates with the Australian Military Court (see Pt VII, Div 3 of the Act). The Australian Military Court is also not a federal court established under Ch III of the Constitution.

AGS (Andras Markus, and David Lewis and Andrew Buckland from the Constitutional Litigation Unit) acted for the Director of Military Prosecutions and the Commonwealth, with the Commonwealth Solicitor-General David Bennett AO QC, Tom Berkely and Stephen Lloyd as counsel.

http://www.austlii.edu.au/au/cases/cth/HCA/2007/29.html

About the authors

David Bennett QC *leads the AGS constitutional litigation practice. He has advised the Commonwealth on constitutional law and policy issues for more than 20 years.*

Andrew Buckland *is the Senior Executive Lawyer in charge of the AGS Constitutional Litigation Unit. He has run a number of significant constitutional cases in the High Court and advises on constitutional and federal jurisdiction issues.*

David Lewis *is a Senior Lawyer in the AGS Constitutional Litigation Unit. He has run several recent significant constitutional cases and has advised extensively on constitutional and other public law issues.*

Susie Brown *is a Senior Lawyer in AGS Office of General Counsel and specialises in advising on constitutional law, statutory interpretation, employment law and environmental law.*

Simon Thornton *is a Lawyer who has recently joined the AGS Constitutional Litigation Unit and has a range of litigation and commercial experience.*

AGS contacts

AGS has a team of lawyers specialising in constitutional litigation.
For further information on the articles in this issue, or on other constitutional litigation issues, please contact David Bennett QC or Andrew Buckland.

David Bennett QC
Deputy Government Solicitor
T *02 6253 7063* ***F*** *02 6253 7303*
david.bennett@ags.gov.au

Andrew Buckland
Senior Executive Lawyer
T *02 6253 7024* ***F*** *02 6253 7303*
andrew.buckland@ags.gov.au

For information on general litigation and dispute resolution matters and services, please contact any of the lawyers listed below.

Canberra	Jenny Anderson	02 6253 7401
Sydney	Greg Kathner	02 9581 7568
Melbourne	Susan Pryde	03 9242 1426
Brisbane	Barry Cosgrove	07 3360 5647
Perth	Graeme Windsor	08 9268 1102
Adelaide/Darwin	Sarah Court	08 8205 4231
Hobart	Peter Bowen	03 6210 2104

Offices

Canberra
50 Blackall Street Barton ACT 2600

Sydney
Level 42, 19 Martin Place Sydney NSW 2000

Melbourne
Level 21, 200 Queen Street Melbourne VIC 3000

Brisbane
Level 12, 340 Adelaide Street Brisbane QLD 4000

Perth
Level 19, 2 The Esplanade Perth WA 6000

Adelaide
Level 18, 25 Grenfell Street Adelaide SA 5000

Hobart
Level 8, 188 Collins Street Hobart TAS 7000

Darwin
Level 3, 9–11 Cavenagh Street Darwin NT 0800

Web site
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