AGS

Litigation notes

Number 23 | 12 November 2013

In this issue

Andrew Buckland
Senior Executive Lawyer
T *02 6253 7024* ***M*** *0411 019 591*
andrew.buckland@ags.gov.au

Andrew Yuile
Senior Lawyer
T *02 6253 7237*
andrew.yuile@ags.gov.au

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

High Court upholds the constitutional validity of the mining tax

The High Court unanimously rejected a challenge brought by the Fortescue Metals Group to the constitutional validity of the *Minerals Resource Rent Tax Act 2012* (Cth) (MRRT Act).

The challenge focused on the allowance made by the MRRT Act, in fixing a miner's minerals resource rent tax (MRRT) liability, for royalties paid under State law. Because royalty regimes can vary from State to State, so too can liability for MRRT (all other things being equal). The plaintiffs argued that it followed that the MRRT Act discriminated between States (contrary to s 51(ii)), gave preference to miners in different States (contrary to s 99), rendered nugatory assistance provided by States to miners (contrary to s 91) and interfered with the States' management of the mineral resources under their control (contrary to the implication associated with *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (*Melbourne Corporation*)). In 4 separate judgments (French CJ; Hayne, Bell and Keane JJ; Crennan J; and Kiefel J) the High Court unanimously dismissed the plaintiffs' challenge.

Fortescue Metals Group Limited v Commonwealth
High Court of Australia, 7 August 2013
[2013] HCA 34; (2013) 87 ALJR 935; (2013) 300 ALR 26

Background

The MRRT legislation

MRRT is created by the MRRT Act and imposed by 3 associated Imposition Acts. The MRRT Act taxes the 'above-normal profits' derived by miners from the extraction of, relevantly, iron ore (ss 1-10, 20-5).

The amount of MRRT payable by a miner in a year is the sum of its 'MRRT liabilities' for each of its 'mining project interests' in that year. A miner's MRRT liability for a mining project interest is calculated by the following formula (s 10-5):

MRRT liability = MRRT rate x (Mining profit – MRRT allowances).

The MRRT rate is 22.5%.

'Mining profit' is the difference between 'mining revenue' and 'mining expenditure'.

Above-normal profits are isolated by making MRRT payable only once a miner's group mining profit exceeds $75 million, having taken into account all deductions for expenditure (including of capital), allowances (including allowances carried forward at uplifted rates) and applicable tax offsets (Hayne, Bell and Keane JJ [53]; Crennan J [147]; Kiefel J [179]–[180]).

Royalties paid by a miner to a State generate a 'royalty allowance' that is one of the MRRT allowances deducted from the miner's mining profit. The royalty allowance is 'grossed up', so that the allowance reduces a miner's MRRT liability by the equivalent of the amount paid to the State in royalties.

The effect of this regime is that, for a miner liable to pay MRRT and assuming all other things remain equal, a reduction in a State mining royalty will:

(a) reduce the miner's royalty allowance by the same amount, and therefore

(b) result in an equivalent increase in MRRT liability.

Similarly, an increase in a State mining royalty will, all other things being equal, result in an equivalent decrease in MRRT liability. (See French CJ [15]; Hayne, Bell and Keane JJ [53]; Crennan J [152]; Kiefel J [181].) Because the MRRT Act expressly includes, as a MRRT allowance, the grossed up amount of royalties paid, the Act was said to be 'expressly designed' so that 'a miner's actual liability to [pay] MRRT will vary from State to State, depending on the royalty rate payable applicable in that State' (Hayne, Bell and Keane JJ [67]). The legislation was also said to impose 'an equalising burden of tax on mining operations in [low royalty] States' (Hayne, Bell and Keane JJ [74]–[79]).

The plaintiffs' arguments

The plaintiffs argued that this regime for royalty allowances rendered the MRRT Act and the Imposition Acts invalid because they:

- discriminate between States or parts of States contrary to s 51(ii) of the Constitution (that section gives the Commonwealth power to legislate with respect to 'taxation; but so as not to discriminate between States or parts of States')
- are 'law[s] or regulation of trade, commerce, or revenue' that give preference to one State over another State contrary to the prohibition in s 99 of the Constitution
- control or hinder the States in the execution of their governmental functions contrary to the constitutional implication associated with *Melbourne Corporation*
- are inconsistent with s 91 of the Constitution (which relevantly provides that nothing in the Constitution 'prohibits a State from granting any aid to or bounty on mining for … other metals').

The Attorneys-General for Queensland and Western Australia intervened in support of the plaintiffs.

The High Court's decision

No geographical discrimination contrary to section 51(ii)

The plaintiffs argued that the potential for a miner's liability to pay MRRT to vary from State to State, depending on the royalty rate applicable in that State, meant that the MRRT Act discriminated between States. This was also said to result in MRRT being imposed 'at a different *effective* rate in different States' (Hayne, Bell and Keane JJ [67]).

The High Court unanimously rejected these arguments. Whether a law discriminates between States or parts of States is to be determined having regard not only to the form of the law but also to its legal and practical operation (Hayne, Bell and Keane JJ [117]; Crennan J [156]). However 'bare demonstration of different consequences in different States does not show that a law with respect to taxation discriminates between States or parts of States' (Hayne, Bell and Keane JJ [109]).

Instead, as Kiefel J stated:

> where a Commonwealth taxation law provides that the same measure is to apply to all persons or things subject to the tax, it would not generally be regarded as likely to discriminate in fact. Where a difference results from the operation of a taxation law, the question arises whether that difference is accounted for by the geographical situation of the subject of the tax. Importantly, for there to be the discrimination of which s 51(ii) speaks, the difference must be produced by the Commonwealth law itself and by reference to that geographical situation. ([202]; see also Hayne, Bell and Kiefel JJ [105], [109], [117]; Crennan J [155])

Significantly the Court held that the MRRT Act does not itself provide for any difference in MRRT liability depending on the State in which a miner operates. Rather, '[t]o the extent that the amount of MRRT paid varies from State to State because different rates of State royalty are charged, those variations are due to the different conditions that exist in the different States, and, in particular, the different legislative regimes provided by the States' (Hayne, Bell and Keane JJ [107]; see also Crennan J [174]; Kiefel J [224]). In that respect the regime for royalty allowances was not relevantly different to the regime for the deduction of amounts incurred in conducting a business when calculating taxable income for the purposes of Commonwealth income tax laws (Hayne, Bell and Keane JJ [122]; see also Crennan J [169], [172] ('part of the business conditions under which … miners operate'); Kiefel J [203]–[204], [226]; see also French CJ [45]–[46]).

For a majority of the Court this was sufficient to establish that the MRRT Act did not discriminate between States or parts of States contrary to s 51(ii). That made it unnecessary to consider the Commonwealth's argument in the alternative: that any differential treatment or unequal outcome resulting from the MRRT Act was the product of a distinction that is appropriate and adapted to the attainment of a proper objective of the MRRT with the result that the MRRT Act did not relevantly discriminate between States (Hayne, Bell and Kiefel JJ [116]; Crennan J [175]).

In contrast, French CJ held that the Commonwealth's argument in the alternative was in truth an aspect of the characterisation of the law for the purposes of s 51(ii) (and s 99) of the Constitution ([48]). In assessing whether a Commonwealth law of general application that allows for different outcomes depending on the existence or operation of a particular type of State law discriminates or gives a preference, an important criterion will be whether any distinction made by the law is 'appropriate and adapted to a proper objective' ([5], [22], [49]). The Chief Justice held that the objectives of the MRRT Act are non-discriminatory and are 'proper objectives, to which the impugned provisions are appropriate and adapted'. The differences in the operation of the MRRT Act in different States arise from the MRRT Act's interaction with different State royalty regimes, which serve those objectives ([50]).

Section 99: no preference without discrimination

The plaintiffs accepted that if the MRRT Act did not discriminate between States then it was not a law that gave preference to one State over another contrary to s 99 (Hayne, Bell and Keane JJ [123]). That is because discrimination is a necessary, but not sufficient, element of preference (Hayne, Bell and Keane JJ [124]). All judges held that it followed from their conclusion that the MRRT Act does not discriminate between States contrary to s 51(ii), that the MRRT Act does not give preference to one State over another contrary to s 99 (French CJ [5], [30], [50]; Hayne, Bell and Keane JJ [125]; Crennan J [176]; Kiefel J [227]).

No impairment of capacity of States to function: *Melbourne Corporation*

The plaintiffs and the State of Western Australia argued that the MRRT Act was contrary to the constitutional implication associated with *Melbourne Corporation* because it interfered with the States' management of the mineral resources under their control (Hayne, Bell and Keane JJ [126]–[128], [132]). In particular, the MRRT Act had the potential to 'neutralise' any incentive to mining provided by a reduction in State royalty rates because that reduction might be replaced by an increased MRRT liability (Hayne, Bell and Keane JJ [126]).

The joint judgment (with which French CJ [6], Crennan J [145] and Kiefel J [229] agreed) dismissed these arguments. Their Honours held that the MRRT Act is 'not aimed at the States or their entities', does not impose some 'special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments', does not deny a State's capacity to fix royalty rates and does not burden a State's decision to raise or lower royalty rates. If the MRRT Act did affect the States' ability to use a reduction in royalty rates as an incentive to attract mining investment, that was not a 'limit or burden on any State in the exercise of its constitutional functions' ([137]).

Section 91 does not relevantly limit Commonwealth legislative power

The plaintiffs argued that s 91 of the Constitution prevents a Commonwealth law from impeding a State from granting 'aid on mining' in the form of a reduction in the rate of a State royalty or an exemption from liability to pay a royalty. Again, this argument relied on the potential for a royalty reduction to be matched by an equivalent increase in MRRT liability (Hayne, Bell and Keane JJ [139]).

The joint judgment (with which French CJ [6] and Crennan J [145] agreed) rejected the plaintiffs' submissions including by reference to the Court's earlier decision of *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120. Their Honours held that s 91 relevantly preserves *State* legislative powers to provide for certain types of aid or bounty but does not limit the legislative powers of the Commonwealth Parliament. There was no warrant for reading s 91 as a prohibition on the federal Parliament passing any law that 'may impair the effect of the provision of assistance by a State to mining for gold, silver, or other metals' ([141]–[143]). Justice Kiefel reached a similar conclusion to the joint judgment ([230]–[233]).

AGS (Leo Hardiman and Sam Arnold from the Office of General Counsel) advised the Commonwealth on the development of the legislation. AGS (Andrew Buckland, Andrew Yuile, Megan Caristo and David Bennett QC from the Constitutional Litigation Unit) also acted for the Commonwealth in the litigation, with the Solicitor-General Justin Gleeson SC, Neil Williams SC, David Thomas and Gim Del Villar as counsel.

The text of the decision is available at: http://www.austlii.edu.au/au/cases/cth/HCA/2013/34.html

Andrew Yuile
Senior Lawyer
T 02 6253 7237
andrew.yuile@ags.gov.au

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

Queensland alcohol restriction laws not inconsistent with the Racial Discrimination Act

In *Maloney v The Queen* the High Court considered whether Queensland laws that restricted the amount of alcohol that could be possessed on Palm Island, which was inhabited almost entirely by Aboriginal people, were discriminatory and inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth) (RDA).

In 6 separate opinions, the Court held (by majority) that the laws differentiated between racial groups in their enjoyment of human rights within s 10 but held (unanimously) that the laws were a 'special measure' within s 8 of the RDA. Consequently, the laws were not inconsistent with the RDA and were valid.

Maloney v The Queen
High Court of Australia, 19 June 2013
[2013] HCA 28; (2013) 87 ALJR 755; (2013) 298 ALR 308

Background

The appellant (Ms Maloney), an Aboriginal woman resident on Palm Island, was convicted of being in possession of more than the prescribed quantity of liquor in a public place in a 'restricted area', without a permit, in contravention of s 168B of the *Liquor Act 1992* (Qld). Palm Island was one of 18 places in Queensland declared by the *Liquor Regulation 2002* (Qld) to be a restricted area. Possessing anything more than 11.25 litres of beer of less than 4% alcohol volume was prohibited. The appellant argued that the laws restricting the possession of alcohol on Palm Island were discriminatory and inconsistent with s 10 of the RDA and, by virtue of s 109 of the Constitution, invalid.

Part 6A of the Liquor Act, under which the restrictions were imposed, is cast in general terms. Its purpose, as stated in s 173F, is to minimise 'harm caused by alcohol abuse and misuse and associated violence' and 'alcohol-related disturbances, or public disorder, in a locality'. Its operation is not confined to Aboriginal communities or Aboriginal people and within restricted areas the prohibitions on possession of alcohol apply without distinction as to race.

However, the provisions of s 168B and Pt 6A were clearly directed at 'the evil of alcohol-fuelled violence and disturbance in [Indigenous] communities' (Hayne J [58]). The provisions were introduced by the *Indigenous Communities Liquor Licences Act 2002* (Qld) as part of the Queensland Government's response to the *Cape York justice study* (the Fitzgerald report). That report had concluded of Indigenous communities in North Queensland that '(a)lcohol abuse and associated violence are so prevalent and damaging that they threaten the communities' existence and obstruct their development' (French CJ [27]; Hayne J [58]). There was a 'strong' suggestion that each of the 18 'restricted areas' declared by the Liquor Regulations was associated

with an Indigenous community. In relation to Palm Island itself, the residents were 'overwhelmingly' Aboriginal people (Hayne J [51], [56]).

Section 173G of the Liquor Act required that, before recommending the declaration of a restricted area, the Minister must be satisfied that the declaration would advance the purpose stated in s 173F. Section 173I also required the Minister to have consulted with the community justice group for the affected area and to have considered any recommendations from that group. In the case of Palm Island, although there was 'agreement across the community that unrestricted liquor was a major concern that needed to be addressed', ongoing division had inhibited community agreement about an alcohol management plan. The measures implemented differed from the recommendation of the Palm Island community justice group and were a compromise between various proposals (French CJ [31]).

The arguments

The appellant highlighted that Palm Island is made up almost entirely of Aboriginal people and the restrictions imposed by the Liquor Regulation were not imposed throughout Queensland. She argued that the effect of the challenged laws was that some Aboriginal persons (those on Palm Island) enjoyed certain human rights to a more limited extent than persons of another race (non-Aboriginal people elsewhere in Queensland). This was said to engage s 10 of the RDA. The appellant also argued that the laws were not a 'special measure' within s 8 of the RDA – if they were, s 10 would not apply – because there had been insufficient consultation with the Palm Island community, the community had not given its prior consent to or acceptance of the measures, there was insufficient evidence to establish the necessity for the restrictions, the restrictions were disproportionate to the end they sought to achieve and the laws did not have a temporal limitation (French CJ [24], [44]).

The respondent argued that the impugned laws did not differentiate between racial groups but applied equally to all persons on Palm Island and therefore did not offend s 10. Alternatively, if the laws did differentiate, they were saved as special measures within s 8. The Commonwealth Attorney-General intervened in support of the respondent.

The High Court's decision

The approach to sections 8 and 10 of the RDA

The RDA implements Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (French CJ [7]; Hayne J [61]; Kiefel J [144]; Bell J [201]; Gageler J [278], [299]). The objects of the RDA are the prohibition and the elimination of racial discrimination (French CJ [7]; Hayne J [59]; Bell J [201]; Gageler J [278]). In that regard, s 10 guarantees rights to equality before the law. It provides that if, by reason of a Commonwealth, State or Territory law, persons of one race do not enjoy a 'right' that is enjoyed by persons of another race or enjoy a 'right' to a more limited extent than persons of another race then, by force of s 10, the persons of the first-mentioned race shall enjoy the right to the same extent as persons of the other race. Section 8 provides that Pt II of the RDA (which includes s 10) does not apply to 'special measures' to which Art 1(4) of the CERD applies – that is, measures that might differentiate between racial groups but which are intended to address inequality in the enjoyment of rights. Article 1(4) provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights

> and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The Court approached ss 8 and 10 as operating in 2 stages:

1. Determine whether s 10 is engaged.
2. If it is, determine whether s 8 is also engaged to 'save' the law.

Justice Gageler approached the construction of ss 8 and 10 slightly differently (see [342–[343], [347], [362]–[364]); however, his Honour's approach is unlikely to result in any practical difference when assessing laws against s 10 of the RDA.

The first inquiry: did the laws engage section 10 of the RDA?

The Court emphasised that s 10 does not refer explicitly to discrimination. Rather, the language of the section focuses on *differential enjoyment of rights*. The question is whether the law, in its terms or in its operation, has the *effect* that persons of one race do not enjoy human rights or fundamental freedoms enjoyed by persons of another race or enjoy them to a more limited extent. The Court declined to interpret s 10 by reference to concepts of 'discrimination' developed in other areas of law, which allow for differentiation for an objectively justifiable reason. Instead, the focus is simply upon whether a law creates a differential enjoyment of rights. There is no room for 'justifiable' differentiation within s 10. The *only* basis upon which a differentiation that would otherwise fall within s 10 is permissible is if that differentiation can be said to be a 'special measure' falling within s 8 of the RDA (French CJ [11], [14], [38]–[39]; Hayne J [65], [68], [75]–[76], [83]–[84]; Crennan J [126]; Kiefel J [147]–[148], [167]; Bell J [200], [204], [213]–[214]; Gageler J [327], [330], [335], [348], [364]). As a result, the reasoning of the Full Federal Court in *Bropho v Western Australia* (2008) 169 FCR 59, followed by the Court of Appeal in this case, was rejected.

Justice Hayne identified 5 questions to be answered in considering a challenge based on s 10 ([62]), directed to the following criteria:

- by reason of a *law*
- persons of a *particular race*
- *do not enjoy a human right*
- or *enjoy such a right to a lesser extent*
- than *persons of another race*.

In this case, the *laws* were the Liquor Act and the Liquor Regulation; the relevant *persons of a particular race* were the Aboriginal people on Palm Island; and the *persons of another race* were non-Aboriginal people living elsewhere in Queensland. It is not necessary for an impugned law to affect only the particular racial group to fall foul of s 10, nor is it necessary that all persons of all other races enjoy the right to the same extent (Hayne J [79]–[80]; Bell J [202]; Gageler J [331]). The main focus of the Court was on whether a 'human right' was engaged and, if so, whether Aboriginal persons on Palm Island enjoyed it to a lesser extent.

The 'human rights' of Aboriginal persons on Palm Island were engaged

The *human rights* the enjoyment of which is protected by s 10 are not legal rights as such but are human rights 'of a kind' referred to in Art 5 of the CERD. This includes more general 'human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life' (French CJ [7], [9]; Kiefel J [145]–[146], [157];

Bell J [205], [219]; Gageler J [285]–[287], [336]; cf Hayne J [63], [72]). The appellant argued that 3 rights from those listed in Art 5 of the CERD were engaged in this case:

- The **right to equal treatment before the tribunals** and all other organs administering justice (CERD Art 5(a)). A majority of the Court held that this right is concerned with *procedural* equality and ensures that laws are applied by the courts to persons coming before them equally, regardless of race. There was no allegation in this case that the appellant had been treated differently from anyone else in matters of procedure or access (French CJ [36]; Kiefel J [151]; Bell J [215]; Gageler J [336]). This right was held not to apply.
- The **right to own property** alone as well as in association with others (CERD Art 5(d)(v)). All members of the Court (except Kiefel J) held that this right was engaged in this case (French CJ [37]–[39]; Hayne J [74]–[76], [83], Crennan J agreeing [112]; Bell J [224], [227]; Gageler J [360]–[361]). It was sufficient that the Queensland laws, by prohibiting possession of alcohol, prevented the enjoyment of a right of ownership of property, namely alcohol. The right to ownership of property such as alcohol was not denied because of the long history of its regulation in the public interest. Justice Kiefel, in dissent, held that it was 'difficult to conceive' of a right or freedom to possess alcohol 'as a right of ownership' ([153]). The impugned law was concerned with the freedom to possess alcohol for consumption. That did not involve any value 'fundamental to the life of a human' of the kind to which the CERD refers and did not qualify as a human right ([157]).
- The **right of access to any place or service intended for use by the general public**, such as transport, hotels, restaurants, cafes, theatres and parks (CERD Art 5(f)). The Court was equally divided as to whether this right was engaged. Chief Justice French ([40]–[41]) and Kiefel J ([152]) held that it was not: Art 5(f) did not stipulate what services were to be provided, only that services that were available had to be supplied equally, which the impugned laws did not affect. Justices Bell and Gageler held that Art 5(f) was engaged: Bell J concluded that access to services of a kind that would be available to non-Aboriginal members of the public elsewhere in Queensland was denied to the Aboriginal community on Palm Island ([226]); Gageler J relied on that part of Art 5(f) referring to access to places intended for use by the general public ([361]). Justice Hayne (Crennan J agreeing [112]) doubted, without deciding, that this right was engaged ([73]).
- Some members of the Court also considered a freestanding **right to be protected against discrimination** in the practical effect of any law (said to be based on Art 7 of the Universal Declaration of Human Rights and Art 26 of the International Covenant on Civil and Political Rights). Justice Bell said that these rights should be accepted as a 'human right' of a kind coming within s 10 of the RDA ([219]). However, in circumstances where other rights were clearly engaged, her Honour said it was inappropriate to determine the breadth of the right ([222]–[223]). Justice Kiefel ([159]–[161]) and Gageler J ([317], [336]) decided against recognising such a right, as a broad right in these terms would be inconsistent with the scheme of ss 8 and 10 of the RDA. Chief Justice French and Hayne and Crennan JJ did not address the issue.

It followed that a majority of the Court held that least 1 human right (the right to own property) of a kind to which s 10 of the RDA applied was engaged by the challenged laws.

Aboriginal people on Palm Island enjoyed those rights to a lesser extent than other racial groups

All members of the Court (other than Kiefel J, who held that no human rights of a kind protected by the RDA were engaged) held that the Queensland laws *in effect* reduced the

enjoyment of rights of the people on the island as compared with the rest of Queensland. Palm Island is populated overwhelmingly by Aboriginal people and it followed that those Aboriginal people (persons of a particular race) enjoyed the relevant human right to a more limited extent than non-Aboriginal people on the mainland (persons of another race), who were not subject to the laws. Justice Gageler stated that, in this way, geography had been 'used as a proxy for race' ([362]; see also Hayne J [84]). And, as Bell J put it, '[i]n Australian society, competent adults may own alcohol. Aboriginal persons on Palm Island enjoy that right to a more limited extent than persons elsewhere in Queensland' ([224]; also French CJ [38]–[39]; Hayne J [77]–[84]; Bell J [204], [224]; Gageler J [342]–[344], [361]–[364]; Kiefel J [147]–[148]).

This conclusion followed, even though the laws did not on their face differentiate between racial groups. In considering the practical effect of the laws, it did not matter that some non-Aboriginal persons lived on Palm Island and would be subject to the laws in the same way as Aboriginal persons: that only confirmed that the laws did not use race directly as a criterion for their operation, and it was in any event only necessary to show that *some* persons of a particular race enjoyed their rights to a more limited extent than persons of other races (Hayne J [78]–[80]; Gageler J [363]).

A majority of the Court therefore held that s 10 was prima facie engaged in this case by the impugned Queensland laws. The remaining question was whether the laws were special measures within s 8 of the RDA.

The second inquiry: were the laws 'special measures' within section 8 and therefore not inconsistent with section 10?

The requirements of a special measure

The Court first considered the requirements of a 'special measure' as set out in Art 1(4) of the CERD. Broadly speaking, the Court considered that Art 1(4) sets out 2 criteria for a special measure: the measure must be for a group or individuals as described in Art 1(4) of the CERD; and the measure must be taken for the 'sole purpose of securing adequate advancement' of those groups or individuals in the sense of ensuring that such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms (French CJ [18]; Hayne J [90]; Kiefel J [177]–[179]; Bell J [244]; cf Crennan J [127] and Gageler J [302], [356], who took a similar, but slightly different, approach.)

However, the Court was divided over whether the word 'necessary' in Art 1(4) qualified the *group* for whom measures may be taken or the *measure itself*. Justices Hayne ([92]) and Bell ([241]) (and, perhaps, French CJ [18], [21]) held that 'necessary' qualifies the group for whom special measures may be taken; that is, the group must need protection to ensure the equal enjoyment of rights. Justices Crennan ([130]–[131]), Kiefel ([178]–[179]) and Gageler ([358]) held that 'necessary' qualifies the measure; that is, the measure must be necessary to secure the equal enjoyment of rights. However, this difference does not seem to alter the basic requirements of a group and a measure with the sole purpose of securing their equal enjoyment of rights. It seems likely, in practice, to affect the order of the steps in the analysis rather that its outcome.

All members of the Court therefore construed s 8 as importing a proportionality analysis, but their Honours held different views on the textual basis for this, the stage at which it is applied and its precise wording. For those judges who saw 'necessary' as being directed towards the group rather than the measure (French CJ, Hayne and Bell JJ), proportionality was still significant in determining whether a measure had been taken for the *sole purpose* of securing adequate advancement in order to ensure equal enjoyment of rights. If a measure was not proportionate to the aim of ensuring

the equal enjoyment of rights, it would not be for that sole purpose. Emphasising the political nature of that inquiry, French CJ and Bell J saw the Court's role as determining whether the measure is reasonably capable of being seen as appropriate and adapted to the sole purpose (French CJ [19]–[21], [46]; Bell J [242]–[248]).

For Hayne J the proportionality analysis was derived from the word 'adequate' in Art 1(4). A law could only be said to be 'adequate' if it met a test of proportionality: if 'the same goal [can] be achieved to the same extent by an alternative that would restrict the rights and freedoms of the relevant group or individuals to a lesser extent' then the law would not be adequate ([102]). For Crennan, Kiefel and Gageler JJ, proportionality was relevant because the word 'necessary' attached to the measure itself. Their Honours all applied a 'reasonable necessity' test: is the measure reasonably necessary for the equal enjoyment of rights (Crennan J [130]–[131]; Kiefel J [167], [180]–[183]; Gageler J [340], [343], [358])? Put another way, are there reasonable, practicable alternative measures available that are less restrictive in their effect? If so, the law would not be reasonably necessary (Kiefel J [182]).

The laws at issue in this case were special measures

It was then left for the Court to consider whether the laws in the present case were special measures within s 8 of the RDA. In doing so, all members of the Court emphasised the severe nature of the problems caused by alcohol abuse and associated violence on Palm Island by referring to extrinsic materials such as reports, background facts, explanatory notes and other publicly available materials (French CJ [21], [27], [31], [45]; Hayne J [58], [105]–[108]; Crennan J [139]; Kiefel J [184]; Bell J [230], [248]; Gageler J [366]–[375]). In the words of Hayne J, these materials demonstrated the mischief to which the impugned provisions were immediately directed: in this case, the 'evil of alcohol fuelled violence and disturbance' ([58]). It was also important that the Liquor Act required the Minister to be satisfied, in deciding whether to declare Palm Island as a 'restricted area' (making it subject to the alcohol restrictions), that imposing the restrictions was necessary to minimise harm caused by alcohol abuse and misuse, associated violence and alcohol-related disturbances or public disorder (French CJ [46]; Hayne J [105]–[106]; Crennan J [122]–[123]; Bell J [250]; Gageler J [366], [374]–[375]).

The materials showed that the sole purpose of the measure was to minimise the causes and consequences of alcohol misuse in the area and thereby secure the adequate advancement of Aboriginal people on Palm Island to ensure their equal enjoyment of human rights to personal security and freedom from violence (French CJ [46]; Hayne J [58], [108]; Crennan J [138]–[139]; Kiefel J [184]; Bell J [248]; Gageler J [378]). As Hayne J observed, '(t)hose who live in fear of violence cannot exercise their rights' ([107]). The materials also showed that the severity of the problem was such that, regardless of the other mechanisms that might have been tried, the provisions ultimately enacted were proportionate to the task of tackling the problem (French CJ [46]; Hayne J [109]; Crennan J [139]; Kiefel J [187]; Bell J [249]; Gageler J [373]–[375]). Accordingly, the challenged Queensland laws were a 'special measure' within s 8 of the RDA.

The Court's approach in relying upon legislative requirements and extrinsic materials denotes a degree of deference to the political judgment of the legislature and executive. Both French CJ (at [19]–[21] and [47]) and Gageler J (at [375]) commented on the respective roles of the Court and the executive in taking and reviewing actions designed to advance the human rights of a group.

Additional findings

The Court also dealt with several other important arguments made by the appellant:

- The Court did not proceed on the basis that there was an onus on the State of Queensland to show that its laws were a special measure (French CJ [45]; Gageler J [354], [355]; see also Hayne J [95] and Kiefel J [185], not finally deciding). Findings of constitutional or legislative facts do not form issues between parties to be tried according to the rules of evidence in the ordinary manner. In applying s 8, the court can use materials including formal evidence adduced by the parties and also material of which judicial notice can be taken (French CJ [21]; Bell J [248]; Gageler J [351]–[353]).
- Prior consultation with (and agreement of) the persons to be affected by a law is not a *legal* criterion of a special measure. Therefore, lack of consultation and prior consent will not, in itself, preclude a finding of a law as a special measure (French CJ [24], [43]; Hayne J [91]; Crennan J [129], [131]; Kiefel J [186]; Bell J [240]; Gageler J [357]). However, consultation is likely to be 'essential to the practical implementation' of a measure and will assist in demonstrating that the law is proportionate (French CJ [25]; see also Hayne J [91]; Crennan J [133]; Bell J [237], [247]).
- A law imposing a criminal sanction can be a special measure. However, the fact that a law said to be a special measure imposes this sanction will be relevant in the proportionality analysis (French CJ [46]; Hayne J [103]–[104]; Crennan J [129], [137]; Kiefel J [186]; Bell J [249]; Gageler J [357]).
- There is no need for a specific temporal limit to be included in a law for it to be a special measure, but a law will cease to be a special measure if it continues in force after its objectives have been achieved (French CJ [43]; Kiefel J [186]; Bell J [252]).
- The Court addressed an argument made by the appellant that, as the RDA defines 'special measures' in s 8 and 'rights' in s 10 by reference to terms of the CERD, the requirements of special measures should take into account recent, non-binding international materials and interpretations of the CERD arguably demonstrating changes in the interpretation of the CERD since the RDA was enacted (French CJ [24]; Kiefel J [170]–[172]; Bell J [234]). International materials might be important: Gageler J held that the purpose of s 10 'would not be achieved were constructional choices now presented by its text not to be made consistently with that contemporary international understanding' ([328]). And Bell J said that the content of the human rights protected by the CERD and s 10 of the RDA might adapt to changes in international law ([236]). But Australian courts cannot 'adopt "interpretations" which rewrite the incorporated text or burden it with glosses which its language will not bear' (French CJ [23]; see also Crennan J [134] and Kiefel J [174]–[176]); and the criteria in Art 1(4) of the CERD (relating to special measures) 'cannot be supplemented by additional criteria reflecting the non-binding recommendations of the CERD Committee' (Bell J [235]). Justice Hayne took the narrowest approach, stating that in interpreting the RDA the only extrinsic materials that could be used in ascertaining the meaning of the international text to which it gave effect were materials in existence at the time of the enactment of the RDA ([61]).

AGS (Louise Rafferty, Andrew Yuile and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor-General Justin Gleeson SC, Craig Lenehan and Fiona Roughley as counsel.

The text of the decision is available at: http://www.austlii.edu.au/au/cases/cth/HCA/2013/28.html

Andrew Buckland
Senior Executive Lawyer
T *02 6253 7024* ***M*** *0411 019 591*
andrew.buckland@ags.gov.au

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

High Court upholds the validity of mandatory minimum sentences for people smugglers

In a 6:1 decision the High Court rejected a challenge to the constitutional validity of a Commonwealth law requiring a sentencing court to impose a mandatory minimum term of imprisonment on a person convicted of smuggling a group of 5 or more unlawful non-citizens into Australia.

Magaming v The Queen
High Court of Australia, 11 October 2013
[2013] HCA 40; (2013) 87 ALJR 1060

Background

The appellant was one of the crew of a boat that entered Australian waters carrying 56 passengers who were unlawful non-citizens. He pleaded guilty in the New South Wales District Court to an offence of smuggling 5 or more unlawful citizens into Australia contrary to s 233C of *Migration Act 1958* (Cth) and was sentenced to the minimum penalty of 5 years' imprisonment with a non-parole period of at least 3 years, as required by s 236B of the Migration Act.

The appellant unsuccessfully appealed his sentence to the New South Wales Court of Criminal Appeal, arguing that the Migration Act was invalid insofar as it required the sentencing court to impose a minimum sentence of imprisonment (see *Karim v The Queen* (2013) 274 FLR 388). The appellant was then granted special leave to appeal to the High Court. The Commonwealth Attorney-General intervened in the High Court and put the primary submissions in support of the validity of the Migration Act provisions.

Legislation

Section 233A of the Migration Act makes it an offence (described as 'people smuggling') to organise or facilitate the bringing or coming to Australia of another person who is an unlawful non-citizen. That offence carries no mandatory minimum sentence.

Section 233C creates an offence described as '[a]ggravated offence of people smuggling (at least 5 people)'. Section 233C makes it an offence to organise or facilitate the bringing or coming to Australia of a group of at least 5 unlawful non-citizens. That offence carries a mandatory minimum term of imprisonment of 5 years and a non-parole period of at least 3 years.

Constitutional issues

The appellant argued that the elements of the offence created by s 233C are identical (save for the number of unlawful non-citizens concerned) with the elements of the

offence created by s 233A. Thus, it was said, where the number of unlawful citizens involved was 5 or more, the provisions 'are coextensive' ([11]). In that case the prosecution's choice of which offence to charge would affect whether an offender *must* be sentenced to imprisonment ([3]). The provisions were said to be invalid because they:

- are incompatible with the separation of judicial and prosecutorial functions
- are incompatible with the institutional integrity of the courts
- require a court to impose sentences that are 'arbitrary and non-judicial'
- distort a judicial function 'affecting liberty in a manner "not reasonably proportionate to the end of general deterrence" which the law sought to serve' ([11]–[12]).

The High Court's decision

The main judgment of the Court was delivered by French CJ, Hayne, Crennan, Kiefel and Bell JJ. Justice Keane agreed with the joint judgment and added some comments of his own and Gageler J dissented.

'... a prosecutor does not choose what punishment will be imposed and does not exercise judicial power when ... they can choose between a charge that carries a mandatory minimum penalty and a charge that does not.'

Majority judgments

Sections 233A and 233C are not coextensive

The joint judgment (Keane J agreeing) rejected the appellant's argument that ss 233A and 233C are 'coextensive'. Their Honours held that, while the 2 offences have many common elements, proof of an offence under s 233C necessarily required the additional proof that a group of 5 or more unlawful non-citizens was to be brought to Australia ([16]–[17]).

Section 236B (read with ss 233A and 233C) are not unconstitutional

The joint judgment (Keane J agreeing) then dismissed the appellant's argument that the sections were incompatible with the separation of judicial and prosecutorial functions and the institutional integrity of the courts. Their Honours held that a prosecutor does not choose what punishment will be imposed and does not exercise judicial power when, in choosing the charge to be laid against an accused, they can choose between a charge that carries a mandatory minimum penalty and a charge that does not ([26], [38]–[40]). They reached this conclusion by applying *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 (*Fraser Henleins*) (of which there was no reason to doubt the correctness of) and *Palling v Corfield* (1970) 123 CLR 52 ([37]–[38]).

In the context of aggravated offences, the joint judgment (Keane J agreeing) characterised the appellant's argument as amounting to the proposition that 'Parliament cannot ... prescribe a mandatory minimum penalty for an aggravated offence if no mandatory minimum penalty is prescribed for the simple offence' ([45]). That proposition was not accepted ([53]).

Their Honours similarly rejected the appellant's argument that s 236B (read with s 233C) was invalid in the case of 'an offender at the bottom end of the scale' because it distorts the 'judicial sentencing function' in a way that 'was "not reasonably proportionate to the end of general deterrence" which the law sought to serve' and for such offenders mandated a penalty that was 'manifestly disproportionate to the offence committed' ([46], [50]). In rejecting this argument, their Honours held that:

- 'Legislative prescription of a mandatory minimum term of imprisonment for an offence ... is not, on that account alone inconsistent with Ch III' ([49]).

- The appellant had not identified a standard that the Court could use to assess the proportionality of a prescribed minimum sentence to the offending conduct ([52]; see also Keane J at [103]–[104]).
- Even if the appellant's sentence could be said to be 'too "harsh" when measured against some standard found outside the [legislation]', that would not render the provisions invalid ([52]).

As Keane J added:

> The enactment of sentences by the legislature, whether as maxima or minima, involves the resolution of broad issues of policy by the exercise of legislative power. A sentence enacted by the legislature reflects policy-driven assessments of the desirability of the ends pursued by the legislation, and of the means by which those ends might be achieved. It is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the Commonwealth and the soundness of a view that condign punishment is called for to suppress that activity, and to determine whether a level of punishment should be enacted as a ceiling or a floor. ([105])

Justice Gageler (dissenting) – section 236B impermissibly allows executive to determine punishment

Justice Gageler, however, accepted the appellant's argument that s 236B (read with s 233C) was contrary to Ch III of the Constitution. His Honour held that *Fraser Henleins* should be overruled because its reasoning 'elevates form over substance' and is 'out of step with the modern purposive understanding of Ch III' ([81]).

His Honour held that a limitation on Commonwealth legislative power should be recognised, arising from the separation of judicial power by Ch III of the Constitution, that 'will be transgressed by a Commonwealth law which purports to confer on an executive officer what is in substance a power to determine the punishment to be imposed by a court in the event of conviction of an offender in a particular case' ([87]–[88]). Justice Gageler concluded that s 236B was such a law because the elements of the aggravated offence of people smuggling created by s 233C wholly encompass the elements of the offence of people smuggling created by s 233A ([91]–[92]). His Honour would have held s 236B relevantly invalid ([60]).

AGS (Andrew Buckland, Megan Caristo and David Bennett QC from the AGS Constitutional Litigation Unit) represented the Commonwealth Attorney-General intervening, with the Solicitor-General Justin Gleeson SC, Chris O'Donnell and Graeme Hill as counsel.

The text of the decision is available at: http://www.austlii.edu.au/au/cases/cth/HCA/2013/40.html

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

Commonwealth law prohibiting offensive use of the post held to be valid

By a statutory majority, the High Court upheld the validity of s 471.12 of the Criminal Code (Cth) which relevantly prohibits a person from using a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, 'offensive'. The challenge to validity was based on the implied constitutional freedom of political communication.

In these appeals from the New South Wales Court of Criminal Appeal (NSWCCA), the High Court divided 3:3, with Crennan, Kiefel and Bell JJ (in a joint judgment) holding s 471.12 valid, while French CJ (with whom Heydon J broadly agreed) and Hayne J found the section invalid. Under s 23(2)(a) of the *Judiciary Act 1903* (Cth), if the High Court is evenly divided in an appeal then the decision of the court appealed from is affirmed. Accordingly, the appeals from the NSWCCA, which had upheld the validity of s 471.12, were dismissed.

Monis v The Queen; Droudis v The Queen
High Court of Australia, 27 February 2013
[2013] HCA 4; (2013) 87 ALJR 340; (2013) 295 ALR 259

Background

The appeals arose out of charges against the appellants alleging offences contrary to s 471.12 of the Criminal Code (Cth). One of the appellants, Mr Monis, was alleged to have sent letters to, among others, the families of Australian soldiers killed while serving in Afghanistan. The letters included statements critical of Australia's involvement in Afghanistan and reflecting adversely on the deceased soldiers. The other appellant, Ms Droudis, was alleged to have aided and abetted him in sending a number of those letters ([1]; [78]; [252]–[255]).

The appellants were charged on indictment before the New South Wales District Court and filed motions for the indictments to be quashed on the ground that s 471.12 is invalid because it infringes the implied constitutional freedom of political communication. The District Court dismissed the motions and the appellants appealed to the NSWCCA. The NSWCCA found that s 471.12 effectively burdened political communication but held that it was nevertheless valid, as it was 'reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the system of government prescribed by the Constitution' ([4], [7]; [79], [81]–[82]; [256]–[257]).

The appellants were granted special leave to appeal to the High Court. The Commonwealth Attorney-General intervened in the High Court to support the validity of s 471.12.

The High Court's decision

Construction: section 471.12 prohibits offensive communication 'at the higher end of the spectrum'

The High Court did not accept the appellants' argument that the reference to 'offensive' in s 471.12 should be construed as criminalising the use of a postal or similar service in a way that would merely 'hurt or wound the feelings of the recipient' of a postal article. The joint judgment of Crennan, Kiefel and Bell JJ observed that the word 'offensive' is a 'relative term, capable of referring to material ranging in degree of offensiveness' ([287]) and concluded that in the context of s 471.12 the term is confined to offensive communication 'at the higher end of the spectrum, although not necessarily the most extreme' ([336]). It applied to communications that were 'very', 'seriously' or 'significantly' offensive ([336]). Their Honours reached that construction on the basis of the section's history ([312]–[316]), statutory context ([309]–[311]) and purpose ([317]–[324]) as well as the principle that legislation should be interpreted to be consistent with the Constitution ([327]) and the principle of legality ([331]).

In discussing purpose, their Honours said that the purpose of s 471.12 was 'not merely to ensure civility of discourse between users of the postal service' ([318]). Rather, s 471.12 had a purpose of protecting people from the intrusion of seriously offensive material into their personal domain ([320], [324], [348]). The result of these considerations was that s 471.12 was to be confined in the way indicated 'so that it goes no further than is necessary in order to achieve its protective purpose, consistent with its terms, without unduly burdening political communication' ([334]).

French CJ and Hayne J, to similar effect, accepted the majority of the NSWCCA's construction of the term 'offensive' as 'confined to conduct at a threshold defined by the words "calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances" ' (French CJ [43], [57]–[59]; Hayne J [90], [162]). French CJ said that this construction 'accorded with the principle of legality in its application to freedom of expression [and] with the need to construe a criterion of serious criminal liability relatively narrowly and clearly where the narrow construction was reasonably open' ([59]). In contrast with the joint judgment, French CJ found that 'the formulation of the purposes of the provision … was not of assistance in the construction or application of s 471.12' ([59]; see also [20], [48]).

Validity: all justices applied the modified *Lange* test to determine validity

All justices accepted that the constitutional validity of s 471.12 in light of the implied constitutional freedom of political communication rested on the application of the test for validity set out in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 as subsequently modified in *Coleman v Power* (2004) 220 CLR 1 (the *Lange* test): that is, whether s 471.12 effectively burdens political communication (the first limb) and, if it does, whether it is nevertheless valid because it is 'reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the system of government prescribed by the Constitution' (the second limb) (French CJ [61]; Hayne J [88], [105]–[106]; Heydon J [236]; Crennan, Kiefel and Bell JJ [276]). However, Heydon J commented that the 'fundamental assumption' that these authorities 'correctly identified and elucidated' the implied freedom was not challenged yet produced an outcome (invalidity of s 471.12) 'so extraordinary as to cast doubt, and perhaps more than doubt' on that assumption ([236]–[237], [251]).

First limb: all justices found that there was an effective burden

All justices concluded that s 471.12 effectively burdened political communication. Crennan, Kiefel and Bell JJ reasoned that s 471.12 'effectively burdens' political communications because political communication that is offensive within the meaning of s 471.12 will be penalised and may therefore be deterred ([343]). Their Honours held that it could not be suggested that the effect upon political communication was so slight as to be inconsequential so that the first limb of the *Lange* test was not met ([343]).

A similar conclusion was reached by the justices in the statutory minority (French CJ [71]; Hayne J [171]). French CJ considered both the content of the communications that s 471.12 affected (which was not confined to the outer limits of political discussion in Australia: [66]–[67]) and the range of mechanisms for communicating to which it applied ([68]–[69]) in concluding that 'the scope of the criminal liability created by s 471.12 in its application to offensive uses of postal or similar services' meant that the section 'must be taken to effectively burden freedom of communication about government or political matters in its operation or effect' ([71]). Further, Hayne J rejected any suggestion that a quantitative assessment of the effect of a law on political communication was relevant – a burden on political communication, even if properly described as 'little', would still have to be justified under the second limb of the *Lange* test ([93], [113]–[122], [173]). Hayne J said that it is not correct at the stage of the first limb of the *Lange* analysis to assume that the form of communication eradicated from political debate is unimportant or to assess whether there remain sufficient forms of political communication ([119], [173]).

Second limb: the Court split 3:3 on whether the law was appropriate and adapted to a constitutionally permissible end

The justices were equally divided on the application of the second limb of the *Lange* test.

Crennan, Kiefel and Bell JJ said that there are 2 inquiries: first, the means adopted to implement a valid legislative object must be proportionate to that object; and, secondly, both the ends and means of the legislation must be compatible with the constitutional imperative of the maintenance of the system of representative government ([277]–[282]). As to the first, a relevant consideration is whether there are other less drastic means of achieving the object that are equally practicable and available. However, '[g]iven the proper role of the courts in assessing legislation for validity, such a conclusion would only be reached where the alternative means were obvious and compelling' ([347]). As to the second, rarely, the legislative object will itself be incompatible with maintaining representative government. Usually, 'the question of incompatibility will involve examining the extent of the effect of the legislative restrictions upon the communications the subject of the implied freedom which supports the maintenance of that system of government' ([281]); that is, undertaking a further proportionality analysis relating to the means employed in the legislation and the object of maintaining representative government ([282]–[283], [345]–[346]).

Applying this analysis, their Honours held that s 471.12 had the protective purpose identified above, that the section was proportionate to achieving its protective purpose ([348]) and that this purpose was not incompatible with the maintenance of the constitutionally prescribed system of government or the implied freedom that supports it ([349]). It remained to consider, applying a proportionality analysis, whether the means employed by s 471.12 to achieve its purpose imposed too great a burden on the implied freedom. Their Honours concluded that they did not. In particular, s 471.12 had only an incidental effect on political communication ([342], [352]) and was limited to

prohibiting seriously offensive communication assessed by an objective standard and involving a fault element of recklessness ([287]–[288], [341], [351]–[352]). Accordingly, s 471.12 was constitutionally valid ([353]).

The justices in the statutory minority characterised the purpose of s 471.12 differently and, for this reason, found that its object was not a 'legitimate end' within the second limb of the *Lange* test. French CJ held that the purpose of s 471.12 was no more than 'the prevention of the conduct which it prohibits'; that is, 'the prevention of uses of postal or similar services which reasonable persons would regard as being, in all the circumstances, offensive'. This was an object that, because of its very breadth, 'should not be regarded as a legitimate end' ([73]).

In further discussing the second limb, his Honour said '[t]he purpose of the prohibition imposed by s 471.12 is as broad as its application' ([74]), which extended to communications conveyed by postal, courier, or packet- or parcel-carrying services for the delivery of newspapers, books and so on to homes or offices or even to distributors of such material ([69]). It followed also that the section could not 'be applied in such a way as to meet the compatibility requirement' of the second limb of the *Lange* test because it applied to prohibit political communications 'in a range of circumstances the limits of which were not able to be defined with any precision and which cannot be limited to the outer fringes of political discussion' ([74]). This was so notwithstanding that s 471.12 was confined by the 'reasonable persons' test and a high threshold definition of what is 'offensive' ([74]).

Similarly, Hayne J emphasised that the second limb of the *Lange* test involves a 'compound conception' that requires consideration of both legislative means and legislative ends in assessing compatibility ([136]–[137], [145]–[146]). He rejected the arguments that a legislative object or end is 'legitimate' if it is within a legislative head of power ([132]–[140]) and that every end conducive to the 'public interest' is compatible in the relevant sense ([142]–[143]). To be 'legitimate', an end 'must be compatible with the constitutional system of representative and responsible government', which includes freedom of political communication ([127]).

In relation to s 471.12, Hayne J held that the sole concern of the provision was the prevention of serious offence ([88], [95], [97], [178], [184], [205]). He rejected arguments that its object was to protect from harm the recipients of, or those who handle, postal articles ([180]–[181], [203]–[206]); prevent violent retaliation ([182], [196]–[202]); or maintain the 'integrity of the post' ([183], [186]–[195]). His Honour held that the prevention of serious offence was not a legitimate end in terms of the second limb of the *Lange* test, as it did no more than 'regulate the civility of discourse carried on by using a [postal or similar] service' ([97], [214], [220]–[222]). Therefore, questions of proportionality of the legislative means for achieving the ends did not arise ([98]).

For the statutory minority, the result was that s 471.12 could not validly apply to support the challenged indictments, as the communications complained of 'on their face involve matters of government or political concern' ([76]; [229]–[232]).

AGS (Simon Thornton, Megan Caristo and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the then Acting Solicitor-General Tom Howe QC, Craig Lenehan and Rowena Orr as counsel.

The text of the decision is available at: http://www.austlii.edu.au/au/cases/cth/HCA/2013/4.html

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

Council by-law prohibiting preaching on a road does not infringe the implied freedom of political communication

A 5:1 majority of the High Court held valid a council by-law that prohibits a person from, among other things, preaching or distributing printed material on a road without the council's prior permission.

The by-law was a valid exercise of the council's power to make by-laws under the South Australian local government legislation and was not invalid under the implied constitutional freedom of political communication.

Attorney-General (SA) v Corporation of the City of Adelaide
High Court of Australia, 27 February 2013
[2013] HCA 3; (2013) 87 ALJR 289; (2013) 295 ALR 197

Background

These appeals to the High Court related to the conduct of the second and third respondents (the Corneloups), who are members of a group called Street Church. The Corneloups have preached and distributed printed material in Rundle Mall in the Adelaide city centre and wish to continue doing so. A by-law made by the Corporation of the City of Adelaide (the Council) prohibits them from engaging in these activities without permission. The by-law provides that no person shall, on any road, preach, canvass, harangue, tout for business or conduct any survey or opinion poll, or distribute any printed material, without the Council's permission. Permission is not required for some activities, including preaching and canvassing in a designated area known as a Speakers' Corner or for conducting a survey or opinion poll, or distributing leaflets, for a candidate during a federal, State or local government election.

The Corneloups challenged the validity of the by-law. The Full Court of the South Australian Supreme Court found that, although the by-law was within the Council's power to make by-laws 'generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants' (the convenience power) under s 667(1) 9 XVI of the *Local Government Act 1934* (SA) (LG Act 1934), it infringed the implied freedom of political communication. The appellant – the South Australian Attorney-General – appealed from that decision to the High Court.

The Commonwealth Attorney-General intervened in the High Court in support of the appellant to put submissions on the approach to determining the validity of delegated legislation (such as by-laws) that burdens political communication and to support the constitutional validity of the by-law.

The High Court's decision

By-law within statutory power

The Corneloups challenged the validity of the by-law on a number of statutory grounds relating to provisions of the South Australian local government legislation. With the exception of Heydon J, all the justices rejected these grounds. In particular, the by-law was within the convenience power properly construed having regard to its scope, object and subject matter (French CJ [38], [41]–[46], [66]; Hayne J [115]; Crennan and Kiefel JJ [190], Bell J agreeing [224]; cf Heydon J (dissenting) [154]–[160]). Hayne J concluded that 'the words of the convenience power are well able to support a by-law governing whether and when there may be activities on a road which may diminish the convenience of using the road' ([108], [115]). The by-law was not invalid on grounds of unreasonableness or lack of proportionality to the by-law-making power. Although the majority agreed that these grounds were not made out, the various majority judgments identified the relevant limits on the power to make delegated legislation in differing terms (compare French CJ [54]–[64]; Hayne J [117]–[123], Bell J agreeing [224]; Crennan and Kiefel JJ [198]–[201]).

Heydon J, in dissent, decided the appeal on the statutory ground that the by-law was not a valid exercise of the convenience power or any other by-law-making power ([154]–[160], [161]).

Approach to validity of by-law under implied freedom of political communication

The Corneloups also argued that the by-law was constitutionally invalid for infringing the implied constitutional freedom of political communication. They accepted that the by-law was directed towards a legitimate end but argued that the general prohibition on preaching, canvassing and distributing printed material was a large intrusion upon the freedom of political communication that was not ameliorated by the possibility of obtaining permission.

All the majority justices accepted that the test for determining the validity of the by-law in light of the implied constitutional freedom of political communication is the test set out in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 as subsequently modified in *Coleman v Power* (2004) 220 CLR 1 (the *Lange* test, set out in the note on *Monis v The Queen* at p 16 above) (see French CJ [67]; Hayne J [131]; Crennan and Kiefel JJ [209]–[210], Bell J agreeing [224]). In contrast to the approach of the majority in *Wotton v Queensland* (2012) 246 CLR 1 in applying the implied freedom to an exercise of statutory power (see Litigation Notes No 22, p 21), the majority here applied the *Lange* test to the by-law itself to determine constitutional validity (Hayne J [137]; Crennan and Kiefel JJ [214]–[216], Bell J agreeing [224]).

For Crennan and Kiefel JJ ([202], [210], Bell J agreeing [224]), the *Lange* test is to be understood in light of the explanation in their judgment in *Monis v The Queen* of the 2 inquiries under the second limb of the *Lange* test (see p 17 above). According to their Honours, the second limb requires that the by-law be 'proportionate to its purposes' as well as 'proportionate in its effects upon the system of representative government which is the object of the implied freedom' ([210]).

By-law consistent with the implied freedom of political communication

In addressing the first limb of the *Lange* test, the parties did not dispute and the majority justices accepted that the by-law did effectively burden political communication in preventing, without permission, the activities to which it applied

(French CJ [67]; Hayne J [133]; Crennan and Kiefel JJ [209], Bell J agreeing [224]). It was therefore necessary to apply the second limb of the *Lange* test.

On applying the second limb, the majority justices decided that the by-law was valid, as it was reasonably appropriate and adapted (or proportionate) to serving a legitimate end in a manner compatible with the constitutionally-prescribed system of representative and responsible government. First, their Honours were of the view that the object or purpose of the by-law was to regulate the public use of roads and public places (French CJ [66]), to prevent 'obstruction in the use of roads' (Hayne J [119], [134]) or to ensure 'the safety and convenience of users of roads' (Crennan and Kiefel JJ [203], Bell J agreeing [224]) and that these objects were compatible with the maintenance of the constitutionally-prescribed system of government (French CJ [68]; Hayne J [135]–[136]; Crennan and Kiefel JJ [203], [221], Bell J agreeing [224]).

Secondly, the majority justices held that the by-law was reasonably appropriate and adapted, or proportionate, to serve its purpose in a manner compatible with the maintenance of the constitutionally-prescribed system of government (French CJ [68]; Hayne J [141]; Crennan and Kiefel JJ [221], Bell J agreeing [224]). It 'adequately balances the competing interests in political communication and the reasonable use by others of a road' (Hayne J [141]). The reasons for this conclusion included the following:

- The by-law's restriction on preaching, canvassing and distributing printed material was confined to particular places (roads) and did not apply to surveys, opinion polls or material distributed by or with the authority of a candidate during the course of an election or for the purpose of a referendum (French CJ [68]; Hayne J [141]; Crennan and Kiefel JJ [217], [219], Bell J agreeing [224]).
- The by-law's requirement that a person seek permission from the Council to preach (among other things) was not itself incompatible with the implied freedom, as had been suggested by the Full Court of the South Australian Supreme Court (Crennan and Kiefel JJ [222], Bell J agreeing [224]).

'... the discretion could not be exercised based on approval or disapproval of the content of the proposed preaching ...'

- The discretion to lift the by-law's restriction had to be exercised by reference only to the purpose of the by-law (Hayne J [140]; Crennan and Kiefel JJ [208], [213], [219], Bell J agreeing [224]) – for example, the discretion could not be exercised based on approval or disapproval of the content of the proposed preaching, canvassing or material to be distributed (French CJ [68]).
- It was difficult to conceive of alternative measures to the by-law that would be equally practicable in regulating the use of roads so as to meet the legitimate objectives of the by-law (Crennan and Kiefel JJ [207]–[208], Bell J agreeing [224]).
- The by-law was not directed to political communication; it could only prevent a political communication incidentally and when necessary to achieve the legitimate object of ensuring the safe and convenient use of roads (Crennan and Kiefel JJ [217], [219], Bell J agreeing [224]).

AGS (Andrew Buckland and Megan Caristo from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the then Acting Solicitor-General Tom Howe QC, and Chris Bleby SC as counsel.

The text of the decision is available at: http://www.austlii.edu.au/au/cases/cth/HCA/2013/3.html

Louise Rafferty
Senior Executive Lawyer
T 02 6253 7005 M 0418 416 495
louise.rafferty@ags.gov.au

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

Detention under court order was valid although authorised by Act later declared unconstitutional

The High Court unanimously held that a detention order, made by a judge of the NSW Supreme Court under legislation later held unconstitutional, was valid until set aside and was thus a defence to a claim for false imprisonment.

State of NSW v Kable
High Court of Australia, 5 June 2013
[2013] HCA 26; (2013) 87 ALJR 737; (2013) 298 ALR 144

Background

In 1995 Levine J of the New South Wales Supreme Court made an order under the *Community Protection Act 1994* (NSW) (the CP Act) that Mr Kable be detained. In 1996, after Mr Kable had served his period of detention, the High Court declared the CP Act invalid and set aside Levine J's order (see *Kable v DPP (NSW)* (1996) 189 CLR 51 (*Kable No 1*). The Court held that the power the CP Act gave the Supreme Court was incompatible with the institutional integrity of that Court required by Ch III of the Constitution.

Mr Kable subsequently brought a false imprisonment claim against the State of New South Wales for the period he was detained. The State relied on the detention order as a defence to that claim, arguing that, as an order of a superior court, it was valid until set aside. The State succeeded at first instance, but on appeal the New South Wales Court of Appeal (NSWCA) unanimously held that the order was no answer to Mr Kable's claim. The NSWCA held that the reasons of the High Court in *Kable No 1* required the conclusion that, 'in making the detention order, "the Supreme Court was not exercising judicial power or authority and was not acting, institutionally, as a superior court but was acting ... as an instrument of the executive" ' ([8]).

The High Court's decision

The High Court unanimously allowed the State's appeal, holding that the detention order provided lawful authority for Mr Kable's detention ([11], [47]).

Detention order, as a judicial order, was valid until set aside

The joint judgment of French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ referred to the 'firmly established' principle that, where a federal court is established as a superior court of record, its orders are valid until set aside, even if the orders are made in excess of jurisdiction (including on constitutional grounds) ([32]; see also Gageler J [56]–[60]). The effect given to a judicial order made beyond jurisdiction comes 'not from the law which purported to confer the relevant jurisdiction but from the status or nature of the court making the order (as a superior court of record)' ([36], [57]). That principle has

its roots in the nature of judicial power ([33]), being the final quelling of controversies according to law, and the authority of a superior court to make a binding determination as to its own jurisdiction ([34], [59]–[60]). The principle was treated as applying equally to the judicial orders of a State Supreme Court ([32]).

The issue in the present case was whether the detention order made by Levine J was a 'judicial order'. The Court concluded it was ([32], [78]). That conclusion was consistent with the view expressed in the joint judgment as to what the High Court actually decided and ordered in *Kable No 1* ([17], [19]). It was also consistent with the premises on which the proceedings leading up to that decision had been conducted ([18]; see also Gageler J [74]).

Detention order was made by a judge acting in his judicial capacity

The joint judgment held that the order made by Levine J was a judicial order, as it had been made by a judge acting in his judicial capacity ([27]). In support of this conclusion, their Honours identified a number of features of both the proceedings before Levine J and the order itself. Those features included that the order was 'the result of an adjudication determining the rights of Mr Kable'; 'the order both authorised and required [Mr Kable's] detention for a fixed term'; the order 'was made following proceedings which were conducted inter partes'; '[s]ubject to some exceptions, the rules of evidence applied'; '[t]he order was enforced as a court order' and 'Mr Kable could and did appeal against the order' ([27]).

These features distinguished the detention order made by Levine J from the warrant issued by a judge of the New South Wales Supreme Court, which the High Court had characterised in *Love v Attorney-General (NSW)* (1990) 169 CLR 307 (*Love*) as being 'essentially administrative in nature' ([26]). Because the warrant in issue in *Love* was 'an instrument made pursuant to a circumscribed statutory authority', its effect, in contrast to the effect of a judicial order, 'depended entirely upon the State Act' ([26]).

Operation of the legal system

The joint judgment observed that the conclusions they had reached about the effect of Levine J's order 'accord with fundamental considerations about the operation of any developed legal system' ([38]). Were it not the case that the orders of a superior court of record are valid until set aside, individuals affected by an order would have to choose whether to disobey it (and risk being found in contempt of court) or obey it (and risk incurring tortious liability to persons whose rights and liabilities are affected by the order) ([39]–[40]). This would be 'almost a status of anarchy' ([40]).

Justice Gageler: detention order was 'judicial' because it was an adjudication to determine the rights of parties

Writing separately, Gageler J agreed that the order made by Levine J was a judicial order ([78]) and was thus valid until set aside ([47], [58]). His Honour identified the justification for the capacity of a superior court to make a judicial order that is valid until set aside as lying in the 'unique and essential function reposed in Ch III courts … of rendering final resolutions of controversies about legal rights and legal obligations' ([59]). According to Gageler J, the making of a judicial order ordinarily resolves, implicitly or explicitly, a question as to the court's jurisdiction and the validity of a statute purporting to confer that jurisdiction. In those circumstances the finality of that order and that resolution are incidents of the nature of the court as a repository of judicial power ([59]–[60]). In the present case the exercise of judicial power by making the detention order resolved the whole of the matter before the Supreme Court.

That matter was 'constituted by the disputed entitlement of the DPP to a preventive detention order under the CP Act', and 'encompassed … whether the Supreme Court had jurisdiction and whether the CP Act was invalid as incompatible with Ch III' ([77]; see also joint judgment at [37]). The detention order was thus 'an adjudication to determine the rights of parties' ([77]).

AGS (Andrew Buckland, Louise Rafferty, Megan Caristo and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Solicitor-General Justin Gleeson SC, and Anna Mitchelmore as counsel.

The text of the decision is available at: http://www.austlii.edu.au/au/cases/cth/HCA/2013/26.html

Asaf Fisher
Senior Lawyer
T *02 6253 7453*
asaf.fisher@ags.gov.au

Andrew Buckland
Senior Executive Lawyer
T *02 6253 7024* ***M*** *0411 019 591*
andrew.buckland@ags.gov.au

Queensland Supreme Court can make a criminal organisation declaration based on secret intelligence

The High Court unanimously rejected a challenge to the *Criminal Organisation Act 2009* (Qld), holding that the Act did not offend the principle derived from *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 (the *Kable* principle). The Court held that the Queensland Supreme Court's power to declare an organisation to be a 'criminal organisation', including on the basis of secret criminal intelligence, was not incompatible with that court's 'institutional integrity'.

Assistant Commissioner Condon v Pompano Pty Ltd
High Court of Australia, 14 March 2013
[2013] HCA 7; (2013) 87 ALJR 458; 295 ALR 638

Background

Section 10 of the Act provides for the Supreme Court to declare an organisation a 'criminal organisation' if, among other things, the Court is satisfied that 'members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity' and 'the organisation is an unacceptable risk to the safety, welfare or order of the community'. A criminal organisation declaration can lead to the Court making further orders against individuals, including orders affecting their liberty.

The Supreme Court may make a criminal organisation declaration based on information that the Court, on the application of the Commissioner of Police, declares 'criminal intelligence'. The Court determines the Commissioner's application in a 'special closed hearing', which relevantly excludes an organisation against which a criminal

organisation declaration may be sought. It does, however, include a person designated as the criminal organisation public interest monitor (the COPIM) who is 'appointed as a kind of statutory "amicus curiae" ' ([12]) and whose functions include testing, and making submissions to the court about, 'the appropriateness and validity' of, relevantly, an application to have information declared 'criminal intelligence'.

Under s 8 of the Act, Assistant Commissioner Condon applied for a declaration that the Finks Motor Cycle Club, Gold Coast Chapter (Finks) and Pompano Pty Ltd (together, 'the organisation') constitute a 'criminal organisation'. In support of the application, he relied on information that had been declared 'criminal intelligence' and thus could not be disclosed to the organisation ([8], [12]). The organisation challenged the validity of a number of the provisions of the Act and that part of the proceeding in the Supreme Court was removed into the High Court ([14]).

The High Court's reasons for rejecting the organisation's challenge

The High Court dismissed the organisation's challenge in 3 judgments. French CJ published his own reasons, as did Gageler J. Hayne, Crennan, Kiefel and Bell JJ (the plurality) published joint reasons.

Can a State Parliament confer power on a court to make a decision on the basis of information that cannot be disclosed to the affected party or their legal representative?

'... the Supreme Court ultimately retained its capacity to act fairly ... and impartially ...'

The plurality observed that an adversarial system assumes, as a general rule, that 'opposing parties will know *what* case an opposite party seeks to make and *how* that party seeks to make it' ([157] (emphasis in original)). The Act constituted a departure from that general rule. The question presented was whether it constituted *such* a departure from the general rule that it distorted the institutional integrity of the Supreme Court as an independent and impartial tribunal. Although their reasons varied, French CJ, the plurality and Gageler J each upheld the validity of the Act on the basis that the Supreme Court ultimately retained its capacity to act *fairly*.

The plurality's approach was to ask 'whether *taken as a whole*, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid "practical injustice" ' ([157] (emphasis added)). They observed:

- under the provisions of the Act, the Supreme Court may have (and in many cases may be required to have) regard to any potential unfairness to a respondent when determining whether to declare information as criminal intelligence ([162])
- although 'the criminal intelligence provisions deny a respondent knowledge of *how* the Commission seeks to prove an allegation, they do not deny the respondent knowledge of *what* is the allegation that is made against it' ([163]).

In the final analysis, the Court retained its capacity to act fairly and impartially, a capacity the plurality described as 'critical to its continued institutional integrity' ([167]).

French CJ's approach was similar to the plurality's: the 'question of validity requires attention to the features of the statutory scheme *taken as a whole*' ([87] (emphasis added)). He emphasised that:

- the Court retains the 'powers necessary to mitigate the extent of the unfairness to [a] respondent in the circumstances of [a] particular case'
- the Court retains also 'the responsibility to determine what, if any, weight to give to criminal intelligence'

- the Court's power to 'control its own proceedings to avoid unfairness' suggests that it would have a discretion to refuse to act on criminal intelligence ([88]).

Also, although the provisions of the Act 'relating to the COPIM adopt a fairly minimalist approach' to the protection of a respondent's interests, they were relevant 'to the effect of the impugned provisions … on the ability of the Supreme Court to provide procedural fairness' ([65]; cf Gageler J [178], [208]).

In Gageler J's view, however, the Act was saved from invalidity *only* by the Supreme Court's capacity to stay, in the exercise of its inherent jurisdiction, a substantive application in which criminal intelligence is relied on, where practical unfairness becomes manifest ([178], [212]).

Deciding on whether an organisation is an unacceptable risk to safety and extending time limits

The organisation also argued that requiring the Supreme Court to decide whether an organisation is 'an unacceptable risk to the safety, welfare or order of the community' involves a question that is not suitable for judicial determination and that the Act denied the organisation procedural fairness by limiting the time to respond to an application that the organisation be declared a criminal organisation. The Court rejected those arguments, including on the basis that the first ground was contrary to authority, and the second ground wrongly assumed that the Act excluded the power of the Supreme Court to extend the time for filing a response to an application for a criminal organisation declaration (French CJ [23]–[24], [93]–[94]; Hayne, Crennan, Kiefel and Bell JJ [143], [172]; Gageler J [175]).

AGS (Asaf Fisher, Joe Edwards and Andrew Buckland from the Office of General Counsel) acted for the Commonwealth Attorney-General intervening, with the Solicitor-General Justin Gleeson SC, Nicholas Owens and Danielle Forrester as counsel.

The text of the decision is available at: http://www.austlii.edu.au/au/cases/cth/HCA/2013/7.html

Asaf Fisher
Senior Lawyer
T *02 6253 7453*
asaf.fisher@ags.gov.au

Andrew Buckland
Senior Executive Lawyer
T *02 6253 7024* ***M*** *0411 019 591*
andrew.buckland@ags.gov.au

International Arbitration Act valid

In a unanimous decision, the High Court rejected a challenge on judicial power grounds to the validity of the *International Arbitration Act 1974* (the IA Act).

TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia
High Court of Australia, 13 March 2013
[2013] HCA 5; 87 ALJR 410; 295 ALR 596

Background

The IA Act gives the 'force of law' in Australia to the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). Chapter VIII of the Model Law provides for the 'recognition' and 'enforcement' of awards made in an international commercial arbitration. An award can be enforced in a 'competent court' (Art 35), which includes the Federal Court ([52]). Enforcement of an arbitral award may be refused only on limited grounds (Art 36). Those grounds are primarily concerned with the independence of the arbitrator and the fairness of the arbitral process; they do not include error of law, including error appearing on the face of the award ([53]).

TCL Air Conditioner (Zhongshan) Co Ltd, a company registered and having its principal of business in China, entered into a distribution agreement with Castel Electronics Pty Ltd, a company registered and having its principal place of business in Australia. The agreement included provision for the resolution of disputes by arbitration. Castel submitted a dispute arising from contractual claims against TCL to arbitration. An arbitral tribunal made 2 awards in favour of Castel – one for damages and the other for the costs of the arbitration ([42], [61]).

When TCL failed to pay the amounts owing under the awards, Castel sought to have them enforced in the Federal Court. In separate proceedings, TCL sought to have the awards set aside. TCL also commenced this proceeding in the original jurisdiction of the High Court seeking constitutional writs of prohibition (to restrain the judges of the Federal Court from enforcing the awards) and certiorari (to quash decisions of that Court in relation to the awards).

The High Court's decision

Must a court be able to refuse to enforce an arbitral award for error of law on the face of the award?

In their joint judgment, French CJ and Gageler J summarised the plaintiff's case for invalidity. They said:

> The plaintiff's argument ... reduces to the proposition that the inability of the Federal Court under Arts 35 and 36 of the Model Law to refuse to enforce an arbitral award on the ground of error of law appearing on the face of the award either: undermines the institutional integrity of the Federal Court as a court exercising the judicial power of the Commonwealth, by

> requiring the Federal Court knowingly to perpetrate legal error; or impermissibly confers the judicial power of the Commonwealth on the arbitral tribunal that made the award, by giving the arbitral tribunal the last word on the law applied in deciding the dispute submitted to arbitration. ([4]; see also [64]–[68])

Their Honours rejected the plaintiff's argument, as did Hayne, Crennan, Kiefel and Bell JJ in a separate joint judgment.

No impermissible conferral of judicial power

The Court confirmed that there is an essential difference between judicial power and arbitral power. Judicial power is a 'sovereign or governmental power exercisable, on application, independently of the consent of those whose legal rights or legal obligations are determined by its exercise' ([28]; see also [75], [107]). By contrast, the 'existence and scope of the authority to make [an] arbitral award is founded on the agreement of the parties in an arbitration agreement' ([31]; see also [106]–[107]).

The determination of rights and liabilities lies at the heart of the judicial function. But 'parties are free to agree to submit their differences or disputes as to their legal rights and liabilities for decision by an ascertained or ascertainable third party' ([75]). Where they do so, the decision-maker exercises a power of 'private arbitration', not judicial power. The finality of an arbitral award reflects the 'consequences of the parties having agreed to submit a dispute … to arbitration' ([108]).

The basic difference between judicial power, which is 'coercive' in nature ([28]), and arbitral power, the foundation of which is consensual ([29], [31], [81], [101]), answers the contention that an arbitrator (or an arbitral tribunal) is engaged in the exercise of judicial power ([28]–[31], [75], [108]). That is so even though an arbitrator's powers are now supplemented by statutory provisions ([109]; see also [9]).

No undermining or impairment of the institutional integrity of the Federal Court

A consequence of submitting a dispute to arbitration is that the rights and liabilities under an agreement that gives rise to the arbitration are 'discharged and replaced by the new obligations that are created by an arbitral award' ([108]; see also [78], [9], [34]). The judicial power of the Commonwealth is engaged when a competent court is called on to enforce those obligations under the award ([32], [104]). In doing so, the court is not concerned with the 'enforcement of any disputed right submitted to arbitration' ([34]; see also [79], [104]).

Thus the Court's inability to 'refuse to enforce an arbitral award on the ground of error of law appearing on the face of the award does nothing to undermine the institutional integrity of the Federal Court' ([34]; see also [104]–[105]). That is because no part of the anterior dispute, resolved by the arbitral tribunal, is before the Court ([80] together with [67]). 'The making of an appropriate order for enforcement of an arbitral award does not signify the Federal Court's endorsement of the legal content of the award any more than it signifies its endorsement of the factual content of the award' ([34]).

The High Court also rejected the contention that the Model Law or an implied term of arbitration agreements *requires* an award to be legally correct ([14]–[16] and [70]–[74]).

No constitutionally entrenched supervision of arbitral awards

TCL also argued that because historically, at common law, courts could set aside arbitral awards for error of law on the face of the award, that capacity constituted a defining characteristic of courts that the legislature could not remove. The Court rejected that argument, describing the common law rule to set aside awards for error of law on the face of the award as 'obscure', operating 'haphazardly' and as a rule that 'common law courts themselves' came to regard as a 'matter of regret' ([38]; see also [90], [104]). Unlike

the constitutionally entrenched supervisory jurisdiction of State Supreme Courts to set aside decisions of inferior courts and executive decision makers for jurisdictional error, the common law rule to set aside an award for error of law on the face of the award 'served no systemic end, and was a "defining characteristic" neither of judicial power nor of any court' ([39]).

In rejecting the plaintiff's argument based on the history of the common law rule, French CJ and Gageler J observed:

> the argument overstates the scope for historical considerations to deprive functions conferred on a court by modern legislation of the character of judicial power. The argument also takes too undiscriminating an approach to the common law. Not every common law rule reflected well on common law courts. Very few common law rules were the manifestation of some fundamental characteristic of judicial power. ([35])

In fact, in this case, historical considerations supported the conclusion that the function conferred on a court by the IA Act is within the concept of judicial power ([105]).

AGS (Asaf Fisher, Andrew Buckland and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Solicitor-General Justin Gleeson SC, Michael O'Meara and Danielle Forrester as counsel.

The text of the decision is available at: http://www.austlii.edu.au/au/cases/cth/HCA/2013/5.html

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

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

Compulsory examinations after charge not authorised by ACC Act

In a 3:2 decision, the High Court held that the *Australian Crime Commission Act 2002* (Cth) (ACC Act) does not, on its proper construction, authorise an examiner appointed under that Act to require a person who has been charged with a Commonwealth indictable offence to answer questions about the subject matter of the charged offence.

This conclusion meant that it was unnecessary for the majority to decide whether the challenged provisions of the ACC Act are consistent with Ch III of the Constitution; the minority would have found the provisions valid.

X7 v Australian Crime Commission & The Commonwealth
High Court of Australia, 26 June 2013
[2013] HCA 29; (2013) 87 ALJR 858; (2013) 298 ALR 570

Background

In *X7 v Australian Crime Commission & The Commonwealth* (*X7*) the plaintiff was arrested by officers of the Australian Federal Police and charged with 3 indictable

Commonwealth offences relating to drugs. While in custody he was served with a summons issued under s 28 of the ACC Act. The summons required him to appear and give evidence before an ACC examiner.

The functions of the ACC include 'to investigate, when authorised by the [ACC] Board, matters relating to federally relevant criminal activity' and 'to undertake, when authorised by the Board, intelligence operations' (s 7A). In furtherance of these functions, s 24A of the ACC Act permits an examiner appointed under the Act to 'conduct an examination' in certain circumstances. To that end an examiner may summon a person to appear before the examiner and give evidence (s 28).

Under ss 30(2)(a) and 30(6) of the ACC Act, a witness who refuses or fails to answer a question that an ACC examiner requires him or her to answer is guilty of an indictable offence. However, provided that before answering the question the witness claims that the answer might tend to incriminate them, the answer is generally 'not admissible in evidence against the person in a criminal proceeding'(s 30(4)–(5)). Moreover, all examinations before an examiner must be conducted in private (s 25A(3)) and the examiner is required to direct that the evidence given must not be published if the failure to give such a direction 'might prejudice … the fair trial of a person who has been, or may be, charged with an offence' (s 25A(9)).

During his examination the plaintiff was asked and initially answered questions about matters concerning the subject matter of the offences with which he had been charged. However, when the plaintiff's examination resumed after an adjournment the plaintiff declined to answer any further questions. The examiner informed the plaintiff that in due course he would be charged with failing to answer questions. The examiner then made a direction under s 25A(9) of the ACC Act that restricted publication of the plaintiff's evidence.

The High Court's decision on construction of the ACC Act, Division 2, Part II

The principle of legality and its application in this case

All of the justices considered that the facts of the case engaged the principle that statutory provisions are not to be construed as abrogating common law rights and immunities or altering the general system of the law in the absence of clear words or necessary implication. This principle is sometimes known as 'the principle of legality'.

The main point of difference between the majority and the minority in this case was whether the ACC Act evidenced a sufficiently clear legislative intention to abrogate common law rights and alter the general system of the law. The minority held that it did; the majority held that it did not.

Hayne and Bell JJ (Kiefel J agreeing) observed that 'the whole process of criminal justice, commencing with the investigation of crime and culminating in the trial of an indictable Commonwealth offence, is accusatorial' ([99]; and see [101]). During this process 'an accused person is not called on to make any answer to an allegation of wrong doing, or to any charge that is laid, until the prosecuting authorities have made available to the accused particulars of the evidence on which it is proposed to rely in proof of the accusation that is made'. Even then the accused need say or do nothing more than enter a plea of not guilty and put the prosecution to proof ([101]). In the majority's view, requiring an accused person to answer questions put by an ACC examiner about the subject matter of a pending criminal charge would 'fundamentally alter' the accusatorial nature of the criminal justice system (Hayne and Bell JJ at [124]; and see also [85], [87], [101] and [136]; Kiefel J agreeing at [158]–[160] and [162]).

The majority did not find any intendment in the ACC Act to derogate from the purity of the accusatorial process of the criminal law. For instance, there is no express reference anywhere in the ACC Act to the examination of a person who had been charged with, but not tried for, an offence about the subject matter of the pending charge ([83]). For this and other textual reasons, the 'general provisions made for compulsory examination, when read in their context, do not imply, let alone necessarily imply, any qualification to the fundamentally accusatorial process of criminal justice which is engaged with respect to indictable Commonwealth offences' ([147]; Kiefel J stating the same conclusion at [157]). The powers of an ACC examiner had to be construed accordingly.

By contrast, for the minority, '[t]he ACC Act reflects a legislative judgment that the functions of the ACC would be impeded if the laying of a charge against one member of a group by a prosecutor prevented continuing investigation of the group's activities by way of examination of that member by the ACC' ([29]). The minority was led to this conclusion by the text and legislative history of the relevant provisions. '[T]he examination provisions contemplate the exercise of the examination powers after a charge has been laid. There is no relevant limitation on who may be summoned under s 28, and no explicit preservation of the privilege against self-incrimination, once charges are laid' (as there had been under the predecessor statute to the ACC Act: [25]). The statutory safeguards constraining the disclosure and any use of the accused person's answers fortified the conclusion 'that the examination powers may be exercised after charges had been laid' ([27]).

Hayne and Bell JJ: possible alternative statutory basis for finding for the plaintiff

Hayne and Bell JJ suggested, without deciding, that a possible alternative basis for finding for the plaintiff is that the determination made by the Board of the ACC (and which the ACC relied on to authorise the examination of the plaintiff) did not, on its proper construction, permit an examination of the plaintiff about the subject matter of his pending charges (at [149], [153]).

Chapter III of the Constitution

As the majority held that the impugned provisions of the ACC Act do not require an accused person to answer questions about the subject matter of a pending criminal charge, their Honours did not need to consider whether the Constitution would permit legislation that required this. Hayne and Bell JJ confined themselves to observing that 'That question would call for consideration not only of Ch III of the Constitution, but also, and more particularly, of s 80 of the Constitution and what is meant by "trial on indictment" and the requirement that on trial on indictment of any offence against the law of the Commonwealth shall be "by jury" '. That question 'is not reached by this case' ([92]; see also [119]). Kiefel J confined herself to noting, elusively, that 'the concept of an accusatorial trial where the prosecution seeks to prove its case to the jury has a constitutional dimension' ([160]).

French CJ and Crennan J held that the impugned provisions of the ACC Act are consistent with Ch III of the Constitution. Their Honours affirmed that common law features of the criminal justice system such as the privilege against self-incrimination are liable, consistently with the Constitution, to statutory modification or abrogation ([39]). What Ch III protects is a court's 'ancient institutional power to punish for contempt'. This is an attribute of judicial power that enables a court 'to control and supervise proceedings to prevent injustice' ([38]). A court has 'a power to take appropriate action in respect of a contempt, or a threatened contempt, in

relation to a fair trial' ([38]). Such power is exemplified by the decision in *Hammond v Commonwealth* (1982) 152 CLR 188 (*Hammond*) – a decision that was generally endorsed by all the justices in *X7*. More specifically, a court's power extends to preventing the prosecution from obtaining an 'unfair forensic advantage' from evidence obtained by compulsory examinations that are carried out by the executive. An unfair forensic advantage, with which it would not be possible to reconcile with a fair trial, might arise from police or prosecution reliance on 'evidence against a person at trial which derives from compulsorily obtained material establishing that person's guilt, or disclosing defences' ([54]; see also [58]). The minority stated these propositions as matter of general law. Whether or not Ch III gives any specific, substantive content to what constitutes 'unfair forensic advantage' is not squarely addressed in the case.

For the minority, the operation of the various 'protective' provisions in the ACC Act (in particular those in ss 25A and 30), combined with a trial judge's discretion on the admissibility of evidence and a trial court's inherent powers to punish for contempt or restrain threatened contempt (as exercised in *Hammond*) all tended to preclude the police or prosecution from obtaining an unfair forensic advantage from compulsory examinations under the ACC Act ([58–59]). Those considerations 'show that the examination provisions do not authorise executive interference with the curial processes of criminal trials' ([60]). This sufficiently answered the plaintiff's main submission about Ch III ([63]). The minority also rejected the plaintiff's submission that the privilege against self-incrimination is a necessary part of trial by jury under s 80 of the Constitution ([64]).

This is not to say that the minority accepted that compulsory examination of a person under the ACC Act about matters that the person faces a criminal charge on will always be permissible. 'Whether a direction under s 25A will be sufficient to preclude the prosecution from obtaining an unfair forensic advantage in a trial cannot be stated in any categorical or exhaustive fashion' ([61]). What will be sufficient (for example, in terms of non-publication orders or other measures) will depend on the particulars of each case. In the present case, the plaintiff made no complaint about the sufficiency of the directions made in respect of his examination ([61]).

'Stop press': further recent decision

The High Court has recently considered again some of these issues in *Lee v New South Wales Crime Commission* [2013] HCA 39 (9 October 2013) (*Lee*) – a case about compulsory examinations under the *Criminal Assets Recovery Act 1990* (NSW) (CAR Act). As in *X7*, the plaintiff in *Lee* was a person who had been charged with a criminal offence. An order was made pursuant to the CAR Act that he be examined on oath about his affairs. He sought a stay of his examination pending the outcome of the criminal charge.

Ultimately the parties all agreed that prejudice to pending criminal proceedings was a relevant consideration to be taken into account in deciding whether to order an examination. Therefore, a Ch III constitutional challenge to provisions of the CAR Act fell away. There remained the question, as in *X7*, of whether the statute should be construed as authorising compulsory questioning after charge, where the questioning was likely to touch upon the subject matter of the charges. All 7 members of the Court held that the 'principle of legality' was again relevant (French CJ [20], [24]; Crennan J [125]; Kiefel J (Hayne J agreeing) [174]–[193]; Bell J [266]; Gageler and Keane JJ [318]).

Unlike in *X7*, in *Lee*, by a 4:3 majority (French CJ, Crennan, Gageler and Keane JJ; Hayne, Kiefel and Bell JJ dissenting), the Court held that the CAR Act (in particular, its

language and purpose) did expressly or impliedly abrogate the privilege against self-incrimination in examinations after charge.

The majority generally approved the principles set out in *X7* (see French CJ [15], [46]–[56]; Crennan J [125]) but came to a different conclusion about their application to the CAR Act. This was due to the particular elements of the statutory scheme in the CAR Act (French CJ [6]–[15], [55]–[56]; Crennan J [129]–[133], [137]–[138], [141]–[144]; Gageler and Keane JJ [326]–[335]). This highlights that it will always be necessary to direct close attention to the elements of the Act in issue – in particular, its language, structure, context and purposes – in determining whether the Act authorises compulsory examinations post charge.

In *X7*, Stephen Donaghue SC and Michael O'Meara appeared for the ACC and the Commonwealth, instructed by AGS (Gavin Loughton, Simon Thornton and Emilie Sutton from the Constitutional Litigation Unit and Kristy Alexander from Dispute Resolution).

In *Lee*, AGS (Gavin Loughton, Andrew Yuile and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Solicitor-General Justin Gleeson SC, and David Thomas as counsel.

The text of the decision in X7 is available at: http://www.austlii.edu.au/au/cases/cth/HCA/2013/29.html

Giving effect to regulations declaring government policy

The High Court unanimously upheld the validity of a New South Wales law requiring the New South Wales Industrial Relations Commission, the judicial members of which constitute the Industrial Court of New South Wales, to give effect to 'government policy' when making or varying any award or order.

The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment
High Court of Australia, 12 December 2012
[2012] HCA 58; (2012) 87 ALJR 162; (2012) 293 ALR 450

Background

The *Industrial Relations Act 1996* (NSW) establishes the Industrial Relations Commission of New South Wales (the Commission). The Commission's functions include setting remuneration and employment conditions. Section 146C requires the Commission, in making or varying any award or order, to give effect to any policy on conditions of employment of public sector employees that has been declared by regulation 'to be an aspect of government policy'.

The Commission is made up of judicial and non-judicial members. Judicial members of the Commission constitute the 'Commission in Court Session', termed the Industrial Court of New South Wales (the Industrial Court), to perform judicial functions of the Commission. The Industrial Court is a 'court of a State' within the meaning of Ch III of the Constitution. The *Kable* principle requires that State courts, as repositories of federal jurisdiction, must be independent and impartial.

The Public Service Association and Professional Officers' Association Amalgamated of NSW (PSA) sought new awards increasing salaries and allowances for public

sector employees ([15]). The policies declared by the regulation for the purposes of s 146C included a policy limiting increases to 'employee-related costs' ([25]). The PSA challenged the validity of s 146C and the regulation in the Industrial Court.

The PSA argued on the basis of the *Kable* principle that the obligation imposed on the Commission by s 146C is invalid because it 'impairs the institutional integrity of the Industrial Court in a manner inconsistent with Chapter III' ([53]). Requiring the Commission to comply with government policy when performing its arbitral functions was said to undermine the independence and impartiality of the Commission when constituted as the Industrial Court to perform judicial functions. The Industrial Court rejected this argument and the PSA appealed to the High Court.

The High Court's decision

The High Court unanimously dismissed the appeal in 3 separate judgments. The Court held that s 146C merely requires the Commission to act according to law ([58]). That is because the requirements, described as 'government policy' in s 146, that the Commission must have regard to are fixed by law ([55]). The requirements are fixed through the exercise of legislative power by making a regulation ([44], [55]). The institutional integrity of the Industrial Court is not affected by its members applying that law when performing the Commission's non-judicial functions ([46], [58], [70]). The description of that law as 'government policy' did not relevantly alter its character ([44], [58] [67]). In reaching this conclusion French CJ construed 'policy' in the context of s 146C as not extending to a policy that is ambulatory or an executive direction about the outcome of a particular matter ([39]–[41]; cf Heydon J not deciding [73]).

The text of the decision is available at: http://www.austlii.edu.au/au/cases/cth/HCA/2012/58.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 30 years.*

Andrew Buckland *is a Senior Executive Lawyer and is the team leader of the AGS Constitutional Litigation Unit in the Office of General Counsel.*

Gavin Loughton *is a Senior Executive Lawyer in the AGS Constitutional Litigation Unit who also has extensive experience in native title litigation.*

Louise Rafferty *is a Senior Executive Lawyer in the AGS Constitutional Litigation Unit and also has extensive experience in other Commonwealth litigation.*

Simon Thornton *(Senior Lawyer),* ***Andrew Yuile*** *(Senior Lawyer) and* ***Megan Caristo*** *(Lawyer) all work in the AGS Constitutional Litigation Unit.* ***Asaf Fisher*** *(Senior Lawyer) was in the AGS Constitutional Litigation Unit and now works in AGS Dispute Resolution in Sydney.*

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 PSM 02 9581 7490

Chief Counsel Dispute Resolution
Tom Howe QC 02 6253 7415

Offices

Canberra *4 National Circuit, 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.

For enquiries regarding supply of issues, change of address details:
T *02 6253 7052* ***F*** *02 6253 7313*
E *ags@ags.gov.au*

ISSN 1448-4803
Approved Postage PP 233744/00042