AUSTRALIAN GOVERNMENT SOLICITOR

Litigation Notes

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Prosecution of Corporate Law Offences

These decisions concern the legislative and constitutional basis for the exercise of State functions or powers by the Commonwealth DPP under the national corporations scheme and the former co-operative scheme.

The Queen v Hughes
High Court of Australia, 3 May 2000
[2000] HCA 22 [(2000) 74 ALJR 802; 171 ALR 155]

Bond v The Queen
High Court of Australia, 9 March 2000
[2000] HCA 13 [(2000) 74 ALJR 597; 169 ALR 607]

Byrnes v The Queen
High Court of Australia, 12 August 1999
[1999] HCA 38 [(1999) 73 ALJR 1292; 164 ALR 520]

These three cases involved challenges to the power of the Commonwealth Director of Public Prosecutions to deal with corporate law offences. In *Byrnes* and *Bond*, the High Court held that neither State legislation (*Byrnes*) nor Commonwealth legislation (*Bond*) permitted the Commonwealth DPP to bring appeals against sentence in relation to offences against the (now repealed) State Companies Codes.

The High Court held in *Hughes* that, in the circumstances of that case, the Commonwealth DPP had power to prosecute Mr Hughes with the particular alleged offences against a State Corporations Law, but left open the possibility that there might be circumstances in which the DPP would not have the constitutional power to do so.

Background and Court's Decisions

The current national corporations scheme commenced on 1 January 1991, and consists of complementary Commonwealth, State and Northern Territory legislation. The scheme was established after the High Court had ruled in *New South Wales v The Commonwealth* (1990) 169 CLR 482 that the corporations power in s.51(xx) of the Constitution did not authorise a Commonwealth law providing for the incorporation of trading and financial corporations. One significant object of the scheme is for the Corporations Law of each jurisdiction to be administered and enforced on a national basis. It was decided that all corporate law offences would be prosecuted and appeals against sentence conducted by the Commonwealth DPP, whereas previously State Companies Code offences had been prosecuted by State DPPs. These three cases addressed the extent to which the Commonwealth DPP could perform these functions.

The High Court's decision in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 established that a Commonwealth officer (such as the Commonwealth DPP) may perform a State function if:

(a) a State law 'conferred' that function on the Commonwealth officer; and

(b) a Commonwealth law 'authorised' the officer to perform that State function.

The purpose of the Commonwealth 'authorisation' was explained as removing any inconsistency which would otherwise exist under s.109 of the Constitution where a State law purports to confer a function on a Commonwealth officer.

Byrnes and Bond

The appellants in *Byrnes* and *Bond* had been sentenced for offences against the Companies Code of South Australia and Western Australia, respectively. The Commonwealth DPP had successfully appealed against the sentences imposed, which were increased.

The High Court in *Byrnes* found that the State law in question (transitional provisions in the *Corporations (South Australia) Act 1990* (SA) which sought to bring within the scope of the national scheme prosecutions for offences against the former co-operative scheme) did not confer the necessary authority on the Commonwealth DPP to bring an appeal against sentence in relation to offences against the SA Companies Code (step (a) referred to above).

In *Bond*, the High Court found that, even if authority for an appeal could be found under WA law in that case, the Commonwealth law in question (s.17 of the *Director of Public Prosecutions Act 1983* (Cth)) did not authorise the Commonwealth DPP to bring an appeal against sentence in relation to WA Companies Code offences (step (b) referred to above). The special nature of an appeal against sentence (namely, the potential jeopardy to the defendant's liberty) meant that very specific authority was required to enable an appeal to be brought, and the general conferrals of power relied upon by the Commonwealth DPP were not sufficient. Accordingly, the High Court allowed both appeals with the effect that the original (lesser) sentences were reinstated.

Hughes

In *Hughes*, the accused had been charged with alleged offences against the Corporations Law of Western Australia (part of the national corporations scheme). He challenged the power of the Commonwealth DPP to prosecute him with an offence against a State law. This matter was removed into the High Court under s.40 of the *Judiciary Act 1903* (Cth). The accused ran two lines of argument – one attacking the provisions of the various Commonwealth and State Corporations Acts which treated Corporations Law offences as if they were Commonwealth offences, and another attacking the provisions which confer the function of prosecuting State Corporations Law offences on the Commonwealth DPP. Both of these arguments were unsuccessful in the particular circumstances of this case.

The accused's first argument was that the Commonwealth and State provisions which provide that State Corporations Law offences are to be treated as if they were Commonwealth offences for various purposes (eg prosecution and sentencing) were invalid because they purported actually to convert State offences into Commonwealth offences. The Court rejected this argument. While some continuing dissatisfaction was expressed with the drafting of the Corporations Acts (especially by Kirby J), the Court accepted that Mr Hughes was being charged with alleged offences against a State law (the Corporations Law of Western Australia).

The accused's second argument was that there was no valid conferral of functions on the Commonwealth DPP to prosecute State Corporations Law offences. This argument was rejected in relation to the particular alleged offences with which the accused was charged.

The Court accepted that the function of prosecuting State Corporations Law offences was conferred on the Commonwealth DPP by the WA Corporations Act (ss 29 and 31), and the DPP was 'authorised' to perform those State functions by the Commonwealth Corporations Act (ss 47 and 73, and regulations made under those provisions).

The Court said, however, that it was necessary under the national corporations scheme to relate the Commonwealth 'authorisation' to a head

of Commonwealth legislative power. (The Commonwealth had argued that this was not necessary, on the basis that the Commonwealth 'authorisation' did not have any substantive operation.)

The joint judgment said the Commonwealth 'authorisation' did have substantive operation, because it (and not the State law) imposed a duty on the Commonwealth DPP to prosecute State Corporations Law offences. The joint judgment appears to derive this duty from the fact that under the national corporations scheme the Commonwealth DPP is given exclusive power to prosecute Corporations Law offences.

Having decided it was necessary to show a link between the Commonwealth 'authorisation' and Commonwealth legislative power, the Court canvassed a number of possible sources of power, including the executive power, and the corporations power (s.51(xx)). But the Court did not need to rule on the availability of either of these powers. Rather, it was sufficient to determine the case on a narrow basis – the prosecution of these alleged offences was within Commonwealth power *in the particular circumstances* because the alleged conduct for which Mr Hughes was being prosecuted involved alleged activities overseas (and therefore came within s.51(xxix) (the external affairs power) or s.51(i) (the overseas trade and commerce power)).

Consequences of Decisions

The decisions (especially *Byrnes* and *Bond*) emphasise the need for Commonwealth officers who perform State functions to satisfy themselves that they have valid authority under both State and Commonwealth law, particularly if the State function is coercive.

The decision in *Hughes* leaves some unresolved questions about the valid operation of the national corporations scheme. Provided the Commonwealth DPP prosecutes offences that are sufficiently connected with trading or financial corporations (or are within other heads of legislative power, as in *Hughes* itself), these prosecutions will clearly be valid. (The joint judgment noted that the Commonwealth could itself enact many Corporations Law offences, particularly under s.51(xx).) But there remain some gaps in, and uncertainties about, the scope of the corporations power (for example, in relation to companies which are not themselves trading or financial corporations).

Text of the decision in *Byrnes* is available through Scaleplus at: http://scaleplus.law.gov.au/html/highcourt/0/99/0/HC000390.htm

Text of the decision in *Bond* is available through Scaleplus at: http://scaleplus.law.gov.au/html/highcourt/0/2000/0/HC000140.htm

Text of the decision in *Hughes* is available through Scaleplus at: http://scaleplus.law.gov.au/html/highcourt/0/2000/0/HC000230.htm

Contact for further information:

Graeme Hill
Principal Solicitor

Tel: (02) 6250 5536
Fax: (02) 6250 5913
E-Mail: graeme.hill@ags.gov.au

David Bennett
Deputy Government Solicitor

Tel: (02) 6250 6223
Fax: (02) 6250 5913
E-Mail: david.bennett@ags.gov.au

Private International Law – Intranational Torts

The High Court has changed the common law choice of law rules applicable to 'intranational' torts, so that Australian courts should now apply the substantive law of the place of the tort. The Court also redefined the distinction between 'substantive' and 'procedural' laws, so that matters such as limitation periods and the amount of damages are now regarded as 'substantive'.

John Pfeiffer Pty Ltd v Rogerson

High Court of Australia, 21 June 2000
[2000] HCA 36

Background

In 1989, Mr Rogerson was injured in a workplace accident occurring in Queanbeyan, NSW. Mr Rogerson brought a tort action against his employer (whose principal business office was in the ACT) in the ACT Supreme Court. The tort was 'intranational', in that the place where the conduct complained of occurred, and the place where the proceedings were brought, were different jurisdictions within Australia. The issue was whether the amount of damages payable to Mr Rogerson should be assessed under:

- the law applicable in NSW (where the amount of damages that could be awarded was limited by Part 5 of the *Workers Compensation Act 1987* (NSW) ('the NSW Act')); or
- the law applicable in the ACT (where there was no 'cap' on the amount of damages that could be paid); or
- a combination of both.

Previously, the High Court had applied a choice of law rule derived from *Phillips v Eyre* (1870) LR 6 QB 1, called a 'double actionability' rule. Under this rule, a plaintiff could only recover in the courts of one Australian jurisdiction for a tort committed in another Australian jurisdiction if the conduct complained of would give rise to a civil liability under (1) the substantive law applicable in the place where the conduct complained of occurred (the 'law of the place of the tort'; here, NSW) *and* (2) the substantive law applicable in the place where the proceeding was brought (the 'law of the forum'; here, the ACT).

Matters of procedure were, however, governed by the law of the forum. The High Court had previously held that the quantification (but not the type) of damages recoverable was a 'procedural' matter (*Stevens v Head* (1993) 176 CLR 433), which meant this amount was assessed under the law of the forum. Both the ACT Supreme Court, and on appeal the Federal Court, therefore applied the law applicable in the ACT to the assessment of damages, and awarded Mr Rogerson an amount of damages that was more than would have been available under the NSW Act.

High Court's decision

The High Court's decision reconsidered both the 'double actionability' requirement referred to above, and the distinction between 'substantive' and 'procedural' laws.

'Substantive' vs 'procedural' laws

All members of the High Court overruled *Stevens v Head*, and redefined the distinction between 'substantive' and 'procedural' laws in the context of choice of law rules applicable to 'intranational' torts. In a joint judgment, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ indicated that matters affecting the existence, extent or enforceability of the rights or duties of the parties to an action were 'substantive', and that 'procedural' laws were confined to rules governing or regulating the mode or conduct of court proceedings. The separate judgments of Kirby J and Callinan J reached similar conclusions. On this basis, all questions about

damages (such as the kinds of damage recoverable, and the amount of damages) are 'substantive' matters, as is the application of any limitation period. Accordingly, Mr Rogerson could not be awarded any more damages than the amount payable under the NSW Act, regardless of the position taken on the 'double actionability' rule. Indeed, Callinan J confined his decision to this ground.

'Double actionability' rule

The Court (apart from Callinan J) also overruled the 'double actionability' rule, and held that, in determining 'intranational' torts, Australian courts should apply the substantive law of the place of the tort. In this case, this meant that liability should be determined under the substantive law applicable in NSW.

The Court reconsidered its earlier decisions that had upheld the 'double actionability' rule in the light of the later ruling in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 that the common law must conform with the Constitution. The joint judgment concluded that several constitutional matters required a 'somewhat different approach' to be taken, in particular, the existence and scope of federal jurisdiction in Chapter III of the Constitution, and the 'full faith and credit' required by s.118 of the Constitution.

Any 'double actionability' requirement was specifically rejected. The joint judgment concluded further that it was preferable to apply the law of the place of the tort, rather than the law of the forum, in this situation. The former approach would apply a fixed and certain liability consistently in all courts in Australia, whereas the latter could expose the defendant to a range of laws imposing different liabilities, depending on where the action was brought. The question of whether the reformulation of the common law choice of law rule was constitutionally entrenched was, however, left open.

Text of the decision is available through Scaleplus at: http://scaleplus.law.gov.au/html/highcourt/0/2000/0/HC000370.htm

Contact for further information:

Graeme Hill
Principal Solicitor

Tel: (02) 6250 5536
Fax: (02) 6250 5913
E-Mail: graeme.hill@ags.gov.au

Paul Sykes
Principal Solicitor

Tel: (02) 6250 5836
Fax: (02) 6250 5912
E-Mail: paul.sykes@ags.gov.au

Public Interest Immunity – Cabinet Documents

A Full Federal Court unanimously upheld the Commonwealth's claim of public interest immunity to resist disclosure of a document which revealed the deliberations of Cabinet.

Commonwealth of Australia v CFMEU

Full Federal Court of Australia, 12 April 2000
(2000) 171 ALR 379

Background

The Commonwealth's public interest immunity claim was made in relation to proceedings brought in the Federal Court by the Construction, Forestry, Mining and Energy Union against the Employment Advocate, alleging that the Employment Advocate threatened to coerce an employer and unions to vary a certified agreement.

In the course of discovery of documents ordered by the Court, the Employment Advocate disclosed the existence of a document described as 'Copy of Letter from the Minister for Employment, Workplace Relations and Small Business to the Prime Minister (undated)'. The Employment Advocate objected to production of the letter on the grounds of public interest immunity on the basis of its status as a Cabinet document. The Commonwealth appeared in support of the immunity claim.

In accordance with the Legal Services Directions, the Department of the Prime Minister and Cabinet (PM&C) assumed responsibility for instructing the AGS in relation to the public interest immunity claim. An affidavit by an Executive Coordinator (Deputy Secretary equivalent) in the Department of the Prime Minister and Cabinet in support of the immunity claim indicated that:

- the letter was an unsigned (but otherwise identical) version of a letter from the Minister to the Prime Minister;
- the letter sought the Prime Minister's agreement to raise matters of high level government policy 'under the line' in Cabinet – ie without a formal submission;
- the letter revealed issues that the Minister sought to have considered by Cabinet, the Minister's proposed course of action in relation to those issues, and the arguments to be put by the Minister;
- the letter was circulated to Ministers in the Cabinet room;
- the letter was in the same position as a Cabinet submission.

The basis of the Commonwealth's immunity claim was that disclosure of the letter would reveal Cabinet deliberations, thereby breaching Cabinet confidentiality, with resulting prejudice to:

- the need for uninhibited discussion of issues by Ministers in the Cabinet room; and
- the well established convention of collective Cabinet responsibility whereby, once a decision is made, all Ministers should publicly support it.

After privately inspecting the letter, Justice Marshall ordered production of it to the CFMEU.

The Commonwealth applied for leave to appeal that decision. This application was based on the premise that the decision was an interlocutory decision, in respect of which an appeal was not available without leave.

However, as an alternative (in case leave was not granted) the Commonwealth also purported to appeal as of right. In relation to an appeal as of right, the Commonwealth's submission was that, on the basis of authorities that a claim of public interest immunity is separate from the subject matter of the proceeding between the parties to the litigation, the rejection of the claim was a final judgment on that separate subject matter.

Apart from opposing the merits of the Commonwealth's appeal, the CFMEU argued that the Commonwealth had no standing to appeal, as it was not a party to the substantive proceeding.

The Decision

Commonwealth's standing to challenge Justice Marshall's decision

The Full Court referred to 'a long line of cases' that a non-party can appeal by leave. The Court also noted statements in other cases that no order rejecting a public interest immunity claim should be enforced until the relevant government, State or Federal, has had an opportunity to appeal the order or test its correctness by some other process.

The Court stated that it was clear that the Commonwealth should be granted leave to appeal, thus finding it unnecessary to decide whether the Commonwealth could appeal as of right.

Public interest immunity test

The Court traversed the public interest bases for maintaining the confidentiality of Cabinet documents, namely the nature of responsible government, the principle of collective Cabinet responsibility and need for uninhibited decision-making and policy development by Cabinet. The Court also noted the following statements by the High Court in *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 617–8:

> In the case of documents recording the actual deliberations of Cabinet, only considerations which are indeed exceptional would be sufficient to overcome the public interest in their immunity from disclosure, they being documents with a pre-eminent claim to confidentiality. ...
>
> Indeed, for our part we doubt whether the disclosure of the records of Cabinet deliberations upon matters which remain current or controversial would ever be warranted in civil proceedings.

The *NLC case* related to Cabinet note books which actually recorded what was said by Ministers in the Cabinet room. In the *CFMEU case*, on the basis of the PM&C officer's affidavit, the Full Federal Court accepted that, although not *recording* actual deliberations, the letter revealed what would have been discussed. The Court also held that the CFMEU had not established exceptional circumstances outweighing those militating against disclosure. In this regard the Court stated that:

- although serious allegations were made, the letter was not central to the resolution of the substantive dispute;
- the fact that a copy of the letter was sent to the Employment Advocate did not amount to a waiver of public interest immunity as it was sent and received as a confidential communication.

The Full Court found that Justice Marshall:

- erred in forming the view that the letter did not attract the high degree of protection which attaches to Cabinet documents which disclose or are likely to reveal Cabinet deliberations; and
- erred in the balancing process by emphasising to an unwarranted extent the need for the letter to be produced in the substantive proceedings.

Implications of the Decision

Standing

The Full Court's decision leaves open the question whether a challenge to a rejection of a public interest immunity claim can occur without needing the Court's leave. This can be important in situations (eg some criminal cases) where leave to appeal is not available.

Public interest immunity test

The decision emphasises the need for confidentiality of documents revealing what Ministers can reasonably be expected to have said in the Cabinet room. The decision has particular application to Cabinet submissions. However, as the Court noted, such protection is not absolute, nor does it last forever. A court must always consider the circumstances of each case, including:

- the nature of that case (eg whether the case is civil or criminal);
- the importance of the issues in that case;
- the relevance of the Cabinet information to those issues;
- the currency of the issues.

Text of the decision is available through Scaleplus at:http://scaleplus.law.gov.au/html/feddec/0/20002/0/FD000410.htm

Contacts for further information:

Libby Haigh
Senior Government Solicitor

Tel: (03) 9242 1499
Fax: (03) 9242 1483
E-Mail: libby.haigh@ags.gov.au

Standing to Bring Proceedings Under the Trade Practices Act

In this case the High Court unanimously upheld the validity of ss 80 and 163A of the *Trade Practices Act 1974* (Cth) which allow 'any person' to bring certain trade practices proceedings. The decision allows considerable scope for Commonwealth laws to modify the common law principles of standing, in particular to achieve public interest objects such as in the Trade Practices Act.

Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd

High Court of Australia, 9 March 2000
[2000] HCA 11; [(2000) 74 ALJR 604; 169 ALR 616]

Background

The respondent sought to raise funds for the Eastern Distributor, a toll road in Sydney, through a prospectus which included forecasts about the volume of traffic. The applicant commenced proceedings in the Federal Court claiming that the respondent had contravened s.52 of the Trade Practices Act by engaging in allegedly misleading and deceptive conduct. The applicant sought a declaration that the respondent had contravened s.52 and an order to compel corrective advertising.

On 20 November 1998, on the application of the respondent, the High Court removed the proceedings into that Court. Gaudron J stated a case to the Full High Court reserving several constitutional questions for decision. In the end, as the High Court upheld the validity of ss 80 and 163A it was unnecessary for the Court to consider the other issues. The Commonwealth Attorney-General intervened in support of the validity of ss 80 and 163A. The Attorney-General was represented by AGS Chief General Counsel Henry Burmester QC (who at the time was acting Solicitor-General of the Commonwealth) and Mark Moshinsky of the Melbourne Bar. The Attorney-General's intervention was conducted by Grahame Tanna and David Bennett of AGS' Constitutional and Native Title Unit, Office of Litigation.

Section 80 of the Trade Practices Act provides that the Court may, on the application of the Australian Competition and Consumer Commission 'or any other person', grant an injunction relating to a contravention of Parts IV, IVA or V of the Act. Section 163A provides that 'a person' may institute a proceeding in the Court seeking, in relation to a matter arising under the Act, a declaration in relation to the operation or effect of specified provisions of the Act or in relation to the validity of any act or thing done or proposed to be done under the Act.

Validity of ss 80 and 163A of the *Trade Practices Act 1974*

At common law, an individual has no standing to seek an injunction or declaration to prevent the violation of a public right or to enforce the performance of a public duty where he or she has no interest beyond that of any other member of the public in upholding the law. In order to establish standing, an individual must show interference with a private right, or a 'special interest' in the subject matter of the action. However, an applicant for an injunction under s.80 of the Trade Practices Act need not show that he or she has a proprietary interest that is affected, or that he or she has suffered special damage or has suffered any damage at all.

Chapter III of the Constitution limits the conferral of jurisdiction on federal courts to 'matters'. The requirement of a 'matter' is that there be a justiciable controversy as to some 'immediate right, duty or liability to be established by the determination of the Court'. The respondent challenged the validity of ss 80 and 163A on the basis that, in conferring

standing on 'any person' to bring proceedings for an injunction or declaration, including a person with no direct or special interest in the subject matter of the proceedings, the sections purport to confer on the Federal Court jurisdiction in proceedings which do not give rise to a 'matter' for the purposes of Ch III. The applicant admitted for the purposes of the removed proceedings that it had no direct or special interest in the subject matter of the dispute. The respondent argued that it followed that there was no justiciable controversy and hence no 'matter'.

The High Court unanimously rejected these arguments in six judgments. Although the applicant had no special interest in the subject matter of the proceedings, its disputed assertion that the respondent had breached s.52 of the Trade Practices Act and its claim for remedies under ss 80 and 163A involved the court in the determination of a 'right, duty or liability' and hence gave rise to a 'matter' for Ch III purposes. It was not necessary that the applicant and respondent have correlative interests in the rights and duties in issue.

Questions of standing might still be relevant to the constitutional requirement of a 'matter' where, for instance, the absence of standing means that there is no legal remedy or appropriate relief for the wrong in question. Discretionary considerations might also arise in relation to deciding whether to grant relief such as a declaration or injunction in a particular case. However, it appears to follow from the judgments in this case that, broadly speaking, Commonwealth legislation may confer standing on any person to seek remedies to enforce public rights, duties and liabilities arising under statute (and, it may be, the general law).

The Court did not find assistance in the more restrictive approach taken in the decisions of the United States Supreme Court on Art III of the United States Constitution, which uses narrower language in limiting federal judicial power to the resolution of 'cases' and 'controversies'.

Text of the decision is available through Scaleplus at:

http://scaleplus.law.gov.au/html/highct/0/2000/rtf/2000030911.rtf

Contact for further information:

David Bennett
Deputy Government Solicitor

Tel: (02) 6250 6223
Fax: (02) 6250 5913
E-Mail: david.bennett@ags.gov.au

Grahame Tanna
Principal Solicitor

Tel: (02) 6250 6603
Fax: (02) 6250 5913
E-Mail: grahame.tanna@ags.gov.au

Defamation Proceedings and Parliamentary Privilege

This case involved questions about the construction and constitutional validity of s.16(3) of the *Parliamentary Privileges Act 1987* ('the Privileges Act') and the effect of s.16(3) on the defamation proceedings brought by Mr Rann, Leader of the Opposition in the Parliament of South Australia against Mr Olsen, Premier of that State.

Rann v Olsen

Full Court of The Supreme Court of South Australia
12 April 2000 [2000] SASC 83

Background

The defamation proceedings arose out of allegations made by Mr Olsen outside Parliament that Mr Rann had lied in giving evidence to a federal parliamentary committee. Mr Rann had told the committee that Mr Olsen, while a Minister of the Government, had leaked confidential information to the Opposition in an attempt to bring about the

downfall of the then Premier of South Australia, Mr Brown. Mr Olsen has pleaded the defences of truth, qualified privilege and fair comment. Mr Rann has pleaded malice against Mr Olsen.

The Court was asked to decide three issues:

- whether s.16(3) of the Privileges Act or s.49 of the Constitution operate to prevent Mr Olsen from maintaining and supporting the defences of truth, qualified privilege or fair comment or prevent Mr Rann from supporting his plea of malice;
- whether s.16(3) is unconstitutional on the basis that it constitutes an impermissible infringement of the implied constitutional freedom of political communication or impermissibly interferes with the judicial power conferred by Chapter III of the Constitution;
- whether the proceedings should be permanently stayed.

The Commonwealth Attorney-General intervened and argued that:

- s.16(3) makes it unlawful for evidence to be tendered or received for the purpose of questioning or relying on the truth of anything forming part of Mr Rann's testimony to the parliamentary committee or for the purpose of questioning or establishing the credibility, motive, intention or good faith of Mr Rann in relation to that testimony;
- s.16(3) is a valid law of the Commonwealth;
- if the exclusion of evidence under s.16(3) makes it impossible fairly to determine the issues between the parties to proceedings, then the proceedings should be stayed.

The Decision

The first question

The members of the Court (Doyle CJ, Prior, Perry, Mullighan and Lander JJ) agreed that s.16(3) of the Privileges Act will operate to prevent Mr Olsen from maintaining his defence of truth. Further, the members of the Court accepted that s.16(3) will limit what can be done to support the pleas of qualified privilege and malice, but disagreed on the extent of that limitation and whether it will prevent those pleas from being supported.

The Court decided that:

- s.16 has the dual purpose of preserving freedom of speech in parliament and the principle of non-intervention under which the courts and parliament recognise their respective constitutional roles;
- there is no reason to read s.16(3) narrowly or otherwise than in accordance with its ordinary meaning;
- in particular, s.16(3) is not subject to any implied limitation as to when or why it operates:
  - s.16(3) operates even if the person, the truth of whose words is questioned, is a plaintiff;
  - s.16(3) operates even if the effect of its application is to deny a defendant a defence based upon a statement by the defendant about what the plaintiff said in proceedings in Parliament;
  - s.16(3) operates even if, in the opinion of the Court, the particular prohibited activity does not in fact impair the freedom of speech in Parliament of the person whose statements are to be challenged;
- the parties to a defamation proceeding cannot waive the operation of s.16(3).

Prior J and Perry J held that *Wright v Lewis* (1990) 53 SASR 416 and *R v Murphy* (1986) 5 NSWLR 18 were wrongly decided. Doyle CJ, with whom Mullighan J agreed, did not find it necessary to decide this point.

Prior J held that s.16(3) of the Privileges Act was declaratory of the operation of Article 9 of the *Bill of*

Rights 1688 (UK). Perry J thought that s.16(3) went further than that Article. Doyle CJ held that the meaning of s.16(3) is not controlled by the meaning of Article 9 and assumed, for the purposes of considering its validity, that s.16(3) extends the protection given by Article 9. Lander J took the same approach as Doyle CJ.

The second question

All members of the Court held that s.16(3) was supported by s.49 of the Constitution and was otherwise a valid law.

Prior J held that the validity of s.16(3) flowed from the fact that it was merely declaratory of the operation of Article 9 of the *Bill of Rights*, which had been expressly picked up and applied by s.49 of the Constitution, and that any implications to be drawn from the Constitution could not defeat a law expressly authorised by that section.

Because Doyle CJ (Mullighan J agreeing), Perry and Lander JJ did not hold that s.16(3) was merely declaratory of the operation of Article 9, their Honours found it necessary to consider Mr Rann's arguments that s.16(3) infringed the implied freedom of political communication and impermissibly interfered with the judicial power conferred by Chapter III of the Constitution. Their Honours held that s.16(3) did not have these effects.

The implied freedom of political communication

Their Honours applied the test laid down by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 for determining whether a law infringes the implied freedom of political communication, namely:

- does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- if so, is the law reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

Their Honours answered yes to both questions. As to the first question, the effect of s.16(3) was to deny Mr Olsen a defence to the defamation action and so burden his freedom of speech. That burden was characterised as significant because it operated directly on the freedom to speak about what happens in Parliament. In relation to the second question, their Honours considered that:

- s.16(3) was an appropriate means of pursuing legitimate objectives: freedom of speech in Parliament and the principle of non-intervention applying between Parliament and the courts; and
- the consequent burden imposed on the freedom of communication was unavoidable given the desired level of protection for freedom of speech in Parliament. In the end, it was a matter for Parliament to determine the extent to which freedom of speech in Parliament should be protected.

The view that s.16(3) is valid was reached 'after much consideration' on the part of Doyle CJ, who wrote the leading judgment on this point.

Interference with judicial power

Their Honours held that s.16(3) was no different from any rule of law that operates to exclude certain evidence from consideration by the Court and did not, therefore, impermissibly interfere with the judicial power conferred by Chapter III of the Constitution.

The third question

All members of the Court held that it is within the Court's power to order a stay of defamation proceedings if s.16(3) of the Privileges Act operates to prevent pleas of truth or qualified privilege being maintained.

Prior J and Perry J would have granted a stay in the present case on the basis that the operation of s.16(3) in effect took from the Court the essence of the defamation dispute pleaded so that it would be impossible fairly to determine the issues between the parties.

The majority, however, refused to stay the proceedings. In their opinion, it was not appropriate for the Court to determine whether or not a stay should be granted in circumstances where it must speculate upon the evidence which might be led at trial and the precise impact of s.16(3) on that evidence. The majority considered that whether the stay should be granted should therefore be determined by the trial judge.

Text of the decision is available through Scaleplus at:

http://scaleplus.law.gov.au/html/highcourt/0/99/0/HC000640.htm

Contact for further information:

Anna Lukeman
Principal Solicitor

Tel: (02) 6250 6728
Fax: (02) 6250 5913
E-Mail: anna.lukeman@ags.gov.au

For further information on litigation matters and services please contact:

Canberra	
David Bennett	(02) 6250 6223
New South Wales	
Simon Daley	(02) 9581 7574
Victoria	
Stephen Lucas	(03) 9242 1200
Queensland	
David Durack	(07) 3360 5700
Canberra City	
Tom Howe	(02) 6246 1256
Western Australia	
Graeme Windsor	(08) 6268 1102
South Australia	
Sarah Court	(08) 8205 4231
Northern Territory	
Rick Andruszko	(08) 8943 1444
Tasmania	
Peter Bowen	(03) 6220 5474

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