



Litigation notes

Number 22 | 10 December 2012

VALIDITY OF TOBACCO PLAIN PACKAGING LAW UPHELD

In a 6:1 decision, the High Court rejected a challenge brought by a number of tobacco companies to the constitutional validity of the *Tobacco Plain Packaging Act 2011* (Cth) (TPP Act).

The tobacco companies had alleged that the TPP Act is contrary to the limitation on Commonwealth legislative power arising from s 51(xxxi) of the Constitution, the section that gives the Commonwealth Parliament power to make laws 'with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'. All of the 6 Justices in the majority concluded that s 51(xxxi) was not engaged because there was no 'acquisition' for constitutional purposes: no-one acquired a benefit in the nature of 'property' from the operation of the TPP Act.

JT International SA v Commonwealth

British American Tobacco Australasia Limited v Commonwealth

High Court of Australia, 15 August 2012 (orders), 5 October 2012 (reasons) [2012] HCA 43; (2012) 86 ALJR 1297; (2012) 291 ALR 669

The Tobacco Plain Packaging Act

The long title of the TPP Act is 'An Act to discourage the use of tobacco products, and for related purposes'. The stated objects of the TPP Act are to improve public health and to give effect to certain obligations that Australia has as a party to the World Health Organization Framework Convention on Tobacco Control (s 3). The TPP Act aims to improve public health by discouraging people from taking up or resuming smoking or using tobacco products, encouraging people to give up smoking or using tobacco products and reducing people's exposure to smoke from tobacco products. Parliament's stated intention is to contribute to achieving the TPP Act's objects by regulating the retail packaging and appearance of tobacco products in order to reduce the appeal of tobacco products to consumers, to increase the effectiveness of health warnings on the packaging and to reduce the ability of the packaging to mislead consumers about the harmful effects of smoking or using tobacco products (s 3).



Gavin Loughton
Senior Executive Lawyer
T 02 6253 7203
gavin.loughton@ags.gov.au



Megan Caristo Lawyer
T 02 6253 7515
megan.caristo@ags.gov.au



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

In this issue

<i>Commonwealth's power to contract and spend money: challenge to the National School Chaplaincy Program</i>	7	<i>Judicial power and validating legislation</i>	23
<i>Statutory caps on payments for radio broadcasts of sound recordings</i>	12	Other constitutional decisions in brief	
<i>Race field information fees consistent with freedom of interstate trade and commerce</i>	15	<i>Judicial power and parole</i>	26
<i>Queensland prisoner legislation does not infringe the implied freedom of political communication</i>	20	<i>Examination power validly conferred on courts</i>	27
		<i>Power of State Supreme Courts to review for jurisdictional error</i>	29

The general effect of the TPP Act is that, from 1 December 2012, all tobacco products must be sold in plain packaging. To take only the main requirements, the packaging must be of a standardised drab colour and, with only limited exceptions, must not bear any trade mark, logo, symbol or other mark. The outer and inner surfaces of the packaging must not have any decorative ridges, embossing, bulges or other irregularities of shape or texture. In the case of cigarette packs in particular, they must be rigid and made of cardboard and must be of a standardised shape and dimensions. The outer surfaces of the pack must (when the pack is closed) be rectangular and the edges must be rigid, straight and not rounded, bevelled or otherwise shaped or embellished in any way, other than as permitted by regulations. If the pack contains lining, that lining must be made only of foil backed with paper (ss 18–20).

The brand name or business name for the tobacco product is permitted to appear on tobacco packaging, but only in a prescribed font, size and colour (ss 20(3) and 21). Separately, under an instrument made under the *Competition and Consumer Act 2010* (Cth) tobacco packaging will also be required to carry graphic health warnings with the Quitline logo and telephone number, covering 75% of the front of tobacco packaging and 90% of the back of tobacco packaging.

The Commonwealth argued that ‘the intellectual property rights relied on by the plaintiffs are “negative” rights only. They do not confer on the plaintiffs any positive right or liberty to use or exploit any trade marks, copyrighted works, designs, patents etc’.

The arguments

The plaintiff tobacco companies relied on various kinds of statutory and common law intellectual property rights that are used in the packaging and sale of their tobacco products, especially:

- trade marks registered pursuant to the *Trade Marks Act 1995* (Cth), including trade marks featuring brand names such as ‘Winfield’ and ‘Camel’
- artistic works in which copyright subsists under the *Copyright Act 1968* (Cth) – namely, art that appears on tobacco packaging
- patents registered pursuant to the *Patents Act 1990* (Cth): the patents relied on by British American Tobacco Australasia Limited (BATA), such as a special seal for packs, were innovations for cigarette packaging
- a design registered under the *Designs Act 2003* (Cth), namely a ‘ribbed’ cigarette pack
- ‘get-up’ – namely, the distinctive appearance of the plaintiffs’ various packagings, exclusive use of which is protected at common law by the tort of passing off
- reputation and goodwill arising from the use of the above rights
- the right to license and assign the above rights.

The plaintiffs said that these rights are rights of ‘property’ as the word is used in s 51(xxxi) of the Constitution and that, given the other, near-comprehensive bans on the advertising and promotion of tobacco arising from other State and Commonwealth statutes, the TPP Act now deprives the plaintiffs of the only meaningful way they can exploit this property and the only remaining economically beneficial use of it. The plaintiffs argued that the effect of the TPP Act was therefore to acquire their property without the provision of just terms, contrary to s 51(xxxi) of the Constitution. On the plaintiffs’ argument the TPP Act, or at least the main parts of it, is either invalid or must be read down in a way that deprives it of most of its force.

In reply, the Commonwealth defended the validity of the legislation on 3 broad bases:

- ***The TPP Act takes no property.*** The intellectual property rights relied on by the plaintiffs are ‘negative’ rights only. They do not confer on the plaintiffs any positive right or liberty to use or exploit any trade marks, copyrighted

works, designs, patents etc. This intellectual property only allows the plaintiffs to stop *other people* from using certain trade marks, copyrighted works etc. The TPP Act does not affect the plaintiffs' negative right to stop other people and, accordingly, no property is taken.

- ***Even if property has been taken, none is acquired.*** For there to be an acquisition for constitutional purposes, not only must someone's property rights be taken or diminished but also someone else must obtain a benefit or advantage that is of a proprietary character. The TPP Act merely regulates conduct. It does not confer on anyone a benefit in the nature of 'property'.
- ***Any acquisition is not within s 51(xxxi) or on unjust terms.*** The TPP Act regulates trading activity in a manner appropriate and adapted to the legitimate objective of improving public health. Any acquisition of property is incidental or consequential upon that regulation. The TPP Act, properly characterised, is therefore not legislation of a kind that falls within the scope of s 51(xxxi); or if it does then, given the harm to which it is directed, its terms are fair and just.

In 6 separate judgments the Court, by a majority of 6:1, rejected the challenge to the validity of the TPP Act and held that there was no 'acquisition' because no-one had acquired a benefit of a proprietary kind from the operation of the Act.

The reasons

In 6 separate judgments the Court, by a majority of 6:1 (Heydon J dissenting), rejected the challenge to the validity of the TPP Act. All of the 6 Justices in the majority held that there was no 'acquisition' under s 51(xxxi) of the Constitution because no-one had acquired a benefit of a proprietary kind from the operation of the Act.

French CJ observed that the statutory creation and regulation of intellectual property rights, which serves public purposes, has from time to time involved changing balances in the commercial and consuming public's interests. While relevant to the circumstances in which their restriction or regulation would amount to an acquisition of property, this did not render them 'inherently susceptible to variation' and so not within the protection of s 51(xxxi) at all. However, the question of acquisition 'directs attention to ... [the] source and nature [of the intellectual property rights] and the consequences of the restrictions imposed by the TPP Act upon their use or enjoyment' (French CJ [30], [35]; see also Gummow J [103]–[105]).

Does the Tobacco Plain Packaging Act 'take property'? (Not resolved)

The Commonwealth did not dispute that (for the most part, but not accepting the get-up and associated rights) the various kinds of intellectual property rights relied on by the plaintiffs constitute 'property' within the meaning of s 51(xxxi) of the Constitution. However, as its first line of defence of the TPP Act, the Commonwealth did dispute that the TPP Act had the effect of depriving the plaintiffs of that property.

The Court did not resolve this argument. Three Justices (French CJ [37]; Gummow J [141]; and Heydon J in dissent) held there was a taking or deprivation of the plaintiffs' property. One Justice held that there was no sufficient taking or deprivation. The remaining 3 Justices did not decide the question.

French CJ rejected the Commonwealth's submission that the TPP Act did not effect a 'taking' ([37]–[38]). His Honour did accept that the intellectual property rights in issue in this case are 'negative in character' ([36]). However, he also accepted BATA's argument that 'rights to exclude others from using property have no substance if all use of the property is prohibited' ([37]). Thus his Honour appears to have proceeded on the basis that although, in form, the plaintiffs' rights remained unimpaired by the TPP Act, as a practical matter the effect of the TPP Act was to render the intellectual property in question useless in

The plaintiffs 'were deprived of their ability to enjoy the fruits of their statutory monopolies'.

the hands of its owners (both as to their use and in authorising use by others ([31])) and this was a sufficient 'deprivation' to enliven the possible operation of s 51(xxxi). The plaintiffs 'were deprived of their ability to enjoy the fruits of their statutory monopolies' ([38]). Heydon J (in dissent as to the result) adopted similar reasoning on this point ([216], [223]).

Gummow J also held that the statutory intellectual property rights in issue did not confer any liberty to use the property 'free from restraints found in other statutes' ([137]). However, his Honour identified a right of a positive character that was (in his view) in substance taken away by the TPP Act. His Honour noted that the statutory intellectual property rights relied on by the plaintiffs involve 'a power of exclusion'. Incidental to this is 'the right to relax that exclusivity in favour of licensees and assignees of the intellectual property in question, who on their part undertake obligations to the licensor or assignor' ([137]). Gummow J concluded that the TPP Act takes away those rights (see also Heydon J [216]). Upon the coming into force of the TPP Act any licensee or assignee of the intellectual property rights relied on by the plaintiffs 'would be enabled to exercise a licence or enjoy the assignment' only in a 'constrained manner. The result is that while the trade marks remain on the face of the register, their value and utility for assignment and licensing is very substantially impaired' ([139]). The plaintiffs' rights were 'in substance, if not in form, denuded of their value and thus of their utility' by the TPP Act ([138]). (His Honour found it unnecessary to decide whether the rights adhering to common law goodwill extend to rights of assignment or licensing that were then 'taken' by the TPP Act ([143]).)

Crennan J adopted a different analysis on the question of 'taking' and reached the contrary conclusion. Her Honour's starting point was that '[t]he plaintiffs acknowledged that there was no formal deprivation' of their intellectual property rights ([279]). What was alleged instead was an indirect taking: the plaintiffs 'contended that they had been "in a real sense ... stripped of the possession and control" of their property' ([279]). Her Honour noted that the plaintiffs described the effect of the TPP Act 'as reducing their proprietary rights to a "husk", as taking the entire "substance" of those rights, as effectively "sterilising" them ... and stripping them of all their worth or value' ([282]). Her Honour focused on this latter contention and concluded that it was 'overstated' ([284]). Her Honour concentrated her analysis on the principal kind of intellectual property rights relied on by the plaintiffs – namely, their trade marks. The 'core function' of a trade mark is to distinguish the registered owner's goods from those of another. By allowing brand names to continue to appear on tobacco packaging, the TPP Act still allows this 'core function' to be discharged ([293]; see also [285], [290]). It is true that the TPP Act restricts the plaintiffs' rights in their registered trade marks and possibly brings about a diminution of the value of those rights. But that is a long way short of the plaintiffs' contention that their rights had been reduced to a 'husk' or 'sterilised'. Thus, in her Honour's view, the TPP Act 'did not constitute a taking amounting to an indirect acquisition' ([296]).

Hayne and Bell JJ held that they did not need to consider whether the TPP Act effects a 'taking' because the relevant constitutional question was whether there had been an 'acquisition' of property ([164], [166]). Similarly, Kiefel J did not address the question of whether there had been a 'taking'.

Was there an acquisition of property? (No)

Although the 6 Justices in the majority took different approaches to the question of whether there was a 'taking', they were unanimous in concluding that the TPP Act did not involve an 'acquisition' of property for the purposes of s 51(xxxi). It is in the reasoning on this issue that the ratio of the case lies. All 6

The plaintiffs' rights were 'in substance, if not in form, denuded of their value and thus of their utility' by the TPP Act.

The 'core function' of a trade mark is to distinguish the registered owner's goods from those of another ... the TPP Act still allows this 'core function' to be discharged.

Justices emphasised that for s 51(xxxi) to be engaged there must be more than a mere taking of property rights. Somebody else must acquire a benefit or advantage and, crucially, that benefit must be in the nature of property, of a 'proprietary' kind (see French CJ [42]; Gummow J [147]; Hayne and Bell JJ [169]; Crennan J [277]; Kiefel J [357]). All of the majority Justices rejected the plaintiffs' reliance on a suggestion of Deane J in the *Tasmanian Dam Case* (1983) 158 CLR 1 at 286–287 that the 'benefit' that was obtained need not be of a proprietary character for s 51(xxxi) to be enlivened (cf Heydon J [200]). An acquisition of property is not made out by mere restriction or extinguishment of a right of property (French CJ [42]; Hayne and Bell JJ [167]; Kiefel J [357]). Nor is it made out by an adverse impact on the 'general economic and commercial position occupied by traders' (Gummow J [47]; see also Hayne and Bell JJ [167]; Crennan J [295]; Kiefel J [357]). In this case, whatever benefits or advantages were conferred on the Commonwealth or anyone else by the TPP Act, they were not benefits in the nature of 'property' (see French CJ [42]; Gummow J [147]–[148]; Hayne and Bell JJ [176], [181]–[184]; Crennan J [306]; Kiefel J [369]–[370]).

As Gummow J concluded, by itself 'pursuit of the legislative objectives stated in s 3 of the [TPP Act] does not yield a benefit or advantage to the Commonwealth which is proprietary in nature' ([147]). The majority rejected the plaintiffs' arguments that the 'control' effected by the TPP Act of their tobacco packaging, together with the removal of the plaintiffs' ability to use marks and other distinctive features of packaging, resulted in the Commonwealth acquiring a proprietary interest (French CJ [42]; Gummow J [147]–[150]; Hayne and Bell JJ [183]; Crennan [306]; Kiefel J [362]). Likewise, a suggested enhancement of goodwill attached to the Quitline logo or a benefit to the Commonwealth of an expected reduction in public health expenditure were 'conjectural' and, like mere discharge of a treaty obligation, insufficient to provide an acquisition (Gummow J [148]).

Hayne and Bell JJ (French CJ [42]; Gummow J [150] agreeing) said that to characterise the effect of the TPP Act as 'control' of retail packaging by the Commonwealth, as the plaintiffs sought to do, diverted attention from the 'fundamental question' of whether the TPP Act gave the Commonwealth a legal interest in the packaging or created a legal relation between the Commonwealth and the packaging that the law describes as 'property' ([183]). They concluded that compliance with the TPP Act created no proprietary interest ([183], [187]). Their Honours held that 'no-one other than the tobacco company that is making or selling the product obtains any use of or control over the packaging' ([182]; see also Crennan J [301], [306]; Kiefel J [362], [369]–[370]). The TPP Act, like other laws requiring warning labels on products, affected the packaging and the use the plaintiffs could make of it, but 'no-one other than the tobacco company makes the decision to sell and to sell in accordance with the law' ([182]). The 'control' achieved by the Commonwealth over the packaging accrued to it only the benefit or advantage of pursuit of its statutory objectives (Kiefel J [369]; see also Hayne and Bell JJ [188]). Or, as Gummow J put it, '[c]ompliance with the [TPP Act] does not create a relationship between "the Commonwealth" and the packaging which is proprietary in nature' ([150]). French CJ concluded:

The fact that the restrictions and prohibitions imposed by the TPP Act create the 'space' for the application of Commonwealth regulatory requirements as to the textual and graphical content of tobacco product packages does not constitute ... an accrual [of rights to the Commonwealth corresponding to those restrictions]. Rather, it reflects a serious judgment that the public purposes to be advanced and the public benefits to be derived from the regulatory scheme outweigh those public purposes and public benefits which underpin the statutory intellectual property rights and the common law rights enjoyed by the plaintiffs. The scheme does that without effecting an acquisition. ([43])

All 6 Justices emphasised that for s 51(xxxi) to be engaged there must be more than a mere taking of property rights. Somebody else must acquire a benefit or advantage and, crucially, that benefit must be in the nature of property, of a 'proprietary' kind.

They concluded that compliance with the TPP Act created no proprietary interest.

In dissent, Heydon J held that the TPP Act gave new, related rights to the Commonwealth, including ‘the right to command how what survived of the [plaintiffs’] intellectual property ... should be used’ and ‘the right to command how the surfaces of the [plaintiffs’] chattels should be employed’ ([217]). The prohibition on the plaintiffs’ rights was ‘integral to the Commonwealth’s command to employ health warnings’ in that ‘the Commonwealth could not have obtained the advantage it gained from the command without the prohibition’ ([219], [224]). His Honour concluded that the Commonwealth’s control was ‘a measurable and identifiable advantage relating to the ownership or use of property’ which enlivened the guarantee in s 51(xxxi) ([226]).

If there was an acquisition, was it nevertheless not within s 51(xxxi) or on unjust terms?

Only Heydon J came to a conclusion on the Commonwealth’s third argument, the other judges finding it unnecessary to decide (Gummow J [156]; Hayne and Bell JJ [189]; Crennan [307]; Kiefel J [344]). His Honour rejected the Commonwealth’s submission that, even if the TPP Act acquired property, the acquisition did not amount to an acquisition for the purposes of s 51(xxxi) because it was a necessary incident of a legislative measure that was reasonably necessary to prevent or reduce harm to public health caused by the trading activity that was being regulated ([230]). He held that Australian constitutional law does not recognise a general principle that legislation contrary to a constitutional limitation on power will not be invalid so long as it reasonably appropriate and adapted to a legitimate end within power ([232]). His Honour further found that the TPP Act did not provide ‘just terms’ for the acquisition of the plaintiffs’ property and rejected the Commonwealth’s submission that the TPP Act provided just terms in the form of ‘fair dealing’ between ‘[plaintiffs] and the Australian nation representing the Australian community put at risk by their products’: ‘the furtherance of the public interest is not a reason to deny just compensation to the property owner’ ([236]).

Kiefel J, although finding it unnecessary to reach a conclusion on the argument, did make some preliminary observations of a sceptical nature about the Commonwealth’s third argument. Her Honour stated that the Commonwealth’s argument bore ‘little resemblance to the tests of proportionality which are applied to the constitutionally guaranteed freedoms’ ([336]); rather, it merely said that, because an acquisition was incidental to its purpose of preventing public health, it went no further than was reasonably necessary ([338]). This concerned her Honour. For her, ‘[a] test of proportionality is necessary where a law purports to restrict constitutional freedoms, because although they cannot be regarded as absolute, the Constitution does not express the limits which may be placed upon them’ ([337]). By contrast, ‘[s]ection 51(xxxi) contains its own limits and conditions’ ([340]). She concluded that the Commonwealth’s argument elided 2 issues: proportionality and the characterisation of a law ([341]). Her Honour concluded that the Commonwealth’s argument might ‘really come down to ... a proposition that some legislative purposes might justify infringement of, or the treatment of a law as standing apart from and not subject to the requirements of, s 51(xxxi)’. However, that was a ‘large proposition’ and it was unnecessary to consider it further ([344]).

Validity of s 15(2)

In the event that some or all of the provisions of the TPP Act had an operation that infringed s 51(xxxi), questions would arise as to whether the TPP Act was intended only to operate fully and according to its terms or whether it was possible to sever the invalid part(s). Against that possibility the TPP Act contained s 15(2), the effect of which (read with ss 15(1) and 15(3)) was that the TPP Act would continue to operate but with the invalid operation severed.

Heydon J ... held that Australian constitutional law does not recognise a general principle that legislation contrary to a constitutional limitation on power will not be invalid so long as it reasonably appropriate and adapted to a legitimate end within power.

The plaintiffs challenged the validity of s 15(2), arguing that it did not contain a standard or test that a court could apply to limit the operation of the TPP Act, with the result that s 15 was asking a court to perform a legislative and not judicial function contrary to the requirements of Ch III. Only some Justices considered this argument. Gummow J (with whom French CJ agreed at [9]) rejected the plaintiffs' argument, finding that s 15(2) was merely 'a severability provision of a specific application' that did not require the Court to 'read up' the TPP Act in an impermissible manner ([99]).

AGS (Gavin Loughton, Andrew Buckland, David Hume, Megan Caristo and David Bennett QC from the Constitutional Litigation Unit and Justine Knowles from AGS Dispute Resolution) acted for the Commonwealth with the then Commonwealth Solicitor-General Stephen Gageler SC, Ron Merkel QC, Stephen Lloyd SC, Jeremy Kirk SC, Anna Mitchelmore and Julian Cooke as counsel.

The text of the decision is available at:

<http://www.austlii.edu.au/au/cases/cth/HCA/2012/43.html>

COMMONWEALTH'S POWER TO CONTRACT AND SPEND MONEY: CHALLENGE TO THE NATIONAL SCHOOL CHAPLAINCY PROGRAM

In a 6:1 decision, the High Court held invalid a funding agreement entered into by the Commonwealth under the National School Chaplaincy Program (NSCP) and payments made by the Commonwealth under that agreement. In so concluding, a majority of 4 Justices held that, in the absence of statutory authority, the Commonwealth does not have a general executive power to make contracts or spend money.

Williams v Commonwealth

High Court of Australia, 20 June 2012

[2012] HCA 23; (2012) 86 ALJR 713; (2012) 288 ALR 410

Background

This matter involved a challenge to the constitutional basis for the Commonwealth's activities and expenditure in relation to the NSCP. The NSCP was an administrative program for the funding of chaplaincy services in schools, administered most recently by the Department of Education, Employment and Workplace Relations pursuant to guidelines issued in respect of the NSCP. Apart from annual appropriations, the NSCP was not supported by statutory authority.

In November 2007, the Commonwealth entered into a funding agreement with Scripture Union Queensland (SUQ) under the NSCP for the provision of chaplaincy services at the Darling Heights State Primary School. SUQ was a company incorporated under the *Corporations Act 2001* which provided chaplaincy services (through chaplains provided by it) in Queensland schools.

Pursuant to the Darling Heights Funding Agreement, SUQ provided chaplaincy services to the school and the Commonwealth made payments in respect of such services in the financial years 2007–08 to 2011–12.

The plaintiff, Mr Williams, is the father of 4 children who were enrolled at the Darling Heights State Primary School. He brought these proceedings against the Commonwealth and relevant ministers, and SUQ, in the High Court to challenge the validity of the NSCP. The Attorneys-General for New South Wales, Queensland, Tasmania, South Australia, Victoria and Western Australia intervened in the proceedings, and the Churches' Commission on Education Incorporated was given leave to appear as *amicus curiae*.



Andrew Buckland

Senior Executive Lawyer

T 02 6253 7024

andrew.buckland@ags.gov.au



Anna Lehane

Counsel

T 02 6253 7330

anna.lehane@ags.gov.au

Plaintiff's challenge

The plaintiff argued the NSCP was invalid on 3 grounds:

- the Commonwealth did not have executive power to enter into the funding agreement or make payments to SUQ
- the payments were not authorised by an appropriation as required by ss 81 and 83 of the Constitution
- the NSCP imposed a religious qualification for a Commonwealth office contrary to s 116 of the Constitution.

The Commonwealth put in issue the plaintiff's standing to challenge the NSCP on the second ground above and to challenge past payments.

Executive power

The case was argued against the background of the High Court's decision in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 (*Pape*) (see *Litigation Notes* No 19, p 1), which held that parliamentary appropriation is not a source of power to spend money (French CJ [111]; Gummow, Crennan and Bell JJ [178], [184]–[185]; Hayne and Kiefel JJ [292], [296]; Heydon J [607]). Hence, the first issue in this case concerned the scope of the Commonwealth's executive power under s 61 of the Constitution, which provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

The Commonwealth argued that the Darling Heights Funding Agreement and payments made under it were valid exercises of the Commonwealth's executive power under s 61. The written submissions of the parties and interveners all proceeded on the common understanding that the Commonwealth's executive power, including the power to enter into contracts and spend money, extended at least to matters in respect of which the Commonwealth has power to legislate, and that no legislative authority other than an appropriation was required to so act. The plaintiff's case had been that the NSCP was not a matter in respect of which the Commonwealth had power to legislate.

During the course of the hearing, however, several members of the Court queried the view that the Commonwealth's executive power (or at least its power to contract and spend) extends at least to the subject matters of Commonwealth legislative power. This led the plaintiff and some States to argue that the Commonwealth's non-statutory executive power was more limited than had been assumed to be the case, and that the Commonwealth did not have executive power to spend money on the NSCP without legislative authority.

The High Court's decision

(1) No executive power to make contracts or spend money for NSCP without legislative authority

Four Justices, in 3 separate judgments (French CJ, Gummow and Bell JJ writing together, and Crennan J), held that the executive power of the Commonwealth did not support the Commonwealth entering into contracts and making payments under the NSCP in the absence of Commonwealth legislation authorising those actions. Appropriation legislation was not sufficient; nor was s 44(1) of the *Financial Management and Accountability Act 1997*, which was interpreted as being directed to the prudent conduct of financial administration rather than conferring power to spend money (French CJ [71]; Gummow and Bell JJ [103]; Crennan J [547]; see also Hayne J [260]; Kiefel J [596]).

The written submissions of the parties and interveners all proceeded on the common understanding that the Commonwealth's executive power, including the power to enter into contracts and spend money, extended at least to matters in respect of which the Commonwealth has power to legislate ...

In reaching this conclusion, these Justices expressly held that, in the absence of legislative authority, the executive power of the Commonwealth does not extend generally to enable it to enter contracts and spend public money relating to any subject matter falling within a head of legislative power (French CJ [4]; Gummow and Bell JJ [135]–[137]; Crennan J [544]).

An important feature of these judgments is the articulation of limits on executive spending without legislative authority arising from the relationship between the executive government and the Parliament, and also the relationship between the Commonwealth and the States.

With respect to the relationship between the Executive and the Parliament, these Justices considered that the system of responsible and representative government provided for by the Constitution would be undermined if the executive government were generally able to enter into contracts without legislative authority. The parliamentary appropriation process was not generally considered to be sufficient to ensure adequate parliamentary control over executive contracting and spending, particularly given the limited powers of the Senate with respect to appropriation Bills under s 53 of the Constitution. Their Honours also rejected the notion that the Commonwealth (or the Executive) should be regarded as having the same capacity to contract as a natural person. Rather, the Commonwealth Executive was to be seen as a branch of the Commonwealth as a polity, with powers limited by reference to its relationship with the other branches of the polity, particularly the Senate (French CJ [21], [38], [60]–[61]; Gummow and Bell JJ [136], [154]–[155]; Crennan J [516]–[517]; see also Hayne J [204]).

These 4 Justices also considered that an ability for the Commonwealth Executive to enter into contracts and spend money without legislative authority beyond an appropriation would have the potential to interfere with the executive branches of the States in a manner inconsistent with the federal system of government established by the Constitution. In particular, it could in practice diminish the authority of the States within the residual areas of power left to them under the Constitution. The Commonwealth spending in this case was contrasted with the granting of financial assistance to the States under s 96 of the Constitution, which has a ‘consensual aspect’ (French CJ [37], [83]; Gummow and Bell JJ [143], [146]–[148]; Crennan J [500]–[502], [522]; see also Hayne J [248]).

(2) Contrast with expenditure in *Pape*

The spending engaged in under the NSCP was distinguished by at least 3 Justices from the spending (the provision of tax bonus payments) upheld in *Pape* in ways relevant both to considerations of responsible and representative government and federalism.

First, Gummow and Bell JJ and Crennan J noted that *Pape* concerned the validity of a statute, whereas in this case there had been no engagement of the Parliament in supplementation of the exercise of the executive power by a statute (Gummow and Bell JJ [90], [143]; Crennan J [499]).

Secondly, the Commonwealth spending considered in *Pape* occurred in response to a national emergency in relation to which only the Commonwealth (or the Commonwealth Executive) had the ability to respond promptly, such that the spending was within the executive power referable to the government of Australia as a nation. In the current context, by contrast, the States had the capacity and means to provide for a scheme such as the NSCP (Gummow and Bell JJ [146]; Crennan J [499]–[507]).

Four Justices expressly held that, in the absence of legislative authority, the executive power of the Commonwealth does not extend generally to enable it to enter contracts and spend public money relating to any subject matter falling within a head of legislative power.

(3) When is legislation not required?

In holding that there was no executive power to support the payments in this case, these 4 Justices all appeared to accept that not all executive contracting and expenditure requires legislative authority beyond an appropriation. In particular, and although expressed in different ways in the various judgments, it appears that specific legislation (beyond an appropriation) will not be required to authorise contracting and expenditure at least for the ordinary and well-recognised functions of the government. However, the contracting and spending engaged in by the Commonwealth under the NSCP – a large-scale program in an area traditionally regulated by the States – was considered to go beyond this description (French CJ [4], [34], [74], [79], [83]; Gummow and Bell JJ [139]–[141], [143]; Crennan J [525]–[534]).

In holding that there was no executive power to support the payments in this case, these 4 Justices all appeared to accept that not all executive contracting and expenditure requires legislative authority beyond an appropriation.

(4) Subject matters of executive spending

The 2 other Justices in the majority, Hayne J and Kiefel J (writing separately), held that the Commonwealth's executive power to spend was not unlimited as to purpose. However, even if it extended to any subject matter within Commonwealth legislative power, their Honours held that the expenditure in the present case was not on a subject within Commonwealth legislative power – that is, the payments could not have been authorised by a valid law made by the Parliament. Specifically, they held that the NSCP could not be regarded as being with respect to trading corporations (under s 51(xx)) or student benefits (under s 51(xxiiiA)). On that basis their Honours did not need to decide the broader question as to the circumstances in which legislative authority (beyond an appropriation) is required to authorise Commonwealth expenditure (Hayne J [183], [253], [286]–[288]; Kiefel J [569], [594]).

In relation to s 51(xxiiiA), their Honours rejected the view that the concept of 'benefits to students' encompassed anything provided by the Commonwealth that is or may be of benefit or advantage to students or that s 51(xxiiiA) approaches an education power. Their Honours considered that the notion of 'benefit' required a more direct or tangible provision of 'material aid' or 'social services' to students (Hayne J [280]–[285]; Kiefel J [570]–[574]). Justice Heydon reached a different view on this aspect in his dissenting judgment (at [408]–[441]).

In relation to s 51(xx), neither Hayne J nor Kiefel J considered it necessary to determine whether SUQ was in fact a 'trading corporation' within the meaning of s 51(xx). Section 51(xx) was considered incapable of supporting the agreement or payments given that the guidelines for the NSCP did not require that a party to a funding agreement for the NSCP be a trading or financial corporation. Put another way, hypothetical legislation implementing the arrangements would not have singled out or produced a differential effect on constitutional corporations and would therefore not have been supported by s 51(xx) (Hayne J [271]–[272]; Kiefel J [575]).

(5) The plaintiff's other grounds for challenge

The plaintiff's other 2 challenges to the validity of the NSCP payments were dealt with only briefly in the decision.

The first was whether the relevant Appropriation Acts authorised the drawing of the money from the Consolidated Revenue Fund for the purpose of making payments under the funding agreement. The majority found it unnecessary to answer this question given the conclusion reached in relation to the separate power to spend money under the NSCP.

The second was whether the NSCP required a religious test as a qualification for an office under the Commonwealth, contrary to s 116 of the Constitution. The Court unanimously dismissed this challenge, finding that the chaplains providing services under the Darling Heights Funding Agreement could not be considered to hold 'offices ... under the Commonwealth' (French CJ [9]; Gummow and Bell JJ [107]–[110]; Hayne J [168]; Heydon J [444]–[447]; Crennan J [476]; Kiefel J [597], although her Honour did not consider that it was strictly necessary to answer this question).

Standing to challenge past expenditure

The Commonwealth did not dispute the plaintiff's standing to challenge the validity of the Darling Heights Funding Agreement or the power of the Commonwealth to continue to make payments under it. However, the Commonwealth argued that the plaintiff did not have standing to challenge past expenditure under the agreement because it could not properly be the subject of declaratory relief.

The majority found that the plaintiff had standing to challenge all of the payments made under the agreement in the financial years 2007–08 to 2011–12 (as well as the agreement itself). This was on the basis that a number of States supported the plaintiff's case with respect to the validity of the agreement and the payments made under it, and that the States had standing because of their interest in the observance by the Commonwealth of the bounds of the executive power (see Gummow and Bell JJ [112], with whom French CJ, Hayne, Crennan and Kiefel JJ agreed at [9], [168], [475] and [557]). Justice Heydon in his dissenting judgment considered that the plaintiff had standing only to challenge the payment made in 2010–11 (as well as the Agreement). The services for which the payment was made in that financial year were still being performed and were to be performed at the time the proceedings were commenced. His Honour considered that declarations that payments in the previous financial years were unlawful should not be granted because they could not produce foreseeable consequences for the parties. His Honour did not consider there to be any special interest in relation to 2011–12 given that no payment had been made since 11 October 2010 (at [327]–[331]).

AGS (Andrew Buckland, David Lewis, Anna Lehane and Angel Aleksov) acted for the Commonwealth defendants, with the then Commonwealth Solicitor-General Stephen Gageler SC, Geoffrey Kennett SC and Stephen Free as counsel.

The text of the decision is available at:

<http://www.austlii.edu.au/au/cases/cth/HCA/2012/23.html>

The Commonwealth did not dispute the plaintiff's standing to challenge the validity of the Darling Heights Funding Agreement or the power of the Commonwealth to continue to make payments under it.

STATUTORY CAPS ON PAYMENTS FOR RADIO BROADCASTS OF SOUND RECORDINGS

In *PPCA v Commonwealth (PPCA)* the High Court unanimously rejected a challenge to the validity of compulsory licensing provisions in the *Copyright Act 1968 (Cth)* (1968 Act) that govern the broadcast of (amongst other things) popular songs by radio stations. The challenge was based on the ‘just terms’ guarantee in s 51(xxxi) of the Constitution.

The challenge failed on statutory construction grounds. The result was that the questions of s 51(xxxi) jurisprudence raised by the plaintiffs did not fall for decision.

Phonographic Performance Co of Australia Ltd v Commonwealth
High Court of Australia, 28 March 2012
[2012] HCA 8; (2012) 86 ALJR 335; (2012) 286 ALR 61

Background

The general position under the 1968 Act is that a person who makes a recording of a popular song obtains a copyright in that recording (ss 89, 97). This copyright – the copyright in the ‘sound recording’ – is separate from the composer’s copyright in the words and music that go to make up the song. The sound recordings in issue in *PPCA* were well-known recordings dating from before the commencement of the 1968 Act on 1 May 1969: recordings by the Beatles, the Easybeats, Slim Dusty and other famous artists. The copyrights in these sound recordings were owned by, or licensed to, record companies or music publishers.

One of the rights included in the copyright in a sound recording is the ‘exclusive right’ to ‘communicate the recording to the public’ (1968 Act, s 85). In consequence, if s 85 were the only relevant provision, the owner of the copyright in a sound recording of a popular song would have, in practical effect, a right of veto over any broadcasts of that sound recording by (say) radio stations. However, s 109 of the 1968 Act changes that. The effect of s 109 is to bring about a compulsory licensing scheme. Section 109 operates to allow a broadcaster to broadcast sound recordings even without authorisation from the owners of the copyrights provided (relevantly) that the broadcaster undertakes beforehand to pay remuneration to the holders of the copyrights. The precise amount of remuneration that is payable is fixed by agreement of the parties concerned or, in the absence of any such agreement, is determined by the Copyright Tribunal.

Subsection 152(8) of the 1968 Act caps the total amount of remuneration payable by any commercial broadcaster, in respect of any period, at 1% of the broadcaster’s revenue for that period. Similarly, s 158(11) sets out a formula for a cap on the amount payable by the ABC.

The caps in s 152 did not exist before 1969. From 1911 to 1968 the copyright law of Australia was governed by an Imperial Act of the British Parliament – the *Copyright Act 1911 (Imp)* (1911 Act). There was no compulsory licensing scheme under the 1911 Act. Under the 1911 Act as it came to be interpreted in the cases, the holders of copyrights in sound recordings did have, in effect, a right of veto over any broadcasts of sound recordings. In principle, this right of veto allowed the holder of a copyright in a sound recording to demand from a broadcaster as high a price as the market would bear for permission to broadcast that sound recording. In practice, from about the mid-1950s radio airplay became



Gavin Loughton
Senior Executive Lawyer
T 02 6253 7203
gavin.loughton@ags.gov.au

The sound recordings in issue, dating from before the commencement of the 1968 Act, were recordings by the Beatles, the Easybeats, Slim Dusty and other famous artists.

so important for the commercial success of recordings of popular songs that holders of copyrights in them were not in a position to insist on any significant payments from radio stations in return for permission to broadcast these sound recordings.

This right of veto over broadcasts of sound recordings, such as it was, was taken away by the 1968 Act. That Act abolished copyrights subsisting under the 1911 Act and in substitution for them conferred fresh copyrights, thenceforth to subsist under the 1968 Act. These fresh copyrights were subject to the compulsory licensing regime with capped remuneration, as provided for by ss 109 and 152.

Outline of the challenge

In 2010, some 42 years after the enactment of the 1968 Act, the holders of copyrights in various British and Australian sound recordings that predated the 1968 Act, and their collecting society (the Phonographic Performance Company of Australia Limited), commenced a challenge to the constitutional validity of the caps in s 152.

The plaintiffs argued that their copyrights held under the 1911 Act were continued in existence by provisions of the 1968 Act but on and from 1 May 1969 were subjected to the compulsory licensing and capped remuneration provided for in ss 109 and 152. The plaintiffs argued that the caps in s 152 reduced their rights in, and the value of, their pre-1 May 1969 copyrights by providing for remuneration that fell short of equitable remuneration. This, it was alleged, gave rise to an acquisition (of their copyright under the 1911 Act) without providing 'just terms', contrary to s 51(xxxi) of the Constitution.

The plaintiffs did not seek the invalidity of the whole of the regime set up by the 1968 Act with a consequent return to the regime of the 1911 Act. Rather, they sought a result by which the regime set up under the 1968 Act continued to operate, but without the caps in s 152(8) and (11).

The Court's rejection of the statutory premise of the plaintiffs' argument

The Court accepted the Commonwealth's submission rejecting the starting premise of the plaintiffs' argument: that their copyrights under the 1911 Act were continued in existence by the 1968 Act. The correct view is that the plaintiffs' copyrights under the 1911 Act were terminated and the fresh copyrights conferred in substitution by the 1968 Act were, from their inception, subject to the compulsory licence and caps in ss 109 and 152. Thus French CJ, Gummow, Hayne and Bell JJ accepted the Commonwealth's submission that:

upon the proper construction of the 1968 Act: (a) copyrights subsisting in Australia on 1 May 1969 under the Imperial System were terminated; (b) thereafter, no copyright subsisted otherwise than by virtue of the 1968 Act; and (c) to that copyright in respect of sound recordings there attached immediately the compulsory licensing system including the 'cap' upon the royalties payable thereunder. ([10])

In separate judgments Heydon J ([61(a)] and [63]) and Crennan and Kiefel JJ ([129]) reached a similar conclusion.

The effect of this conclusion was that the provisions challenged by the plaintiffs – ss 109 and 152 of the 1968 Act – 'did not cause any property to be acquired' (Heydon J [63]). The plaintiffs did not attack the termination of the plaintiffs' copyrights under the 1911 Act and the substitution of fresh copyrights under the 1968 Act on (allegedly) inferior terms. There were good reasons for

The plaintiffs' copyrights under the 1911 Act were terminated and the fresh copyrights conferred in substitution by the 1968 Act were, from their inception, subject to the compulsory licence and caps in ss 109 and 152.

this. The probable effect of such a challenge, if successful, would have been that the plaintiffs continued to hold their copyrights under the 1911 Act ([11]; see also [130]). The plaintiffs did not seek such a result. They did not want to return to the regime under the 1911 Act, presumably because the 1968 Act has other significant benefits for them, such as a longer copyright period than the one that existed under the 1911 Act. The plaintiffs could not take the benefits of the regime provided for by the 1968 Act without the burdens of it (including the caps in s 152).

Accordingly, the challenge to the validity of ss 109 and 152 failed because the statutory premise of the plaintiffs' case was not made good. It was unnecessary for the Court to rule on the questions of s 51(xxxi) jurisprudence raised by the case.

The plaintiffs could not take the benefits of the regime provided for by the 1968 Act without the burdens of it.

Observations of Crennan and Kiefel JJ on the copyright power

Crennan and Kiefel JJ did set out some general comments on the relationship between ss 51(xviii) (the copyright power) and s 51(xxxi) (acquisition of property other than on just terms), especially in the context of changing times and circumstances ([96], [109]–[115]). On the one hand their Honours said that:

recurrent legislative balancing of the competing interests of copyright owners and the public does not support absolute propositions such as that copyright is an inherently unstable right, or that reductions in the exclusive rights to do acts within a copyright are always permissible adjustments under s 51(xviii) of the Constitution which do not attract the guarantee under s 51(xxxi). ([96])

On the other hand, in an apparent reference to the regime of compulsory licences for the broadcast of sound recordings instituted by the 1968 Act, their Honours observed that:

The economic impact of any new exception to infringement on a subsisting statutory monopoly, and the public interest to be served by the creation of a new exception to infringement, may affect the question of whether any acquisition of property which the new exception effects will attract the guarantee in s 51(xxxi). ([110])

The other judgments did not address these broader issues.

AGS (Gavin Loughton, Simon Thornton, David Bennett QC and Asaf Fisher from the Constitutional Litigation Unit) acted for the Commonwealth, with the then Commonwealth Solicitor-General Stephen Gageler SC, Stephen Lloyd SC and Kate Richardson as counsel.

The text of the decision is available at:

<http://www.austlii.edu.au/au/cases/cth/HCA/2012/8.html>

RACE FIELD INFORMATION FEES CONSISTENT WITH FREEDOM OF INTERSTATE TRADE AND COMMERCE

In *Betfair Pty Ltd v Racing NSW (Betfair)* and *Sportsbet Pty Ltd v NSW (Sportsbet)* the High Court unanimously dismissed challenges to the validity of fees imposed by NSW horse racing control bodies as a condition of using NSW race field information. In *Sportsbet* the High Court also rejected a challenge to the validity of the legislation authorising the imposition of the fees. The High Court held that the practical operation of the fee did not discriminate against interstate wagering operators in order to protect intrastate operators.

Accordingly, in *Betfair* the Court held that the fee was not contrary to the requirement in s 92 of the Constitution that trade and commerce among the States shall be absolutely free. In *Sportsbet* the Court found that the fee and associated legislation were not inconsistent with s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth) (the NT Act), the statutory equivalent to s 92 of the Constitution that applies to trade and commerce between the Northern Territory and the States.

Betfair Pty Ltd v Racing NSW

High Court of Australia, 30 March 2012

[2012] HCA 12; (2012) 86 ALJR 418; (2012) 286 ALR 221

Sportsbet Pty Ltd v NSW

High Court of Australia, 30 March 2012

[2012] HCA 13; (2012) 86 ALJR 446; (2012) 286 ALR 404

Legislation

Gambling on horse racing in NSW is governed by the *Racing Administration Act 1998* (NSW) (RA Act) and the *Racing Administration Regulation 2005* (NSW) (RA Reg). Provisions in the RA Act and RA Reg require Betfair and Sportsbet (in common with other wagering operators) to obtain a 'race field information use approval' in order to use 'NSW race field information' (RA Act, s 33(1)(a)). NSW race field information is needed, in practice, by wagering operators to conduct their business with respect to NSW racing events. A 'wagering operator' is 'a bookmaker, a person who operates a totalizator or a person who operates a betting exchange'. 'Use of NSW race field information' is, generally speaking, defined to cover any publication or communication, in Australia or elsewhere, of information that identifies the name or number of a horse or greyhound taking part in, or withdrawn from, a race to be held at a race meeting in NSW (RA Act, ss 27, 32A).

Race field information use approvals are granted under s 33A of the RA Act by the relevant racing control body (in the case of thoroughbred racing, Racing New South Wales (RNSW) and, in the case of harness racing, Harness Racing New South Wales (HRNSW)). In accordance with s 33A and cl 16(2) of the RA Reg, the approvals may include a condition that the approval holder pay a fee that does not exceed 1.5% of the holder's wagering turnover that relates to the race (or class of races) covered by the approval. 'Wagering turnover' is defined in cl 14(1) to mean, in relation to a race or class of races, 'the total amount of wagers made on the backers side of wagering transactions made in connection with that race or class of races'.



David Lewis

Senior Executive Lawyer

T 02 6253 7541

david.lewis@ags.gov.au



Simon Thornton

Senior Lawyer

T 02 6253 7287

simon.thornton@ags.gov.au

NSW race field information is needed, in practice, by wagering operators to conduct their business with respect to NSW racing events.

Betfair

Background

Betfair operates a betting exchange and is licensed in Tasmania. In general terms, a 'betting exchange' is a facility that enables persons to place or accept bets with other persons through the exchange or to place bets with the operator of the exchange that the exchange then matches with opposing bets placed by others. Wagers or bets placed and accepted on Betfair's betting exchange may be on horse races or other sporting events, including such events in NSW.

TAB Limited (TAB) has a statutory monopoly to conduct the only off-course totalisator operation in NSW. TAB charges a commission of, on average, 16% of wagering turnover.

Both Betfair and TAB were granted 'race field information use approvals' for thoroughbred and harness racing by RNSW and HRNSW respectively. Each approval was subject to a condition that the wagering operator pay a fee of 1.5% of its 'wagering turnover' to the relevant racing control body (the turnover fee).

Betfair argued that, because of the nature of its wagering operation (a betting exchange), a fee of 1.5% of its wagering turnover represents a far greater percentage of its gross revenue from commissions (between 54% and 61% for 2007–09) than the same fee does for the in-State wagering operator TAB (about 10% of its commission, which is derived from all back bets). This is because there is a fixed and direct relationship between the wagering turnover and gross revenue of a totalisator, while no such relationship exists in respect of the betting exchange conducted by Betfair, as Betfair generally charges commission only on net winnings per event from back or lay bets that are successful, not on all back bets. Accordingly, in this appeal against a decision of the Full Federal Court, Betfair argued that its interstate trade was subject to a protectionist burden or disadvantage contrary to s 92 of the Constitution and that, as a result, the race field information fees were invalid.

Betfair argued that its interstate trade was subject to a protectionist burden or disadvantage contrary to s 92 of the Constitution and that, as a result, the race field information fees were invalid.

The High Court's decision in Betfair

The High Court unanimously rejected Betfair's argument and dismissed its appeal. In doing so, it distinguished its earlier decision in *Betfair v WA* (2008) 234 CLR 418 (discussed in *Litigation Notes* No 16, p 13). The earlier decision involved a WA law that erected barriers against entry into the wagering services market by interstate operators, including a prohibition on a person in WA wagering with a betting exchange outside WA. In contrast, the NSW law in issue here involved payment of a fee for the use of NSW race field information ([6]).

Since *Cole v Whitfield* (1988) 165 CLR 360, the High Court has held that s 92 requires that trade and commerce among the States shall be free from discriminatory burdens of a protectionist kind. Protectionist burdens are those that protect intrastate trade from competition from interstate trade, as a result of either their legal effect or their practical operation.

The joint judgment (French CJ, Gummow, Hayne, Crennan and Bell JJ) found that the race field information fee, applying at the same rate to back bet turnover, was neutral on its face as between the various wagering operators, including TAB and Betfair, and that it was imposed without distinction between interstate and intrastate trade ([29], see also Kiefel J [99]).

Betfair's s 92 argument therefore required it to establish that the practical effect of the fee was to 'discriminate against interstate trade and thereby protect intrastate trade of the same kind' ([36]). The joint judgment emphasised that not all discrimination between competitors in a market engages s 92

of the Constitution ([34]–[37]); rather, '[i]t is the concept of protectionism which supplies the criterion by which discriminatory laws may be classified as rendering less than absolutely free trade and commerce among the States' ([36]; see also Heydon J [59]–[60]; Kiefel J [110]). Betfair was required to identify 'a relevant differential treatment which it can show is likely to discriminate in a *protectionist sense* between interstate and intrastate wagering transactions which utilise NSW race field information' (emphasis added, [31]). Betfair sought to do this by reference to the different effects of the fee on the differing business models of the various wagering operators ([26]; Kiefel J [99]). That is, it relied on the particular features of its business model as a low margin operator to characterise the fee as imposing a discriminatory burden of a protectionist kind ([42]).

One difficulty, however, with Betfair's approach was that 'the subject of s 92 is interstate trade, not traders' ([50]; see also Heydon J [60]–[61]; Kiefel J [112]–[114]). Thus, Betfair's:

emphasis upon the circumstances of particular traders, and upon features which may be accidental to those circumstances and to the interstate transactions in which the traders may engage, risks characterisation of the law in question not by its effect upon interstate trade, the constitutional issue, but by its effect upon particular traders. ([46]; see Kiefel J at [119])

The joint judgment held that the practical operation of the race field information fee based on wagering turnover did not discriminate because it did not show an objective intention to treat interstate and intrastate trade in wagering transactions alike, notwithstanding a relevant difference between them ([52]). This was because 'the circumstance that the fee structure adopted by Betfair for its wagering operations differed from that adopted by other wagering operators did not constitute a relevant difference which, consistently with s 92, could not be disregarded by treating alike interstate and intrastate wagering transactions utilising NSW race field information' ([55]). Betfair only demonstrated that, 'by maintaining its current pricing structures and given its low margin', the fee 'absorbed a higher proportion of its turnover on interstate transactions than that of the turnover of TAB, the principal intrastate wagering operator' ([55]). Accordingly, when considered by reference to its effect on interstate trade rather than on a particular trader, the race field information fee was not relevantly discriminatory, let alone protectionist ([52]). In any event, even if the fee were discriminatory, Betfair had not demonstrated 'that the likely practical effect of the imposition of the fees will be loss to it of market share or profit or an impediment to increasing that share or profit' ([56]). It had not been shown that the fee structure burdened interstate trade to its competitive disadvantage ([52]).

Kiefel J similarly concluded that Betfair had not demonstrated that the fee, in its practical operation, was likely to have a discriminatory, protectionist effect ([130]–[135]). And, in his separate judgment, Heydon J held that Betfair had failed to demonstrate that the fee challenged in the proceedings 'is an actual burden on interstate trade to a significantly greater extent than it is an actual burden on intrastate trade' ([76]; see also [71]).

Both the joint judgment and Kiefel J left for another day the question whether – and, if so, how – s 92 applies, notwithstanding its words "among the States", to markets conducted without reference to State boundaries' ([57]; see Kiefel J [123]–[127]; cf Heydon J [63]–[65]). This is the question whether s 92 may be contravened by a law that lessens competition in a national market that operates without reference to State boundaries. If so then in a case of that kind there might be no need to demonstrate protectionist discrimination against interstate trade.

Betfair was required to identify 'a relevant differential treatment which it can show is likely to discriminate in a protectionist sense between interstate and intrastate wagering transactions which utilise NSW race field information'.

When considered by reference to its effect on interstate trade rather than on a particular trader, the race field information fee was not relevantly discriminatory, let alone protectionist.

Sportsbet

Background

Sportsbet is the holder of a bookmaking licence and has its principal place of business in the Northern Territory. The approvals granted by RNSW and HRNSW, which permit Sportsbet to use NSW race field information, are, as in *Betfair's* case, subject to a condition that Sportsbet pay a fee of 1.5% of its turnover to the relevant racing control body. It appealed to the High Court against a decision of the Full Federal Court which found that ss 33 and 33A of the RA Act, Pt 3 of the RA Reg (which includes cl 16) and the conditions of the approvals granted under those provisions requiring the payment of the fees were valid.

Sportsbet argued that the approvals requiring it to pay the race field information fee were invalid based on 3 main allegations: first, that TAB was refunded the amounts that it paid under its approval to RNSW and HRNSW; second, that all, or most, bookmakers in NSW were exempted from having to pay the 1.5% turnover fee because they have a wagering turnover that is relevantly less than \$5 million per annum (the threshold set by RNSW for imposition of the fee) or \$2.5 million (the threshold set by HRNSW for the imposition of the fee); and, third, that all or most NSW bookmakers received a reduction in the fees payable to the racing clubs that run the racecourses on which they operate.

Thus, Sportsbet, an interstate operator, argued it was subject to a requirement to pay the fee while intrastate operators were not because they were effectively immunised by the refund (in TAB's case) or a combination of the thresholds and fee reductions (in the case of in-State bookmakers). Accordingly, Sportsbet argued that its interstate trade was subject to a burden or disadvantage contrary to s 49 of the NT Act and that the approvals were therefore invalid by virtue of s 109 of the Constitution. Under s 109, Commonwealth laws prevail over inconsistent State laws to the extent of the inconsistency.

Sportsbet also argued that the legal and practical operation of ss 33 and 33A of the RA Act and Pt 3 of the RA Reg imposed a burden or disadvantage on interstate gambling operators and that the provisions were therefore contrary to s 49 of the NT Act and invalid by virtue of s 109 of the Constitution.

The High Court's decision in *Sportsbet*

As in *Betfair*, the High Court unanimously dismissed Sportsbet's appeal. The joint judgment (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) held that it was not shown that the challenged measures exhibited discrimination against interstate trade, let alone protectionist discrimination ([27], [36]). They also held that, even if Sportsbet made good its case, the relief to which it would be entitled would not extend to the invalidity of ss 33 and 33A of the RA Act and the whole of Pt 3 of the RA Reg ([4]). This is because the powers conferred by the RA Act and the RA Reg to impose conditions on race field approvals are to be read as not authorising the imposition of conditions that are contrary to s 49 of the NT Act ([12]).

In respect of Sportsbet's challenge to the approvals, their Honours again emphasised that the relevant consideration is the effect of the law on interstate trade, not simply the effect on particular traders ([7]). They also again referred to the fact that the challenged law was neutral on its face and so its *legal effect* was not discriminatory in a protectionist sense ([17]). Thus, Sportsbet relied upon the *practical operation* of the law as demonstrating its inconsistency with the requirements of s 49 of the NT Act ([20]). However, as was the case in *Betfair*, the focus of Sportsbet on the effect of the challenged

... their Honours again emphasised that the relevant consideration is the effect of the law on interstate trade, not simply the effect on particular traders.

law on its particular circumstances and those of one or more of its competitors by ‘minute analysis of business models, as applied from time to time’, ‘distracts attention from the concern of s 92 with effect upon trade, not prejudice to particular traders’ ([20]).

Turning to Sportsbet’s argument based on the thresholds that exempted many NSW bookmakers, the joint judgment found that:

The practical operation of the thresholds is not to provide a protectionist measure to insulate New South Wales on-course bookmakers from the economic burden of the fee. Both intrastate and out of State competitors could benefit from the threshold, and, in any event, there was no necessary connection between the location from which a wagering operator conducted its business and the turnover of that business. ([27])

Sportsbet’s contention that the refund to TAB produced discrimination against interstate trade was also rejected on the basis that the payments to TAB were less than the fees paid, were confined to a particular period and were paid as part of the settlement of a dispute under an agreement between TAB, RNSW and HRNSW ([30], [33], [36]). The joint judgment did not expressly deal with the argument concerning the reduction in the fee that bookmakers paid to racing clubs.

Heydon J also rejected Sportsbet’s arguments (set out at [42]) because ‘the appellant did not analyse the effect of the impugned legislation on interstate trade compared with intrastate trade. Instead, it examined its own position and, primarily, that of TAB’ ([43]; see also [47], [51]). The challenged legislation ‘imposed a burden uniformly on interstate and intrastate traders’ ([46]) and therefore neither the thresholds nor the reduction in fees payable to racing clubs by bookmakers were contrary to the requirements of s 49 of the NT Act ([43], [46]–[47]). Heydon J also rejected the argument that TAB’s payments were refunded, because the payments to TAB were for settlement of a contractual dispute ([50]).

AGS (David Lewis, Simon Thornton and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, who intervened in both matters, with the then Commonwealth Solicitor-General Stephen Gageler SC and Graeme Hill as counsel.

The text of the decisions is available at:

Betfair: <http://www.austlii.edu.au/au/cases/cth/HCA/2012/12.html>

Sportsbet: <http://www.austlii.edu.au/au/cases/cth/HCA/2012/13.html>

QUEENSLAND PRISONER LEGISLATION DOES NOT INFRINGE THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

In *Wotton v State of Queensland* the High Court unanimously upheld the constitutional validity of Queensland legislation imposing a qualified prohibition on interviewing prisoners, including those who had been released on parole but were still under sentence, finding that the provision was consistent with the implied freedom of communication about government and political matters. It also upheld the power of the Parole Board to impose conditions on the grant of parole on the same basis.

A majority of the High Court (French CJ, Gummow, Hayne, Crennan and Bell JJ (the joint judgment) and Kiefel J) found that the challenged provisions were reasonably appropriate and adapted to a constitutionally permissible end. However, they held that the Court should not, in these proceedings, decide the validity of the 2 parole conditions imposed pursuant to one of the challenged provisions, as that was a question that should be determined on an application for judicial review. In contrast, Heydon J upheld the validity of the challenged provisions and the parole conditions, finding that there was no relevant burden on any freedom to communicate about government and political matters.

Wotton v State of Queensland

High Court of Australia, 29 February 2012

[2012] HCA 2; (2012) 86 ALJR 246; (2012) 285 ALR 1

Background

Mr Wotton was convicted of rioting causing destruction arising from events that occurred on Palm Island in 2004. He was sentenced to a term of imprisonment and was released on parole in 2010. Section 200(2) of the *Corrective Services Act 2006* (Qld) (the Act) authorised the local Parole Board to impose conditions on his release. The Parole Board did so, and Mr Wotton's release was, relevantly, conditional on him not attending public meetings on Palm Island without the approval of the corrective services officer and on him not receiving a payment or benefit in relation to dealings with the media.

Additionally, s 132(1)(a) of the Act prohibited a person from interviewing or obtaining a written or recorded statement from a prisoner, although under s 132(2)(d) no offence would be committed if the person had the approval of the chief executive of the Queensland Department of Corrective Services. This qualified prohibition on interviewing a prisoner continued to apply to a prisoner released on parole.

Both a decision by the chief executive under s 132(2)(d) as to whether to give approval to a person to interview a prisoner and a decision of the Parole Board to impose particular conditions on a grant of parole under s 200(2) were subject to judicial review under the *Judicial Review Act 1991* (Qld) (Judicial Review Act).

Mr Wotton challenged the validity of ss 132(1)(a) and 200(2) and the 2 parole conditions on the basis that they impermissibly infringed the implied freedom of political communication.



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



Simon Thornton
Senior Lawyer
T 02 6253 7287
simon.thornton@ags.gov.au

The High Court's decision

The Court accepted, consistent with prior authority, that a law impermissibly burdens the implied freedom if it:

- (1) effectively burdens the freedom of communication about government or political matters (the first limb)
- (2) is not reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the constitutionally-prescribed system of government (the second limb) ([25], [40]–[41], [77] and [82]).

Application of implied freedom to exercises of statutory power

The operation of both of ss 132(1)(a) and 200(2) depended on the exercise of a statutory power: in the case of s 132, the power in the chief executive to approve the communication; and, in the case of s 200, the power of the Parole Board to impose parole conditions. The joint judgment accepted the Commonwealth's submissions that the application of the implied freedom of political communication in these circumstances raises 2 distinct questions, the first being whether the statute conferring the power is valid, and the second being whether a particular exercise of that statutory power is valid ([22]). The first question – namely, whether a statute conferring a power (here ss 132 and 200(2)) is valid – is a constitutional question. Assuming the statute is valid without needing to be read down, the second question (here the validity of the parole conditions) concerns the proper exercise of the statutory power and is not a constitutional question ([22], [74]).

Validity of statutory provisions

In the present case, the Court answered the first, constitutional, question by holding that the statutory powers in ss 132(1)(a) and 200(2) did not impermissibly burden the implied freedom of political communication and were therefore valid ([33], [92], [66]). In reaching this conclusion the joint judgment considered the validity of the challenged provisions on the assumption that, for the purpose of the first limb, ss 132(1)(a) and 200(2) imposed effective burdens on political communication ([28]–[29]). In the case of s 132(1)(a), the burden was the obligation to seek and obtain the chief executive's approval under s 132(2)(d). In the case of s 200(2), the burden was the observance of any conditions imposed by the Parole Board.

The joint judgment and Kiefel J accepted the Commonwealth's submission that public discussion of matters relating to Aboriginal and Indigenous affairs, including perceived or alleged injustices, involved discussions about government or political matters at a national level in the sense necessary to engage the implied freedom ([26], [80]). The joint judgment also suggested that communications concerning the interaction between law enforcement and policing services and Aboriginal persons were communications about national government or political matters of the relevant kind ([27]).

Heydon J disagreed with the conclusions of the joint judgment on the first limb and concluded that the challenged provisions (and parole conditions) did not give rise to any 'realistic threat' or create 'practical impediments' to, and therefore did not 'effectively burden', the implied freedom of political communication ([55], [59]–[65]). Significantly, in his Honour's view, there remained available other ways in which Mr Wotton or others could communicate on political matters ([59], [60], [62], [65]). It followed from his conclusion on the first limb that Heydon J did not find it necessary to address the second limb.

The joint judgment and Kiefel J accepted the Commonwealth's submission that public discussion of matters relating to Aboriginal and Indigenous affairs, including perceived or alleged injustices, involved discussions about government or political matters at a national level in the sense necessary to engage the implied freedom.

By contrast, the rest of the Court considered the second limb and held that the burdens imposed on political communication by s 132(1)(a), as qualified by s 132(1)(d), and s 200(2) were reasonably appropriate and adapted to serving a legitimate end in a manner compatible with the constitutionally-prescribed system of government ([31]–[32], [84]–[89], [91]). For s 132(1)(a) read with s 132(1)(d), the ‘legitimate end’ was set out in s 3(1) of the Act as the need to consider community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders ([31], [84]–[85]). For s 200(2), the ‘legitimate end’ was identified by the terms of s 200 itself as the imposition of conditions the Parole Board reasonably considered necessary to ensure good conduct and to stop the parolee committing an offence ([32], [91]).

In concluding that the burdens imposed by ss 132(1)(a), as qualified by s 132(1)(d), and s 200(2) were reasonably appropriate and adapted to serve these respective ends, the joint judgment referred in particular to the fact that, in the exercise of their powers, the chief executive (under s 132(2)(d)) and the Parole Board (under s 200(2)) were obliged to have regard to, respectively, ‘the restraint upon legislative power’ and ‘what was constitutionally permissible’, and to the fact that their ‘reasoned decision[s]’ were ‘judicially examinable’ under the Judicial Review Act ([31]–[32]; see also Kiefel J at [88], [90]).

Validity of parole conditions

Both the joint judgment and Kiefel J found that the question of the validity of the particular parole conditions did not arise in this proceeding but instead fell to be determined on an application for judicial review under the Judicial Review Act ([33], [74]). As noted, Heydon J would have upheld the validity of the parole conditions ([59]–[60]).

AGS (Andrew Buckland, David Hume and Simon Thornton from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, who intervened in this matter with the then Solicitor-General Stephen Gageler SC and Craig Lenehan as counsel.

Text of the decision is available at:

<http://www.austlii.edu.au/au/cases/cth/HCA/2012/2.html>

... the burdens imposed on political communication ... were reasonably appropriate and adapted to serving a legitimate end in a manner compatible with the constitutionally-prescribed system of government.

JUDICIAL POWER AND VALIDATING LEGISLATION

In a unanimous decision, the High Court held that s 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) (the Act) applied to validate the registration of an industrial association whose registration had been quashed by the Federal Court.

The High Court rejected the argument that this operation of s 26A was invalid as an impermissible usurpation of, or interference with, the judicial power of the Commonwealth. The provision did not dissolve or reverse the Federal Court order. Rather, it assumed the correctness of the Court's decision and attached new legal consequences to the historical fact of purported registration.

Australian Education Union v General Manager of Fair Work Australia
High Court of Australia, 4 May 2012
[2012] HCA 19; (2012) 86 ALJR 595; (2012) 286 ALR 625

Background

In 2008, the Full Federal Court held that the 'registration' of the Australian Principals Federation (APF) under the then *Workplace Relations Act 1996* (Cth) was invalid and ordered '[a] writ of certiorari issue to quash' the APF's registration (*Australian Education Union v Lawler* (2008) 169 FCR 327). The basis of the Federal Court's decision was that the APF's constituent rules did not contain the required 'purging rule' – a rule that a person's membership be terminated when the person was no longer qualified for membership by reason of their employment (French CJ, Crennan and Kiefel JJ [3]). Following the Federal Court's decision, a note that the APF's registration had been quashed was made against the entry relating to the APF in the register of registered organisations maintained under the Act (French CJ, Crennan and Kiefel JJ [13]).

In response to the Federal Court's decision and to avoid the potential invalidity of the registration of associations whose rules had the same defect, Parliament enacted s 26A of the Act. Section 26A provided that if an association was 'purportedly registered as an organisation under [the Act] before the commencement' of the section and 'the association's purported registration would, but for this section, have been invalid merely because, at any time, the association's rules did not have' a purging rule then 'that registration [was] taken, for all purposes, to be valid and to have always been valid'.

On 1 July 2009, upon the commencement of s 26A of the Act, a further entry was made in the register of registered organisations relating to the APF that referred to s 26A of the Act (French CJ, Crennan and Kiefel JJ [16]). The Australian Education Union (AEU), which had opposed the APF's registration, then filed an application in the Federal Court seeking a declaration that the APF was not, by reason of the operation of s 26A of the Act, an organisation within the meaning of the Act. A single judge of the Federal Court dismissed the application, and the Full Federal Court dismissed an appeal from the single judge's decision. The AEU then filed an application for special leave to appeal to the High Court and the application was referred to the Full Bench of the High Court.

Outline of the challenge

In summary, the AEU argued that:

- properly construed, s 26A does not operate to validate the registration of the APF
- alternatively, if s 26A purports to validate the registration of the APF then s 26A is, to that extent, invalid as an impermissible usurpation of or



David Lewis
Senior Executive Lawyer
T 02 6253 7541
david.lewis@ags.gov.au



Megan Caristo Lawyer
T 02 6253 7515
megan.caristo@ags.gov.au

interference with the judicial power of the Commonwealth and should be read down so as not to validate the registration of the APF (French CJ, Crennan and Kiefel JJ [21]).

Section 26A applied to validate the registration of the APF

Section 26A explicitly applied to an association that had been ‘purportedly registered’ before s 26A commenced. However, the AEU contended that s 26A did not apply to an association like the APF, the registration of which had been quashed by court order before s 26A commenced. An association of that kind was, according to the AEU, not an association that was ‘purportedly registered’ *immediately* ‘before’ the commencement of s 26A (Gummow, Hayne and Bell JJ [62]).

The Court rejected this argument. All the judges held that the terms ‘purportedly registered ... before the commencement of this section’ in s 26A encompassed an association with the identified defect in its rules that was entered on the register at some time before s 26A commenced. The continuing presence of the association on the register when s 26A commenced was not required (French CJ, Crennan and Kiefel JJ [38]; Gummow, Hayne and Bell JJ [63]; Heydon J [101]–[103], [113]). In relation to the APF, the order in *Australian Education Union v Lawler* ‘did not rewrite history’, the ‘historical fact of the making of the entry remained’ and s 26A operated by reference to that fact (French CJ, Crennan and Kiefel JJ [38]; see also Heydon J [113]). The APF’s registration was invalid and therefore a ‘purported registration’, even before the Full Federal Court’s order quashing the registration, and the order did not alter this (French CJ, Crennan and Kiefel JJ [38]; Heydon J [115]; see also Gummow, Hayne and Bell JJ [69]). Section 26A therefore applied to the APF’s purported registration (French CJ, Crennan and Kiefel JJ [5], [40]; Gummow, Hayne and Bell JJ [61]; Heydon J [113]).

In aid of its preferred construction of s 26A, the AEU contended that a construction of s 26A so that it applied to the APF would be ‘unfair’, as it would mean that the AEU would lose the benefit of the judgment it had secured in *Australian Education Union v Lawler* and would have wasted its resources in obtaining it (French CJ, Crennan and Kiefel JJ [28]). French CJ, Crennan and Kiefel JJ rejected the AEU’s contention on the basis that ‘[c]onsiderations of fairness at this level of particularity are not of great assistance in the construction of a statutory rule with general application’ ([28], [32]). They said that the Court was not in a position to make broad judgments, appropriate to the Parliament, about the balance of fairness (including weighing the competing public and private interests) in relation to the legislative validation of the APF’s registration ([29], [32]). Heydon J also rejected the AEU’s argument on the grounds that it is not appropriate to treat the process of construing the Act as concerned with the AEU’s private rights and private powers ([109]; see also Gummow, Hayne and Bell JJ [70], [71]).

In considering the construction of s 26A, the judges discussed the common law and statutory presumptions against certain kinds of retrospectivity (French CJ, Crennan and Kiefel JJ [23]–[35]; Gummow, Hayne and Bell JJ [64], [94]; Heydon J [105], [109]).

Was section 26A valid?

The AEU argued that if s 26A operated to validate the APF’s registration then s 26A impermissibly usurped, or interfered with, the judicial power of the Commonwealth contrary to Ch III of the Constitution. The argument was that s 26A in substance ‘dissolved’ or ‘reversed’ the Federal Court’s orders in *Australian Education Union v Lawler* (French CJ, Crennan and Kiefel JJ [47]; Gummow, Hayne and Bell JJ [72]).

In considering the construction of s 26A, the judges discussed the common law and statutory presumptions against certain kinds of retrospectivity.

The Court noted that, as a general rule, the Commonwealth Parliament cannot direct courts exercising federal jurisdiction as to the manner and outcome of the exercise of their jurisdiction (French CJ, Crennan and Kiefel JJ [48]; Gummow, Hayne and Bell JJ [78], [87]). It was also acknowledged, as previous cases have held, that Parliament can legislate with respect to rights in issue in pending judicial proceedings. Further, if a court decides a common law principle or the construction of a statute, Parliament can enact legislation to change the law as declared by the court and do so with effect from a date prior to the enactment (French CJ, Crennan and Kiefel JJ [49]–[50]; see also Gummow, Hayne and Bell JJ [78], [87]). Nevertheless, the Court suggested that there may be some situations where legislation affecting rights in issue in pending proceedings or determined in completed proceedings might be invalid because it impermissibly interferes with the exercise of judicial power (French CJ, Crennan and Kiefel JJ [20]; Gummow, Hayne and Bell JJ [76]). For example, it would be an impermissible interference with Commonwealth judicial power if the Parliament were to purport to set aside the decision of a court exercising federal jurisdiction (French CJ, Crennan and Kiefel JJ [53]).

Parliament can legislate with respect to rights in issue in pending judicial proceedings. Further, if a court decides a common law principle or the construction of a statute, Parliament can enact legislation to change the law as declared by the court and do so with effect from a date prior to the enactment.

Gummow, Hayne and Bell JJ noted that the effects of s 26A in altering the law, if valid, were, on the one hand, to deprive the AEU of whatever advantage it had obtained from the Federal Court's judgment and, on the other hand, that the APF had, since the time of its purported registration (and irrespective of the decision in *Australian Education Union v Lawler*), always had the status of a registered organisation ([97]). Despite this, the Court rejected the AEU's argument that s 26A dissolved or reversed the judgment or orders in *Australian Education Union v Lawler* (French CJ, Crennan and Kiefel JJ [47], [53]; Gummow, Hayne and Bell JJ [90]; Heydon J [116]). The judges provided various reasons, including the following.

First, s 26A assumed that the Full Federal Court correctly decided *Australian Education Union v Lawler* on the law as it then stood (French CJ, Crennan and Kiefel JJ [53]; Gummow, Hayne and Bell JJ [89], [96]; Heydon J [116]).

Second, s 26A did not 'alter or in any way affect the orders which the Full Court had made' (Gummow, Hayne and Bell JJ [90]) and did not 'seek, expressly or by implication, to overrule the [Full Court's] reasoning or set aside [the order of certiorari]' (Heydon J [116]).

Third, s 26A did not 'purport to declare what the law was' at the time of the Full Federal Court's decision (Gummow, Hayne and Bell JJ [96]; see also French CJ, Crennan and Kiefel JJ [53]). Section 26A was 'in no sense ... a legislative adjudication of any right or question of law which had been in issue in the *Lawler* matter' (Gummow, Hayne and Bell JJ [90]). The 'substantive operation' of s 26A was simply to '[attach] new legal consequences to an act or event which the court had held, on the previous state of the law, not to attract such consequences', and a law with that substantive operation did not usurp, or interfere with, judicial power (French CJ, Crennan and Kiefel JJ [48], [53]). 'Section 26A simply created a new legal regime by reference to a particular group of acts – the steps that effected the "purported registration"' (Heydon J [116]). That is, s 26A did not seek to restore the APF's registration that had been quashed; it accepted its invalidity. Rather, s 26A stated a new rule about registration and gave that new rule retrospective effect. Parliament had the power to enact such a retrospective rule.

AGS (David Lewis and David Hume from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening with the then Commonwealth Solicitor-General Stephen Gageler SC and Chris Young as counsel.

The text of the decision available at:

<http://www.austlii.edu.au/au/cases/cth/HCA/2012/19.html>

OTHER CONSTITUTIONAL DECISIONS IN BRIEF

JUDICIAL POWER AND PAROLE

The High Court unanimously upheld the validity of a State law that altered the circumstances in which a grant of parole could be made for a prisoner serving an existing sentence.

Crump v New South Wales

High Court of Australia, 4 May 2012

[2012] HCA 20; (2012) 86 ALJR 623; (2012) 286 ALR 658

Background

The plaintiff, Mr Crump, was sentenced to life imprisonment in 1974 following convictions for murder and conspiracy to murder. The trial judge made remarks in sentencing the plaintiff to the effect that he should never be released from jail (non-release recommendation). At that time, s 463 of the *Crimes Act 1900* (NSW) conferred on the NSW Governor a power to release prisoners on licence. In 1989, NSW enacted reforms and amendments to the statutory scheme for sentencing and parole of prisoners. As a part of those amendments, it became possible for a person serving an existing life sentence to apply to the NSW Supreme Court for the determination of a minimum term (to be served before being eligible for release on parole) and an additional term.

In 1997, the plaintiff was the subject of such a determination. McInerney J of the NSW Supreme Court made an order replacing the plaintiff's life sentence with a minimum term of imprisonment of 30 years and an additional term of life imprisonment. By virtue of that order, the plaintiff became eligible for parole on 13 November 2003.

In 2001, s 154A was inserted into the *Crimes (Administration of Sentences) Act 1999* (NSW) (Administration Act). Section 154A included extra criteria to be considered by the NSW Parole Authority when deciding whether to release on parole a 'serious offender the subject of a non-release recommendation'. The effect of s 154A is that the Parole Authority may only release the plaintiff on parole if it is satisfied that he is in imminent danger of dying or is incapacitated to the extent that he no longer has the physical ability to do harm to any person; and that he has demonstrated that he does not pose a risk to the community.

The plaintiff argued that s 154A was invalid because, by radically reducing any chance he had of being released on parole, its effect was to vary or otherwise alter the effect of McInerney J's sentencing determination; he said that this legislative action interfered with the appellate jurisdiction conferred on the High Court by s 73 of the Constitution, which was the appropriate avenue for any amendment of the effect of that judicial determination.

The High Court's judgment

The High Court unanimously dismissed the challenge to validity. There were 3 judgments, but each rejected the key premise of the plaintiff's argument. McInerney J's order was an exercise of judicial power giving rise to a 'judgment, decree, order or sentence' of the Supreme Court attracting the High Court's appellate jurisdiction under s 73 of the Constitution ([9], [47], [58]). However, the Court held that the variation in the parole eligibility criteria effected by s 154A did not 'impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty' (Gummow, Hayne, Crennan, Kiefel and Bell JJ



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



Asaf Fisher
Lawyer
T 02 6253 7479
asaffisher@ags.gov.au

[60]; see also French CJ [34]–[38] and Heydon J [71]–[74]). McInerney J’s order, the effect of which was that the plaintiff was liable to undergo penal servitude for life, was left ‘untouched’ by s 154A ([72]).

McInerney J’s sentencing determination gave rise to an opportunity for a parole application but did not confer on the plaintiff an entitlement to be released on parole or to have the question whether he ought to be released on parole determined in accordance with the regime that applied at the time the order was made ([35], [60], [70]–[71]). A sentencing judge always faces ‘the practical reality ... [of] the prospect of legislative and administrative changes in parole systems’ ([60]; see also [38] and [72]). After sentencing, the executive branch of government is responsible for the future of a prisoner ([28], [59]). Here, the decision whether to release the plaintiff was reposed in the Parole Authority and its power to release a person on parole depended on the law in force at the time of its decision ([36], [60], [70]–[71]).

AGS (Simon Thornton, Andrew Yuile and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the then Commonwealth Solicitor-General Stephen Gageler SC and Kate Morgan as counsel.

The text of the decision is available at:

<http://www.austlii.edu.au/au/cases/cth/HCA/2012/20.html>

EXAMINATION POWER VALIDLY CONFERRED ON COURTS

The WA Court of Appeal unanimously upheld the validity of the power conferred on a court by ss 596A and 597 of the *Corporations Act 2001* (Cth) to summon a person for examination in relation to the ‘examinable affairs’ of a corporation that is under ‘external administration’. The High Court subsequently refused an application for special leave to appeal: *Saraceni v Jones* (2012) 86 ALJR 1181.

Saraceni v Jones

Western Australian Court of Appeal, 16 March 2012
[2012] WASCA 59; (2012) 259 FLR 398; (2012) 287 ALR 551

Background

The applicant, Mr Saraceni, was a director of 3 companies that were, at the time of the proceedings, under external administration: all 3 companies were in receivership as a result of private appointments of receivers and managers. In addition, in one case an agent of a mortgagee in possession had also been appointed. On the application of these administrators of the companies, the WA Supreme Court issued summonses under s 596A to the applicant for examination about the ‘examinable affairs’ of the companies. The applicant sought to have the examination summonses set aside on the basis that s 596A and s 597 (which relates to the conduct of the examination) invalidly confer on a court a power (or function) that is neither judicial nor incidental to the exercise of judicial power.

The Commonwealth Parliament can only confer on a court a power that is judicial or incidental to the exercise of a judicial power.

The Court of Appeal’s reasons

The Commonwealth Parliament can only confer on a court a power that is judicial or incidental to the exercise of a judicial power (Martin CJ [5]; McLure P [80]–[81]). There is, though, ‘no single combination of necessary or sufficient

factors [that] identifies what is judicial power' ([7], [83]). Judicial power is not limited to the 'adjudication of existing rights and obligations by applying the law to facts determined by the court', though this adjudicative function may be regarded as constituting the 'core' of judicial power ([13]–[14]; [85]–[86]). Powers historically performed by courts (or powers that are analogous to those historically performed by courts) may also be conferred as judicial powers ([83]).

Though the examination power under ss 596A and 597 does not involve the adjudication of existing rights and obligations, with the consequence that it falls outside the 'core' of judicial power ([86]), both Martin CJ and McLure P (with whom Newnes JA agreed: [255]) nevertheless concluded that the power is judicial. Martin CJ and McLure P agreed that the examination power, on application of a receiver or agent of a mortgage in possession, is validly conferred on a court because it is analogous to the power, historically exercised by courts, to supervise the examination of individuals in connection with the affairs of a company that is being wound up either by order of a court or *voluntarily* ([3], [231], [240]).

In Martin CJ's view, the examination power could also be characterised as judicial (or incidental to judicial power) 'without reference to historical analogy' ([4]). This was principally on the basis that an examination power was not of a kind that falls 'exclusively within one or other of the legislative, executive [or] judicial branches' ([20]); the examination power here, understood in the overall context of the legislative scheme of external administration covered by Ch 5 of the Corporations Act (which includes many judicial powers of direction, supervision and control conferred upon courts) and the purpose and scope of the examination power, was validly reposed in a court ([57]). However, McLure P concluded that if (contrary to her conclusion based on history) the examination power was non-judicial in character then it would not be validly conferred as incidental to judicial power ([249]).

The examination power, on application of a receiver or agent of a mortgage in possession, is validly conferred on a court because it is analogous to the power, historically exercised by courts, to supervise the examination of individuals in connection with the affairs of a company that is being wound up either by order of a court or voluntarily.

Special leave to appeal refused

In refusing special leave to appeal, the High Court (Gummow, Hayne and Bell JJ) emphasised the historical factors that the Court of Appeal relied on to support its decision upholding the validity of the examination power. The High Court endorsed the reasoning of McLure P that 'the analogy between an examination in respect of companies in receivership and those in voluntary liquidation was "very close" and that the power of a court in this latter respect was of longstanding and predated Federation'. Making examination orders on application of a receiver was 'an action *of a kind* which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system' (emphasis added, 1182 [3]). This was the basis for the High Court's conclusion that the 'actual orders of the Court of Appeal are not attended by doubt' (1182, [4]). Having regard to the Court of Appeal's reasons based on historical factors, the High Court considered that it 'need express no further view about the correctness of the reasons of the Court of Appeal' (1182, [4]).

AGS (Asaf Fisher and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with AGS Chief General Counsel Robert Orr QC and Andrew Buckland from the Constitutional Litigation Unit as counsel.

The text of the decision is available at:

<http://www.austlii.edu.au/au/cases/wa/WASCA/2012/59.html>

POWER OF STATE SUPREME COURTS TO REVIEW FOR JURISDICTIONAL ERROR

Consistently with the High Court's decision in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (*Kirk*) (see *Litigation Notes* No 20, p 11), a State law cannot validly deny the Supreme Court of the State the power to review decisions of lower State courts, and executive decision-makers, for jurisdictional error occasioned either by an act in breach of conditions that circumscribe their jurisdiction or by a wrongful failure to exercise jurisdiction.

A majority of the High Court held that s 206 of the *Fair Work Act 1994* (SA) does not deprive the Supreme Court of South Australia of its power to review decisions of the Industrial Relations Commission of South Australia (the Commission) for either kind of jurisdictional error. If s 206 had purported to limit the Supreme Court's jurisdiction by preventing review of a failure to exercise jurisdiction it would have been invalid.

Public Service Association of South Australia Inc v Industrial Relations Commission (SA)

High Court of Australia, 11 July 2012

[2012] HCA 25; (2012) 86 ALJR 862; (2012) 289 ALR 1

A State law cannot validly deny the Supreme Court of the State the power to review decisions of lower State courts, and executive decision-makers, for jurisdictional error.

Background

In October 2010 the Public Service Association of South Australia (PSA) notified the Commission of 2 disputes with the chief executive of the SA Department of Premier and Cabinet relating to the terms of public sector employment in South Australia. The Commission decided that it lacked jurisdiction because there was no 'industrial dispute' before it.

PSA sought judicial review of the Commission's decision in the SA Supreme Court. The Full Court of the Supreme Court held that it did not have jurisdiction to entertain PSA's summons for judicial review because s 206 only permits a determination of the Commission to be challenged before the Full Court 'on the ground of an excess or want of jurisdiction'. Applying the reasoning in an earlier decision of the High Court, *Public Service Association (SA) v Federated Clerks Union* (1991) 173 CLR 132 (the 1991 PSA case), the Full Court decided that 'excess or want of jurisdiction' in s 206 did not include a wrongful refusal to exercise jurisdiction.

The High Court held in *Kirk* that the supervisory role exercised by a State Supreme Court over lower State courts and executive decision-makers 'through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts' (at 581, [98]). Legislation that purports to deny to a State Supreme Court that supervisory role is invalid.

High Court's reasons

Contrary to South Australia's submissions, the High Court said that the decision in *Kirk* protects not only the jurisdiction of State Supreme Courts to grant certiorari or prohibition for a wrongful assumption of jurisdiction but also the exercise by Supreme Courts of their supervisory jurisdiction through the grant of mandamus for jurisdictional error involving a wrongful denial of jurisdiction. The High Court unanimously affirmed that *Kirk* applies to all kinds of jurisdictional error: 'it is the boundary between jurisdictional error and non-jurisdictional error that marks the limits upon State legislative power to abrogate the supervisory jurisdiction of a State Supreme Court' (French CJ [29]–[30]; Gummow, Hayne, Crennan, Kiefel and Bell JJ [60]–[63]; Heydon J [72]).

The first question for the High Court was whether s 206 could be construed consistently with the principle derived from *Kirk*; if it could, no question of invalidity would arise ([53], [63]). A majority of the Court held that s 206 could be construed consistently with *Kirk*; if the Commission wrongly decides that there is no ‘industrial dispute’ – a jurisdictional fact – it exceeds its jurisdiction ([31], [65]).

The Full Supreme Court had correctly held that it was required by the High Court’s decision in the 1991 PSA case to conclude that s 206 ‘denied it jurisdiction with respect to the judicial review sought by the PSA’ ([50]), but the interpretation given to the phrase ‘an excess or want of jurisdiction’ in that earlier case was, in light of *Kirk*, shown to be ‘wrong in a significant respect’ and should not be followed ([60], [66]). If s 206 had purported to limit the Supreme Court’s jurisdiction by preventing review of a failure to exercise jurisdiction it would have been invalid ([63]).

Unlike the majority, Heydon J held that ‘a failure to exercise jurisdiction cannot be described as “an excess or want of jurisdiction”’ ([88]). It followed that s 206 was invalid to the extent that it purportedly excludes the Supreme Court’s jurisdiction to review the Commission’s refusal to exercise jurisdiction ([88]).

AGS (David Lewis and Niamh Lenagh-Maguire from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the then Commonwealth Solicitor-General Stephen Gageler SC, Geoffrey Kennett SC and Chris Bleby as counsel.

The text of the decision is available at:
<http://www.austlii.edu.au/au/cases/cth/HCA/2012/25.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 25 years.

Andrew Buckland is a Senior Executive Lawyer and is the team leader of the AGS Constitutional Litigation Unit. He runs significant constitutional cases in the High Court and advises on constitutional and federal jurisdiction issues.

Gavin Loughton is a Senior Executive Lawyer in the AGS Constitutional Litigation Unit who also has extensive experience in native title litigation. He has instructed in major constitutional litigation, most recently in cases about acquisition of property and judicial power.

David Lewis is a Senior General Counsel in AGS's Office of General Counsel. He has run constitutional cases and advises on constitutional and other public law issues.

Simon Thornton is a Senior Lawyer in the AGS Constitutional Litigation Unit. He has instructed in important constitutional cases in the High Court, including *Phonographic Performance Co v Commonwealth* and *X7 v Commonwealth*. He also provides advice on constitutional issues and statutory interpretation.

Asaf Fisher is a Senior Lawyer in the AGS Constitutional Litigation Unit. He has instructed in several significant constitutional cases in the High Court and intermediate courts of appeal. Most recently, those cases have related mainly to the exercise of judicial power.

Megan Caristo is a Lawyer in the AGS Constitutional Litigation Unit. She has been involved in several constitutional cases in the High Court, including *Monis v The Queen* and *Attorney-General for the State of South Australia v Corporation of the City of Adelaide* (in both of which judgment is reserved).

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 Andrew Buckland or David Bennett QC.

Andrew Buckland

Senior Executive Lawyer
T 02 6253 7024
andrew.buckland@ags.gov.au

David Bennett QC

Deputy Government Solicitor
T 02 6253 7063
david.bennett@ags.gov.au

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

National Group Leader Dispute Resolution

Matthew Blunn 02 6253 7424

Chief Solicitor Dispute Resolution

Simon Daley 02 9581 7490

Chief Counsel Dispute Resolution

Tom Howe QC 02 6253 7415

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

www.ags.gov.au

Electronic versions of AGS newsletters are available for clients who prefer to receive issues in this form. Please email ags@ags.gov.au to arrange supply.

For enquiries regarding supply of issues or to change address details, please email ags@ags.gov.au.

ISSN 1329-458X
Approved Postage PP 255003/05308