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Litigation notes

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Disclosure of information by APS employees

The decision in this case casts doubt on the validity of regulation 2.1 of the Public Service Regulations 1999, which puts restrictions on the disclosure of official information by public servants. It may be that the regulation will have to be replaced with one that is cast more narrowly. But aside from this regulation there are other obligations on public service employees not to disclose information.

Bennett v President, Human Rights and Equal Opportunity Commission

Federal Court of Australia, 10 December 2003
[2003] FCA 1433; 204 ALR 119

Background

Mr Bennett, the applicant, is an APS employee in the Australian Customs Service and is the Federal President of the Customs Officers' Association. He made a complaint to the Human Rights and Equal Opportunity Commission (HREOC) that the CEO of Customs had:

(i) infringed his human right of freedom of expression; and

(ii) discriminated against him on the basis of his trade union activity and his political opinion.

HREOC examined the claim and decided to discontinue its inquiry because it was satisfied that the acts of Customs were not within (i) or (ii) above.

Mr Bennett had been given directions by Customs to refrain from speaking to the media about various public service issues. Those directions had been grounded on regulation 7(13) of the then Public Service Regulations.

The text of that regulation (which was repealed in 1999) was as follows:

> An APS employee must not, except in the course of his or her duties as an APS employee or with the Agency Head's express authority, give or disclose, directly or indirectly, any information about public business or anything of which the employee has official knowledge.

One of the key bases of Mr Bennett's challenge was that regulation 7(13) of the Public Service Regulations (made under the *Public Service Act 1922*) was invalid, because it infringed the implied constitutional freedom of political communication. Mr Bennett challenged HREOC's decision to discontinue its inquiry, seeking an order of review under the *Administrative Decisions (Judicial Review) Act 1977*.

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This issue

One of the functions of HREOC is to inquire into breaches of human rights and discrimination. Human rights are, among other things, rights recognised in the International Covenant on Civil and Political Rights (the ICCPR). Article 19(2) of the ICCPR gives everyone the right of freedom of expression. Article 19(3) provides that that right may be subject to certain restrictions. But under Article 19(3) these restrictions may only be as provided by law, and they must be necessary for respect of the rights or reputations of others, or for the protection of national security or of public order or of public health or morals.

Facts

In 1998 Mr Bennett was given a formal warning by the CEO of Customs not to make media comment which involved disclosure of information about public business or anything of which he had official knowledge. He was warned that failure to comply with the direction could lead to disciplinary action. Mr Bennett disputed the lawfulness of the direction. Mr Bennett did a media interview in November 1998. He was subsequently charged with a breach of regulation 7(13). In May 1999 he was found to have breached that regulation, and a penalty of reduction in salary was later imposed on him.

In October 1999, the disciplinary decisions were revoked, on the basis of AGS advice that regulation 7(13) must be read down so as not to apply to public comment on matters of public administration already on the public record.

The decision

Finn J found that:

— the subject matter of the directions given to Mr Bennett was set by regulation 7(13)

— the regulation is invalid in that it infringes the implied freedom of political communication and cannot be read down so as to avoid that consequence

— even if the regulation were not invalid, the directions infringed Mr Bennett's right to freedom of expression under Art 19(2) of the ICCPR as they were not necessary for the protection of public order under Art 19(3)

— but the direction may have been a lawful and reasonable exaction of loyalty from Mr Bennett which was not inconsistent with Article 19 (based on his duty of 'loyalty and fidelity' as an APS employee), and

— because this possibility was not addressed by HREOC the matter must go back to HREOC for further consideration.

The direction may have been a lawful and reasonable exaction of loyalty from Mr Bennett.

Summary of reasons

Regulation 7(13)

Finn J found regulation 7(13) to be a 'catch-all' provision, unconcerned with whether the information was publicly available. He subjected the regulation to the test in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567, which asks:

— whether the law effectively burdens freedom of communication about government or political matters

— if it does, whether the law is reasonably appropriate and adapted to serve a legitimate end which is compatible with the maintenance of the system of representative and responsible government prescribed by the Constitution.

Finn J found the regulation did burden freedom of political communication. It operated in the heartland of the freedom, that is, communication about political or governmental matters and about the executive organs of the State [78].

Finn J accepted that the effective working of government is a legitimate end compatible with the constitutionally prescribed system of government [95] but found that regulation 7(13) was not reasonably appropriate and adapted to that end because of the catch-all nature of the provision.

Finn J noted that there have been a number of government reports (particularly at State level) highlighting the need for open government [85]. He found that the regulation was so wide that it placed an almost impossible demand in domestic, social and work-related settings; and that the control it imposes impedes the flow of information to the community [98]–[99].

Finn J did however recognise that there are species of official information disclosure of which might properly be regulated [100]. For example, the Commonwealth can validly prohibit the disclosure of information to protect national security, cabinet secrecy and the impartiality of the public service [80]. But he noted that regulation 7(13) does not differentiate between species of information or consequences of disclosure [101]. He referred with apparent approval to a South Australian secrecy provision which is not a catch-all provision [106], and concluded that regulation 7(13) was invalid [108].

Finn J found that the regulation was so wide it placed an 'almost impossible' demand in domestic, social and work-related settings.

The Customs direction and the ICCPR

Finn J carried out this analysis on the basis of the assumption that regulation 7(13) was valid. As such, the Customs directions would have been provided for by law, but the question would arise whether those directions were protected by Art 19(3) of the ICCPR as being necessary for the protection of public order. Finn J found that 'furthering the efficient conduct of government' hardly qualifies as a 'fundamental principle, consistent with respect for human rights, on which a democratic society is based'. He concluded that the regulation was not necessary for the protection of public order [114]. This conclusion was explicitly based on the inappropriateness of the terms of regulation 7(13) [116].

Mr Bennett's duty of loyalty and fidelity

Finn J found that as an employee Mr Bennett owed the Commonwealth a common law implied duty of loyalty and fidelity. He noted that in public sector settings the duty is also sourced in status considerations, and that there has been an emphasis on the distinctive employment requirement of loyalty to the Crown, which translates into loyalty to the Government of the day [117].

The Commonwealth argued that even if regulation 7(13) was invalid, the duty of loyalty coupled with the power to give directions justified what had been done to Mr Bennett.

The duty of loyalty and fidelity has 'notorious uncertainties'.

Finn J noted that the duty of loyalty and fidelity has 'notorious uncertainties' and that its applications tend to be instance specific [121]. He decided to remit the matter to HREOC but made a number of observations on the duty of loyalty:

— the duty must only be developed in a way which does not unnecessarily impair the constitutional freedom of political communication

— the imprecision in the duty is well recognised, so that the content of the duty may be instance specific, turning on the facts of each case

— there is no significant Australian jurisprudence on the subject in a public service setting

— in this case Mr Bennett was both an APS employee and the president of a registered industrial organisation, and it may be that account would need to be taken of this in deciding whether he had been disloyal

— the duty of loyalty and fidelity overlaps with the equitable duty in employment settings to protect confidential information [123]–[127].

The discrimination issue

Finn J noted that even though regulation 7(13) was invalid, it was open to Customs to justify its actions. This might be done on the basis that Mr Bennett was being required to adhere to his duty of loyalty and fidelity, and that that duty was one of the inherent requirements of his job [140]. Finn J found that the duty of loyalty was an inherent requirement of Mr Bennett's public service employment [145]. But the question as to whether Customs could properly rely on that duty to justify its actions towards Mr Bennett had not been addressed by HREOC.

Finn J then offered some observations on how the duty of loyalty might be affected in a situation where an employee is also an official of a registered industrial organisation, serving two masters whose interests could be antagonistic:

— the fact that an employee holds an office in an industrial organisation does not alter their obligation to their employer

— an employee cannot rely on an inconsistent duty to a third party to justify their failure to discharge an obligation owed to their employer, for example, a duty of confidence

— an employer may permit an employee to engage in conduct which would otherwise breach an obligation owed to an employer

— the freedom of association provisions of the *Workplace Relations Act 1996* preclude the Commonwealth as employer from taking certain actions against a union official, if the action is taken for a prohibited reason.

Finn J concluded by noting that any proper consideration of the loyalty obligation of the public service employee–union official would have to address the issue of dual loyalties [154].

Implications of the decision

Finn J's finding of invalidity of old regulation 7(13) should be taken as casting very serious doubt on the validity of regulation 2.1 of the Public Service Regulations 1999, which is in substantially identical terms to old regulation 7(13).

But this does not mean that it is now open slather for APS employees when it comes to disclosure of information. There remain in place a large number of sources, in specific statutory provisions (including in the Public Service Act), in common law and in equity that control the disclosure of information by public servants.

In particular, the decision does not mean that a properly confined direction to an employee not to disclose information could not be both lawful and reasonable.

... the decision does not mean that a properly confined direction to an employee not to disclose information could not be both lawful and reasonable.

A question that remains to be decided is to what extent a direction not to disclose information would run foul of Article 19 of the ICCPR and, if it did, whether this would render it unreasonable and so beyond the power in subsection 13(5) of the Public Service Act.

Because of the vagueness of the duty of loyalty and fidelity, satisfactory resolution of this issue is only likely to be achieved by the creation of a

much more sharply focused non-disclosure provision in the Public Service Regulations.

Beyond the APS Code of Conduct, the decision may have implications for a range of catch-all secrecy provisions in Commonwealth (and State) legislation.

The decision also highlights the complexity of placing constraints on the disclosure of information by an APS employee who is also a union official.

Text of the decision is available at: <http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/1433.html>. This note was originally published in the email service *AGS Casenotes* (No. 53, 12 December 2003).

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The constitutional meaning of 'alien'

A British subject who comes to Australia after 1949 is an 'alien' for constitutional purposes, if he or she has not been naturalised. The High Court's decision in *Shaw* overrules *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, and returns to the position decided in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.

Shaw v Minister for Immigration and Multicultural Affairs

High Court of Australia, 9 December 2003
[2003] HCA 72, (2003) 203 ALR 143

Background

Mr Shaw was born in the United Kingdom, and came to Australia in 1974, aged 2. He has not left since. Mr Shaw has not been naturalised as an Australian citizen, but under Commonwealth migration law he was taken to have a transitional (permanent) visa. The Minister sought to cancel that visa, on the basis of Mr Shaw's criminal record. The consequence of cancellation under Commonwealth migration law was that Mr Shaw became an 'unlawful non-citizen' and liable to be removed from Australia. The constitutional power to remove Mr Shaw largely depended on whether he was within the 'aliens' power in s 51(xix) of the Constitution (although the Minister also made other arguments).

Generally, a non-citizen is an 'alien'. In *Patterson*, however, a majority of the High Court held that there was a middle category of 'non-citizen non-aliens', consisting of British subjects who arrived in Australia before a certain date. There was disagreement in *Patterson* over what that date was: Gaudron and Kirby JJ held it was 1987, McHugh J held it was 1973, and Callinan J agreed with both Kirby and McHugh JJ. Importantly, however, *Patterson* held that these 'non-citizen non-aliens' were not within the aliens power and could not be removed from Australia under Commonwealth migration law.

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Decision

In *Shaw*, the Minister argued that this middle category of 'non-citizen non-aliens' should be discarded, in line with the High Court's earlier decision in *Nolan*. That argument was accepted by Gleeson CJ, Gummow and Hayne JJ (who had dissented on this issue in *Patterson*), and by Heydon J (who was appointed to the High Court after *Patterson* was decided).

Majority: A non-citizen is an 'alien'

The majority (Gleeson CJ, Gummow and Hayne JJ in a joint judgment, with Heydon J agreeing) held that laws under s 51(xix) can define who is an alien, the consequences of being an alien, and how the status of 'alien' is removed by naturalisation. In this sense, citizenship – while a statutory concept – is the obverse of being an alien [2].

The majority accepted that the Commonwealth Parliament does not have unlimited power to define who is an alien [9]. However, the constitutional term 'alien' includes at least a person born outside Australia to parents who were not Australian citizens, who has not been naturalised under Australian law and who entered Australia after the commencement of the *Australian Citizenship Act 1948* (Cth) on 26 January 1949 [7], [32]. In the majority's view, Mr Shaw was an alien under that definition.

Previously, the majority in *Patterson* had concluded that a British subject who came to Australia before a certain date (either 1973 or 1987) was not an 'alien' for the purposes of the Australian Constitution. The *Shaw* majority rejected that conclusion, noting that:

— the Australian Constitution uses the expression 'subject of the Queen', not 'British subject' [10];

— Australia gradually developed legal and political independence from the UK during the first half of the 20th century. This independence meant that, when Australia enacted its own citizenship laws in 1948, the constitutional expression 'subject of the Queen' meant subject of the Queen of Australia, not the Queen of the UK [14]–[20]; and

— the Constitution contemplated changes in the political and constitutional relationship between Australia and the UK, particularly s 51(xxxviii) (which enables the Commonwealth, with the concurrence of the States, to exercise a power that in 1901 could only be exercised by the UK Parliament) [26]–[27].

In this sense, citizenship – while a statutory concept – is the obverse of being an alien.

The majority in *Shaw* therefore concluded that a person who (a) is born outside Australia to non-Australian parents, (b) entered Australia after the commencement of the *Australian Citizenship Act 1948* (Cth), and (c) has not been naturalised under Australian law is an 'alien' for constitutional purposes [32]. That conclusion meant that Mr Shaw could be removed from Australia under Commonwealth migration laws. In his separate judgment, Heydon J left open the possibility that, even at 1901, a British subject was an 'alien' for the purposes of the Australian Constitution [190].

Dissent: A British subject who arrives before 1986 is not an 'alien'

The dissenting justices in *Shaw* (McHugh, Kirby and Callinan JJ) had been in the majority in *Patterson*. They emphasised here that a majority in *Patterson* had rejected the simple distinction between 'citizen' and 'alien'. In their view, the High Court should now resolve the disagreement over when a person is a 'non-citizen non-alien', rather than discarding that notion altogether. Although these justices had taken different views on this issue in *Patterson*, they agreed in *Shaw* that the relevant date was

the enactment of the Australian and UK *Australia Acts* on 3 March 1986 [51]–[52] (McHugh J), [110]–[111] (Kirby J), [177]–[178] (Callinan J). Mr Shaw had arrived in Australia before 1986 and therefore, in the view of the dissenting justices, could not be removed from Australia as an 'alien'.

Other arguments: immigration power, external affairs, and implied nationhood

The Minister also argued that Mr Shaw was an 'immigrant' within s 51(xxvii) of the Constitution. The *Shaw* majority did not need to deal with this argument; however, it was rejected by the dissenting justices. The dissenting justices held that Mr Shaw had been absorbed into the Australian community (even though he had engaged in criminal activity since he was 14), and was therefore no longer an 'immigrant' [46] (McHugh J), [115]–[121] (Kirby J), [154] (Callinan J).

Finally, the Minister argued that Mr Shaw could be removed from Australia under the external affairs power, or the so-called 'implied nationhood' power. Again, the majority justices did not need to deal with these arguments, and the dissenting justices rejected them [122]–[126] (Kirby J), [181]–[182] (Callinan J); see also [46] (McHugh J).

Precedent in constitutional cases

Before *Shaw*, the question of whether a British subject like Mr Shaw was an 'alien' had been considered by the High Court in *Nolan* and *Patterson*. The 6:1 decision in *Nolan* that these British subjects were 'aliens' was overruled by the 4:3 decision in *Patterson*, which in turn was overruled by the 4:3 decision in *Shaw*. Kirby J was critical of the majority in *Shaw*, stating that 'chance happenings affecting [the Court's] composition' should not change the governing law [60]. He also stated that justices of the High Court should normally give effect to majority rulings on the Constitution, to avoid 'the spectacle of deliberate persistence in attempts to overrule recent constitutional decisions on identical questions' on the basis of retirements from and new appointments to the Court [76].

The Shaw majority considered that departing from Patterson was in line with the Court's general approach to overruling its earlier decisions.

The majority, however, raised a question whether *Patterson* had even been effective in overruling *Nolan*. According to the *Shaw* majority, the High Court should not be taken to have overruled its earlier decisions unless the new doctrine 'may readily be discerned' by lower courts in the Australian hierarchy. On that approach, the majority held in *Shaw*, the decision in *Patterson* 'plainly fails to pass muster' [36].

In any event, the *Shaw* majority considered that departing from *Patterson* was in line with the Court's general approach to overruling its earlier decisions [39].

— The discussion of the aliens power in *Patterson* did not rest upon a principle worked out in a succession of cases. Indeed, *Patterson* itself had overruled the relatively recent decision of *Nolan*.

— Moreover, the aliens power issue was not necessary to decide *Patterson*. In *Patterson*, the conclusion that the Minister's decision should be set aside for non-constitutional reasons provided a 'clear alternative basis' for the High Court's decision.

— The difficulty faced by lower courts in applying the majority judgments in *Patterson* militated against maintaining that approach.

— Finally, the majority also noted that the Minister had moved 'as quickly as may be' to obtain reconsideration of *Patterson*.

Other cases about the definition of 'alien'

Shaw clarifies an important aspect of the constitutional definition of 'alien'. However, other issues remain. For example, in *Singh v The Commonwealth* [2004] HCA 43 (9 September 2004), the High Court held (with McHugh and Callinan JJ dissenting) that a child born in Australia of non-citizen parents can be treated as an 'alien', particularly if the child is a citizen of another country. Conversely, in *Taurino v Minister for Immigration and Multicultural and Indigenous Affairs* (argued before Wilcox J on 9 September 2004), the applicant argued that a person born outside Australia to an Australian citizen cannot be treated as an 'alien'. Judgment is reserved in *Taurino*.

The constitutional definition of 'alien' also arises in *Re Battersby; Ex parte Ame*. The prosecutor in that case is challenging the validity of Australian laws that provided that people who became citizens of Papua New Guinea on independence in 1975 were no longer Australian citizens. A case has been stated for the consideration of the Full Court of the High Court.

Text of the decision is available at: <http://www.austlii.edu.au/au/cases/cth/HCA/2003/72.html>. This note updates an earlier version published in the email service *AGS Casenotes* (No. 52, 11 December 2003).

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Licensed premises and duty of care for intoxicated patrons

The High Court, by a 4 to 2 majority, has ruled that, even if a licensed club could come under a duty of care in negligence not to serve alcohol to an inebriated patron, the running down of the plaintiff by a passing motor vehicle, shortly after she left the defendant club in a heavily inebriated state, was not attributable to the breach of any such duty.

Cole v South Tweed Heads Rugby League Football Club Limited

High Court of Australia, *15 June 2004*
[2004] HCA 29; (2004) 207 ALR 52

The case is another in the law of negligence where a marked divergence of thinking emerges from different members of the High Court. This is not a criticism of the Court. Rather, it shows the complex issues that these cases raise for courts, concerning the response of the common law to broad social and moral issues such as what protection the individual is entitled to at the hands of others in exercising their freedom of choice in matters such as lifestyle, self-fulfilment and leisure.

Similar divergences emerged last year in the case of *Cattanach v Melchior* (2003) 199 ALR 131 where, the High Court by a 4 to 3 majority, cleared the way for Australian courts to award damages at common law for the costs of raising a healthy child conceived in consequence of a negligently performed sterilization procedure (see *AGS Casenotes* No. 50, 25 July 2003). (This latter decision has already been legislatively nullified in New South Wales, at least in its application to cases arising after the taking effect of relevant provisions of the *Civil Liability Amendment Act 2003* (No. 94 of 2003) on 19 December 2003 inserting Part 11 (ss 70 and 71) into the *Civil Liability Act 2002*.)

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Background

The defendant licensed club, the premises of which included on-site bar facilities for members and guests, was sued in negligence by the plaintiff, a middle-aged woman, for injury she suffered in 1994, when she was struck by a passing motor vehicle very shortly after leaving the club premises in early evening. The woman had become heavily inebriated through prolonged drinking at the club's bar (having been on the club premises for some eight hours). Upon leaving the club, the plaintiff had refused the club's offer to arrange travel home for her.

The driver of the motor vehicle which struck the plaintiff was the other defendant to the damages claim.

The New South Wales Court of Appeal, in overturning the trial judge's decision, ruled unanimously that there was no duty of care upon the club to the plaintiff in relation to the serving of alcohol to her at the bar to safeguard her against the injury she suffered as an inebriated pedestrian in the immediate aftermath of her departure from the club premises.

The plaintiff obtained special leave to appeal to the High Court. The High Court dismissed the appeal by a 4 to 2 majority (McHugh J and Kirby J dissenting). Heydon J did not sit, having participated, while still a member of the Court of Appeal, in the decision under appeal.

Decision

Of the majority, Gleeson CJ and Callinan J, in separate judgments, rejected the existence of a general duty of care upon the operator of licensed premises to protect a patron from the consequences of becoming inebriated through consuming alcohol served on the premises. Gleeson CJ gave the strongest analysis of legal principle in support of this position. He said [14] and [15]:

> A duty to take care to protect an ordinary adult person who requests supply from risks associated with alcohol consumption is not easy to reconcile with a general rule that people are entitled to do as they please, even if it involves a risk of injury to themselves. The particular circumstances of individual cases, or classes of case, might give rise to such a duty, but we are not here concerned with a case that is out of the ordinary.
>
> Again, as a general rule a person has no legal duty to rescue another. How is this to be reconciled with a proposition that the respondent had a duty to protect the appellant from the consequences of her decision to drink excessively? There are many forms of excessive eating and drinking that involve health risks but, as a rule, we leave it to individuals to decide for themselves how much they eat and drink. There are sound reasons for that, associated with values of autonomy and privacy.

... as a rule, we leave it to individuals to decide for themselves how much they eat and drink.

Callinan J endorsed the rejection of a duty of care by the Court of Appeal in the decision under appeal. He supported the comments of Heydon JA (as he then was) in that decision that such a duty would 'call for constant surveillance and investigation of the condition of customers', and 'might oblige publicans to restrain customers from departing the licensed premises until some guarantee of their safety after departure existed'.

The two other members of the majority, Gummow and Hayne JJ, in their joint judgment, chose not to address the question whether any duty of care existed. They said that, if the defendant licensed club did owe a duty to ensure that the plaintiff did not fall into danger when she left the premises, the club here had discharged that duty by offering safe

transport home (which the plaintiff rejected). They said that, if the club owed a duty of care in monitoring the amount of alcohol the plaintiff had consumed, a breach of that duty was not the cause of the injuries the plaintiff sustained when struck by the motor vehicle.

In the minority, McHugh J saw the club, as occupier of the premises, owing a duty to the plaintiff to protect the plaintiff, as an entrant to the premises, from all activities carried out on the premises, including the sale of food and beverages and their consumption. This extended to taking affirmative action by refusing to serve the plaintiff with alcohol once her inebriated state was apparent. Kirby J took a slightly different approach. He did not rely upon the club's duty as an occupier of premises to entrants. Instead, he founded the duty of care more directly on the intoxicating effects of alcohol, and the commercial benefits to the club from the sale of alcohol on the club's premises. In doing so, he downplayed any influence of the plaintiff's exercise of free will. Kirby J said [91]:

> The law of tort exists not only to provide remedies for injured persons where that is fair and reasonable and consonant with legal principle. It also exists to set standards in society, to regulate wholly self-interested conduct and, so far as the law of negligence is concerned, to require the individual to act carefully in relation to a person who, in law, is a neighbour.

State of the law

The state of the law appears to be that (if one treats Heydon JA's judgment in the Court of Appeal as indicative of the view he would hold as a member of the High Court in a future case) three members of the High Court support the position that a licensed club operator or publican owes no general duty of care to a patron with respect to the patron's consumption of alcohol served on the premises. Two take a contrary position, while the remaining two are undecided. Of the last two, if past experience in negligence cases is any guide, Hayne J, and, to a slightly lesser extent, Gummow J, are probably more likely to lean towards a conservative position on the question of whether a duty of care comes into being.

There is probably some reduced likelihood that the question of a duty of care in this area will come again before the High Court.

Recently enacted State and Territory civil liability reform legislation

There is probably some reduced likelihood that the question of a duty of care in this area will come again before the High Court. Some of the legislation enacted by the States and Territories to reform the law on civil liability in light of the Ipp Report into the Law of Negligence in Australia includes provision that a person is not owed a duty of care merely because the person is intoxicated. Further, the fact that a person is or may be intoxicated does not of itself increase or otherwise affect the standard of care owed to the person. (Section 49 of the *Civil Liability Act 2002* (NSW) is the prime example.) This legislation would generally only apply to conduct occurring after the date of the legislation's commencement of operation, which across the different States and Territories, have been dates only within the last 2 years or so.

Text of the decision is available at: <http://www.austlii.edu.au/au/cases/cth/high_ct/2004/29.html>.

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High Court decisions in brief

Constitutional cases

North Australian Aboriginal Legal Aid Service Inc v Bradley & Northern Territory

[2004] HCA 31, (2004) 206 ALR 315, 17 June 2004

In rejecting a challenge to the appointment of the Chief Magistrate of the Northern Territory, the High Court considered issues of judicial independence in the context of remuneration arrangements. The Chief Magistrate had been appointed until age 65 but with remuneration initially fixed only for a period of two years. The High Court held that the courts of the NT, like other courts capable of exercising the judicial power of the Commonwealth, must be and appear to be independent and impartial and, in particular, free of government influence. However, the Court considered that the fixing of the Chief Magistrate's remuneration for a specified period, with the executive government then legislatively required to refix remuneration at the end of the period, did not render the magistracy or the office of Chief Magistrate dependent on the legislature or executive of the NT in a way incompatible with the requirements of independence and impartiality. The Court considered that, to the contrary, preservation of adequate remuneration by periodic review is apt to defend the interests of judicial independence and impartiality.

http://www.austlii.edu.au/au/cases/cth/HCA/2004/31.html

Minister for Immigration and Multicultural and Indigenous Affairs v B

[2004] HCA 20; (2004) 206 ALR 130, 29 April 2004

The High Court held that the Family Court did not have jurisdiction to release children from immigration detention or make orders for their welfare in detention. The jurisdiction of the Family Court to make orders relating to the welfare of children is conferred by the provisions of Part VII of the *Family Law Act 1975* (Cth) dealing with children. The Court held that the operation of Part VII is confined by certain sections which apply the Part by reference to heads of Commonwealth legislative power. In the case of a child of a marriage (as in this case), the application provisions ensured that Part VII was supported by the marriage power in s 51(xxi) of the Constitution by confining its operation to the parental responsibilities of the parties to a marriage for a child of the marriage. The Court held that orders for release from immigration detention or for welfare in detention involved the responsibilities of the Minister for Immigration and Multicultural and Indigenous Affairs and not parental responsibilities.

http://www.austlii.edu.au/au/cases/cth/HCA/2004/20.html

Bayside City Council v Telstra Corporation Limited

[2004] HCA 19; (2004) 206 ALR 1, 28 April 2004

The High Court upheld the validity and effective operation of a provision in the *Telecommunications Act 1997* (Cth) exempting telecommunications carriers from discriminatory State laws – here laws imposing local council charges on their networks of cables. The Telecommunications Act provided that a State or Territory law had no effect to the extent that it discriminated against a carrier or carriers. The Court held that this provision applied to the activities of carriers in their capacity as carriers and was supported by s 51(v)

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Family Court does not have jurisdiction to release children from immigration detention

Exemption from discriminatory State laws upheld

of the Constitution (the posts and telegraphs power). It held that s 51(v) empowers the Commonwealth to confer immunity from State laws on telecommunications carriers, whether owned by the Commonwealth or not, and could extend to conferring a limited immunity such as an immunity from discriminatory State laws. The Court rejected an argument that the Commonwealth law had the effect of dictating to the States the way in which they should draft their taxation laws and was therefore contrary to the *Melbourne Corporation* doctrine (an implied constitutional limit that prevents the Commonwealth from imposing a significant burden on a State's capacity to function as a government). The Court decided that the State laws authorising the imposition of the local council charges did discriminate against telecommunications carriers because the charges were not generally imposed on other persons (e.g., electricity and water providers) in respect of similar use of public land. Those laws were therefore invalid to that extent by virtue of s 109 of the Constitution (which provides that a Commonwealth law prevails over a State law to the extent of any inconsistency between them).

http://www.austlii.edu.au/au/cases/cth/HCA/2004/19.html

Silbert v Director of Public Prosecutions (WA)
[2004] HCA 9; (2004) 205 ALR 43, 3 March 2004

WA law confiscated proceeds of crime on deemed conviction

The High Court upheld the validity of challenged provisions of the *Crimes (Confiscation of Profits) Act 1988* (WA) which operated on a 'deemed conviction'. The Act gave the WA Supreme Court power to order forfeiture of property or payment of a pecuniary penalty where a person had been 'convicted of a serious offence'. However, a person was deemed to have been convicted of a serious offence for the purposes of the Act where he or she had been charged with such an offence but had died before trial. The validity of the Act was challenged on the basis that, contrary to Chapter III of the Australian Constitution, it conferred on the Supreme Court powers which were incompatible with the Court's role as a repository for the exercise of the judicial power of the Commonwealth (thus infringing the principle in *Kable v DPP (NSW)* (1996) 189 CLR 510), principally because the court was required to proceed on the basis of a deemed conviction. The High Court held that the Court could not make a forfeiture order unless satisfied beyond reasonable doubt that the person had committed the offence and the forfeiture order provisions were therefore valid. It also held that, even if a pecuniary penalty order could be made without determination of whether the offence had been committed, the pecuniary penalty provisions were valid. The deemed conviction was not a legislative determination of criminal guilt; it simply enlivened the provisions of the WA Act requiring the Court to determine whether a person had derived benefits from the commission of a serious offence and should pay a pecuniary penalty.

http://www.austlii.edu.au/au/cases/cth/HCA/2004/9.html

Putland v The Queen
[2004] HCA 8; (2004) 204 ALR 455, 12 February 2004

Application of State and Territory criminal procedure laws to Commonwealth trials

This case considered the operation of the Commonwealth law that picks up and applies State and Territory criminal procedure laws in trials of Commonwealth offences. The NT Supreme Court had sentenced the appellant on conviction for six indictable Commonwealth offences. The Supreme Court imposed an aggregate sentence of four years' imprisonment relying on the aggregate sentencing power in the *Sentencing Act* (NT). The

NT power was available for sentencing for Commonwealth offences only if it was picked up and applied as Commonwealth law by s 68(1) of the *Judiciary Act 1903* (Cth). The High Court held that it was. Section 68(1) applies the criminal procedure laws of a State or Territory to trials of Commonwealth offences in that State or Territory unless those laws are inconsistent with Commonwealth laws or the Constitution. The Court held that the NT aggregate sentencing power was not inconsistent with the limited aggregate sentencing power for summary offences in the *Crimes Act 1914* (Cth) or with the general sentencing provisions in Part 1B of the Crimes Act. It also held that s 68(1), in applying State and Territory laws which did not operate uniformly in respect of all Commonwealth defendants, was not inconsistent with the Constitution. There is no general constitutional implication that Commonwealth laws must operate uniformly throughout the Commonwealth and it is constitutionally permissible for a Commonwealth law to assimilate the position of a defendant to a Commonwealth prosecution with the position of all other defendants tried in the same State or Territory.

http://www.austlii.edu.au/au/cases/cth/HCA/2004/8.html

Broadcast Australia Pty Ltd v Minister Assisting the Minister for Natural Resources

[2004] HCA 4; (2004) 204 ALR 46, 10 February 2004

Transfer of Commonwealth assets and liabilities on privatisation

The High Court upheld the effectiveness of a Commonwealth provision in the form commonly used in Commonwealth legislation to effect the transfer of assets and liabilities on the privatisation of a Commonwealth operation – that is, a provision the effect of which is that specified assets owned by the Commonwealth vest in a specified company without the need for conveyance, transfer or assignment. This case involved a permissive occupancy granted under State law and held by the Commonwealth over a parcel of State Crown land in NSW. The Commonwealth Minister for Finance and Administration made a declaration under s 9(1) of the *National Transmission Network Sale Act 1998* (Cth) purporting to transfer specified assets held by the Commonwealth (including the permissive occupancy) to the predecessor of the appellant. The Court rejected the respondent's argument that, because at State law the permissive occupancy was revoked if the holder attempted to transfer it without consent, the s 9 declaration could not operate to transfer the permissive occupancy. The Court said that, to the extent that State law purported to prevent the Commonwealth law from taking effect and to insulate the permissive occupancy from transfer by the Commonwealth law, it was inconsistent with the Commonwealth law and invalid to that extent by virtue of s 109 of the Constitution (which provides that a Commonwealth law prevails over a State law to the extent of any inconsistency between them).

http://www.austlii.edu.au/au/cases/cth/HCA/2004/4.html

Blunden v Commonwealth

[2003] HCA 73; (2003) 203 ALR 189, 10 December 2003

Applicable law for Melbourne/Voyager collision

The High Court decided that, in an action for damages against the Commonwealth for negligent acts or omissions in international waters, the law limiting time for the commencement of actions that is in force in the State or Territory in which the action is commenced applies. The Court's decision was made in the context of an action brought in the ACT Supreme Court by a former crew member of *HMAS Melbourne* for alleged injuries

arising from the collision in 1964 between *HMAS Melbourne* and *HMAS Voyager*. As the Commonwealth was a party to the action, the Supreme Court was exercising federal jurisdiction and s 80 of the *Judiciary Act 1903* (Cth) directed the Court to apply the common law of Australia as modified by the statute law in force in the State or Territory in which the jurisdiction was exercised. The Court considered that there was no common law choice of law rule applicable to the present circumstances; rather, the statute law in force in the ACT, in particular the *Limitation Act 1985* (ACT), applied to the action by force of s 80 of the Judiciary Act.

http://www.austlii.edu.au/au/cases/cth/HCA/2003/73.html

Attorney-General (WA) v Marquet

[2003] HCA 67; (2003) 202 ALR 233, 13 November 2003

WA electoral bills not validly passed

This case involved the binding effect of 'manner and form' requirements for the enactment of State laws. A manner and form requirement is a provision in a State law which purports to require a future parliament to make a law only in a particular manner or form. Section 6 of the *Australia Act 1986* (Cth) provides that a law 'respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect' unless it is made in the manner and form required by State law. In this case, the High Court held that two WA electoral distribution Bills passed by the WA Parliament could not lawfully be presented for royal assent because they were not passed in compliance with the manner and form requirement in the *Electoral Distribution Act 1947* (WA) (i.e., by absolute majorities in both Houses of Parliament). The requirement was binding by virtue of s 6 of the Australia Act.

http://www.austlii.edu.au/au/cases/cth/HCA/2003/67.html

Paliflex Pty Ltd v Chief Commissioner of State Revenue

[2003] HCA 65; (2003) 202 ALR 376, 12 November 2003

South Sydney City Council v Paliflex Pty Ltd

[2003] HCA 66; (2003) 202 ALR 396, 12 November 2003

State laws apply to land formerly owned by Commonwealth

In these cases the High Court upheld the application of State laws to land which had previously been owned by the Commonwealth. The Commonwealth Parliament has exclusive legislative power in respect of places acquired by the Commonwealth for public purposes (s 52(i) of the Constitution). In a series of cases in 1970 and 1971, the High Court decided that State law has no force in Commonwealth places. As a consequence, the Commonwealth Parliament enacted the *Commonwealth Places (Application of Laws) Act 1970* which generally applies the provisions of State laws to Commonwealth places while they remain Commonwealth places. In the present cases, the High Court held that NSW land tax and local government rates were payable by a company from the time of its acquisition from the Commonwealth of land which had been owned by the Commonwealth when the NSW laws were enacted. The consequence of the High Court's judgment appears to be that, generally, State laws will apply according to their terms in a Commonwealth place once the place is no longer owned by the Commonwealth.

http://www.austlii.edu.au/au/cases/cth/HCA/2003/65.html;
http://www.austlii.edu.au/au/cases/cth/HCA/2003/66.html

Other cases

Purvis obo Hoggan v NSW & HREOC

[2003] HCA 62; (2003) 202 ALR 133, 11 November 2003

Child with disability suspended from school – no discrimination

The High Court decided that a child with a disability was not entitled to compensation under the *Disability Discrimination Act 1992* for his suspension and expulsion from a mainstream high school as a result of his violent behaviour. The school would have been liable to pay compensation if it had treated the child less favourably than, in circumstances the same or not materially different, it would have treated a person without the disability, and if the less favourable treatment was because of the disability. The Court held that the treatment of the child was to be compared with treatment of a child without a disability who exhibits the same behaviour. Thus the child had not been treated less favourably than a child without a disability. This construction of the Act meant that the school was not placed in a position where it could not insist on compliance with the criminal law.

http://www.austlii.edu.au/au/cases/cth/HCA/2003/62.html

Truong v The Queen

[2004] HCA 10; (2004) 205 ALR 72, 4 March 2004

'Specialty' provision in Extradition Act not infringed

The High Court upheld the appellant's conviction in the Victorian Supreme Court for murder and kidnapping, deciding that the 'speciality' provision in s 42 of the *Extradition Act 1988* (Cth) had not been infringed. The appellant had been extradited to Australia by the United Kingdom for four conspiracy offences, including conspiracy to murder and conspiracy to kidnap, but not for murder and kidnapping. Section 42(1)(a)(i) of the Extradition Act provides that a person is not to be tried in Australia for any offence allegedly committed before surrender to Australia other than an offence for which the person was surrendered or any other offence of which the person could be convicted on proof of the conduct constituting the first offence. Gleeson CJ, McHugh, Hayne and Heydon JJ held that the conduct alleged for the conspiracy offences also constituted the murder and kidnapping offences and that the appellant had been validly convicted as s 42 was not infringed. Gummow, Hayne and Callinan JJ held that s 42 did not operate to deny jurisdiction of courts but could be raised by a defendant as a special plea to the arraignment. That had not occurred at the appellant's trial. Therefore, the Court did not need to decide the validity of a Commonwealth law which ousted the general criminal jurisdiction of State courts (although Kirby J, in dissent on the operation of s 42, upheld its validity as a law directing when trials of extradited persons could, and could not, occur).

http://www.austlii.edu.au/au/cases/cth/HCA/2004/10.html

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