AUSTRALIAN GOVERNMENT SOLICITOR

Litigation Notes

Number 10 30 October 2003

The Constitution and the States

This appeal dealt with the right to proceed against a State in a constitutional matter arising in federal jurisdiction. The case is significant for its consideration of aspects of the recovery of invalid taxes.

British American Tobacco Australia Ltd v Western Australia

High Court of Australia, 2 September 2003
[2003] HCA 47; (2003) 200 ALR 403

Background

The appellant brought an action in the WA Supreme Court seeking, amongst other things, a declaration that s.6 of the *Business Franchise (Tobacco) Act 1975* (WA) invalidly imposed excise duty (contrary to s.90 of the Constitution) and an order for the repayment of licence fees invalidly collected under that Act. A similar fee imposed by NSW legislation had been struck down by the High Court in *Ha v New South Wales* (1997) 189 CLR 465.

The appellant's action was summarily dismissed by the Full Court of the WA Supreme Court on the basis that the appellant had failed to give written notice of its action as required by s.6 of the *Crown Suits Act 1947* (WA) and s.47A of the *Limitation Act 1935* (WA). Section 6 provides that 'no right of action lies' against the State unless the plaintiff gives to the WA Crown Solicitor notice in writing of the circumstances upon which the action will be based 'as soon as practicable…after the cause of action accrues'. Section 47A provides that 'no action shall be brought' against any person (other than the State) 'for any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority' unless the prospective plaintiff gives to the prospective defendant notice in writing of the circumstances upon which the action will be based 'as soon as practicable…after the cause of action accrues'.

The appellant argued that because the action involved a question arising under the Constitution (that is, the operation of s.90 of the Constitution), it was within federal jurisdiction. State provisions cannot apply of their own force in federal jurisdiction. Instead, they only apply if picked up by s.79 of the *Judiciary Act 1903* (Cth). Section 79, however, does not pick up State provisions if the Constitution or a Commonwealth law 'otherwise provides'.

In this case, the appellant argued that both the Constitution and s.64 of the *Judiciary Act* ('In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.') 'otherwise provided' so that s.6 of the Crown Suits Act was not picked up. Nor was s.47A of the Limitation Act rendered applicable by s.64 of the Judiciary Act.

WA argued that s.64 of the Judiciary Act does not render s.6 and s.47A inapplicable because:

- s.64 does not operate unless a right of action otherwise exists. However, no right of action exists unless a notice has been given pursuant to s.6 of the Crown Suits Act
- s.64 does not apply where the State is performing a function peculiar to government (such as the collection of taxes) as consequential proceedings cannot be equated to a 'suit between subject and subject'
- s.64 is invalid if it purports to impose a substantive liability on WA to pay the amount claimed
- as s.47A of the Limitation Act applies to a suit between subject and subject, its application in federal jurisdiction is not precluded by s.64. As s.47A imposes an obligation to give written notice similar to that in s.6, the result remains the same even if s.6 does not apply.

The Commonwealth Attorney-General intervened in the High Court to support WA's second and fourth arguments.

High Court's Decision

The appeal was heard by six Justices and unanimously upheld. The summary judgment entered against the appellant was set aside. The High Court's decision means that the appellant can now pursue its action for the recovery of the invalidly collected franchise fees. Whether it succeeds at the trial of that action will presumably involve consideration of any defences on which the State might now rely.

Federal Jurisdiction

The Court decided, first, that the matter involved the exercise of federal jurisdiction. Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ considered that the appellant's common law claim for money had and received involved a matter 'arising under' the Constitution within the meaning of s.76(i) of the Constitution because it involved the contention that the franchise fees were excises and invalidly exacted by reason of s.90 of the Constitution. Federal jurisdiction in respect of the claim was conferred on the WA Supreme Court by s.39(2) of the Judiciary Act.

Kirby J considered that the claim came within s.76(i) at least because it involved the 'interpretation' of the Constitution. He also considered that the claim was within federal jurisdiction because it came within the diversity jurisdiction (s.75(iv) of the Constitution). In so holding, he rejected longstanding authority that corporations were not 'residents' of a State for the purposes of that provision.

The Right to Proceed

It was then necessary to consider how the appellant had a right to proceed against the State for its claim in federal jurisdiction. Gleeson CJ considered that while the appellant's cause of action arose under the common law, the right to proceed against the State in this case is implied from the Constitution. He reasoned that the Constitution defines both the powers of the Commonwealth and, to a more limited extent, the powers of the States. The right to proceed against both the Commonwealth and the States in respect of matters concerned with the scope of powers defined under the Constitution is therefore conferred by necessary implication from the Constitution itself: in the case of the Commonwealth, by implication from s.75(iii) of the Constitution; in the case of the States, by implication from the particular provision limiting State power (in this case, s.90). The Commonwealth Attorney-General had put submissions substantially to this effect.

In a joint judgment, McHugh, Gummow and Hayne JJ (with whom Callinan J agreed) considered that the right to proceed was conferred in this case by necessary implication from the conferral of federal jurisdiction by s.39(2) of the Judiciary Act. In their view, a law like s.39(2), which invests State courts with jurisdiction in the terms of s.76(i) of the Constitution, is a law which necessarily subjects the

States to the relevant exercise of the judicial power of the Commonwealth.

Kirby J took a different approach, and held that in this case the Constitution (and not just the common law) created the cause of action and conferred the right to proceed. In doing so he held that the decision of the High Court in *Kruger v The Commonwealth* (1997) 190 CLR 1 was incorrect.

Application of the Crown Suits Act

Finally, the Court addressed the application of the State provisions in question. Gleeson CJ considered that s.6 of the Crown Suits Act was not picked up by s.79 of the Judiciary Act because the rules relating to Crown immunity from suit are either irrelevant to a claim based upon a contention that a State has acted in contravention of a Constitutional limitation, or if they are applicable, because the Constitution otherwise provides (that is, the Constitution, by implication, confers the appellant's right to proceed against the State, and recourse to the provisions of the Crown Suits Act as conferring and regulating a right to proceed is neither necessary nor appropriate).

McHugh, Gummow and Hayne JJ (with whom Callinan J agreed) considered that s.79 of the Judiciary Act could only pick up s.6 of the Crown Suits Act if it also picked up s.5 of that Act (which provides that the Crown may sue and be sued in the same manner as a subject, that is, gives a right to proceed). Section 5, however, could not be picked up because a law of the Commonwealth (s.39(2) of the Judiciary Act, which in their opinion conferred the right to proceed in this case) 'otherwise provided'. They also considered that s.79 could not pick up s.6 (if it could be separated from s.5) because s.64 of the Judiciary Act would then be a law which 'otherwise provided'. This was because, if it applied, s.6 would then put the State in a special position contrary to s.64. Further:

- when the action was brought in the Supreme Court the condition for the operation of s.64 was satisfied. The action was 'validly constituted' (cf. WA's first argument) because s.6 had no application in federal jurisdiction.
- they also rejected WA's (second) argument that because the claim related to a peculiarly government function (the collection of revenue) it was not possible to put the parties in 'as nearly as possible' the same situation as in a suit between subject and subject. They considered that s.64, which is a facilitative provision and which otherwise assists the appellant, should not be given a limited operation by an expanded reading of the phrase 'as nearly as possible'.

Kirby J again favoured (without finally deciding) a different approach. In his view it is misconceived to describe a State as a manifestation of the Crown. The Crown Suits Act, which appears to refer to actions against the Crown rather than against the State, would therefore be inapplicable. But in any event, he agreed with McHugh, Gummow and Hayne JJ that s.79 did not pick up s.6 of the Crown Suits Act because s.39(2) of the Judiciary Act 'otherwise provided'.

Section 47A of the Limitation Act

Gleeson CJ rejected WA's fourth argument that the effect of s.64 of the Judiciary Act is to render s.47A of the Limitation Act applicable and thereby defeat the appellant's claim. Section 47A deals with a suit against a very particular kind of defendant, in relation to a very particular kind of act of neglect or default. It deals with agents of the Crown, and confers upon them a protection similar in some respect to that provided to the Crown by the Crown Suits Act. If s.64 were to operate in this case, it would not do so by applying s.47A and thereby putting the Government of WA in the place of an agent of the Government of WA; it would do so by putting the Government in the place of an ordinary citizen. The other members of the Court did not deal

with this issue and might have left it to be decided in the trial of the appellant's claim.

Text of the decision is at <http://www.austlii.edu.au/au/cases/cth/high_ct/2003/47.html>.

Contact for further information:

David Bennett
Deputy Government Solicitor

Tel: (02) 6253 7063
Fax: (02) 6253 7303
E-mail: david.bennett@ags.gov.au

Commonwealth Constitutional Powers and the States

This decision concerns the ambit of an implied constitutional limit on Commonwealth power arising from the federal compact and reflects a shift in judicial thinking in this area. Special Commonwealth laws applying only to State officials, that were intended to replicate as closely as possible other generally applying laws, were struck down on the basis that they contravened this limit. As a result, any laws applying only to the States, even if enacted within a broader statutory framework, will need to be carefully considered to ensure that they do not contravene this limit.

Austin and Anor v Commonwealth

High Court of Australia, 5 February 2003
[2003] HCA 3; (2003) 195 ALR 321

Background

This case involved a challenge to the validity of the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997* (Cth) ('the Imposition Act') and the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth) ('the Assessment Act') in their application to a NSW Supreme Court judge (the first plaintiff) and a Victorian Supreme Court master (the second plaintiff).

The case was heard by six members of the High Court. Callinan J did not sit.

High Court's Decision

The Court unanimously rejected the plaintiffs' construction arguments and held the superannuation surcharge legislation purported to apply to the first plaintiff. Further, the Court unanimously held that the legislation did not purport to apply to the second plaintiff, as she came within a statutory exception to the surcharge. However, the majority of the Court held (with Kirby J dissenting) that the surcharge legislation was invalid in its application to State judges.

Construction arguments

The plaintiffs argued that the superannuation surcharge legislation did not apply to them because they were not members of superannuation funds as defined and did not accrue any superannuation benefits prior to retirement.

The Court acknowledged that some of the language in the Assessment Act (such as 'fund') did not naturally apply to a judges' pension scheme, but held that the Court should not adopt a literal construction if that caused the operation of the Act to miscarry [101]. In this respect, taxation legislation was like any other legislation. Accordingly, the legislation applied.

Constitutional arguments

The plaintiffs also argued that the legislation was invalid because:

(a) it discriminated against the States by placing a special burden or disability on the States and thereby contravened the first limb of the *Melbourne Corporation* doctrine

(b) it operated to destroy or curtail the continued existence of the States or their capacity to function as governments and thereby contravened the second limb of the *Melbourne Corporation* doctrine

(c) the surcharge was so arbitrary or capricious that it could not properly be characterised as a tax, and

(d) the Imposition Act dealt with more than one subject of taxation, and thereby contravened s.55 of the Constitution (laws imposing taxation shall deal with one subject of taxation only).

A further objection that the superannuation surcharge legislation imposed a tax on property belonging to a State, contrary to s.114 of the Constitution, was abandoned in oral argument.

The Attorneys-General of the States of NSW, Victoria, South Australia and Western Australia intervened in support of the plaintiffs. SA and WA put further arguments as to the invalidity of the legislation, namely:

- by requiring the States to calculate a judge's surchargeable contributions the Assessment Act impermissibly imposed an official duty on State officers and conscripted the States to perform Commonwealth functions, and
- by requiring the engagement of a suitably qualified actuary to perform the necessary calculations, the Assessment Act impaired the ability of a State to determine the number and identity of its employees or to determine their terms and conditions of employment.

The plaintiffs' constitutional arguments outlined in (c) and (d) above were rejected by Gaudron, Gummow and Hayne JJ [182]–[201], with Gleeson CJ, McHugh and Kirby JJ agreeing on this point. The Court confirmed that a tax is not 'arbitrary' simply because it depends on the formation of an administrative opinion, or because it will entail hardship [186], and also confirmed that the Parliament has considerable latitude in determining the subjects of taxation for the purposes of s.55 of the Constitution (see [199]).

Melbourne Corporation doctrine

Melbourne Corporation v The Commonwealth (1947) 74 CLR 31 held that Commonwealth legislative power is subject to the implied limit that it cannot undermine the separate existence of the States as governments. Here, the Court held that the superannuation surcharge legislation contravened this principle, because it interfered with the States' freedom to select the method of remunerating State judges.

Briefly, in the ordinary case, the superannuation surcharge is imposed on the superannuation provider, in the expectation that it will be passed on to the member by way of reduced superannuation benefits. In the case of members of 'constitutionally protected superannuation funds', however, the surcharge is imposed directly on the member. This was done because there were thought to be constitutional difficulties (in particular, the operation of s.114 of the Constitution) in imposing the tax on the State superannuation provider. The effect of this special scheme, however, was that, unless the States amended their pension schemes to allow for the commutation of the pension to a lump sum, a State judge could face a significant lump sum liability on retirement.

In the majority's view, the Commonwealth legislation had the practical effect of requiring the States to amend their arrangements for providing judicial pensions and this meant that there had been, in a significant manner, a curtailment or interference with the exercise of State constitutional power (see [168]–[170] per Gaudron, Gummow and Hayne JJ; see also [28]–[29] per Gleeson CJ, [233] per

McHugh J). The majority's reasoning was strongly influenced by *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, which held that the 'integrity and autonomy' of the States requires that the States have almost complete freedom to determine the terms and conditions of their 'higher level' officials (including State judges).

The majority also considered that the surcharge adversely affected the capacity of the States to recruit judges and to retain them after the first possible date for retirement (see [28] per Gleeson CJ, [169] per Gaudron, Gummow and Hayne JJ, [232] per McHugh J), in particular, because the surcharge debt was required to be paid as a lump sum upon retirement, the level of the debt could significantly exceed the level of the pension and the debt increased by way of compound interest, including after the first possible date for retirement.

The Court noted that there was no constitutional problem with State judges paying general Commonwealth taxes, such as income tax [176]; (see also [22] per Gleeson CJ, [287] per Kirby J).

Kirby J dissented, because he did not think that the superannuation surcharge had a significant detrimental effect on the ability of the States to determine the terms and conditions of State judges [290] and did not affect the ability of the States to recruit or retain judges [291]–[293], [299].

One limb or two?

The *Melbourne Corporation* doctrine had been understood to consist of two separate prohibitions: (1) a prohibition on Commonwealth laws that imposed special burdens or disabilities on the States and (2) a prohibition against enacting laws of general application that prevented the States from functioning as governments (which protects, among other things, the 'integrity and autonomy' of the States). In *Austin*, however, four members of the Court held that there was a single prohibition: the Commonwealth cannot restrict or burden the States in the exercise of their constitutional powers [124], [143] per Gaudron, Gummow and Hayne JJ, [281] per Kirby J; contra [223] per McHugh J). While the practical significance of this change is unclear, it may be that the Commonwealth has more scope to enact laws that impose a special burden on the States, provided that these discriminatory laws do not restrict or burden the States in their exercise of constitutional powers.

Gaudron, Gummow and Hayne JJ (with Gleeson CJ agreeing on this point) found it unnecessary to address the further constitutional arguments put forward by SA and WA [181]. Kirby J, however, rejected those arguments [270]–[274].

Text of the decision is available at <http://www.austlii.edu.au/au/cases/cth/high_ct/2003/3.html>.

Contact for further information:

Jenny Burnett
Senior Executive Lawyer

Tel: (02) 6253 7012
Fax: (02) 6253 7303
E-Mail: jenny.burnett@ags.gov.au

Constitutional Limits on Restricting Judicial Review

This decision of the High Court is relevant to the construction of Commonwealth statutory provisions (known as 'privative clauses') intended to restrict judicial review of Commonwealth administrative decisions, and in considering the availability of other means of restricting such review.

These proceedings raised the question of the construction and constitutional validity of the privative clause in s.474 of the *Migration Act 1958* which was designed to restrict significantly the availability of judicial review of migration decisions. They also involved the question of the construction and validity of s.486A of the Migration Act which imposed a strict time limit of 35 days on applying to the High Court for review of decisions affected by the privative clause in s.474.

The High Court unanimously held that s.474 and s.486A are valid but construed them so as to reduce significantly the scope of their intended effect. Gaudron, McHugh, Gummow, Kirby and Hayne JJ gave a joint judgment and Gleeson CJ and Callinan J each gave separate judgments.

Plaintiff S157 of 2002 v Commonwealth

High Court of Australia, 4 February 2003
[2003] HCA 2; (2003) 195 ALR 24

Background

The plaintiff sought a declaration in the original jurisdiction of the High Court that s.474 and s.486A of the Migration Act are invalid. He asserted that, but for s.474 and s.486A, he would have applied to the High Court for relief under s.75(v) of the Constitution in relation to a decision of the Refugee Review Tribunal alleging a denial of procedural fairness.

Section 474 was enacted in the form of a *Hickman* clause which, read literally, excludes the jurisdiction of courts to review the decisions to which it applies, but has been construed by the courts to allow review on three narrow grounds – that the decision was not made bona fide, did not relate to the subject-matter of the Act under which the decision was made and was not reasonably referable to the power of the decision-maker (*R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598). This rule of construction is a means of reconciling provisions in an Act which impose requirements on the decision-maker with provisions which purport to exclude the jurisdiction of the courts to review the decision. The rule is subject to the proviso that truly jurisdictional ('inviolable') limitations will be enforced by the courts; the question whether a limitation is inviolable is a matter of construction (see, e.g., *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 400).

One view of a clause of this kind had been that it operates to expand the jurisdiction of the decision-maker to allow the making of a decision that need only conform with the three *Hickman* conditions (*DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168, 179, 205–207, 220). On this view, the effect of a privative clause is that a decision conforming with the *Hickman* conditions cannot involve jurisdictional error. The clause so construed is unlikely to be inconsistent with s.75(v) of the Constitution. Section 75(v) confers original jurisdiction on the High Court in matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth and has generally been seen as conferring jurisdiction to grant relief in relation to decisions of Commonwealth officers involving jurisdictional error.

It is clear from the explanatory memorandum and second reading speech that s.474 was enacted in reliance on the *Hickman* line of authority and that the intention of the provision was to restrict judicial review of most migration decisions to the *Hickman* conditions.

Privative clause – section 474

All members of the Court accepted that s.474 cannot be read literally as, so read, it would be inconsistent with s.75(v) of the Constitution.

Joint judgment

The joint judgment rejected the notion that a *Hickman* clause is to be read as expanding the jurisdiction of the decision-maker to make a decision which conforms only with the *Hickman* conditions [64], [91], [99].

Their Honours decided that the *Hickman* line of authority had never been applied to give a privative clause the effect of impliedly repealing all the statutory limitations on the exercise of a statutory power and s.474 could not be read in this way [67]. They found that the privative clause could not be construed to extend to decisions *purportedly* made under the Act (i.e. decisions involving jurisdictional error) otherwise the clause would be inconsistent with s.75(v) of the Constitution and would confer authority on non-judicial decision-makers conclusively to determine their own jurisdiction, possibly in breach of the principle implied in Ch III of the Constitution that judicial power be conferred only on the courts specified in s.71 of the Constitution [75]–[76].

They contemplated that the privative clause could have the effect that 'some procedural or other requirements laid down by the Act are to be construed as not essential to the validity of a decision' [69], i.e., the clause might have the effect of limiting to some extent the errors that can be classified as jurisdictional.

The joint judgment therefore concluded that s.474 does not preclude judicial review for jurisdictional error and is not inconsistent with s.75(v) of the Constitution. Denial of procedural fairness involves a jurisdictional error and the decision the plaintiff seeks to impugn will not be protected by s.474 from a finding of denial of procedural fairness [83].

Gaudron, McHugh, Gummow, Kirby and Hayne JJ indicated their view that the difference between their understanding and the Commonwealth's understanding of the *Hickman* line of authority is 'not some logical or verbal quibble', but 'a real and substantive' reflection of the propositions that the High Court's jurisdiction under s.75(v) cannot be removed and that the judicial power of the Commonwealth cannot be exercised other than in accordance with Ch III of the Constitution [98]. They indicated the possible constitutional difficulties with some of the other means of seeking to achieve the effect that s.474 of the Migration Act was designed to achieve [100]–[103]. They concluded that s.75(v) of the Constitution:

> is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. [104]

Gleeson CJ

Gleeson CJ was not prepared to construe s.474 as intended impliedly to repeal all the statutory limitations contained in the Migration Act [26]–[27]. He took into account the presumptions that legislation should be construed:

- in accordance with Australia's international obligations and the rule of law
- so as not to curtail fundamental rights and freedoms or deny access to the courts, and

- by reference to the whole of the Act, not simply by reference in this case to s.474 as the central or controlling provision. [29]–[33]

If the Parliament had intended to authorise the Refugee Review Tribunal acting in good faith to affirm a refusal of a protection visa made unfairly and in contravention of the requirements of natural justice, it should have made its intention clearer [37].

Callinan J

Callinan J recognised some of the difficulties involved in immigration policy and administration [116]–[117], [125] and considered it important to recognise that the attack on the validity of s.474 was an attack on the will of the Parliament [118]. Nevertheless, he held that s.474 does not protect decisions involving 'manifest error of jurisdiction' or 'a departure from an essential or imperative requirement' [160].

Time limit – section 486A

The plaintiff argued that s.486A of the Migration Act is invalid on a number of bases, most significantly on the basis that it is inconsistent with the conferral on the High Court of jurisdiction under s.75(v) of the Constitution.

Gaudron, McHugh, Gummow, Kirby and Hayne JJ applied their reasoning in relation to s.474 to hold that s.486A does not apply to a decision involving jurisdictional error [86]–[87]. They recognised that, on this construction, the time limit will have limited effect but considered this result unsurprising because the legislation had proceeded on an incorrect view as to the *Hickman* line of authority [88]–[91]. Gleeson CJ also considered that s.486A does not apply to a decision involving jurisdictional error [41].

Callinan J held that s.486A was inconsistent with s.75(v) of the Constitution because it denied applicants recourse to the remedies available under s.75(v) [174]–[175].

Outcome

It therefore seems that privative clause decisions which involve jurisdictional error at common law (such as, for example, those involving denial of procedural fairness, identification of a wrong issue or reliance on irrelevant material) will be amenable to judicial review despite s.474. Section 474 may have some effect in determining whether a statutory limitation is jurisdictional. The consequences of the High Court's decision for judicial review of privative clause decisions are being worked out in a series of cases in the Federal Court.

What remains unclear from the Court's decision is the extent, if any, to which particular grounds of review, such as denial of procedural fairness, are constitutionally entrenched by s.75(v) of the Constitution and the extent to which the Commonwealth Parliament can legislate to provide, other than by way of a privative clause, that a decision-maker is authorised to make a decision which would otherwise involve a jurisdictional error, although the joint judgment suggests that availability of review for fraud, bribery, dishonesty or other improper purpose may be constitutionally required [82].

Nor does the Court's decision resolve the issues as to the capacity of the Parliament to impose a strict time limit on s.75(v) applications to the High Court.

Text of the decision is available at <http://www.austlii.edu.au/au/cases/cth/high_ct/2003/2.html>.

Contact for further information:

Jenny Burnett
Senior Executive Lawyer

Tel: (02) 6253 7012
Fax: (02) 6253 7303
E-Mail: jenny.burnett@ags.gov.au

Public Law Remedies and Private Bodies

This decision addresses the issue of obtaining judicial review of a decision made by a privately owned Corporations Act company according to a statutory scheme. A majority of the High Court took the view that the binding recommendations of Australian Wheat Board (International) Limited on the grant of bulk wheat export permits were not amenable to judicial review. Nonetheless, the reservations of the majority on making more general statements about the issue and the dissent of Kirby J may mean that further judicial challenges will arise.

NEAT Domestic Trading Pty Limited v AWB Limited

High Court of Australia, 19 June 2003
[2003] HCA 35; (2003) 198 ALR 179

Background

On 19 June 2003 a full bench of five High Court justices handed down a decision concerning whether decisions made under section 57 of the *Wheat Marketing Act 1989* (the Act) to refuse approval for six applications to the Wheat Export Authority for bulk export permits to NEAT Domestic Trading Pty Ltd (NEAT) were void for failure to follow administrative law principles.

On 1 July 1999 a new scheme for administering the export of wheat was introduced with the creation of the Wheat Export Authority (the Authority) and three companies incorporated under the Corporations Law. As part of these arrangements, Australian Wheat Board (International) Limited (AWBI) was incorporated as a wholly owned subsidiary of Australian Wheat Board Limited. AWBI is the only company that can export wheat without applying to the Authority for a permit (s.57(1A)). Moreover, under the new scheme the Authority cannot give consent to bulk exports 'without prior approval in writing' from AWBI (s.57(3B)). Thus, AWBI, which is owned and controlled by growers and not the Commonwealth, has a right of veto over exports from Australia and since 1 July 1999 has approved a bulk export in only one instance.

The explanatory memorandum for the *Wheat Marketing Legislation Amendment Act 1998* which initiated these changes explained them as necessary for competing with the 'interventionist polices of other grain producing countries such as the US and EU' and so endorsed an 'export monopoly' to 'maximise the net returns to growers'. This is called 'the single desk' approach.

NEAT's application for bulk export

In this context NEAT made six applications to export bulk quantities of durum wheat in circumstances which related to specific business opportunities unconnected with those of AWBI and where it claimed that the interests of AWBI were not affected. AWBI did not give its approval for any of these applications and referred to a policy whereby it said that issuing any bulk permits would detract from the single desk policy and benefit a select group of growers to the detriment of those who delivered their grain to the national pool.

NEAT's Case

NEAT sought judicial review in the Federal Court of the decision by AWBI to refuse to give approval for a permit to be issued by the Authority. The argument for judicial review was that there had been an inflexible application of policy. That is, that AWBI 'was acting in accordance with a rule or policy without regard to the merits of the case' [17]. NEAT argued that under ss.5(2)(f) and 6(2)(f) of the *Administrative Decisions (Judicial Review) Act 1977* this was a decision of an administrative character made under an enactment and reviewable under that Act.

High Court's Decision

Gleeson CJ

Gleeson CJ decided that AWBI was able to apply such a strict policy in light of the Act's monopolistic scheme and NEAT's appeal failed. The policy was not inconsistent with the Act nor was any claim advanced to render the policy irrelevant. Gleeson CJ then stated that it was 'strictly unnecessary to decide whether the withholding of an approval by AWBI was a decision of an administrative character made under an enactment'. Nonetheless, he expressed his 'preference' that the withholding of the approval by AWBI was such a decision and '[t]o describe it as representing purely private interests is inaccurate' [27].

McHugh, Hayne and Callinan JJ

In a joint judgment the following questions were identified:

- can public law remedies be granted against private bodies?
- do public law remedies lie where AWBI fulfils the role it plays under the Act? [49]

The judgment concluded that the private character of AWBI as a company incorporated under the corporations law for the pursuit of, in this instance, maximizing returns to those who sold wheat through pool arrangements, meant that it is not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests [51].

Section 57(3B) could not be interpreted as imposing a duty on AWBI to take into account any 'public' considerations, such as those implied from the subject-matter, scope or purpose of the Act, in deciding whether to grant approval. Further, AWBI 'could not be compelled, by mandamus or otherwise, to decide whether to grant or not grant its approval [because] it was under no statutory, or other, obligation to consider that question' [58].

The judgment noted the intersection between the private and the public when a private corporation is given a role in a scheme of public regulation. The court had not been informed of any other federal legislation in which there was a similar intersection. 'If processes of privatisation and corporatisation continue, it may be that an intersection of this kind will be encountered more frequently' [49].

The judgment warns that the conclusion in this particular matter 'is not to be understood as an answer to the more general question [they] identified' about applying public law remedies to private bodies [50].

Kirby J

In his dissenting judgment Kirby J both supported the availability of public law remedies over some private bodies (as established in *R v Panel on Take-overs and Mergers, Ex parte Datafin Plc* (1987) QB 815 and *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242) and also took the view that the decision of AWBI was an administrative decision made under an enactment. Kirby J argued that the nature of the decision maker as a private company was irrelevant to the public power being exercised. Kirby J stated:

> Whilst such features of AWBI may be *relevant* to the character of particular decisions that it makes, they are not *determinative*. In a particular case, a statutory scheme may have entrusted decisions of a public, governmental or regulatory character to a private corporation, involving that body, to that extent, in the exercise of public power. [99]

Moreover, Kirby J saw constitutional implications for these types of delegations and warned that the:

> constitutionally entrenched power of judicial review is one of the limits on the extent to which corporatisation and privatisation of federal administrative action in Australia may escape the disciplines of judicial scrutiny. [103]

Kirby J emphasised that rights to challenge the decision of the Authority 'would be reduced to

nought' if the decision of the AWBI could not be reviewed and this would result in AWBI coming 'close to possessing absolute legal power' [108] and [105]. Kirby J felt that the facts of NEAT's applications warranted greater consideration from AWBI and were thus unlawful.

Implications for Judicial Review

The implications of this decision are that where a privately owned Corporations Act company makes decisions under an enactment it may be free to pursue its own interests without regard to public law considerations. This will occur where the legislation in question allows the interests of the corporation to be the sole consideration in reaching its decision. Such decisions may not be amenable to judicial review. However, there is a clear indication that the private nature of the decision-making entity will not necessarily make it immune from having to comply with public law procedures. Additionally, given the three to two division against the applicability of the *Administrative Decisions (Judicial Review) Act 1977* in this particular instance, coupled with a warning that it might apply in other legislative schemes, further litigation in this area seems likely.

The text of this decision can be found at <http://www.austlii.edu.au/au/cases/cth/high_ct/2003/35.html>.

This briefing was prepared by AGS lawyer Peter Nicholas while a graduate lawyer at AGS under the supervision of Madeline Campbell, Senior Executive Lawyer.

Contact for further information:

Madeline Campbell
Senior Executive Lawyer

Tel: (02) 6253 7408
Fax: (02) 6253 7381
E-mail: madeline.campbell@ags.gov.au

High Court Constitutional Decisions in Brief

Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd
5/9/03, [2003] HCA 49; (2003) 201 ALR 1

In this appeal the High Court unanimously decided that in order to obtain a conviction in a customs or excise prosecution in the Queensland Supreme Court the criminal standard of proof beyond reasonable doubt must be satisfied. The Court also decided that the provisions of the *Evidence Act 1977* (Qld) which apply in civil cases in the Supreme Court are to be applied in the trial of customs and excise prosecutions.

The appellant brought proceedings against the respondents in the Queensland Supreme Court alleging that they had moved goods without authorisation and evaded customs and excise duty contrary to ss 33 and 234(1)(a) and (d) of the *Customs Act 1901* (Cth) and ss 61 and 120(1)(iv) of the *Excise Act 1901* (Cth).

The proceedings were a 'customs prosecution' and an 'excise prosecution' within the meaning of the Customs Act (s.244) and the Excise Act (s.133) respectively. Those Acts both relevantly state that the proceedings may be 'commenced prosecuted and proceeded with in accordance with any rules of practice (if any) established by the Court for Crown suits in revenue matters or in accordance with the usual practice and procedure of the Court in civil cases or in accordance with the directions of the Court or a Judge' (s.247 of the Customs Act, s.136 of the Excise Act). Customs and excise prosecutions have traditionally been conducted as civil prosecutions for the recovery of pecuniary penalties.

The leading judgment is that of Hayne J (with whom Gleeson CJ and McHugh J agreed). Hayne J considered that the standard of proof to be applied in

a customs or excise prosecution was not a matter of 'practice and procedure' within the meaning of s.247 of the Customs Act and s.136 of the Excise Act. As the Customs Act and the Excise Act therefore did not provide for the standard of proof to be applied, it was necessary to consider the operation of ss 79 and 80 of the *Judiciary Act 1903* (Cth). Section 79 picks up and applies State laws, including the laws relating to procedure, evidence and the competency of witnesses, in matters within federal jurisdiction. However, no Queensland Act prescribes the standard of proof to be applied in customs and excise prosecutions. The relevant section was therefore s.80. Section 80 picks up and applies the common law, as modified by the Constitution and State statute law, to matters within federal jurisdiction. The question was therefore what standard of proof the common law requires in respect of customs and excise prosecutions. Hayne J considered that where a prosecution for pecuniary penalties seeks a conviction for an offence against a law of the Commonwealth, the common law requires proof to the criminal standard of beyond reasonable doubt.

Hayne J considered that s.247 of the Customs Act and s.136 of the Excise Act required that those provisions of the Queensland Evidence Act concerning matters of practice and procedure that would be applied in a civil case (including the provisions regulating the admissibility of evidence) be applied in these proceedings in the Queensland Supreme Court.

The approach taken to the question of the applicable standard of proof meant that it was unnecessary for the Court to consider the respondent's constitutional argument that application of the civil standard of proof would contravene s.71 of the Constitution as it would require a court to exercise federal judicial power in a manner inconsistent with the essential character of a court or with the nature of judicial power.

http://www.austlii.edu.au/au/cases/cth/high_ct/2003/49.html

Contact for further information on the decision in *Labrador*:

Simon Daley
Special Counsel Litigation

Tel: (02) 9581 7490
Fax: (02) 9581 7559
E-mail: simon.daley@ags.gov.au

Re Maritime Union of Australia; Ex parte CSL Pacific Shipping
7/8/03, [2003] HCA 43; (2003) 200 ALR 39

The High Court considered whether the extended operation of the *Workplace Relations Act 1996* (Cth) provided by s.5(3)(b) gave the Australian Industrial Relations Commission jurisdiction to make an award applicable to the foreign crew of a foreign-registered ship. The ship had been time-chartered to an Australian company and was engaged in trade along the Australian coast pursuant to permits granted under the *Navigation Act 1912* (Cth). The case raised issues of statutory construction and constitutional power. The High Court held unanimously that the AIRC had jurisdiction from s.5(3)(b) to make an award applying to the ship's crew and that s.5(3)(b) was valid under the trade and commerce power (s.51(i) of the Constitution).

http://www.austlii.edu.au/au/cases/cth/high_ct/2003/43.html

Oates v Attorney-General of the Commonwealth
4/3/03, [2003] HCA 21; (2003) 197 ALR 105

The High Court held that the *Extradition Act 1988* does not confine the Commonwealth's executive power to request extradition from another country and extended to authorise the request to Poland for extradition of the appellant.

http://www.austlii.edu.au/au/cases/cth/high_ct/2003/21.html

Fittock v The Queen; Ng v The Queen
reasons published 10/4/03, [2003] HCA 19, 20; (2003) 197 ALR 1, 10

The High Court held that s.68 of the *Judiciary Act 1903* validly applied the reserve juror provisions of the *Juries Act 1996* (NT) and the additional juror provisions of the *Juries Act 1967* (Vic) to trials for Commonwealth offences. In particular, the Court rejected the applicants' arguments that the application of the reserve and additional juror provisions to the conduct of their trials infringed s.80 of the Constitution (trial on indictment of a Commonwealth offence shall be 'by jury'). The reserve and additional juror provisions allow for the empanelment of reserve or additional jurors to seek to ensure that, if any jurors are discharged during the trial, sufficient jurors remain available when the jury retires to consider its verdict. The High Court considered that the application of the provisions did not conflict with any of the essential features of the trial by jury required by s.80. The decision of the High Court reduces the prospects of Commonwealth trials being aborted on the basis that the number of jurors has fallen below a statutory minimum.

Fittock also raised the question of whether s.80 applies in the territories of the Commonwealth. In light of their finding that s.80 would not be infringed, all justices of the Court considered it unnecessary to determine whether the Court should reconsider the decision in *R v Bernasconi* (1915) 19 CLR 629 which held that s.80 does not apply to trials on indictment in the territories.

http://www.austlii.edu.au/au/cases/cth/high_ct/2003/19.html

The Queen v Gee
13/3/03, [2003] HCA 12; (2003) 196 ALR 282

The High Court held that ss 72–77 of the *Judiciary Act 1903* (which provide a procedure for reservation of questions of law in trials of Commonwealth offences in relatively limited circumstances and only at the instance of the accused) are not inconsistent with and do not exclude any general jurisdiction which would otherwise be conferred on the SA Supreme Court by s.68(2) of the Judiciary Act to direct the reservation of questions of law in the same way as in the trial of a State offence. Section 68(2) of the Judiciary Act gives State courts which have jurisdiction in relation to the trial of State offences the 'like jurisdiction' in relation to Commonwealth offences. Section 350 of the *Criminal Law Consolidation Act 1935* (SA) provides a mechanism for the Supreme Court to direct reservation of questions of law in trials for State offences and was picked up by s.68(2).

The inconsistency question arose in a case where the prosecutor, the Commonwealth Director of Public Prosecutions, sought the reservation of questions of law. The decision of the High Court confirms the availability of State and Territory procedures for reserving questions of law in trials for Commonwealth offences.

http://www.austlii.edu.au/au/cases/cth/high_ct/2003/12.html

Roberts v Bass
12/12/02, [2002] HCA 57; (2002) 194 ALR 161

This decision involved the first consideration by the High Court since *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 of the interaction between the law of defamation and the freedom of political communication implied in the Commonwealth Constitution. The High Court determined the question of what constitutes malice on the part of a person who publishes material during an election campaign which would overcome a defence of common law qualified privilege. Malice is established where the publication is actuated by an improper motive, and a majority of the High Court held that publishing electoral material (information, arguments, facts and opinions about a parliamentary candidate and his or her policies) with a view to damaging the candidate's prospects of election is not an improper motive; it is indeed 'central to the electoral and democratic process'. Nor is it necessary for a person publishing

material to establish a positive belief in the truth of the material in order to avoid a finding of malice. If this were not so, the common law of qualified privilege would not conform with the freedom of political communication and would need to be developed to comply with the Constitution.

The appeal arose out of a defamation action brought by a candidate for re-election at the 1997 SA State General Election in respect of election material written and published by a person representing the Clean Government Coalition, some of which was also distributed on election day as a how-to-vote card by a member of a local public interest group. The South Australian courts found both defendants to be liable. By majority, the High Court allowed the appeal and set aside the judgment against the defendants. The Court ordered that there be a new trial of the action against the Clean Government Coalition defendant as the District Court had not made sufficient findings to determine whether that defendant had merely been providing electors with information about the candidate or had been actuated by an improper motive.

http://www.austlii.edu.au/au/cases/cth/high_ct/2002/57.html

Re Minister for Immigration and Multicultural Affairs; Ex parte Te and Re Minister for Immigration and Multicultural Affairs; Ex parte Dang
7/11/02, [2002] HCA 48; (2002) 193 ALR 37

The High Court decided that the applicant in each case was an 'alien' for the purposes of the Commonwealth's power to make laws with respect to 'naturalization and aliens' (s.51(xix) of the Constitution). The decision confirms the Commonwealth's power to make laws regulating the presence in, and removal from, Australia of any person who is not an Australian citizen (other than certain British subjects).

Mr Te was of Cambodian origin, came to Australia as a refugee in 1983 and committed several heroin trafficking offences. He was ordered to be deported under the criminal deportation provisions of the *Migration Act 1958*. Mr Dang was of Vietnamese origin, came to Australia as a refugee in 1981 and committed numerous offences, including armed robbery and heroin trafficking offences. The Minister cancelled his visa, the effect of which is to render him subject to removal from Australia. Neither applicant was an Australian citizen.

In each case, the applicant argued that the relevant provisions of the Migration Act could not validly apply to him because he owed allegiance to the Queen of Australia and to no other power and/or because he had been absorbed into the Australian community, and so was no longer an alien. The applicants relied on the High Court's decision in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 in which the Court, by a 4–3 majority, overruled previous High Court authority and held that a British subject non-citizen (at least if born in the United Kingdom) who arrived in Australia before 1973 (or, perhaps, 1987) is not necessarily an alien for the purpose of the aliens power.

The High Court unanimously held that the applicants in these cases were aliens and therefore subject to the relevant provisions of the Migration Act. The members of the Court who formed the majority in *Patterson* in effect confirmed that the category of non-citizen non-aliens extends only to the British subjects referred to in *Patterson*. The minority judges in *Patterson* adhered to their view that the Parliament can treat as an 'alien' any person born outside Australia whose parents were not Australians and who has not been naturalised.

In *Shaw v Minister for Immigration and Multicultural Affairs*, which was heard by the High Court on 17 June 2003 and in which judgment is reserved, the Commonwealth argued that the Court should overrule the decision in *Patterson* and adopt the approach of the minority in that case.

http://www.austlii.edu.au/au/cases/cth/high_ct/2002/48.html

Solomons v District Court of New South Wales
10/10/02, [2002] HCA 47; (2002) 192 ALR 217

The High Court decided that the *Costs in Criminal Cases Act 1967* (NSW) does not apply to the prosecution of a Commonwealth offence. The NSW Act establishes a mechanism for the payment from the NSW Consolidated Revenue Fund to an acquitted person of their costs of defending the prosecution. The High Court held that the NSW Act was limited to prosecutions for State offences and was not picked up and applied to a Commonwealth prosecution by s.79 of the *Judiciary Act 1903* (which directs the law that is to be applied by a court in the exercise of federal jurisdiction).

http://www.austlii.edu.au/au/cases/cth/high_ct/2002/47.html

Macleod v Australian Securities and Investments Commission
11/9/02, [2002] HCA 37; (2002) 191 ALR 543

The High Court held that the statutory power of the predecessor of the Australian Securities and Investments Commission to 'carry on' a prosecution did not extend to bringing an appeal. The Court applied the principle it had previously relied on in *Byrnes v The Queen* (1999) 199 CLR 1 and *Bond v The Queen* (2000) 201 CLR 213, that a prosecution appeal is an exceptional jurisdiction which must be expressly conferred. The appeal in question was to the Full Court of the WA Supreme Court from a decision of a single judge of the WA Supreme Court which had itself overturned a conviction for an offence under the then Corporations Law (WA). The High Court did not need to determine whether conferral on the Commission of a power to appeal in relation to a State offence would have been within the legislative power of the Commonwealth.

http://www.austlii.edu.au/au/cases/cth/high_ct/2002/37.html

Contact for further information:

David Bennett
Deputy Government Solicitor

Tel: (02) 6253 7063
Fax: (02) 6253 7303
E-mail: david.bennett@ags.gov.au

For further information on litigation matters and services please contact:

Canberra	
Jenny Anderson	(02) 6253 7401
New South Wales	
Julia Hall	(02) 9581 7432
Victoria	
Susan Pryde	(03) 9242 1426
Queensland	
Maurice Swan	(07) 3360 5702
Western Australia	
Graeme Windsor	(08) 6268 1102
South Australia	
David Williams	(08) 8205 4283
Northern Territory	
Jude Lee	(08) 8943 1444
Tasmania	
Peter Bowen	(03) 6220 5474

For assistance with supply of copies, change of address details etc Tel: (02) 6253 7052, Fax: (02) 6253 7313, E-mail: ags@ags.gov.au.

Text will be available on the AGS web site: see 'For Clients' on <http://ags.gov.au>.

ISSN 1329-458X Print Post Approved PP255003/05308