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Litigation notes

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The Work Choices decision

The High Court, by a 5:2 majority (Kirby J and Callinan J dissenting), has upheld the constitutional validity of the recent amendments to the *Workplace Relations Act 1996* (WRA) made by the *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices Act).

State of NSW v Commonwealth of Australia (Work Choices Case)
High Court of Australia, 14 November 2006
[2006] HCA 52

In upholding the constitutional validity of the Work Choices Act the Court has confirmed that the Commonwealth's power with respect to trading, financial and foreign corporations extends to:

— the regulation of the activities, functions, relationships and the business of a corporation

— the creation of rights, and privileges belonging to a corporation

— the imposition of obligations on a corporation.

In respect of these matters, the corporations power also extends to:

— the regulation of the conduct of those through whom a corporation acts, its employees and shareholders

— the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

Background

Historically, Commonwealth laws regulating aspects of industrial relations have relied on s 51(xxxv) of the Constitution, which confers power on the Commonwealth Parliament to enact legislation with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. In more recent years, however, the Commonwealth has relied on other heads of power, including s 51(xx), for some aspects of its industrial relations legislation. Section 51(xx) confers power on the Commonwealth Parliament to enact legislation with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' (constitutional corporations).

Then in December 2005 the Commonwealth Parliament enacted the Work Choices Act, which created a substantially new federal industrial relations regime primarily in reliance on the corporations power.[1] Most significantly, the WRA (as amended by the Work Choices Act) now directly regulates the industrial rights and obligations of constitutional corporations and their employees.

Canberra
Andrew Buckland *Senior Executive Lawyer*
andrew.buckland@ags.gov.au

Canberra
David Bennett *Deputy Government Solicitor*
david.bennett@ags.gov.au

This issue

The states of New South Wales, Victoria, Queensland, South Australia and Western Australia and two trade union organisations challenged the constitutional validity of the WRA as amended by the Work Choices Act. The Attorneys-General of Tasmania, the Northern Territory and the Australian Capital Territory intervened in support of the plaintiffs' challenge to the constitutional validity of the law. The case was argued over six days by a record 39 counsel.

According to the Explanatory Memorandum for the Work Choices Act, use of the corporations power (together with the other powers relied on) for the new regime 'would mean that up to 85 per cent of Australian employees would be covered by the federal system'. The principal issue before the High Court was the validity of the extensive use of the corporations power to support the new federal regime.

The majority decision

Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ delivered a joint judgment upholding the validity of the legislation.

Scope of corporations power

After discussing previous High Court authority on the corporations power, developments in company and corporations law in the 19th century, the Convention Debates,[2] drafting history and various failed referendums[3] to amend both s 51(xx) and s 51(xxxv), the majority endorsed the statement by Gaudron J in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 that the corporations power extends to:

> the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

The power 'extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations'.

It follows that the power 'extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations': [178].

The plaintiffs had relied on three main lines of reasoning to argue that the corporations power should not be construed as supporting the WRA: [57].

— First, the corporations power was said to extend only to regulating the dealings of corporations with persons external to the corporation and not its internal relationships. The relationship between a corporation and its employees was said to be part of its internal relationships.

— Secondly, it was argued that the corporations power did not support a law merely because it conferred rights or imposed obligations on a corporation. Rather, 'the fact that the corporation is a foreign, trading, or financial corporation should be significant in the way in which the law relates to it': [140].

— Thirdly, it was argued that the corporations power had to be read down because of the presence of s 51(xxxv). The consequence was said to be that the Commonwealth Parliament could enact laws dealing with the industrial relations between a corporation and its employees only under s 51(xxxv) and not under the corporations power.

The joint judgment rejected each of these asserted limitations on the corporations power. Their Honours observed that underlying each of them 'was a theme, much discussed in the authorities on the corporations power, that there is a need to confine its operation because of its potential effect upon the (concurrent) legislative authority of the States': [54], [183]–[196]. They regarded this appeal to the 'federal balance' as carrying 'a misleading implication of static equilibrium'.

The approach of the joint judgment was to determine the content of the power to legislate 'with respect to' constitutional corporations by applying settled principles of constitutional interpretation, beginning with the decision in the *Engineers' case* (*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129). The *Engineers' case* discarded 'an approach to constitutional construction that started in a view of the place to be accorded to the States formed independently of the text of the Constitution' although it 'did not establish that no implications are to be drawn from the Constitution': [194]. One of those implications is that the Constitution requires the continued existence of the states 'as separate bodies politic each having legislative, executive and judicial functions': [194]. However, the implication 'does not identify the content of any of those functions'.

Their Honours emphasised at several points the need to construe the constitutional text and said:

> The general principles to be applied in determining whether a law is with respect to a head of legislative power are well settled. It is necessary, always, to construe the constitutional text and to do that "with all the generality which the words used admit". The character of the law must then be determined by reference to the rights, powers, liabilities, duties and privileges which it creates. The practical as well as the legal operation of the law must be examined. If a law fairly answers the description of being a law with respect to two subject-matters, one a subject-matter within s 51 and the other not, it is valid notwithstanding there is no independent connection between the two subject-matters. Finally, as remarked in *Grain Pool of Western Australia v The Commonwealth*, "if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice". [142] (footnotes omitted)

'The proposition, that a particular construction of s 51(xx) would or would not impermissibly alter the federal balance, must have content, and the plaintiffs made no attempt to define that content.'

It is apparent that their Honours did not regard the 'fundamental and far-reaching legal, social, and economic changes in the place now occupied by the corporation, compared with the place it occupied when the Constitution was drafted and adopted' as providing any basis for applying different principles in construing the text of s 51(xx): [67], see also [121]. The consequent extension in the range of activities that Commonwealth laws could now reach was a practical result of those changes but this fell well short of establishing that 'the States could no longer operate as separate governments exercising independent functions'. The majority concluded that 'the proposition, that a particular construction of s 51(xx) would or would not impermissibly alter the federal balance, must have content, and the plaintiffs made no attempt to define that content': [196].

In rejecting the three particular ways in which the plaintiffs sought to restrict the scope of the legislative power in s 51(xx), the majority also reached the following conclusions.

— First, the suggested division between external and internal relationships found no support in the text of s 51(xx) ([94]–[95]), was 'a distinction of doubtful stability' and, even if were to be adopted, 'there seems every reason to treat relationships with employees as a matter external to the corporation': [66], see also [89]–[90].

— Secondly, the majority held that s 51(xx) is not, as some members of the Court had previously suggested, limited to the trading activities of trading corporations and the financial activities of financial corporations. That is not what s 51(xx) says: [169]. To the extent that the WRA prescribes norms regulating the relationship between constitutional corporations and their employees, or is directed to protecting constitutional corporations from conduct intended and likely to cause loss or damage to them, it can be characterised as a law with respect to corporations without needing to satisfy any additional requirement that the nature of a corporation (as a trading, financial or foreign corporation) is significant as an element in the nature or character of the law: [198].

— Thirdly, there was no basis in the text and structure of the Constitution, or in the historical context in which s 51(xxxv) was included in the Constitution, for reading down s 51(xx) by reference to s 51(xxxv). The majority referred to the general principle that 'a law with respect to a subject-matter within Commonwealth power does not cease to be valid because it affects a subject outside power or can be characterized as a law with respect to a subject-matter outside power': [219], see also [204]. Although s 51(xxxv) confers power in relation to particular means (conciliation and arbitration) for the prevention and settlement of a particular class of industrial disputes (interstate disputes), its text expresses the scope of the power as a compound conception rather than containing a positive prohibition or restriction upon what would otherwise be within its scope. There was, then, no reason to read s 51(xx) as subject to any such prohibition or restriction: [203], [219]–[222].

WRA validly regulates industrial rights and obligations

As a result, the majority upheld the validity under the corporations power of the provisions of the WRA that regulate the industrial rights and obligations of constitutional corporations and their employees. These include provisions dealing with:

— minimum terms and conditions of employment covering matters such as rates of pay, maximum hours of work, and leave entitlements, which together constitute the 'Australian Fair Pay and Conditions Standard' in Part 7 of the WRA ([246]), and other provisions relating to minimum entitlements of employees: [251]

— the making of workplace agreements, in Part 8 of the WRA ([252]), including provisions:

  – prohibiting certain content from being included in the agreements and proscribing conduct in relation to prohibited content: [275], [416]

  – regulating industrial action to do with the making of collective Workplace Agreements in Part 9: [258]–[261]

— the minimum entitlements of employees in relation to termination of employment set out in ss 637 and 643 of the WRA ([278]), and the interim exclusion of certain corporations (small businesses) from state laws regarding redundancy pay effected by Part VIAAA : [270].[4]

The majority also upheld these provisions as supported by the territories power (s 122) in so far as they apply to employers incorporated in a territory, or employers that carry on an activity in a territory so far as the employer employs, or usually employs, an individual in connection with the activity carried on in the territory: [335]–[343].

The majority upheld the validity under the corporations power of the provisions of the WRA that regulate the industrial rights and obligations of constitutional corporations and their employees.

Registration and accountability of organisations

Schedule 1 sets up a system of registration, incorporation and regulation of industrial organisations (i.e. unions and employer organisations). Registered organisations have a range of rights and privileges under the WRA, including to intervene in matters before the Australian Industrial Relations Commission (AIRC), to be parties to collective agreements and to seek certain relief under the Act. In return for such rights and privileges, however, registered organisations are required to comply with various standards set out in Schedule 1.

The majority upheld the validity of Schedule 1, stating that:

> If it be accepted, as it should be for the argument on this branch of the plaintiffs' case, that it is within the corporations power for the Parliament to regulate employer–employee relationships and to set up a framework for this to be achieved, then it also is within power to authorise registered bodies to perform certain functions within that scheme of regulation. It also is within power to require, as a condition of registration, that these organisations meet requirements of efficient and democratic conduct of their affairs. [322]

Excluding state and territory laws (s 16 of the Act)

Section 16 of the WRA deals with the exclusion of certain state and territory laws. In particular, s 16(1) provides that the WRA is intended to apply to the exclusion of the state and territory laws identified in s 16(1)(a) to (e) (such as 'a State or Territory industrial law', a term defined in s 4(1)) so far as those laws would apply in relation to an employee or employer. Section 16(4) then provides for additional state and territory laws – that the WRA is intended to apply to the exclusion of – to be prescribed by regulation.[5]

The majority rejected an argument that s 16 of the WRA is invalid as a bare attempt to exclude state laws. The majority accepted the Commonwealth's argument that s 16 validly indicated the 'field' that the WRA covers, even though the Act does not make detailed provision about every matter within that field which is dealt with by state and territory law: [369]–[370]. Section 16 is not materially different from other Commonwealth provisions that had been upheld in previous decisions of the High Court: [372].

Other issues

A number of other challenges made by the plaintiffs to the WRA were rejected, including to the following:

— ***Broad regulation-making powers:*** The operation of several provisions in the WRA depends on the making of regulations, for example as to what content is prohibited from being included in workplace agreements (s 356),[6] and what additional state and territory laws are excluded by s 16 (s 16(4)). The majority rejected arguments that these provisions involved an impermissible delegation of legislative power to the executive and thus were not 'laws': [375]–[376], [414]–[418], [420]. The majority did, however, state that the technique employed at least by s 356 was 'undesirable' (at [399]), and led to the ambit of the relevant regulation-making power being 'imprecise': [417].

— ***Transitional arrangements for employees/employers leaving the federal system:*** Schedule 6 of the WRA provides transitional arrangements for non-federal system employers and employees, who were bound by federal awards made under the pre-reform WRA, but who are not within the new system established by the Work Choices Act. During a five-year transitional period those employers and employees remain bound by the relevant awards, which are continued in operation as 'transitional awards' and are maintained by the AIRC, but within the limits specified in Schedule 6. The majority held Schedule 6 to be valid, including because it was part of the Commonwealth's staged dismantling of the previous system established pursuant to s 51(xxxv) of the Constitution: [307]–[308]. The majority similarly upheld transitional arrangements in Schedule 1 for organisations which may no longer be eligible for registration: [327].

— ***Rights of entry under state law:*** The plaintiffs attacked various provisions in Part 15 which prohibit certain persons from exercising a right under state law to enter premises for OH&S purposes, unless amongst other things the person also holds a permit under the WRA. Part 15 relevantly applies to a right to enter premises occupied or controlled by a constitutional corporation, or where the right relates to conduct of a constitutional corporation, or where the right relates to a contractor in so far as the contractor provides services to a constitutional corporation. In so applying, Part 15 is supported by the corporations power: [284]–[286].

— ***Freedom of association:*** Part 16 proscribes certain conduct to ensure that employers, employees and independent contractors are free to become, or not become, members of industrial associations and are not victimised because they are, or are not, such members (s 778(1)). Part 16 is supported by the corporations power because it only applies to conduct by or against constitutional corporations, conduct whose ultimate purpose or effect is

The majority rejected an argument that section 16 of the WRA is invalid as a bare attempt to exclude state laws.

to cause harm to a constitutional corporation, and conduct affecting a person *in his or her capacity* as employee of, or contractor to, a constitutional corporation: [291]–[294].

— ***Restraining state industrial authorities:*** Section 117 confers power on the AIRC to make an order restraining a state industrial authority from dealing with a matter that is also the subject of proceedings before the AIRC. The majority rejected the plaintiffs' arguments that s 117 is contrary to s 106 of the Constitution (which provides for the continuation of the 'Constitution of each State'), or otherwise infringes what is known as the *Melbourne Corporation* doctrine, and held that s 117 is supported by the corporations power: [390]–[393]. The interference with the functioning of a state which s 117 permitted is 'relatively minor'.

Dissenting judgments

Justices Kirby and Callinan each delivered strongly worded dissenting judgments, drawing attention to the wide-ranging consequences of a broad view of the corporations power, given the role that corporations now play in modern life. For example, Kirby J stated:

> The States, correctly in my view, pointed to the potential of the Commonwealth's argument, if upheld, radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the States' principal governmental activities. Such fields include education, where universities, tertiary colleges and a lately expanding cohort of private schools and colleges are already, or may easily become, incorporated. Likewise, in healthcare, where hospitals (public and private), clinics, hospices, pathology providers and medical practices are, or may readily become, incorporated. Similarly, with the privatisation and out-sourcing of activities formerly conducted by State governments, departments or statutory authorities, through corporatised bodies now providing services in town planning, security and protective activities, local transport, energy, environmental protection, aged and disability services, land and water conservation, agricultural activities, corrective services, gaming and racing, sport and recreation services, fisheries and many Aboriginal activities. All of the foregoing fields of regulation might potentially be changed, in whole or in part, from their traditional place as subjects of State law and regulation, to federal legal regulation, through the propounded ambit of the corporations power. [539]

The dissenting judges considered that s 51(xx) had to be read down in order to preserve the 'federal balance' in the Constitution.

In light of this the dissenting judges considered that s 51(xx) had to be read down in order to preserve the 'federal balance' in the Constitution.[7] Thus Callinan J stated:

> There is nothing in the text or the structure of the Constitution to suggest that the Commonwealth's powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society. This Court too is a creature of the Constitution. Its powers are defined in Ch III, and legislation made under it. The Court goes beyond power if it reshape[s] the federation. By doing that it also subverts the sacred and exclusive role of the people to do so under s 128. [779]

The dissenting judges then held that s 51(xx)[8] should be read down or restricted in its operation by reference to s 51(xxxv), with the result that Parliament has, in effect, no power to legislate with respect to the employment relationship between a constitutional corporation and its employees except pursuant to s 51(xxxv): [583], [913].

In reaching this conclusion, the dissenting judges also referred to:

— the history of failed referenda to amend the Constitution to confer power on the Commonwealth with respect to industrial matters more generally (Kirby J at [437], Callinan J at [707]–[735])

— s 51(xxxv) as protecting industrial fairness (Kirby J at [519]–[531])

— the assumption, by successive governments and courts, that s 51(xxxv) was the Commonwealth's only source of power to legislate with respect to industrial matters (Kirby J at [428]–[447]).

According to the dissenting judges, the core provisions of the WRA as amended were laws with respect to industrial disputes or industrial relations and were invalid for failing to comply with the limitations in s 51(xxxv) concerning conciliation and arbitration. Furthermore, as those core provisions could not be severed from the balance of the amendments, the entire Work Choices Act was invalid: [599], [912]. Kirby J also held that Schedule 6 and various 'opaque' regulation-making powers were invalid in their own right: [460].

Issues for the future?

Since the Work Choices Act several lower courts have had to address whether various employers are constitutional corporations and thus covered by the WRA. In the present case, the majority emphasised that the question of what is a constitutional corporation was not in issue in this case, and that any debate about that question 'must await a case in which [it] properly arise[s]' (see e.g. [55], [58], [86], [158], [185]). Similarly, the majority noted that no party had sought to reopen the *Incorporation case* (*NSW v The Commonwealth (The Incorporation Case*) (1990) 169 CLR 482) and thus that there was no occasion to consider further what it decided (namely that s 51(xx) does not confer a general power to incorporate trading or financial corporations): [137].

The question of what is a constitutional corporation was not in issue in this case, and any debate about that question must await a case in which it properly arises.

AGS lawyers advised on the constitutional basis of the Work Choices Act and acted for the Commonwealth in the High Court litigation. The Commonwealth's counsel in the litigation included the Commonwealth Solicitor-General David Bennett QC and AGS Chief General Counsel Henry Burmester QC.

Text of the decision is available at:
<*http://www.austlii.edu.au/au/cases/cth/HCA/2006/52.html*>

Notes

1 Parts of the WRA are also supported by other heads of power. Most notably, the operation of the WRA in Victoria is supported by a reference of power from that state pursuant to s 51(xxxvii) of the Constitution.

2 In relation to which the majority expressed some caution, stating that 'the answer to [the] question [whether a law is within power] is not to be found in attempting to attribute some collective subjective intention to all or any of those who participated in the Convention Debates': [120].

3 The majority concluded that 'There are insuperable difficulties in arguing from the failure of a proposal for constitutional amendment to any conclusion about the Constitution's meaning.': [131]–[135].

4 Part VIAAA has since been replaced by the more general exclusion of state laws effected by s 16 of the WRA.

5 According to the majority the kinds of laws that can be prescribed under s 16(4) are, however, limited by its statutory context: [361].

6 Section 356 provides: 'The regulations may specify matters that are prohibited content for the purposes of this Act'.

7 At [532]–[559] per Kirby J, and [774]–[797] per Callinan J.

8 And other heads of power, except for the defence power (s 51(vi), [569], [797]), probably the external affairs power (s 51(xxix), [573], [797]) and perhaps the territories power (s 122, [573], [910]).

Constitutional validity of acting judges

The High Court held that the appointment of an acting judge to the NSW Supreme Court did not infringe Ch III of the Constitution and upheld the validity of transitional provisions in the *Corporations Act 2001* (Cth).

Forge v Australian Securities and Investments Commission
High Court of Australia, 5 September 2006
[2006] HCA 44; (2006) 229 ALR 223

Background

Foster AJ, an acting judge of the NSW Supreme Court, found the claimants to have breached their duties as directors in respect of a number of transactions occurring in 1998. The transactions were alleged to be in contravention of the NSW Corporations Law at the time but, as the case was heard in 2002, Foster AJ applied the transitional provisions in the *Corporations Act 2001* (Cth) to determine the case under that Act.

The claimants challenged Foster AJ's decision in the High Court on two bases:

— that the appointment of acting judges to the NSW Supreme Court under s 37 of the *Supreme Court Act 1970* (NSW) was constitutionally impermissible and, hence, that Foster AJ's appointments for successive 12-month terms were invalid

— that the transitional provisions in the Corporations Act were invalid.

Chapter III of the Constitution and the appointment of acting judges to state courts

The challenge to the appointment of acting judges to the NSW Supreme Court was based on the decisions in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146. The claimants submitted that these cases established that Ch III requires state Supreme Courts to be independent and impartial, and that in order for judges to be independent and impartial they need to have the same, or a substantially equivalent, level of security of tenure and remuneration as provided for judges of federal courts in s 72 of the Constitution.

The High Court held 6:1 (Kirby J dissenting) that s 37 of the Supreme Court Act and the acting appointments of Foster AJ to the NSW Supreme Court were valid.

Ch III requires each state to maintain a Supreme 'Court' that is independent and impartial

The majority judges accepted that Ch III of the Constitution requires that there always be a court in each state which answers the constitutional description 'the Supreme Court of [a] State'. It is, therefore, beyond the legislative power of a state to alter the constitution or character of its supreme court such that it ceases to be a 'court' within the meaning of Ch III. Whilst it is not possible to define all the characteristics of a 'court' (and simply calling a body a court is not sufficient), a majority of judges accepted that, for a body to answer the description of a 'court' it must satisfy minimum requirements of institutional independence and impartiality.

Independence and impartiality can be secured otherwise than by appointing only permanent judges

All members of the High Court held that, for state courts, the minimum requirements of independence and impartiality are not those specified in s 72 of the Constitution. In particular, it is not necessary that a state (or territory) supreme court consist only of full time permanent judges with security of

Canberra
Robyn Briese *Lawyer*
T *02 6253 7077* ***F*** *02 6253 7303*
robyn.briese@ags.gov.au

Joint author
Andrew Buckland *Senior Executive Lawyer*
(see page 1 for contact details)

For a body to answer the description of a 'court' it must satisfy minimum requirements of institutional independence and impartiality.

tenure until a statutorily determined age of retirement. Indeed, acting judges have been a feature of the judicial systems of the states since before federation.

Furthermore, the majority justices held that terms regulating tenure and security of remuneration until retirement are not the only safeguards of judicial independence and impartiality. This can legitimately be secured by a range of institutional arrangements (including security of tenure and remuneration *within the term of appointment*, complaints and disciplinary mechanisms, the requirement to give reasons, the judicial oath, the availability of appeals, the doctrine of apprehension of bias, and immunity of judges from suit).

On the facts of this case the majority justices all concluded that s 37 of the Supreme Court Act and the appointments of Foster AJ were valid. However, there were different approaches:

— Gleeson CJ (with whom Callinan J agreed) noted that, apart from security of tenure until retirement, the safeguards applicable to acting judges in the NSW Supreme Court were in effect the same as those applying to permanent judges. This was sufficient to satisfy the minimum requirements of judicial independence in Ch III.

— Gleeson CJ also emphasised his view that the appointment of judges is a responsibility of the political branch of government '[which has] the responsibility of paying the salaries, and providing the necessary resources, of the appointees, and [which has] political accountability for bad or unpopular decisions about appointments': [19]. In this respect, whether the appointment of acting judges is desirable is a different matter to the legality of their appointment.

— Gummow, Hayne and Crennan JJ also referred to the general safeguards applicable to acting judges in the NSW Supreme Court, but ultimately upheld the validity of the appointments of Foster AJ on the narrower ground that the claimants had not demonstrated that the particular circumstances surrounding his appointments had affected the institutional integrity of the court. Circumstances which the joint judgment considered would be relevant to this question included how many acting judges have been appointed, who has been appointed (a judge of another court, a retired judge or a legal practitioner), for how long, to do what, and why, and the perception of the informed observer about such appointments.

Acting judges have been a feature of the judicial systems of the states since before federation.

The transitional provisions of the Corporations Act 2001 (Cth)

The applicable transitional provisions in the Corporations Act were intended to preserve rights and liabilities acquired, accrued or incurred under the various state corporations laws and to enable those rights and liabilities to be vindicated under the Commonwealth Act. The claimants argued that proceedings under the transitional provisions did not give rise to a 'matter' for the purposes of s 76(ii) of the Constitution as the proceedings did not involve the enforcement of a liability derived from Commonwealth law. Rather, the liability derived from state law.

The High Court unanimously upheld the validity of the transitional provisions, holding that they operated by creating *new* rights and liabilities by reference to past acts and that the relevant 'matter', for the purposes of s 76(ii) of the Constitution, was the justiciable controversy as to ASIC's entitlement to orders against the claimants, under the Corporations Act, in respect of those newly created rights and liabilities.

The Commonwealth Solicitor-General, David Bennett AO QC, appeared as senior counsel for the Commonwealth and the Commonwealth Attorney-General (intervening) and was instructed by AGS.

Text of the decision is available at:
<http://www.austlii.edu.au/au/cases/cth/HCA/2006/44.html>

The external affairs power and child sex tourism offences

The High Court has upheld provisions making it a criminal offence for an Australian citizen or resident, while outside Australia, to engage in sexual conduct with a person under 16. In doing so, a majority of the Court affirmed that the external affairs power includes a power to make laws with respect to matters outside the geographical limits of Australia. Whilst the external affairs power also clearly extends to legislating with respect to the implementation of treaties to which Australia is a party and with respect to Australia's relations with other countries (and international organisations), at least some members of the Court doubted or rejected the proposition that it extends to matters of 'international concern'.

XYZ v Commonwealth
High Court of Australia, 13 June 2006
[2006] HCA 25; (2006) 227 ALR 495

Canberra
David Lewis *Senior Lawyer*
T *02 6253 7541* ***F*** *02 6253 7303*
david.lewis@ags.gov.au

Joint author
Andrew Buckland *Senior Executive Lawyer*
(see page 1 for contact details)

Facts and decision

The plaintiff was an Australian citizen committed for trial in Victoria for alleged offences against ss 50BA and 50BC of the *Crimes Act 1914* (Cth). Those provisions make it a criminal offence for an Australian citizen or resident, while outside Australia, to engage in certain forms of sexual activity with a person under 16 years of age. The plaintiff was alleged to have committed the offences against a foreign child while in Thailand in 2001.

The plaintiff brought these proceedings in the High Court to challenge the constitutional validity of ss 50BA and 50BC. The only issue was whether the provisions were supported by s 51(xxix) of the Constitution, which gives the Commonwealth Parliament power to make laws with respect to 'external affairs'. The Commonwealth argued that the impugned provisions were supported by the external affairs power for any of the following reasons:

— they operated on conduct geographically external to Australia

— they concerned Australia's relations with other countries

— they operated on a matter of international concern.

The High Court upheld the validity of the provisions by a 5:2 majority. Gleeson CJ, and Gummow, Hayne and Crennan JJ, upheld the provisions on the first basis (i.e. because they operated on conduct geographically external to Australia): [10], [38], [49]. Kirby J upheld the provisions on the second basis (i.e. because they concerned Australia's relations with other countries, particularly Thailand, and international organisations): [139]. Callinan and Heydon JJ dissented, both as to the existence of the first basis for validity and as to the application of the second basis. Kirby J, and Callinan and Heydon JJ also expressed some reservations about the third basis (i.e. that the external affairs power extends to laws that operate on matters of international concern).

The external affairs power includes a power to make laws with respect to matters outside the geographical limits of Australia.

Geographic externality principle

Prior authority

Prior to this case it appeared settled that the external affairs power included a power to legislate with respect to places, persons, matters or things outside the geographical limits of, that is, external to, Australia (the 'geographic externality

principle'). This was established in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 in which the High Court upheld provisions of the *War Crimes Act 1945* rendering unlawful certain conduct engaged in outside Australia as supported by the external affairs power. Importantly, all seven members of the Court in that case endorsed the geographic externality principle, although two judges (Brennan J and Toohey J) held that a law operating on things geographically external to Australia must have some nexus with Australia to be within s 51(xxix) (which deals the external affairs *of Australia*). (On the facts of that case Toohey J held that there was sufficient nexus, whilst Brennan J held there was not.)

On several occasions after *Polyukhovich* the High Court endorsed the geographic externality principle (see e.g. *Victoria v Commonwealth (Industrial Relations Act Case*) (1996) 187 CLR 416 at 485 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ and *De L v Director-General, New South Wales Department of Community Services* (1996) 187 CLR 640 at 650).

XYZ challenges prior authority

In the present case the plaintiff submitted that the external affairs power does not support a law 'simply because that law operates on matters or events outside Australia', and that to the extent the Court held otherwise in previous cases, those cases are incorrect and should be overruled.

Gummow, Hayne and Crennan JJ held that the geographic externality of the conduct dealt with by the impugned provisions was by itself enough to bring them within the external affairs power.

Four members of the Court expressly rejected this argument. In a joint judgment Gummow, Hayne and Crennan JJ held that the geographic externality of the conduct dealt with by the impugned provisions was by itself enough to bring them within the external affairs power: [49]. They said the view of the external affairs power adopted in the *Industrial Relations Act case* (that geographic externality alone is sufficient) is 'correct': [38]. They noted that the impugned provisions would thus be valid even 'without the further requirement, here imposed by s 50AD, that the person alleged to have committed the offence outside Australia must be an Australian citizen or a resident of Australia': [49].

Similarly, Gleeson CJ accepted that the external affairs power 'includes a power to make laws with respect to places, persons, matters or things outside the geographical limits of, that is, external to, Australia': [10]. He referred to the different views taken in *Polyukhovich* (with only Brennan and Toohey JJ requiring a nexus with Australia in addition to geographic externality) but said that that difference did not affect the present case: [10]. That was presumably because, should a nexus be required, in this case it would be provided by the fact that the offences applied only to Australian citizens or residents. (A similar approach had been taken by the Court in *Horta v Commonwealth* (1994) 181 CLR 183 at 193–194.)

Kirby J did not decide whether the impugned provisions were valid on the basis of the geographic externality principle, but upheld them on a different basis (see below). He said that the arguments in the case had planted in his mind 'a doubt' about the correctness of the geographic externality principle, but he refused to overrule it: [114]. He did, however, suggest that Brennan J's approach in *Polyukhovich* (requiring an Australian nexus) should be revisited: [114], [116].

Callinan and Heydon JJ (dissenting)

Callinan and Heydon JJ said the geographic externality principle should be rejected, and previous authority should be overruled to the extent necessary: [206]. In their view, the phrase 'external affairs' was originally intended to

be, and is now, synonymous with 'foreign affairs' or 'foreign relations' and that as such it refers to *relations* between Australia and other countries and international organisations: [158]–[170], [177]. It does not extend to all matters geographically external to Australia.

In response to the Commonwealth's argument that, without the geographic externality principle, there would be a lacuna in the legislative competence of the federal and state parliaments to legislate on things external to Australia, Callinan and Heydon JJ pointed to the states' extraterritorial powers, and the Commonwealth's power under s 51(xxxviii) of the Constitution to exercise, with the concurrence of the parliaments of the states, any power which at federation could be exercised only by the United Kingdom Parliament, as 'reduc(ing) the theoretical existence of a lacuna to vanishing point': [187]; cf. Gleeson CJ at [13]–[15].

Australia's relationship with other countries and international organisations

Of the majority only Kirby J considered (and upheld) the validity of the impugned provisions on the basis that they concerned Australia's relations with other countries and international organisations. He said that Australia invoked jurisdiction over the plaintiff under the active nationality principle of international law (he was an Australian citizen), in respect of his conduct in Thailand. This necessarily affected Australia's relationship with Thailand: [131]–[134]. Further, material before the Court showed that the subject matter of the provisions is related to Australia's external relations with relevant international organisations (particularly the United Nations treaty body with responsibility for the implementation of the Convention on the Rights of the Child): [138]–[139].

Heydon and Callinan JJ said there were 'immense difficulties' facing any court wishing to apply the international concern doctrine, which had not been resolved by argument in this case.

In contrast, Callinan and Heydon JJ held that the material before the Court did not establish that the impugned provisions affected Australia's relations with other countries: [209]–[212]. They questioned whether statements of the executive government, that Australia's reputation was being adversely affected by the conduct of Australians overseas, could establish that the matter would affect Australia's external relations and thereby expand Commonwealth legislative power: [209]. Also, they regarded the possibility of Australia criminalising conduct in a country that may be legal in that country as not fitting coherently with extradition law (usually a country will only extradite where the alleged offence is an offence in that country too). This might also *adversely* affect Australia's relations with other countries because it could be seen as an attempted intrusion into the affairs of the other country: [210], [212]. Underlying this last point appears to be an assumption that the external affairs power would not support laws that *adversely* affect Australia's relationships with other countries.

International concern

Prior to this case, particularly during the 1980s, some High Court judges had suggested that the external affairs power includes a power to legislate with respect to a matter of 'international concern' (although no case was decided in the High Court on this basis alone). So, for example, in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 217, Stephen J said that a 'subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject-matter a part of a nation's "external affairs"' (see also *Commonwealth v Tasmania*

(Tasmanian Dam Case) (1983) 158 CLR 1, at 131–132 (Mason J), 171–172 (Murphy J), 220 and 222 (Brennan J), 258 (Deane J)). Other High Court judges had denied that the external affairs power supports laws on any matter of international concern (see e.g. Gibbs CJ in *Koowarta* at 202–203, 207, with whom Aickin and Wilson JJ agreed).

In XYZ, Heydon and Callinan JJ said there were 'immense difficulties' facing any court wishing to apply the international concern doctrine, which had not been resolved by argument in this case: [225]. These included difficulties in how to identify whether a matter was of international concern and in measuring the extent of the international concern to determine the boundaries of Commonwealth legislative power. However, their Honours did not need conclusively to deny the doctrine's existence. This was because they said that even if the material in this case demonstrated some international concern, that concern was directed at the sale of children, child prostitution and child pornography, rather than the specific conduct (child sex tourism) covered by the impugned provisions: [226]. Furthermore, whilst the material before the Court revealed general concern about sexual activity involving children under 12 (the age of consent in some countries), the impugned provisions, in criminalising conduct with older children, went beyond the relevant area of concern: [226].

All judges addressed the consequences of different interpretations of the external affairs power on the balance of powers between the Commonwealth and states.

None of the majority judges expressed a firm view about the 'international concern' aspect of the external affairs power. Of these judges, Kirby J gave it the most consideration but considered that it was 'still undeveloped in Australia' so he preferred to put it to one side: [127]. Gleeson CJ at [18] and Gummow, Hayne and Crennan JJ at [50]–[53] noted the arguments about international concern as a possible basis of support under the external affairs power and, in the latter case, referred to the 'unsettled questions concerning the use of the notion of international concern', but did not need to resolve those questions as validity was upheld on another basis.

Federalism

Finally, it is worth noting that all judges addressed, to various degrees, the consequences of different interpretations of the external affairs power on the balance of powers between the Commonwealth and states established by the Constitution (see e.g. Kirby J [56]–[57], [111], [115], [125], [147], and Callinan and Heydon JJ [209], [221]; contrast Gleeson CJ [18], and Gummow, Hayne and Crennan JJ [39]–[40]).

The Commonwealth Solicitor-General, David Bennett AO QC, appeared as senior counsel for the Commonwealth and was instructed by AGS.

Text of the decision is available at:
<http://www.austlii.edu.au/au/cases/cth/HCA/2006/25.html>

Forfeiture of superannuation benefits

Commonwealth legislation can validly forfeit the superannuation benefits of a member of Parliament who is convicted of a 'corruption offence', without contravening s 51(xxxi) of the Constitution (acquisition of property on just terms).

Theophanous v Commonwealth
High Court of Australia, 11 May 2006
[2006] HCA 18; (2006) 226 ALR 602

Canberra
Graeme Hill *Senior Lawyer*
T *02 6253 7080* ***F*** *02 6253 7303*
graeme.hill@ags.gov.au

Background

Part 2 of the *Crimes* (*Superannuation Benefits) Act 1989* (Cth) (the CSB Act) provides for the superannuation benefits of a Commonwealth employee to be forfeited if the employee is convicted of a 'corruption offence'. Where a Commonwealth employee (defined to include a member of the Commonwealth Parliament) is convicted of a corruption offence, the minister may authorise the Commonwealth DPP to apply to the appropriate court for a 'superannuation order' (s 16). The DPP must make the application to the court and the court must make the order if it is satisfied that the person was convicted of a 'corruption offence' as defined (s 19(1)). Once the order takes effect, the person ceases to be a member of their superannuation scheme (here, the scheme established by the *Parliamentary Contributory Superannuation Act 1948*), rights to future superannuation benefits cease and benefits already received and attributable to employer contributions must be repaid (s 21). The person is, however, entitled to his or her employee contributions.

The plaintiff was a member of the Commonwealth Parliament between October 1980 and November 2001. In May 2002, he was convicted of several offences that were 'corruption offences' as defined in the CSB Act. In August 2004, the Minister directed the Commonwealth DPP to apply for a superannuation order in respect of the plaintiff. Before that order was made, the plaintiff applied to the High Court for a declaration that the CSB Act was invalid.

The plaintiff argued that Part 2 of the CSB Act was contrary to s 51(xxxi) of the Constitution (which confers power on the Commonwealth Parliament to make laws with respect to the acquisition of property on just terms). His main arguments were that (1) the forfeiture under the CSB Act was not proportionate to the severity of the offence committed, and (2) the CSB Act authorised in certain circumstances the cessation of benefits that might become payable to an employee's spouse, who was innocent of any wrongdoing.

The Court held that any acquisition of the plaintiff's superannuation benefits under the CSB Act fell outside the requirement in s 51(xxxi) for 'just terms'.

Decision

The High Court rejected the plaintiff's arguments. The Court held that the CSB Act is not contrary to s 51(xxxi) of the Constitution.

Acquisition was not one to which s 51(xxxi) applies

The Court held that any acquisition of the plaintiff's superannuation benefits under the CSB Act fell outside the requirement in s 51(xxxi) for 'just terms'. Although s 51(xxxi) is usually the only source of power for the Commonwealth to acquire property, there are some acquisitions of property to which s 51(xxxi) and the requirement for 'just terms' do not apply (such as a penalty). The CSB Act was an example of this principle.

— In their joint judgment, Gummow, Kirby, Hayne, Heydon and Crennan JJ explained that an exaction of property will fall outside s 51(xxxi) if the provision of just terms would be 'inconsistent' or 'incongruous' with the nature of the exaction: [60]. Here, the purpose of the forfeiture under the CSB Act was to vindicate the public interest in the integrity of public officials by denying benefits to those who are found to have misused their office: [62]–[63]. The provision of 'just terms' would be incongruous with the nature of this exaction.

— In a separate judgment, Gleeson CJ held that the provision of 'just terms' would weaken or destroy the sanction in the CSB Act, the 'obvious purpose' of which was 'to maintain high standards of probity in the conduct of public affairs', and therefore the acquisition fell outside s 51(xxxi): [10] and [14].

As far as spouse entitlements were concerned, the joint judgment noted that their interest was contingent on the Commonwealth employee being entitled to superannuation benefits. Accordingly, if a superannuation order was made against the plaintiff, then his spouse would not have any entitlement under the relevant superannuation legislation: [66].

The Court left open the question of whether a Commonwealth employee's statutory superannuation benefits were 'inherently defeasible', such that they could be amended in any manner without attracting s 51(xxxi) of the Constitution: [7], [67]. Gleeson CJ, however, indicated that he was not inclined to accept this argument: [7].

Gleeson CJ held that abuse of public office is so destructive of the quality of public life 'that strong sanctions should be applied when it is detected'.

Acquisition was supported by s 51(xxxvi)

As the CSB Act fell outside s 51(xxxi) of the Constitution, it required support from another head of power. The Commonwealth Parliament has clear power to legislate with respect to the remuneration (including superannuation benefits) of members of Parliament, under s 51(xxxvi) of the Constitution (read with s 48).

The plaintiff argued that the CSB Act was not supported by s 51(xxxvi) of the Constitution, because the forfeiture was not a reasonably proportionate consequence of the breach of the law. The joint judgment doubted whether 'proportionality' was relevant in construing a non-purposive power like s 51(xxxvi): [70]. In any event, the forfeiture of superannuation benefits under the CSB Act was not disproportionate: [71]. Forfeiture of property – even in the hands of an innocent owner – is a well-established means of obtaining compliance with the law: [71]. Gleeson CJ held that abuse of public office is so destructive of the quality of public life 'that strong sanctions should be applied when it is detected': [10].

The Commonwealth Solicitor-General, David Bennett AO QC, appeared as senior counsel for the Commonwealth and was instructed by AGS.

Text of the decision is available at:
<*http://www.austlii.edu.au/au/cases/cth/HCA/2006/18.html*>

The constitutional meaning of 'alien'

In the latest in a series of cases dealing with the concept of 'alien' in s 51(xix) of the Constitution (the naturalization and aliens power), the High Court has held that a child whose parents are foreign nationals does not merely by reason of birth in Australia acquire a status preventing the Commonwealth Parliament from treating the child as an alien. Commonwealth laws could validly exclude the child from formal membership of the Australian community as a citizen.

Canberra
David Bennett *Deputy Government Solicitor*
T *02 6253 7063* ***F*** *02 6253 7303*
david.bennett@ags.gov.au

Koroitamana v Commonwealth
High Court of Australia, 14 June 2006
[2006] HCA 28; (2006) 227 ALR 406

The applicants were two children born in Australia. Their parents were Fijian citizens. Neither applicant was an Australian citizen under s 10(2) of the *Australian Citizenship Act 1948* (Cth), as neither parent was an Australian citizen or permanent resident and the children had not resided in Australia for 10 years from birth. Under the Constitution of Fiji, the applicants were entitled to, but had not obtained, Fijian citizenship by registration. As 'non-citizens' of Australia the applicants were subject to detention and removal from Australia under ss 189 and 198 of the *Migration Act 1958* (Cth) should their bridging visas not be renewed. The High Court unanimously rejected the applicants' argument that they were not aliens within s 51(xix) of the Constitution. Sections 189 and 198 of the Migration Act therefore validly applied to them.

Previous authority

The Commonwealth Parliament has a broad but not unqualified power under s 51(xix) to define who is a member of the Australian community, which 'now means citizenship' (*Koroitamana* at [11] per Gleeson CJ and Heydon J). Parliament cannot treat someone as an alien if he or she 'could not possibly answer the description of "aliens" in the ordinary understanding of the word' (*Pochi v Macphee* (1982) 151 CLR 101 at 109 per Gibbs CJ). In earlier cases it had been sufficient for the High Court to conclude that an alien included a person born outside Australia to non-Australian parents who had not since been naturalised. However, more recently the High Court has held that the Parliament can treat as an alien a person born within Australia to non-citizen parents, at least where the person is a citizen of another country (*Singh v Commonwealth* (2004) 209 ALR 355, see AGS *Litigation Notes* No. 13), and several members of the Court suggested that it is open to the Commonwealth Parliament to treat a stateless person as an alien (see e.g. *Singh* at [190] per Gummow, Hayne and Heydon JJ, [271] per Kirby J; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 571 [1] per Gleeson CJ).

The Commonwealth Parliament has a broad but not unqualified power under s 51(xix) to define who is a member of the Australian community, which 'now means citizenship'.

Applicants' argument – alienage requires more than descent from foreign parents

The applicants argued that a person born in Australia could not be treated by the Parliament as an alien unless they had some further 'relevant characteristic'. The applicants accepted that, on the basis of *Singh*, the possession of a foreign nationality or allegiance would be a relevant characteristic allowing the Parliament to treat them as aliens, but as they were not citizens of Fiji they did not have this characteristic. The applicants also accepted that 'stateless' persons would have a relevant characteristic allowing the Parliament to treat them as aliens. However, they argued they were not stateless because they were born in Australia (an argument Gleeson CJ and Heydon J at [15] described as 'circular'). Critically, the applicants sought to argue

that 'the aliens power would not support a law that defined aliens purely by descent, at least where there was no allegiance to the state of that descent': [32]. They argued that the Fijian nationality of their parents was not a 'relevant characteristic' allowing Parliament to treat them as aliens as that could not be used to deny the status arising from their birth in Australia and their lack of any allegiance to a foreign power.

No further characteristic required

The High Court unanimously rejected the applicants' argument that by reason of their birth in Australia they had acquired a status which prevented the Parliament from treating them as aliens, with some shades of difference in the reasoning in the various judgments. In their joint judgment Gleeson CJ and Heydon J said that 'it is open to Parliament to decide that a child born in Australia of parents who are foreign nationals is not automatically entitled to ... membership [of the Australian community]': [11], [14]. Otherwise, the capacity of the Parliament to treat the applicants as aliens would depend on whether their parents chose to register them as Fijian citizens, a conclusion which would involve 'a considerable fetter on the power of the federal Parliament to identify those who are to be treated, whether for domestic or international purposes, as nationals of Australia' (at [13], citing *Singh* (2004) 209 ALR 355 at 413).

The High Court unanimously rejected the applicants' argument that by reason of their birth in Australia they had acquired a status which prevented the Parliament from treating them as aliens.

The joint judgment of Gummow, Hayne and Crennan JJ at [48]–[50] (with, it seems, Callinan J agreeing at [86]) applied a similar approach. Their Honours also said (at [51]) that because of s 23D of the Citizenship Act and the facts of this case it was not necessary to consider any operation of the Commonwealth's arguments to render persons born in Australia stateless (see also Gleeson CJ and Heydon J at [15]). Section 23D is a special provision to prevent persons born in Australia from being stateless where the person is not, and has never been, a citizen of any country or entitled to acquire the citizenship of a foreign country. Kirby J similarly held, applying *Singh*, that '[the applicants'] birth in Australia without any other present nationality' did not mean that they acquired the constitutional status of Australian nationality so as to take them outside the aliens power: [80]. His Honour also concluded that the applicants had a right to obtain Fijian citizenship so that they were not stateless in international law and said that '[i]n this case the consideration of potential statelessness can therefore be ignored': [78], [82].

The Commonwealth Solicitor-General, David Bennett AO QC, appeared as senior counsel for the Commonwealth and was instructed by AGS.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2006/28.html

Constitutional decisions in brief

Dalton v New South Wales Crime Commission

High Court of Australia [2006] HCA 17; (2006) 226 ALR 570, 10 May 2006

Joint authors
David Bennett *Deputy Government Solicitor*
Graeme Hill *Senior Lawyer*
(see pages 1 and 14 for contact details)

In this case the High Court unanimously upheld the validity of s 76 in Pt 4, Div 4 of the *Service and Execution of Process Act 1992* (Cth), which empowers state and territory supreme courts to grant leave to serve interstate a subpoena issued by a state tribunal performing investigative functions (here, the New South Wales Crime Commission). Section 76 was a valid exercise of the Commonwealth Parliament's power in s 51(xxiv) of the Constitution to make laws with respect to 'the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States'.

Validity of section 76 of the Service and Execution of Process Act

The High Court had previously decided that the word 'process' in s 51(xxiv) was not governed by the words 'of the courts'. That is, s 51(xxiv) was a power to make laws 'with respect to the service and execution of (1) the civil and criminal process of the States, and (2) the judgments of the courts of the States' (*Ammann v Wegener* (1972) 129 CLR 415 at 436 per Gibbs J). The appellant accepted this position but argued that the words '*civil and criminal* process of the States' only applied to process (such as a subpoena) issued by state bodies performing adjudicative functions and did not extend to process issued by a body performing an investigative function. The High Court rejected this argument.

In a joint judgment, Gleeson CJ, Gummow, Hayne, Callinan, Heydon, and Crennan JJ said that 'the words "civil and criminal" are used in s 51(xxiv) not as words of limitation but to embrace within the head of legislative power all that might properly answer the description "process"': [28]. The joint judgment rejected the argument that there was a clear division carried into s 51(xxiv) between 'adjudicative' and 'investigative' functions. Their Honours noted, for example, that courts in England and Australia had historically exercised a range of administrative and investigative functions: [45]. Given that 'process' in s 51(xxiv) could extend to process in aid of the investigative functions of *courts*, there was no basis for excluding process in aid of the investigative functions of *tribunals*: [43].

Rather than attempting an exhaustive definition of the 'process' covered by s 51(xxiv), the joint judgment considered whether the type of process covered by Pt 4, Div 4 was 'process' within s 51(xxiv). The joint judgment relied on various matters, in combination, to conclude that it was ([50]–[53]):

— a 'subpoena' compelled a person to attend

— the reason for attendance was to give evidence on oath or affirmation before a tribunal established by state law performing an investigative function

— the out of state service of a tribunal's process was subject to obtaining the leave of the Supreme Court of the issuing state.

The joint judgment noted that s 51(xxiv) might support a scheme that did not have all of these features; however, it was unnecessary to decide: [53].

Kirby J wrote a separate judgment also upholding the validity of s 76.

The Commonwealth Solicitor-General, David Bennett AO QC, appeared as senior counsel for the Commonwealth Attorney-General and was instructed by AGS.

<http://www.austlii.edu.au/au/cases/cth/HCA/2006/17.html>

Vasiljkovic v Commonwealth

High Court of Australia [2006] HCA 40, 3 August 2006

In this case the High Court (Gleeson CJ and Gummow and Hayne JJ, with Heydon J agreeing; Kirby J dissenting) upheld the validity of key aspects of the *Extradition Act 1988* (Cth).

Validity of administrative detention under the Extradition Act

The Court held that the Extradition Act validly provided for the administrative detention of persons (including Australian citizens) while a decision was made on whether the person should be surrendered for extradition. The decision to detain is made by a state magistrate exercising administrative power in a personal capacity and not as a member of a court. Like immigration detention, detention for the purposes of extradition is one of the exceptions to the general principle derived from the separation of judicial power effected by Ch III that ordinarily a person could only be detained under Commonwealth law for a breach of the criminal law, which could only be determined by a court exercising judicial power. The Court also held that the administrative detention was valid even though the Extradition Act did not require that the country seeking extradition establish a prima facie case that the person committed the alleged offences. Finally, the Court said that the Extradition Act was supported by the external affairs power in s 51(xxix) even though there was no extradition treaty between Australia and Croatia, the country seeking extradition. The external affairs power is not limited to implementing treaties and extends to laws concerning Australia's relations with other countries, such as extradition.

AGS Chief General Counsel, Henry Burmester AO QC, appeared as senior counsel for the Commonwealth and was instructed by AGS.

<http://www.austlii.edu.au/au/cases/cth/HCA/2006/40.html>

About the authors

***David Bennett** heads the AGS constitutional litigation practice. He has advised the Commonwealth on constitutional law issues for more than 20 years.*

***Andrew Buckland** has run significant constitutional cases in the High Court and other superior courts. Prior to joining the constitutional litigation practice, Andrew advised a number of Commonwealth clients on constitutional and other public law issues.*

***Robyn Briese** has been involved in a number of recent constitutional cases in the High Court and other superior courts and has advised on constitutional issues raised by notices given under s 78B of the* Judiciary Act 1903.

***Graeme Hill** has been involved in major constitutional cases as counsel or instructing solicitor. He has particular expertise in federal jurisdiction and inter-governmental immunities.*

***David Lewis** is a Senior Lawyer in constitutional litigation. Prior to joining the constitutional litigation practice, he advised a range of Commonwealth clients on constitutional and other public law issues.*

AGS contacts

AGS has a team of lawyers specialising in constitutional litigation. For further information on the articles in this issue, or on other constitutional litigation issues, please contact the authors or practice leader Deputy Government Solicitor, David Bennett.

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

Canberra	Jenny Anderson	02 6253 7401
Sydney	Julia Hall	02 9581 7432
Melbourne	Susan Pryde	03 9242 1426
Brisbane	Barry Cosgrove	07 3360 5647
Perth	Graeme Windsor	08 9268 1102
Adelaide/Darwin	Sarah Court	08 8205 4231
Hobart	Peter Bowen	03 6220 5474

Offices

Canberra
50 Blackall Street Barton ACT 2600

Sydney
Level 42, 19 Martin Place Sydney NSW 2000

Melbourne
Level 21, 200 Queen Street Melbourne VIC 3000

Brisbane
Level 12, 340 Adelaide Street Brisbane QLD 4000

Perth
Level 19, 2 The Esplanade Perth WA 6000

Adelaide
Level 18, 25 Grenfell Street Adelaide SA 5000

Hobart
Level 8, 188 Collins Street Hobart TAS 7000

Darwin
Level 3, 9–11 Cavenagh Street Darwin NT 0800

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