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Litigation notes

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INCONSISTENCY OF COMMONWEALTH AND STATE LAWS; VALIDITY AND OPERATION OF VICTORIAN *CHARTER OF HUMAN RIGHTS*

In *Dickson v The Queen* (2010) 241 CLR 491 (*Dickson*) (discussed in Litigation Notes 20, p 9), the High Court held that a State conspiracy to steal offence applying to Commonwealth property was invalid by reason of inconsistency with a similar Commonwealth offence. That decision gave rise to uncertainty about the circumstances in which Commonwealth and State criminal offence provisions could validly apply to the same subject matter.

In *Momcilovic v The Queen* (*Momcilovic*), the High Court again considered this issue. In a 6:1 decision, the Court held that a Victorian drug trafficking offence was not inconsistent with a similar Commonwealth offence and therefore was not invalid under s 109 of the Constitution.

The Court also addressed the operation and validity of core provisions of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Charter). The Court held valid by a 6:1 majority a provision that required courts, so far as possible, to interpret Victorian statutory provisions consistently with the human rights set out in the Charter. By a 4:3 majority the Court held that the Victorian Supreme Court could validly make a 'declaration of inconsistent interpretation' if it found that a statutory provision could not be interpreted consistently with the human rights specified in the Charter. However, for differing reasons, a 5:2 majority set aside the declaration of inconsistent interpretation made by the Supreme Court in the present case.

Momcilovic v The Queen
High Court of Australia, 8 September 2011
[2011] HCA 34; (2011) 280 ALR 221

Background

Ms Momcilovic was convicted after a jury trial in the Victorian County Court of trafficking in a drug of dependence contrary to s 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (the Drugs Act). Her application for leave to appeal against conviction was dismissed by the Victorian Court of Appeal. Her appeal to the High Court included an argument that s 71AC of the Drugs Act was invalid, as it was inconsistent with s 302.4 of the Criminal Code (Cth) (the Code), which created an offence of trafficking in a controlled drug.

The drugs in question were found on premises occupied by Ms Momcilovic, but she denied knowledge of them. The term 'traffick' is defined in s 70(1) of the Drugs Act to include 'have in possession for sale'. At her trial, s 5 of the Drugs Act had been applied. Section 5 was construed by the County Court and

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the Court of Appeal as reversing the legal onus of proof by deeming a person to have possession of drugs that were on premises occupied by the person 'unless the person satisfies the court to the contrary'. Section 5 could not be construed, even in light of the Charter, as imposing only an evidentiary burden. The Court of Appeal therefore made a declaration under s 36(2) of the Charter that s 5 of the Drugs Act could not be interpreted consistently with her right under s 25 of the Charter to be presumed innocent.

Inconsistency: section 109 of the Constitution

Section 109 of the Constitution provides that '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

The High Court held in *Dickson* that a State conspiracy to steal offence applying to Commonwealth property was inconsistent with a similar Commonwealth offence. This was because differences between the substantive provisions of the Commonwealth and State conspiracy offences indicated that the Commonwealth law had 'designedly left' areas of liberty into which the State law could not intrude.

The application of s 109 of the Constitution to particular Commonwealth and State laws depends on the proper construction of the Commonwealth law.

However, in *Momcilovic*, a 6:1 majority of the High Court held that the Victorian drug trafficking offence was not inconsistent with the Commonwealth drug trafficking offence and was therefore not invalid under s 109 of the Constitution (French CJ [109]–[112]; Gummow J [276]–[277]; Heydon J [481], [486]; Crennan and Kiefel JJ [656]–[657]; Bell J [660]; Hayne J (dissenting) [280], [366]). There was no s 109 inconsistency, although there were differences in the maximum penalties ([105]), the sentencing regimes and the mode of trial ([108], concerning the need for jury unanimity). The Commonwealth offence was not exhaustive or exclusive of the State offence applying to the same subject matter.

Concurrent operation provision

Momcilovic affirms that the application of s 109 of the Constitution to particular Commonwealth and State laws depends on the proper construction of the Commonwealth law, in particular determining its scope and purpose. An express statement of legislative intention in the Commonwealth law about its relationship with State laws will be relevant to this process of construction.

Section 300.4 of the Code is a 'concurrent operation' provision and states that Pt 9.1 of the Code (which deals with serious drug offences and contains s 302.4) is 'not intended to exclude or limit the concurrent operation of any law of a State or Territory', even where the laws provide for different penalties, fault elements or defences. In *Dickson*, there was no concurrent operation provision applying to the offences there in issue ([276]). In *Momcilovic*, s 300.4 was unanimously held to be relevant to deciding whether there was inconsistency but not, by itself, determinative. The effect of s 300.4 was to require that the Commonwealth law be construed as not dealing with its subject matter exhaustively or exclusively of State law. (Gummow J added that s 4C(2) of the *Crimes Act 1914* (Cth) (as to which, see below) supplemented this operation of s 300.4 of the Code.) However, analysis of the other provisions of the Commonwealth and Victorian laws (in light of s 300.4) was still required to determine whether there was inconsistency (see, generally, French CJ [104]–[112]; Gummow J [262], [272], [275]–[277]; Hayne J [316], [320]; Heydon J [472], [479]–[482], [486]; Crennan and Kiefel JJ [639], [648]–[652], [654], [655]; Bell J [660]).

As Gummow J put it ([272]), in a passage with which French CJ and Bell J agreed:

> [A] provision such as s 300.4 of the Code requires the federal law in question to be read and construed in a particular fashion, namely as not disclosing a

> subject-matter or purpose with which it deals exhaustively and exclusively, and as not immunising the rule of conduct it creates from qualification by State law. To the federal law so read and construed, s 109 then applies and operates to render inoperative any State law inconsistent with it. But by reason of the construction to be given to the federal law, there will be greater likelihood of a concurrent operation of the two laws in question.

Similarly, Crennan and Kiefel JJ said that, while it was not determinative, s 300.4 was 'a very clear indication' that the Commonwealth law was not exhaustive or exclusive in respect of drug trafficking and was not intended to exclude the operation of the Victorian law where it dealt with the same subject matter but contained different penalties ([654]). Their Honours also observed that the nature of the offence created by the Commonwealth law, dealing with drug trafficking, 'does not support an inference of intended exclusivity; rather it supports the contrary inference' ([652]).

Differing views were expressed on what provided the content of the Commonwealth 'law' and State 'law' relevant for determining s 109 inconsistency.

Mode of trial and sentencing laws: what are the 'laws' for section 109 purposes?

Ms Momcilovic argued that differences in the applicable Commonwealth and Victorian laws relating to trial by jury and sentencing gave rise to s 109 inconsistency. Under s 80 of the Constitution, a verdict of guilty after a jury trial on indictment for an offence against a law of the Commonwealth must be unanimous (*Cheatle v The Queen* (1993) 177 CLR 541). In contrast, a guilty verdict after a trial on indictment for a Victorian offence may be by majority ([108]). Similarly, different statutory provisions apply to sentencing for Commonwealth and Victorian offences ([108]). In *Dickson*, the Court said that the case for inconsistency between the Commonwealth and State conspiracy provisions there in issue was 'strengthened by the differing methods of trial the legislation stipulates for the federal and State offences', particularly because of the differences in jury unanimity (at 241 CLR 491, 504 [20]).

In *Momcilovic*, differing views were expressed on what provided the content of the Commonwealth 'law' and State 'law' relevant for determining s 109 inconsistency. Clearly, this includes the physical and fault elements of the respective offences and the attached penalties ([233]). At least 3 justices held that the general, procedural provisions for the operation of the system for adjudication of criminal guilt, including provisions for the mode of trial by jury, were not part of the Commonwealth or State 'law' for s 109 purposes and so could not give rise to inconsistency (French CJ [109]–[110]; Gummow J [236]–[237]; Bell J [660]; contra Hayne J [304]). Although French CJ expresses his agreement with part of the judgment of Gummow J, which he characterises as applying the same approach to differing Commonwealth and State sentencing provisions ([109]), it is not clear that this characterisation is correct. It is possible to read the judgment of Gummow J as referring to both the differing penalty provisions and the associated sentencing principles as part of the relevant 'law' for s 109 purposes ([207], [236]-[237], [252], [257]; see also Hayne J [292]).

For Crennan and Kiefel JJ ([624], [655]) and Heydon J ([479], [480]), it appears that differences in the mode of trial and sentencing principles were procedural variations of a kind that, as a product of the federal framework allowing Commonwealth and State criminal justice systems, could not give rise to inconsistency for s 109 purposes.

Different penalties and sentencing laws: operational inconsistency

A difference in the maximum penalties for Commonwealth and State offences might give rise to an inconsistency ([641], [656]). However, in this context, s 4C(2) of the *Crimes Act 1914* (Cth) is significant. Under s 4C(2), where an act or omission constitutes an offence under both Commonwealth and State laws

and the offender has been punished for that offence under the State law, the offender is not liable to be punished for the offence under the Commonwealth law. Gummow J (with whom both French CJ at [110] and Bell J at [660] agreed in this respect) regarded the existence of different maximum penalties for the same conduct as only giving rise to possible inconsistency upon the exercise, at the stage of sentencing after conviction, of the judicial powers to impose penalties ([252]). This kind of inconsistency, arising only if and when there is an occasion for the exercise of powers conferred by both Commonwealth and State laws, is referred to as 'operational inconsistency' ([249]). Section 4C(2) reduces the occasions for conflict between Commonwealth and State offences with different maximum penalties by 'rolling back' the Commonwealth law where there has been a State conviction ([104], [110], [254]; see also [268]; cf Hayne J at [348], [351]). So a person could not be punished under both laws here, although the maximum penalty applicable would not be known until there was a prosecution under one of the laws. This outcome, dependent on decisions taken by Commonwealth and State prosecution authorities, was 'to be accepted as a product of the accommodations required by the federal system' (Gummow J [256]). Similarly, Crennan and Kiefel JJ referred to s 4C(2) in the context of a discussion of operational inconsistency, and appeared to regard it as part of the context that demonstrated that there was no Commonwealth intention that the Commonwealth offence be exclusive so as to preclude the operation of the State offence ([645]–[646], [652]).

So a person could not be punished under both laws here, although the maximum penalty applicable would not be known until there was a prosecution under one of the laws.

'Direct' and 'indirect' or 'covering the field' inconsistency

The High Court has distinguished between 'direct inconsistency' and 'indirect' or 'covering the field' inconsistency (for example, in *Dickson* at 502 [13]–[14]; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 85 ALJR 945 at [39]–[41]; see p 9). By reference to statements of Dixon J in *Victoria v Commonwealth ('The Kakariki')* (1937) 58 CLR 618 at 630, 'direct inconsistency' is said to arise where a State law would alter, impair or detract from the operation of a Commonwealth law. 'Indirect' or 'covering the field' inconsistency is said to arise if it appears from the terms, the nature or the subject matter of a Commonwealth law that it was intended as a complete statement of the law governing a particular matter or set of rights or duties, and a State law attempts to regulate or apply to the same matter or relation.

In *Momcilovic*, both Gummow J and Hayne J cautioned that care is needed in referring to different classes of inconsistency ([245], [318], [339]), as this 'tends to obscure the task always at hand in cases where reliance is placed upon s 109, namely to apply that provision only after careful analysis of the particular laws in question to discern their true construction' (Gummow J [245]; see also Crennan and Kiefel JJ [630]). Indeed, 'covering the field' inconsistency can be seen as 'but an instance of alteration, impairment and detraction' (Gummow J [242], [244]). However, while bearing this in mind, the distinction remains a useful tool of analysis (Hayne J [340]; Heydon J [475]; Crennan and Kiefel JJ [630]).

'Direct inconsistency' is said to arise where a State law would alter, impair or detract from the operation of a Commonwealth law.

Differences in the substantive operation of an offence: 'areas of liberty designedly left'

Ms Momcilovic had argued that, on the position assumed at trial and in the Victorian Court of Appeal that the reverse onus in s 5 of the Drugs Act applied to her prosecution for trafficking under s 71AC of the Drugs Act, there was a s 109 inconsistency, as she was subject to a standard of criminal liability that rendered her liable to conviction under s 71AC in circumstances where she would not be liable to conviction under s 302.4 of the Code ([273]). The argument was that s 71AC read with s 5 brings within its scope mere occupation of premises ([109], [660]). However, a 5:2 majority of the Court held that, as a matter of construction, s 5 of the Drugs Act did not apply to a prosecution for

trafficking under s 71AC of the Drugs Act (French CJ [72]; Gummow J [198]–[199]; Hayne J [280]; Crennan and Kiefel JJ [606], [611]; Heydon J (dissenting) [371](b), [461]–[462], [469]; Bell J (dissenting) [692]).

This meant that, for the purposes of considering s 109 inconsistency, it could not be argued that the State law criminalised conduct that was deliberately not rendered criminal by the Commonwealth law ([109], [275]–[276], [280], [633], [639]; see also [477], [479], [660]). That is, in terms of concurrent operation, it could not be argued that there were 'areas of liberty designedly left' by the Commonwealth law that 'should not be closed up' by the State law (cf *Dickson* at 504 [22], 505 [25]). Indeed, s 71AC was 'less stringent' than the provisions of the Code ([106], [276]). Heydon J said that '(i)t is the substantive criminal law which determines what areas of liberty are left, not procedural law' ([479]).

None of the differences in the operation of the Commonwealth and State offences gave rise to inconsistency under s 109.

None of the differences in the operation of the Commonwealth and State offences gave rise to inconsistency under s 109. However, because s 5 had been wrongly applied at trial, the High Court set aside the conviction and ordered a new trial.

Hayne J dissenting on section 109

Hayne J agreed with the reasons of Gummow J except on s 109, in relation to which he was the only justice to hold that the Commonwealth and Victorian provisions were inconsistent ([280]). Hayne J observed that federal, State and Territory rules that make up the body of law 'must speak as a single and coherent whole to those to whom they are addressed'; there can be no 'contradiction or contrariety' or 'antimony' between those laws ([283], [346]). Here, Hayne J considered that, even assuming the rules of conduct prescribed by the Commonwealth and State laws to be identical, differences in the maximum penalties, the requirements for jury unanimity and sentencing principles demonstrated inconsistency because the State law 'altered, impaired or detracted' from the Commonwealth law ([303], [349]) in a context where the differing Commonwealth and State laws were directed to the same subject and for the same ordinary criminal law purposes ([338], [349]).

The Victorian Charter: interpreting statutory provisions consistently with human rights

As noted, the High Court rejected Ms Momcilovic's argument that provisions of the Charter required that s 5 of the Drugs Act be interpreted, consistently with the right to the presumption of innocence in s 25 of the Charter, as imposing only an evidential and not a legal burden on an accused person to negative possession of drugs. The text of s 5 did not allow the construction for which Ms Momcilovic argued. However, s 5 was construed as not applying to the offence under s 71AC ([73]). In dealing with the construction issues, the Court addressed the operation and validity of key provisions of the Charter.

Section 32 ... did not confer on the courts a legislative power to rewrite a provision to give effect to the Charter rights.

Under s 32 of the Charter, '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. By a 6:1 majority, the High Court held that s 32 was valid (French CJ [46], [50]–[51]; Gummow J [146](vi), [171]; Hayne J [280]; Crennan and Kiefel JJ [565]–[566], [600]; Bell J [684]; Heydon J (dissenting) [439], [454], [456]). Section 32 was construed to require no more than an ordinary judicial task of statutory interpretation in light of the human rights specified in the Charter. It did not confer on the courts a legislative power to rewrite a provision to give effect to the Charter rights.

French CJ expressly likened the operation of s 32 to the common law principle of legality. That principle is the presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and

unequivocal language ([43]; *Coco v The Queen* (1994) 179 CLR 427 at 437). In French CJ's view, s 32 'requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms' ([51]).

Similarly, Gummow J (which whom Hayne J agreed on this point at [280]) and Crennan and Kiefel JJ said that s 32 must be understood to reflect the ordinary approach to statutory construction which requires consideration of a provision's terms, context and purpose, and referred to the discussion of this process in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 ([170]–[171], [565]–[566]).

Accordingly, s 32 required an orthodox exercise of judicial power in which the Charter was part of the context in which a statute was to be construed ([565]) and would be consistent with Ch III of the Constitution, the separation of legislative and judicial powers under the Constitution and the institutional integrity of State courts. As Bell J put it, the 'task imposed by s 32(1) is one of interpretation and not of legislation' ([684]; see also [146](vi), [171], [566]).

Section 7(2) ... permits a law to subject a Charter human right to 'reasonable limits'.

Justified limits: section 7(2)

Section 7(2) of the Charter permits a law to subject a Charter human right to 'reasonable limits' the need for which can be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. A question arose as to the relationship between reasonable limits on the enjoyment of a human right that might be justified under s 7(2) and the obligation under s 32 to interpret statutory provisions consistently with human rights. Gummow J (Hayne J agreeing at [280]) and Bell J held that, in interpreting statutory provisions pursuant to s 32, the human rights are to be determined having regard to reasonable limits on those rights under s 7(2) ([168], [677], [683]). The s 7(2) criteria were 'readily capable of judicial evaluation' ([684]). Heydon J also came to the conclusion that s 7(2) was central to the interpretation task under s 32 but held that the functions conferred by ss 7(2) and 32 were legislative functions that turned on criteria not capable of judicial resolution and so could not be conferred on State courts consistently with their character as courts – consequently the whole of the Charter was invalid ([427], [430]–[439]).

In contrast, French CJ and Crennan and Kiefel JJ held that reasonable limits justified under s 7(2) were only relevant after the interpretive task under s 32 had been completed ([35]–[36], [575]). That is, in interpreting statutory provisions consistently with human rights pursuant to s 32, the human rights were those set out in Pt 2 of the Charter without considering any reasonable limits on those rights under s 7(2). French CJ said that s 7(2) could be relevant to whether the Supreme Court should exercise its discretion to make a declaration of inconsistent interpretation under s 36 (although not in determining whether there was inconsistency for the purposes s 36 ([36])). Crennan and Kiefel JJ said that s 7(2) may have an interpretive effect on the content of a Charter right (but not on the statutory provision in question) and found it difficult to discern that s 7(2) had any consequences other than as a statement of principle directed to the legislature ([571], [575]).

Declaration of inconsistent interpretation: section 36

Under s 36(2) of the Charter, 'if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect'. Such a declaration of inconsistent interpretation does not affect the validity of the provision being interpreted, but a response to it by the minister administering the provision must

be tabled in the Victorian Parliament and published in the Government Gazette (ss 36(5), 37).

A 4:3 majority held that s 36 was valid: it was not invalidated by the principle associated with *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (French CJ [95]–[97], [101]; Crennan and Kiefel JJ [603]–[605]; Bell J [661]; Gummow J (dissenting) [172], [188]; Hayne J (dissenting) [280]; Heydon J (dissenting) [457]). Under the *Kable* principle, as developed in recent cases, a State Parliament may not enact a law that would be inconsistent with the defining characteristics of the courts of the State or, in particular, would substantially impair their institutional integrity (see *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v NSW* (2011) 85 ALJR 746, see p 18).

... section 36 was not invalidated by the principle associated with Kable *...*

French CJ and Bell J: not judicial power but valid

French CJ (Bell J agreeing [661]) held that making a declaration under s 36 was not an exercise of judicial power or incidental to it. This was because a declaration under s 36 did not decide or affect the rights and liabilities of the parties, did not set down any guidance for the disposition of future cases and did not have any legal effect on the operation or validity of the statutory provision that was its subject ([88]–[89]); nor did it enable, support, or facilitate the exercise by the Court of its judicial function ([90]–[91]). However, s 36 was nevertheless valid. This was because the *Kable* principle allows State courts to undertake some non-judicial functions that (because of the strict separation of federal powers under Ch III of the Constitution) a federal court could not undertake. The making of a declaration under s 36 reinforced, rather than impaired, the institutional integrity and independence of the Supreme Court by manifesting the constitutional limitations on the Court's role in doing no more than directing the attention of the Victorian Parliament to disconformity between a State law and a human right set out in the Charter ([92]–[97]). Although the Supreme Court could not, as part of proceedings in federal jurisdiction (such as here), exercise a non-judicial power of the kind in s 36, it could proceed after its functions in the exercise of federal jurisdiction were exhausted to make a s 36 declaration as an exercise of State power ([95]–[97], [101]).

Crennan and Kiefel JJ: incidental to judicial power and valid but inappropriate here

Crennan and Kiefel JJ held that, while making a declaration under s 36 was not an exercise of judicial power (for reasons similar to those given by French CJ), it was incidental to an exercise of judicial power and did not impair the Supreme Court's institutional integrity ([584], [586], [589], [597], [603]–[605]). The declaration was incidental to an exercise of judicial power because the Supreme Court could identify the inconsistency with human rights in the course of interpreting the Victorian provisions in proceedings that did involve the exercise of judicial power ([589], [600]). It was relevant to the conclusion of validity that, on their Honours' approach, the abstract issue under s 7(2) was divorced from the question of statutory construction under s 32 which the s 36 declaration followed ([590]). However, Crennan and Kiefel JJ held that it was not appropriate for the Supreme Court to have made the declaration in this case where to do so involved the Court in acknowledging that the trial process involved a denial of Charter rights but the conviction was nevertheless valid ([604]; cf [96], [186]). This may give the appearance of undermining the conviction ([601], [605]). It appears that their Honours considered such a declaration to be usually inappropriate in the sphere of criminal law ([605]).

Gummow, Hayne, and Heydon JJ: not judicial power and invalid

Gummow J (Hayne J agreeing [280]) held that the making of a declaration under s 36 is neither an exercise of judicial power nor incidental to it, as it has

no dispositive effect, does not affect the rights and liabilities of the parties and is merely advisory ([178], [181], [187]). He held that, because of the advisory structure that s 36 created, it attempted to change the constitutional relationship between the courts and the executive and legislature by empowering the Court to set in train executive consideration of changes to legislation. This operation of s 36 was inconsistent with the institutional integrity of the Supreme Court and it was therefore invalid under the *Kable* principle ([183]–[184], [188]). However, s 36 could be severed from the rest of the Charter ([189]). Heydon J also regarded the s 36 power as non-judicial and concluded that s 36 was invalid, as it took the Victorian Supreme Court outside the constitutional conception of a court ([457]; see also [437]).

A court exercising federal jurisdiction ... may apply s 32 to read Victorian statutory provisions ... consistently with the human rights set out in the Charter.

Appeals to the High Court under section 73 of the Constitution and section 36 declarations

Since 5 members of the High Court held that the making of a declaration under s 36 was neither an exercise of judicial power nor incidental to it, ordinarily no appeal would lie to the High Court under s 73 of the Constitution from the making of such a declaration by the Supreme Court (French CJ [101]). However, in this case, as a majority held that s 36 (and therefore the declaration made under it) was invalid (Gummow, Hayne, and Heydon JJ) or that the declaration was incidental to judicial power but should not have been made in the exercise of the Supreme Court's discretion (Crennan and Kiefel JJ), the Court set the declaration aside.

Implications for federal jurisdiction

Ms Momcilovic's criminal trial in the Victorian County Court and her appeal to the Victorian Court of Appeal were in federal jurisdiction as a matter between a State (Victoria) and a resident of another State (at the time of the trial, Ms Momcilovic was a resident of Queensland) within s 75(iv) of the Constitution (French CJ [6], [9], [99]; Gummow J [134]–[139]; Crennan and Kiefel JJ [594]).

Because 6 members of the Court (all apart from Heydon J) regarded s 32 of the Charter as involving a valid, orthodox exercise of judicial power, a court exercising federal jurisdiction (whether it is a federal court or a State court) may apply s 32 to read Victorian statutory provisions, so far as possible, consistently with the human rights set out in the Charter.

It appears that, on the approach of French CJ and Bell J (that a declaration can be made in an exercise of State power) and of Crennan and Kiefel JJ (that making a declaration is incidental to an exercise of judicial power), a State court that has exercised federal jurisdiction may proceed to make a declaration of inconsistent interpretation under s 36 of the Charter in an appropriate case ([101]).

However, on the approach of 5 justices of the Court that the making of a declaration of inconsistent interpretation under s 36 is neither an exercise of judicial power nor incidental to it (French CJ, Gummow, Hayne, Heydon and Bell JJ), a Commonwealth law could not provide for a federal court to make a declaration of inconsistent interpretation having the characteristics of those made under s 36 ([100], [146](viii)).

AGS (David Lewis, Niamh Lenagh-Maguire and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, who intervened, with the Commonwealth Solicitor-General, Stephen Gageler SC, Rachel Doyle SC, and Alistair Pound as counsel, at the main hearings and Henry Burmester QC appearing instead of the Solicitor-General at an additional hearing.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2011/34.html

INCONSISTENCY BETWEEN COMMONWEALTH AND STATE LONG SERVICE LEAVE PROVISIONS

A recent appeal concerned whether there was inconsistency for the purposes of s 109 of the Constitution between long service leave entitlements under federal industrial instruments made under the *Workplace Relations Act 1996* (continued under the Fair Work legislative framework) and the scheme for portable long service leave established by the *Construction Industry Long Service Leave Act 1997* (Vic) (the State Act). Section 109 states that '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

The High Court in a joint judgment unanimously decided that, 'applying accepted tests of direct and indirect inconsistency', there was no inconsistency, as there was no 'real conflict' between the State Act and the Commonwealth law embodied in the industrial instruments ([60]).

Jemena Asset Management (3) Pty Ltd v Coinvest Limited
High Court of Australia, 7 September 2011
[2011] HCA 33; (2011) 280 ALR 206

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Background

The portable long service leave scheme established under the State Act entitled workers in the construction industry to benefits paid out of a trust fund. Employers were obliged to contribute to the trust fund; employees were entitled to be paid benefits from the fund after a period of continuous employment (even if with different employers) in the construction industry. The federal industrial instruments made detailed provision for the grant of, and payment for, long service leave ([18], [47]), entitling employees to take 13 weeks long service leave after completion of 10 years continuous service with one employer. The appellant employers argued that they were not obliged to comply with the State Act because it was inconsistent with the Commonwealth laws and federal industrial instruments made under them.

Section 109 inconsistency

The case turned on whether there was either 'direct inconsistency' or 'indirect inconsistency' between the Commonwealth laws and the State Act. Direct inconsistency exists where a State law would 'alter, impair or detract from' the operation of a Commonwealth law. Indirect inconsistency exists where a Commonwealth law is intended to constitute a complete statement of the law governing a particular matter or set of rights and duties and a State law purports to regulate or apply to that matter or relation and so detract from the full operation of the Commonwealth law.

The High Court held that, in this case, there was no direct inconsistency arising from the State Act imposing obligations additional to those under the federal industrial instruments. The federal scheme provided for the grant of long service leave, while the State Act provided for long service leave benefits in the form of cash payments ([52]). The High Court said that it was important that, under the State Act, if an employee was paid by an employer for long service leave under federal instruments, there was a corresponding reimbursement to the employer and reduction in the money paid to the employee under the State Act ([28], [52]). The State Act therefore did not undermine an employer's obligation under the federal instruments to grant, and pay for, long service leave or an employee's entitlement to receive leave ([53]).

The High Court held that, in this case, there was no direct inconsistency arising from the State Act imposing obligations additional to those under the federal industrial instruments.

The High Court held, for 2 reasons, that there was no indirect inconsistency. First, because the Commonwealth scheme was a 'beneficial' scheme, it could be inferred that Parliament did not intend to exclude a compatible, beneficial State law like that in issue ([57]). Secondly, while the federal industrial instruments dealt with all long service leave entitlements and obligations arising in a particular employment relationship, the instruments simply did 'not deal with, or even mention' portable long service leave benefits arising from continuous service in the construction industry ([58]–[59]).

In reaching these conclusions, the High Court commented on the general principles applicable to s 109 inconsistency cases ([36]–[46]). Four of the principles outlined are particularly relevant. First, an industrial award, 'whilst not of itself a law of the Commonwealth, has the force and effect of such a law where so provided by the machinery of a Commonwealth statute' ([11]). For that reason, the expressions 'a law of the State' and 'a law of the Commonwealth' in s 109 are sufficiently general to cover inconsistencies involving a federal industrial order or award or other federal legislative instrument or regulation ([38]). Here, the Commonwealth laws expressly addressed the paramountcy of instruments made under them ([12]–[14]). Secondly, a State law will only 'alter, impair or detract from' a Commonwealth law in the sense necessary to engage s 109 if the alteration or impairment of, or detraction from, the Commonwealth law is 'significant and not trivial' ([41]). Thirdly, the tests of 'direct inconsistency' and 'indirect inconsistency' have a common basis in the principle that s 109 is engaged where there is a 'real conflict' between a Commonwealth law and a State law. Fourthly, the extent of any inconsistency 'depends on the text and operation of the respective laws' ([45]).

The tests of 'direct inconsistency' and 'indirect inconsistency' have a common basis in the principle that s 109 is engaged where there is a 'real conflict' between a Commonwealth law and a State law.

AGS (Ros Kenway, Danielle Forrester and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Commonwealth Solicitor-General, Stephen Gageler SC, and Chris Young as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2011/33.html

WHAT IS A TAX?

In 2 recent cases, the High Court has considered when an impost will be a tax for the purposes of the Constitution. The High Court has generally defined a tax as 'a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered' (*Air Caledonie International v Commonwealth* (1988) 165 CLR 462, 467 citing *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 276).

In *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2011] HCA 35, the High Court upheld the validity of the superannuation guarantee charge (SGC) and considered the 'public purpose' aspect of the concept of taxation. In *Queanbeyan City Council v ACTEW Corporation Ltd* [2011] HCA 40, the High Court held that 2 imposts by the ACT on its wholly-owned corporation, ACTEW Corporation Ltd, were not taxes but instead internal financial arrangements of government.

Roy Morgan Research Pty Ltd v Commissioner of Taxation
High Court of Australia, 28 September 2011
[2011] HCA 35; (2011) 281 ALR 205

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Background

This was an appeal from a Full Federal Court decision ((2010) 184 FCR 448) which:

— held that persons engaged by Roy Morgan Research Pty Ltd (Roy Morgan) to conduct interviews as part of its market research business were 'employees' for the purposes of the superannuation guarantee scheme

— rejected a challenge to the constitutional validity of the provisions imposing the SGC as a tax that Roy Morgan was liable to pay in respect of the employment of such persons.

Roy Morgan appealed the constitutional issue to the High Court, arguing that the superannuation guarantee charge (SGC) is not a tax because it is not imposed for a public purpose and therefore is not supported by the taxation power in s 51(ii) of the Constitution. The High Court decided unanimously that the SGC is a valid tax. A joint judgment was given by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, with Heydon J separately upholding validity.

The High Court decided unanimously that the superannuation guarantee charge is a valid tax.

Superannuation guarantee scheme

The superannuation guarantee scheme is established by 2 Acts: the *Superannuation Guarantee (Administration) Act 1992* (Administration Act) and the *Superannuation Guarantee Charge Act 1992* (Charge Act). The scheme applies in relation to 'employers' of 'employees'. Generally speaking, the scheme imposes a tax (the SGC) on an employer who fails to meet the prescribed minimum level of superannuation contribution for an employee (see ss 5 and 6 of the Charge Act, imposing the SGC on an employer's 'superannuation guarantee shortfall', and ss 17–23 of the Administration Act, dealing with calculation of the shortfall). The amount of the tax is equal to the amount of the 'superannuation guarantee shortfall' and includes an administration component and interest. An employer's SGC liability is, therefore, reduced if the employer makes superannuation contributions in respect of an employee. There is, then, for this and other reasons, a practical incentive for employers to make superannuation contributions in respect of their employees to avoid liability to pay the SGC (joint judgment [3]; Heydon J [57]). The SGC is paid into the Consolidated Revenue Fund (CRF).

Where an employer pays the SGC because of a shortfall in relation to an employee, Pt 8 of the Administration Act provides for equivalent funds (but excluding the administration component) to be paid out of the CRF, under a standing appropriation (s 71), for the benefit of the employee. Where an employee is over 65 or has retired due to permanent incapacity or invalidity, Pt 8 obliges the Commissioner of Taxation to make the payment directly to the employee. Otherwise, the relevant amount is to be paid for the benefit of the employee into a specified form of superannuation account (s 65 of the Administration Act). The Full Federal Court held ((2010) 184 FCR 448, 481 [98]–[100]) that Pt 8 of the Administration Act was supported by the 'invalid and old-age pensions' power in s 51(xxiii) of the Constitution and Roy Morgan did not challenge this conclusion in the High Court.

... the imposition of a tax for the benefit of the Consolidated Revenue Fund is made for public purposes.

Roy Morgan argued that this legislative arrangement, whereby an employer's SGC payment triggers a corresponding payment to an employee or employee's fund:

- effectively involved a conferral of a 'private and direct benefit' on the employee
- that as a result the SGC was not an exaction levied for a 'public purpose'
- that it is an essential element of a tax that it be imposed for a public purpose
- and that accordingly, the SGC was not a 'tax' within the meaning of s 51(ii).

The High Court's decision

Joint judgment

The joint judgment rejected Roy Morgan's argument that the SGC was not imposed for a public purpose because it conferred a private and direct benefit on employees. Although receipt of an impost into the CRF does not establish that the impost is a tax (as all revenues or moneys raised or received by the Commonwealth form the CRF), the joint judgment held that '[i]t is settled that the imposition of a tax for the benefit of the Consolidated Revenue Fund is made for public purposes' ([49]). The linkage between the SGC (calculated on a shortfall for an employee) paid into the CRF and the payment from the CRF under Pt 8 of the Administration Act for the benefit of the employee did not indicate that the SGC was not imposed by Parliament for public purposes. Further, the joint judgment held that the SGC did not fall into any of the categories of imposts that would take it outside the constitutional conception of 'taxation' (for example, a fee for service) ([43]). Their Honours also emphasised that the fact that revenue raising was only secondary to the attainment of another object did not mean that an impost could not be a tax ([16], [48]).

The fact that revenue raising was only secondary to the attainment of another object did not mean that an impost could not be a tax.

The joint judgment concluded that the appellant's case, characterising the SGC as conferring a 'private and direct benefit' on the employees, depended upon 'tracing' the SGC through the CRF. However, the SGC paid by a particular employer lost its identity once it formed part of the CRF ([51]). Money received into the CRF is not earmarked – indeed, the establishment of the CRF was designed to prevent earmarking – and is available to be appropriated for any purpose for which the Commonwealth may lawfully spend money ([50], [51]).

Heydon J

Heydon J also rejected the appellant's argument that the SGC was not imposed for a public purpose. However, his reasoning looked beyond the fact of payment into the CRF and addressed the underlying purpose of the superannuation guarantee laws, holding that the provision of workplace superannuation is a

public purpose ([60]) and the SGC 'tends to persuade employers to make direct superannuation contributions' and that this 'achieves public purposes quite independently of any revenue collected through it' ([57], [62]).

AGS (Kathryn Graham from the Office of General Counsel and Danielle Forrester from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Commonwealth Solicitor-General, Stephen Gageler SC, Stephen Donaghue and Damian O'Leary as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2011/35.html

Queanbeyan City Council v ACTEW Corporation Ltd
High Court of Australia, 5 October 2011
[2011] HCA 40

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Background

These appeals from the Full Court of the Federal Court concerned the validity of 2 imposts levied by the Australian Capital Territory on a Territory-owned corporation, ACTEW Corporation Ltd (ACTEW). One, the Water Abstraction Charge, was imposed by the ACT on the holder of a licence to take water in the ACT for the purposes of urban water supply and was, at the relevant times, calculated by reference to the amount of water charged to users. ACTEW was the only holder of such a licence. The other, the Utilities Network Facilities Tax (UNFT), was imposed by the ACT on the owner of a utilities infrastructure network on land in the Territory and was calculated by reference to the route length of the network. ACTEW paid both imposts to the ACT. ACTEW then charged Queanbeyan City Council (QCC), for the supply of water, an amount that included the costs it had incurred in paying those imposts.

In these appeals, QCC contended that the imposts were duties of excise (that is, taxes on goods) which, by reason of s 90 of the Constitution, could not validly be levied by the ACT and so should not have been passed on to QCC by ACTEW. Section 90 gives the Commonwealth Parliament exclusive power to impose duties of excise.

The High Court unanimously dismissed the appeals (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in a joint judgment, with Heydon J writing separately) on the basis that, to the extent that the imposts were levied on ACTEW, they were not taxes and so could not be duties of excise within the meaning of s 90 of the Constitution. The reason they were not taxes was that ACTEW was an entity 'indistinct from the polity' that levied the imposts (that is, the ACT) and an impost on such an entity was an 'internal financial arrangement of government', not a tax (see particularly joint judgment [19]–[22]; Heydon J [46]).

To the extent that the imposts were levied on ACTEW, they were not taxes and so could not be duties of excise ... The reason they were not taxes was that ACTEW was an entity 'indistinct from the polity' that levied the imposts ...

Internal financial arrangements

The High Court unanimously held that amounts paid under internal governmental financial arrangements of the kind in issue were not characterisable as taxes. The joint judgment cited, with apparent approval, an observation of Keane CJ in the Full Court below that '[w]hen it is said that a tax is a compulsory exaction by a public authority for public purposes, what is in contemplation is an exercise of the power of the government lawfully to take from the governed, as opposed to the internal financial arrangements of the government' ([19], quoting (2010) 188 FCR 541, 554 [51]). Similarly, Heydon J appeared to adopt the proposition that '[a] tax involves a government taking

money from the governed, as distinct from merely being an incident of the internal financial arrangements of the government' ([46]). His Honour's analysis appears to accept that payment of an impost levied by a polity on an entity that is indistinct from the polity is not a tax, as, where the entity is subject to and directed by the same will as the polity purporting to impose the tax, there is no element of the polity taking money from the governed ([48], [53]). This is so even if the payment is made under a legally enforceable obligation ([60]–[61]).

The Court also indicated that, in determining whether the imposts were duties of excise, it was not relevant that they might have applied to some non-government entities as well as to ACTEW. The joint judgment said of the UNFT: 'it is not to the point that [the UNFT] also may be imposed upon the owners of other network facilities as well as ACTEW, and that these other owners may not be identified with "the Territory" ' ([16]; see also Heydon J [55]).

The Court unanimously considered that ACTEW and the ACT were relevantly indistinct.

What is the 'government'?

Having observed that an impost by a government on the government itself may not be a tax, the High Court considered whether ACTEW was indistinct from the ACT itself such that an impost on ACTEW by the ACT was just an internal financial arrangement of government and not a tax. The Court unanimously considered that ACTEW and the ACT were relevantly indistinct.

In reaching this conclusion, the joint judgment referred to the 'extensive control exercised by the Territory executive ... over the conduct of the affairs of ACTEW' under the *Territory-owned Corporations Act 1990* (ACT) (TOC Act) ([37]). The joint judgment and Heydon J referred to the various statutory provisions that subjected ACTEW to the control of the ACT executive ([33]–[36]; [47]–[49]). Amongst others, these included provisions imposing a duty on ACTEW's directors to comply with directions from the voting shareholders (who, by law, were required to be ACT Ministers); provisions imposing a duty on ACTEW and its directors to appoint the ACT Auditor-General as ACTEW's auditor; and provisions limiting ACTEW's borrowing to limits set by the ACT Treasurer. The Court also referred to ACTEW's statutory objectives ([32]; [47]). Justice Heydon described these as including objectives that were 'public in character' ([47]). The joint judgment also noted ACTEW's special statutory exemption from certain government duties ([36]).

The effect of section 8 of the *Territory-owned Corporations Act 1990 (ACT)*

ACTEW was subject to the TOC Act. The Court considered whether the identification of ACTEW with the ACT was affected by s 8 of that Act. Sections 8(1)(a) and 8(2)(a) of the TOC Act provided, respectively, that a Territory-owned corporation was not the Territory and was not entitled to any immunity or privilege of the Territory, 'only because of its status as a Territory-owned corporation'. The Court held that these provisions were directed solely to whether the mere status of an entity as a Territory-owned corporation had the effect that it was the Territory or was entitled to the Territory's privileges and immunities; it did not affect what would otherwise flow from the relevant substance of the relationship between a particular Territory-owned corporation and the Territory addressed in other provisions of the TOC Act (joint judgment [40]; Heydon J [64]). Section 8(2)(b) of the TOC Act provided that an entity was not, only because of its status as a Territory-owned corporation, 'exempt from a tax, duty, fee or charge payable under an Act'. The Court held that this provision did not affect the characterisation of the impost. In effect, this was because the

dispute was not over whether ACTEW was liable to pay the impost but over the characterisation of that impost as a tax (joint judgment [40]; Heydon J [65]).

The High Court's decision affects whether charges imposed on a body that is indistinct from a polity are properly characterised as taxes but does not mean that polities cannot require their 'corporatised' entities to pay the charges (although not as a tax) (Heydon J [58]–[59]).

AGS (Andrew Buckland, Danielle Forrester and David Hume from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with AGS Chief General Counsel Robert Orr QC, Stephen Donaghue and Catherine Button as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2011/40.html

REMEDIAL LEGISLATION AFTER INVALIDITY OF AUSTRALIAN MILITARY COURT

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In *Haskins v Commonwealth* (*Haskins*) and *Nicholas v Commonwealth* (*Nicholas*), the High Court (by a majority of 6:1, Heydon J dissenting) upheld the validity of the *Military Justice (Interim Measures) Act (No 2) 2009* (Cth) (Interim Measures Act (No 2)), which sought to restore the effectiveness of punishments imposed by the (unconstitutional) Australian Military Court (AMC).

The High Court rejected arguments that the Act usurped judicial power, in particular as a bill of pains and penalties and, in *Haskins*, that it acquired property otherwise than on just terms contrary to s 51(xxxi) of the Constitution.

Haskins v Commonwealth
High Court of Australia, 10 August 2011
[2011] HCA 28; (2011) 85 ALJR 836; (2011) 279 ALR 434

Nicholas v Commonwealth
High Court of Australia, 10 August 2011
[2011] HCA 29; (2011) 85 ALJR 862; (2011) 279 ALR 465

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Background

These challenges to the validity of the Interim Measures Act (No 2) were brought in the High Court's original jurisdiction. Each plaintiff had been purportedly convicted and sentenced by the AMC prior to the High Court's decision in *Lane v Morrison* (2009) 239 CLR 230 (*Lane*), which held that the AMC was unconstitutional and its decisions invalid (see Litigation Notes 19, p 7). The plaintiff Haskins's punishment included detention, while the plaintiff Nicholas's punishment included dismissal from the Defence Force.

In response to the decision in *Lane*, the Commonwealth Parliament enacted 2 laws. *The Military Justice (Interim Measures) Act (No 1) 2009* (Cth) (Interim Measures Act (No 1)) restored the previous system of military disciplinary tribunals (including courts martial), the validity of which has been 'repeatedly upheld' (*Haskins* [21]) by the High Court. The Interim Measures Act (No 2) was enacted to 'maintain the continuity of discipline in the Defence Force' by imposing disciplinary sanctions on persons corresponding to punishments imposed by the AMC (*Haskins* [3]). It did this, if the AMC had purported to impose a punishment other than imprisonment, by declaring the rights and liabilities of persons to be the same as if (that is, on the hypothesis that) the

(invalid) punishment had instead been imposed by a general court martial, and approved on review, under the system restored by the Interim Measures Act (No 1). However, the Interim Measures Act (No 2) also provided a person who was subject to a punishment declared to be imposed by that Act with separate mechanisms for a review of the imposition of the punishment within the chain of command of the Defence Force (*Haskins* [10]).

Haskins v Commonwealth

Usurpation of judicial power and bill of pains and penalties

The plaintiff argued that the Interim Measures Act (No 2) usurped judicial power and, in particular, invalidly provided directly for legislative punishment of a specified group of persons without the procedural safeguards of a judicial trial. The majority judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said that the plaintiff's argument that the Interim Measures Act (No 2) usurped judicial power proceeded from an unstated premise that only a Ch III court could impose military punishment, including detention, on the plaintiff ([24]). However, as the decisions upholding the system of military disciplinary tribunals (including courts martial) established, punishments imposed by the Interim Measures Act (No 2) were not punishments of a kind that could be imposed only in the exercise of the judicial power of the Commonwealth ([21]):

> Because the decisions made by courts martial and other service tribunals are amenable to intervention from within the chain of command, the steps that are taken to punish service members are taken only for the purpose of, and constitute no more than, the imposition and maintenance of discipline within the defence force; they are not steps taken in exercise of the judicial power of the Commonwealth.

The challenged provisions of the Interim Measures Act (No 2) therefore did not usurp judicial power ([24]).

The argument that the Interim Measures Act (No 2) was a bill of pains and penalties was also rejected by the majority on the basis that this aspect of the plaintiff's challenge proceeded from the same incorrect assumption that the punishments imposed by the Act could only be imposed by a Ch III court ([25]). There was no legislative intrusion upon judicial power which, in the Australian constitutional context, was an essential feature of a bill of pains and penalties. The majority also held that the impugned provisions did not have the prohibited features of a bill of pains and penalties for two additional reasons:

Punishments imposed by the Interim Measures Act (No 2) were not punishments of a kind that could be imposed only in the exercise of the judicial power of the Commonwealth.

- First, the majority held that 'it is inapposite to describe the impugned provisions as having imposed a punishment on those with whom the AMC had dealt' ([26]). This was because the review process provided for in the Interim Measures Act (No 2) meant that the punishment to be imposed was not finally fixed by the Act – the final decision lay within the chain of command ([27]–[28], [40]) – and because, at least partly as a result of the provisions declaring the rights and liabilities of *all* persons, including persons other than those the subject of punishment orders ([32]), the challenged provisions would be better characterised as 'in the nature of an act of indemnity intended to preclude liability for past acts' ([30]; see also [14]).
- Secondly, the Interim Measures Act (No 2) did not make 'any legislative finding of contravention of a norm of conduct' and therefore did not determine any questions of guilt or make crimes of any acts ([26], [33]).

The impugned provisions in the Interim Measures Act (No 2) did not infringe Ch III by reason that the drafting device by which invalid punishments were

validated operated by reference to a deemed or hypothetical, rather than an actual, imposition of punishment by a service tribunal. This was a drafting device upon which to base the provision for punishment reviews and 'does not deny that what is done by the impugned provisions is for the enforcement of discipline within the defence force' ([40]).

Acquisition of property

The proceedings by the plaintiff in *Haskins* included a claim for damages for false imprisonment arising from his detention under the order made by the AMC. The plaintiff also challenged the Interim Measures Act (No 2) on the ground that it acquired property – his common law action for false imprisonment – without provision of just terms, contrary to s 51(xxxi) of the Constitution. The majority rejected this argument, holding that, in the circumstances, the plaintiff had no cause of action for false imprisonment ([68]) and therefore no property had been acquired. This was because to permit the plaintiff to maintain such a cause of action would be destructive of military discipline ([67]):

> To permit the plaintiff to maintain an action against those who executed that punishment (whether service police or the officer in charge of the Corrective Establishment) would be destructive of discipline. Obedience to lawful command is at the heart of a disciplined and effective defence force. To allow an action for false imprisonment to be brought by one member of the services against another where that other was acting in obedience to orders of superior officers implementing disciplinary decisions that, on their face, were lawful orders would be deeply disruptive of what is a necessary and defining characteristic of the defence force. It would be destructive of discipline because to hold that an action lies would necessarily entail that a subordinate to whom an apparently lawful order was directed must either question and disobey the order, or take the risk of incurring a personal liability in tort.

To permit the plaintiff to maintain such a cause of action would be destructive of military discipline.

Heydon J

In dissent, Heydon J held that the Interim Measures Act (No 2) was invalid because, contrary to Ch III, it imposed a punishment without any trial by a Ch III court ([96]) and the existence of the review process, involving a body that was not a Ch III court, did not cure this defect ([115]–[117]).

Nicholas v Commonwealth

In this case the same majority of 6:1 (Heydon J dissenting) held that the challenge to the validity of the Interim Measures Act (No 2) on the basis that it was a bill of pains and penalties failed for the reasons given in *Haskins*.

AGS (Gavin Loughton and Simon Thornton from the Constitutional Litigation Unit) acted for the Commonwealth with the Commonwealth Solicitor-General, Stephen Gageler SC, and Stephen Free as counsel.

Text of the decisions is available at:
Haskins v Commonwealth:
http://www.austlii.edu.au/au/cases/cth/HCA/2011/28.html

Nicholas v Commonwealth:
http://www.austlii.edu.au/au/cases/cth/HCA/2011/29.html

VALIDITY OF POWER TO MAKE 'SUPPRESSION ORDERS' UPHELD

The High Court unanimously rejected a challenge to the validity of s 42 of the *Serious Sex Offenders Monitoring Act 2005* (Vic) (the Act), which conferred on the Supreme Court and County Court of Victoria power to make a 'suppression order' in proceedings under the Act. A suppression order prevented the publication of the material to which it applied, except as might be permitted in the order.

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The grounds of challenge included implications from Ch III of the Constitution about the institutional integrity of courts and 'open justice', and the freedom of communication about government and political matters impliedly protected by the Constitution. Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ wrote a joint judgment and French CJ wrote separately.

Hogan v Hinch
High Court of Australia, 10 March 2011
[2011] HCA 4; (2011) 85 ALJR 398; (2011) 275 ALR 408

Background

The defendant, Mr Hinch, was charged with 5 counts of contravening suppression orders that had been made by the County Court under s 42 of the Act. The suppression orders 'prohibited publication of any information that might enable the identification of certain persons, convicted of sex offences, who were the subject of post-custodial extended supervision orders under the Act' ([1]).

The legislation

For the stated main purpose of the protection of the community, the Act provided for courts to make orders for the ongoing supervision of certain sexual offenders after their release from prison. Under s 42, a court could make a suppression order in a proceeding under the Act but only 'if satisfied that it is in the public interest to do so'. By s 42(3) it was an offence for a person to 'publish or cause to be published any material in contravention of an order under [s 42]'.

Section 42 was ancillary to proceedings under the Act relating to supervision orders. Its focus was not on the fact of conviction of an offence but on the conduct of the subsequent proceedings under the Act: it was concerned with 'information which might enable those in possession of it to recognise, ascertain or establish that a given person is an offender or a witness or other person who has appeared at the proceeding in question' ([74]; see also [28]–[29], [37]–[38]). The joint judgment characterised the operation of s 42 as follows ([75]):

> The Act provides for a regime under which, after release, an eligible offender may be subjected to an intrusive monitoring regime which requires an identified and fixed place of residence. This is done in aid of the main purpose of the Act spelled out in s 1(1). The orders establishing this regime may be frustrated by such steps as identification of the offender as living in a particular area or publication of photographs showing a distinctive appearance. The power conferred by s 42(1) is designed to protect against frustration of the processes of the court in the proceeding in question.

Power to make suppression orders not inconsistent with Chapter III of the Constitution

Institutional integrity of Supreme and County Courts not 'distorted'

The defendant contended, relying on the principle associated with *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 by which a State Parliament may not enact a law that would substantially impair the institutional integrity of State courts, that the power to make suppression orders was 'incompatible with their character as courts capable of exercising the judicial power of the Commonwealth' ([2](1), [40] (French CJ)). This was said to follow because s 42 empowered a court to 'abrogate the open justice principle' without any 'limitations or safeguards' and to 'make decisions having a bearing on public safety, without providing reasons', and because there was 'no mechanism for appeal or review of a suppression order under s 42' ([40]). Each of these contentions was rejected.

... the power to make a suppression order ... did not turn on a criterion that was insusceptible of strictly judicial application.

— The joint judgment concluded that '(t)he criterion for the exercise of power under s 42 is not such as to impair impermissibly the character of the State courts as independent and impartial tribunals and thus to render them inappropriate repositories of federal jurisdiction' ([80]). Section 42 was not unbounded and the power to make a suppression order only if the court was satisfied that it was in the 'public interest' to do so did not turn on a criterion that was insusceptible of strictly judicial application ([80]). Section 42 did not 'authorise the court to act upon its whim' (French CJ [41]); what is in the 'public interest' derives its content from the purposes of the legislation (French CJ [41] read with [31]–[32]; joint judgment [80]). Also, French CJ emphasised that an order under s 42 'cannot impose a general prohibition on the publication of material in the public domain unless that publication might have the prescribed effect of enabling a given person to be "identified" in the limited sense already explained' ([41] read with [34]–[38]; see also joint judgment [74]).

— The Act did not displace the obligation for a court ordinarily to give reasons for an order ([42]; [82]).

— Finally, suppression orders are amenable to appeal and review ([43]; [83]).

'Open court' (or 'open justice') principle not absolute

... there was no implication from Ch III that in absolute terms required that courts carry out all their activities in public.

The defendant argued that s 42 was contrary to an implied requirement from Ch III of the Constitution that all courts must be open to the public and carry out their activities in public. It is '[a]n essential characteristic of courts ... that they sit in public' (French CJ [20], [46]). However, the attributes of judicial power are means directed to the end of doing justice (French CJ [20]; joint judgment [87]) and the High Court unanimously decided that there was no implication from Ch III that in absolute terms required that courts carry out all their activities in public ([20]–[27]; [89]–[91]). For French CJ, it was significant that, at common law, courts had long been able to limit the application of the open justice principle and s 42, though more 'far reaching', was analogous to those common law powers that courts had exercised historically. It did not deprive the courts of their essential characteristics as such ([46], also [26]; compare joint judgment at [88], the plurality finding it 'unnecessary to accept that there is an inherent jurisdiction or implied power in some circumstances to restrict the publication of proceedings conducted in open court'). The plurality ([90]–[91]) accepted the following statement of principle by Gibbs J in *Russell v Russell* (1976) 134 CLR 495, 520:

> Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament. The need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed

> court. If the [Family Law Act] had empowered the Supreme Courts when exercising matrimonial jurisdiction to sit in closed court in appropriate cases I should not have thought that the provision went beyond the power of the Parliament. In requiring them to sit in closed court in all cases – even proceedings for contempt – the Parliament has attempted to obliterate one of their most important attributes. This it cannot do.

This statement of principle indicated that 'a federal law to the effect of s 42 would be valid and would not deny an essential characteristic of a court exercising federal jurisdiction' ([91]). It followed that s 42 was valid because the limits that Ch III imposes on the legislative power of the federal Parliament are stricter than those it imposes on the legislative powers of State Parliaments.

The prohibition on publication imposed by s 42(3) did not 'display a "direct" rather than "incidental" burden upon' the freedom of communication.

No infringement of the implied freedom of political communication

The implied constitutional freedom of communication about government and political matters operates as a restriction on legislative power. The joint judgment noted that 'communications concerning the exercise of judicial power stand apart' ([92], [93]). However, the defendant argued ([94]):

> [T]he communications by him which found the charges laid ... under s 42(3) concern acts or omissions of the legislative and executive branches of the government of Victoria. He seeks the repeal of the Act, in particular of s 42 itself, and contends that his communications do not lose protection of the freedom recognised in *Lange* because they also deal with the administration of justice by the courts of a State.

Consideration of whether section 42 infringes the implied freedom

Section 42 was said to infringe the implied freedom by inhibiting 'the ability of the defendant and others to criticise the Act itself and to seek legislative changes by public assembly, protest and dissemination of "factual data concerning court proceedings as a means of seeking such changes"' (joint judgment [63]; see also French CJ [2](3)).

In terms of the established 2-stage analysis in applying the implied freedom, the Court accepted that s 42 burdened political communication (French CJ [50]; joint judgment [95]). However, the provision was valid, as it was reasonably appropriate and adapted to serve a legitimate end in a manner that was compatible with the constitutionally prescribed system of representative and responsible government.

French CJ considered that, '(h)aving regard to the limits on the application of s 42, properly construed, and its relationship to long-established common law and implied powers', s 42 was a 'reasonable means' of achieving 'the protection of the community and the rehabilitation of serious sex offenders who are at risk of re-offending after they have completed their sentences' ([50]). The joint judgment emphasised that the prohibition on publication imposed by s 42(3) did not 'display a "direct" rather than "incidental" burden upon' the freedom of communication ([95]). A law that has a direct effect on the freedom of communication is more difficult to justify ([95]–[96]). Section 42, properly construed, operated 'in aid of the scheme embodied in the Act' ([98]).

AGS (Ros Kenway, Danielle Forrester and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, who intervened with the Commonwealth Solicitor-General, Stephen Gageler SC, and Albert Dinelli as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2011/4

NSW CRIMINAL ORGANISATIONS CONTROL LAW INVALID

In a 6:1 decision, the High Court held that the *Crimes (Criminal Organisations Control) Act 2009* (NSW) (the NSW Act) was invalid.

The long title to the NSW Act stated its purpose as being 'to provide for the making of declarations and orders for the purpose of disrupting and restricting the activities of criminal organisations and their members'. The Act was invalid because an 'eligible judge' (a judge of the Supreme Court of NSW acting in their personal capacity) was not required to provide reasons for the making of a declaration as to a particular organisation.

In conferring this function upon an eligible judge, the NSW Act was incompatible with the maintenance of the institutional integrity of the Supreme Court because, without reasons being required, the making of a declaration (which was a critical step in the making of a control order by the Supreme Court) could not be assessed according to the terms in which it was expressed. This could affect the appearance of independence and impartiality of the judge and the Supreme Court.

Wainohu v New South Wales
High Court of Australia, 23 June 2011
[2011] HCA 24; (2011) 85 ALJR 746; (2011) 278 ALR 1

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Background

Under Pt 2 of the NSW Act, on the application of the NSW Commissioner of Police (the Commissioner) an 'eligible judge' could, after a hearing, 'declare' an organisation on the basis of its involvement in serious criminal activity. An 'eligible judge' was a judge of the NSW Supreme Court who had consented to being, and who was declared by the NSW Attorney-General to be, an 'eligible judge' (s 5). The power of an eligible judge to declare an organisation was conferred on the judge *persona designata* (Gummow, Hayne, Crennan and Bell JJ [77], Heydon J [168]; French CJ and Kiefel J accepted that the power to make a declaration was administrative and not judicial ([1], [5]) but did not need to decide whether the function here was conferred on a judge *persona designata*, as this was not a necessary condition for validity at the State level ([49], [61])). The term *persona designata* in this context describes a power conferred upon a judge as an individual and not in the exercise by the judge of the jurisdiction of the Supreme Court itself ([34]).

An eligible judge could declare an organisation if satisfied that (s 9(1)):

— members of the organisation associated for the purpose of organising, planning, facilitating, supporting or engaging in 'serious criminal activity'

— the organisation represented a risk to public safety and order in NSW.

Under s 13(2) of the NSW Act an eligible judge was 'not required to provide any grounds or reasons' for making a declaration under Pt 2 (s 13(2)).

Under Pt 3 of the NSW Act, if an organisation was 'declared', the Commissioner could apply to the Supreme Court for control orders in respect of members of that organisation. The jurisdiction to make a control order was conferred upon the Supreme Court itself. The NSW Act provided that the Supreme Court 'is to' make an interim control order in relation to a person if it is satisfied that the person is a member of a declared organisation and 'sufficient grounds' exist for making the order (ss 14(3) and 19(1)). At the (final) control order hearing, the Supreme Court 'may' make a control order if satisfied of the same things as for an interim control order (s 19(1)). Gummow, Hayne, Crennan and Bell JJ noted

that the control order provisions, with a requirement for 'sufficient grounds', differed from the legislation held invalid in *South Australia v Totani* (2010) 242 CLR 1 (see Litigation Notes 20, p 18), as 'there is no obligation imposed upon the Supreme Court to make an order upon the basis of the anterior declaration made by an eligible judge' ([111]).

The NSW Act imposed restrictions on persons who were subject to control orders, including an offence of associating with each other (s 26). Statutory authorisations to engage in certain activities and vocations (such as possessing a firearm or operating a tow truck) were suspended (interim control order) or revoked (final control order) (s 27) ([17]).

The Commissioner applied under s 6 of the NSW Act to an eligible judge for a declaration that the Hells Angels Motorcycle Club in NSW be declared a 'declared organisation'. Prior to any declaration being made, the plaintiff (a member of the club) brought these proceedings in the original jurisdiction of the High Court challenging the validity of the NSW Act on the basis that it contravened implications arising from Ch III of the Constitution, as first enunciated in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The *Kable* principle holds that a State Parliament cannot confer upon a State court 'a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role under Ch III of the Constitution, as a repository of federal jurisdiction and as a part of the integrated Australian court system' ([44]).

Majority judgments

Two majority judgments were delivered, by French CJ and Kiefel J and by Gummow, Hayne, Crennan and Bell JJ. Heydon J dissented. For the majority judges, the invalidity of the Act turned on the application of the *Kable* principle in the context of there being no duty on an eligible judge to give reasons for making a declaration under Pt 2.

... the invalidity of the Act turned on the application of the Kable *principle in the context of there being no duty on an eligible judge to give reasons for making a declaration under Pt 2.*

The majority judges all rejected an argument by Victoria that State Parliaments were not limited at all in the functions that could be conferred on a judge *persona designata*. Performance of a function conferred on a judge, but not in that person's capacity as a State judge exercising the jurisdiction of the court of which the person was a member, could nevertheless substantially impair the institutional integrity of the court (French CJ and Kiefel J [47], [51]; Gummow, Hayne, Crennan and Bell JJ [105]; cf Heydon J [172]).

No duty to give reasons

All members of the Court concluded that the NSW Act did not impose a duty upon eligible judges to provide reasons for the making of a declaration or decision, except in limited circumstances in connection with an investigation by the Ombudsman (ss 13(2) and 39; [65], [67]–[69], [99], [145], [154]). This did not preclude eligible judges from giving reasons but, as Gummow, Hayne, Crennan and Bell JJ expressed it, the 'intractable' language of s 13(2) of the NSW Act could not accommodate a reading which coupled the power to give reasons with a duty to give reasons other than in the limited circumstances arising under s 39 ([101]–[102]).

Gummow, Hayne, Crennan and Bell JJ

Gummow, Hayne, Crennan and Bell JJ accepted the Commonwealth's submission that, for both federal and State courts, a constitutional principle having the same foundation prevents legislative or executive interference with their institutional integrity ([105]; compare French CJ and Kiefel J [42]–[43], [45] and cf Heydon J [172]):

> The principle applies throughout the Australian integrated court system because it has been appreciated since federation that the Constitution does not permit of different grades or qualities of justice.

Kable is an aspect of this principle and, notwithstanding that no strict doctrine of separation of powers applies at the State level, it prevents a State Parliament from conferring functions on a State court that are incompatible with its institutional integrity. At the federal level the principle has been applied to prevent the Commonwealth Parliament from conferring an administrative function on a federal judge *persona designata* where this would be incompatible with the performance of their judicial functions (*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1). Their Honours accepted in this case that incompatibility might also be manifested by State or Territory legislation conferring a function on a judge *persona designata* ([105]; see also French CJ and Kiefel J [47]).

For Gummow, Hayne, Crennan and Bell JJ, it appears that the context in which the validity of the NSW Act was to be assessed included that judges were selected as the persons in whom the power to make declarations under Pt 2 was vested in order to utilise the confidence reposed in them as holders of judicial office ([79], [94], [109]). They concluded ([109]):

> The vice in s 13(2) as it presently stands is that s 9 and s 12 confer new functions on Supreme Court Judges in their capacity as individuals with the result that an outcome of what may have been a contested application cannot be assessed according to the terms in which it is expressed. This is unlike the outcome under Pt 3 of the Act. The opaque nature of these outcomes under Pt 2 also makes more difficult any collateral attack on the decision, and any application for judicial review for jurisdictional error. The effect of Pt 2 is to utilise confidence in impartial, reasoned and public decision-making of eligible Judges in the daily performance of their offices as members of the Supreme Court to support inscrutable decision-making under s 9 and s 12.

Part 2 was therefore invalid as the absence of a requirement to give reasons gave rise to the possibility ([103]) of arbitrary decision-making ([92]) that could not be assessed according to its own terms ([94]), and an appearance of an unacceptable relationship between the judiciary and other branches of government ([94]), which was incompatible with the institutional integrity of the Supreme Court and would diminish the reputation of the courts for acting in accordance with judicial process ([94]).

It appears that Gummow, Hayne, Crennan and Bell JJ accepted that, had the NSW Act 'required as well as permitted the provision of grounds or reasons' for the making of a declaration by a judge *persona designata*, it would not have resulted in incompatibility with the institutional integrity of the Supreme Court ([107]–[108]; see also French CJ and Kiefel J [70]). The NSW Act could also have validly conferred the powers under Pt 2 (excluding s 13(2)) on the Supreme Court itself as an exercise of judicial power ([92]).

French CJ and Kiefel J

French CJ and Kiefel J also applied the *Kable* principle, emphasising that, in the light of the decisions in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 and *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531, the term 'institutional integrity' refers to the 'defining or essential characteristics of a court', which include 'the reality and appearance of the court's independence and its impartiality'. Their Honours concluded that 'a defining characteristic of a court [is] that it generally gives reasons for its decisions' ([7], [44], [54]–[58]). Here, the incompatibility or impairment was

Part 2 was therefore invalid as the absence of a requirement to give reasons gave rise to the possibility of arbitrary decision-making ... and an appearance of an unacceptable relationship between the judiciary and other branches of government.

accentuated by the proximity of the function of the eligible judge and the function of the Supreme Court under the NSW Act (French CJ and Kiefel J [7], [66]–[69]; see also Gummow, Hayne, Crennan and Bell JJ [90], [109]).

French CJ and Kiefel J reasoned therefore ([68]):

> [T]he Act creates a connection between the non-judicial function conferred upon an eligible judge by Pt 2 of the Act and the exercise of jurisdiction by the Supreme Court under Pt 3 of the Act. This has the consequence that a judge of the Court performs a function integral to the exercise of jurisdiction by the Court, by making the declaration, but lacks the duty to provide reasons for that decision. The appearance of a judge making a declaration is thereby created whilst the giving of reasons, a hallmark of that office, is denied. These features cannot but affect perceptions of the role of a judge of the Court, to the detriment of the Court.

The majority judgments concluded that ... there was no prospect of severance and the whole of the NSW Act was invalid.

The majority judgments concluded that, since Pt 3 of the NSW Act (concerning control orders) depended on the validity of Pt 2 (concerning declarations of organisations), the presence of s 13(2) rendered Pt 2 invalid, and Pts 1 and 4 were machinery provisions, there was no prospect of severance and the whole of the NSW Act was invalid (French CJ and Kiefel J [70]–[71], Gummow, Hayne, Crennan and Bell JJ [90], [102], [115]).

The majority judgments also held that the privative clause in the NSW Act that purported to exclude review by the Supreme Court of a declaration made by an eligible judge could not operate to exclude review for jurisdictional error in light of the decision in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 ([15], [89]; Heydon J did not express a view).

Heydon J dissenting

Heydon J would have held the NSW Act to be valid including because:

- an eligible judge was likely to provide reasons wherever the interests of justice required it, even though there was no duty to do so ([154]; cf French CJ and Kiefel J [69], Gummow, Hayne, Crennan and Bell JJ [103])
- the declaration by an eligible judge as a designated person was an administrative decision and s 13(2) did no more than reflect the common law position that there is no general rule requiring that reasons be given for administrative decisions
- the declaration by an eligible judge was not a step in the decision-making process of the executive government ([160]–[161])
- the failure to give reasons in the making of a declaration under Pt 2 of the NSW Act, which did not itself affect rights, was not so significant as to impair the independence and impartiality of the eligible judge where the Supreme Court undertook an ordinary curial procedure before making a control order under Pt 3 of the NSW Act ([164]–[165]).

AGS (David Lewis and Angel Aleksov from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Commonwealth Solicitor-General, Stephen Gageler SC, and Caroline Spruce as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2011/24.html

PROVISIONS CLOSING THE FEDERAL ELECTORAL ROLL EARLY INVALID

By a 4:3 majority the High Court held invalid amendments to the *Commonwealth Electoral Act 1918* (the Electoral Act) that reduced the time available to enrol or transfer enrolment to a new electoral Division for a federal election.

The majority found the amendments to be invalid because they disentitled persons, who would otherwise be eligible, from voting in a federal election and did not do so for a 'substantial reason' – that is, in a way that was proportionate or reasonably appropriate and adapted to fulfilling an end compatible with the constitutional requirement that the Parliament be 'directly chosen by the people'.

Rowe v Electoral Commissioner
High Court of Australia, 6 August 2010 (orders), 15 December 2010 (reasons)
[2010] HCA 46; (2010) 85 ALJR 213; (2010) 273 ALR 1

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Background

Section 7 of the Constitution provides that the Senate shall be composed of senators 'directly chosen by the people of the State'. Section 24 of the Constitution provides that the House of Representatives shall be composed of members 'directly chosen by the people of the Commonwealth'.

Under ss 8, 10, 30 and 31 of the Constitution, read with s 51(xxxvi), Parliament can make laws relating to elections. Under the Electoral Act, only an 'elector' may vote in a federal election (s 93(2)). An 'elector' is 'any person whose name appears on a Roll as an elector' (s 4(1)). Enrolment is compulsory: every person who is entitled to be enrolled for any Subdivision and whose name is not on the Roll is required to submit a claim for enrolment to the Electoral Commissioner, subject to limited exceptions (s 101). A person whose name is not on the Roll after 21 days from the date upon which the person became entitled to be enrolled is guilty of an offence (s 101(4)).

For the 8 federal elections between 1983 and 2006, under the Electoral Act a person who was qualified as an elector had 7 days after the issue of the writs for an election to lodge a claim for enrolment or transfer of enrolment. Prior to 1983, the Rolls had closed on the date of issue of the writs, although since the 1930s an executive practice (departed from in 1983) had developed of announcing the election some days before the issue of the writs.

In 2006 the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* amended the Electoral Act (the 'impugned amendments'). The impugned amendments changed the closing time for new enrolments from 7 days after the issue of the writs to 8 pm on the day of the issue of the writs. The closing time for transfer of enrolments was changed from 7 to 3 days after the issue of the writs ([52]–[53]). A practical consequence of the amendments was that a significant number of persons (for the 2010 election, estimated at 100,000) would not be entitled to vote at an election, as their claims for enrolment or transfer could now not be considered until after the election ([78]).

Outline of the challenge

In summary, the plaintiffs argued that:

— An election conducted according to the amended Electoral Act would not yield Houses of Parliament 'directly chosen by the people' as required by ss 7 and 24 of the Constitution and so the impugned amendments were invalid.

— The validity of the impugned amendments should be determined according to the 2-stage test adopted by a majority of the High Court in *Roach v Electoral Commissioner* (2007) 233 CLR 162 (*Roach*) – that is, does the law impose a disqualification from what otherwise is universal adult suffrage and, if so, does it do so for a substantial reason? A 'substantial reason' (that is, a reason of 'real significance') is one that is reasonably appropriate and adapted to serve an end that is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government.

— The impugned amendments 'disentitled' or 'disqualified' the plaintiffs from voting and therefore detracted from the existence of a universal adult franchise.

— The amendments did not impose this disqualification for a 'substantial reason'.

... the impugned amendments did not meet the requirement of ss 7 and 24 of the Constitution that the federal Parliament be 'directly chosen by the people'.

Judgments

Three majority judgments were delivered, by French CJ, by Gummow and Bell JJ and by Crennan J. Dissenting judgments were delivered by each of Hayne J, Heydon J and Kiefel J.

Summary

The majority justices held that the impugned amendments did not meet the requirement of ss 7 and 24 of the Constitution that the federal Parliament be 'directly chosen by the people'. This requirement is now a constitutional imperative of universal adult-citizen franchise that can only be departed from for a 'substantial reason'. Here, the practical effect of the impugned amendments, although directed to entitlements to enrol rather than qualifications to vote, was to prevent a significant number of persons from voting at an election and there was no sufficient justification for that restriction. In particular, the provisions were not justified by the legitimate purpose of the need for the protection of the integrity (or correctness) of the electoral Rolls, as they were not shown to be necessary or appropriate to that end.

French CJ held that 'the heavy price imposed by the [impugned amendments] in terms of [their] immediate practical impact upon the fulfilment of the constitutional mandate was disproportionate to the benefits of a smoother and more efficient electoral system to which the amendments were directed', in circumstances where there was no existing difficulty of electoral fraud ([75], [78]).

Gummow and Bell JJ held that the legislative purpose of the impugned amendments in preventing fraud 'before it is able to occur', where there had been no previous systemic fraud under the 7-day period, did not supply a 'substantial reason' for the practical operation of the amendments in disqualifying large numbers of electors ([167]). The practical operation of the provisions went beyond any advantage in preserving the integrity of the electoral process ([167]).

Crennan J held that the impugned amendments had not been shown to be 'necessary or appropriate' for the protection of the integrity of the electoral Rolls, and the prevention of fraud, where the risk of fraud had not been substantiated, did not constitute a 'substantial reason' for disentitling a significant number of electors from exercising their right to vote ([384]).

The result of the majority's reasoning is that any amendment that impedes the existing statutory entitlement to vote will need to be shown to be for a 'substantial reason' in the sense explained or it will be invalid.

The minority justices did not accept that the impugned amendments, in dealing with procedures for enrolment to vote, amounted to a disqualification from voting ([187], [225], [283]–[284], [411]). They considered that the argument for invalidity impermissibly depended on a substantial number of people disobeying the statutory obligation to enrol in the correct Division by a particular time ([252], [314], [488]). According to Kiefel J ([488]):

> It would be a curious application of a test of proportionality if a law, otherwise valid, was invalid because Parliament should recognise that people will not fulfil their statutory obligations.

For Hayne J at least, the second stage of the *Roach* test was therefore not reached ([225]; see also Heydon J [283]). In any event, Hayne J and Kiefel J each held that the plaintiffs had not demonstrated that the impugned amendments were not appropriate and adapted to serve a legitimate end, which included the purpose of encouraging compliance with the obligation to enrol and thereby facilitating exercise of the franchise ([262], [264], [485]). Hayne J understood the plaintiffs' claim to rest on the proposition that the constitutionally prescribed system of representative government requires Parliament to maximise participation by those who are eligible to be enrolled ([221]). He rejected that proposition and, with the other minority justices, would have dismissed the case on the basis that an election conducted under the impugned amendments would yield a Parliament 'directly chosen by the people' ([221], [224], [264]).

Application of the Roach *test*

The majority justices accepted, as had the parties, that the test of validity was the *Roach* test or a closely analogous test ([23], [161], [384]). This test applied as much to the impugned amendments as a law of a procedural or machinery kind that affected the exercise of the franchise as to a law of the kind in issue in *Roach* that effected an exception to the franchise in disqualifying certain prisoners from voting (French CJ [24]). French CJ and Crennan J accepted that the impugned amendments served legitimate ends ([74], [381]). However, none of the majority justices accepted that the justifications advanced for the amendments (to prevent fraud and encourage timely enrolment) were sufficient ([78], [167], [384]).

The limits of Parliament's discretion

The majority justices acknowledged that Parliament has a considerable discretion as to the means it chooses to regulate elections ([29], [125], [325]). The Court should not hold a law invalid 'on the basis of some finely calibrated weighing of detriment and benefit' or because there might be a better way of achieving the same purpose ([29]). However, for French CJ it was significant that the impugned amendments altered 'a long-standing mechanism, providing last-minute opportunities for enrolment before an election' ([22]). It was this detriment to participation in the election caused by the change effected by the amendments that was to be justified under the *Roach* test, rather than deciding whether 'an election conducted under its provisions nevertheless results in members of Parliament being "directly chosen by the people" ' ([25]–[26]). This approach suggests that the content of electoral laws from time to time may acquire a constitutional significance that makes it more difficult to justify a change effecting a detriment to entitlements to vote than it would be to justify the electoral system had the relevant benefit not existed in the first place (cf Heydon J [310]–[311]).

The majority justices acknowledged that Parliament has a considerable discretion as to the means it chooses to regulate elections.

Gummow and Bell JJ noted that the method of conducting a ballot is not an end in itself but, rather, is the means to the end described in ss 7 and 24; that is, the means of attaining a Parliament directly chosen by the people ([126]). Similarly, Crennan J said that Parliament may make political choices about qualification

for the franchise and the manner in which elections are conducted 'so long as any electoral system adopted remains within the broad range of alternatives by which provision may be made for Houses of Parliament composed of members "directly chosen by the people" '([325]).

A constitutional right to vote

All of the majority judgments quoted with apparent approval Gleeson CJ's conclusion in *Roach* that ss 7 and 24 of the Constitution have become a constitutional protection of the right to vote ([20], [123], [328]) and hence of universal adult-citizen suffrage.

French CJ accepted, following McTiernan and Jacobs JJ in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 and Gleeson CJ in *Roach*, that the content of the constitutional concept of 'chosen by the people' has evolved since 1901 and is now informed by the universal adult-citizen franchise that is prescribed by the Electoral Act ([18], [20]). According to French CJ, that evolution is irreversible and the content of the constitutional concept, informed by 'durable legislative development' of the franchise, 'cannot now be diminished', although it could be adjusted from time to time ([18]).

... sections 7 and 24 of the Constitution have become a constitutional protection of the right to vote.

Similarly, Crennan J accepted that ([328]):

> [H]istorical circumstances, and the stage reached in the evolution of representative government, as at the date of federation assist in exposing the bedrock and show that the relevant words of ss 7 and 24 have always constrained Parliament, in a manner congruent with Gleeson CJ's conclusion [in *Roach*] that the words of ss 7 and 24 have come to be a constitutional protection of the right to vote.

Her Honour went on to note that '[t]he Constitution, and specifically ss 7 and 24, would constrain any reversion to arbitrary exclusions from the franchise, based on gender and race, of the kind which occurred in one or more colonies at the time of federation' ([356]).

The plaintiffs' failure to comply with their statutory obligations

None of the majority justices considered the fact that the plaintiffs had failed to comply with their legal obligation to apply for enrolment or transfer of enrolment to be determinative. They emphasised that, while it is an offence not to seek enrolment within the required time, a person who might have committed that offence may not be prosecuted once the person applies for enrolment ([51], [131], [370]). French CJ said the provisions were designed 'not to punish, but to encourage maximum participation by persons qualified to vote' ([51]). The other members of the majority made similar comments ([130]–[131], [370]).

None of the majority justices considered the fact that the plaintiffs had failed to comply with their legal obligation to apply for enrolment or transfer of enrolment to be determinative.

In contrast, the dissenting justices emphasised the significance of the plaintiffs' failure to comply with their obligations under the Electoral Act. This meant that the plaintiffs' argument that they were legislatively 'disqualified' or 'disenfranchised' failed, as their inability to cast a vote resulted from their own inaction in meeting 'simple obligations and procedures' ([225], [284], [314], [488]).

The plaintiffs' acceptance that the pre-amendment scheme was valid

The plaintiffs did not challenge the validity of the previous 7-day close of Rolls period. Gummow and Bell JJ regarded the validity of the previous scheme as separate from the plaintiffs' claim, so that the plaintiffs' failure to challenge the previous scheme was not a contradiction in their case ([140]). Similarly, French CJ considered the question of the validity of the previous provisions as beside the point ([73](5)).

The plaintiffs' failure to challenge the validity of the previous 7-day close of Rolls period was given more weight in the dissenting judgments, including on the basis that the few days difference was not constitutionally significant ([191], [277]–[279], [309], [489]).

AGS (Niamh Lenagh-Maguire, David Lewis and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth (the second defendant) with the Commonwealth Solicitor-General, Stephen Gageler SC, Geoffrey Kennett and Damian O'Leary as counsel. AGS (Jim Heard of AGS Sydney) also acted for the Electoral Commissioner with Geoffrey Johnson as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2011/12.html

JUDICIAL REVIEW OF OFFSHORE PROCESSING REGIME

In a joint judgment the High Court unanimously held that recommendations made to the Minister for Immigration and Citizenship in the course of the offshore processing of refugee claims were subject to judicial review. The Court construed the recommendations as having a statutory foundation and as a result did not need to decide whether an exercise of non-statutory executive power is subject to administrative law constraints or the extent to which decisions made by independent contractors to whom Commonwealth power has been 'contracted out' are reviewable.

Plaintiff M61/2010E v Commonwealth
Plaintiff M69 of 2010 v Commonwealth
High Court of Australia, 11 November 2010
[2010] HCA 41; (2010) 85 ALJR 133; (2010) 272 ALR 14

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Background

The plaintiffs, 2 Sri Lankan citizens, arrived at Christmas Island and were detained pursuant to s 189(3) of the *Migration Act 1958* (Cth) as unlawful non-citizens. They claimed refugee status – that is, to be persons to whom 'Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol' ([2]). Subject to what follows below, the Migration Act provides that an unlawful non-citizen who enters Australian territory at an 'excised offshore place' cannot make a valid application for a visa (s 46A(1)). The Territory of Christmas Island is an 'excised offshore place', with the result that the plaintiffs were unable to make a valid application for a visa, including for a 'protection visa'.

However, this prohibition was subject to the power of the Minister for Immigration and Citizenship to 'lift the bar' on the making of a valid application for a visa (s 46A(2)). That power could only be exercised by the Minister personally (s 46A(3)), and the Minister was not under a duty to consider whether to exercise the power (s 46A(7)). The Minister also had a power to grant a visa to a person in detention under s 189, if the Minister thought it in the public interest to do so, without there having been a valid application for that visa (s 195A). Again, that power could only be exercised by the Minister personally and the Minister was under no duty to consider whether to exercise it (s 195A(4), (5)), even if requested to do so.

Between 2001 and 2008 the Commonwealth removed offshore entry persons from excised offshore places to third countries pursuant to the 'Pacific Strategy' ([29]–[32]). Removal of such persons ceased in 2008 and the Government announced that 'asylum claims of future unauthorised boat arrivals would be processed on Christmas Island' ([32], [37]). This processing was conducted in the first instance by officers of the Department of Immigration and Citizenship, who conducted what was known as a Refugee Status Assessment (RSA) of each claimant using a procedural manual developed by the Department ([38]–[44]). An adverse determination of refugee status was subject to review (Independent Merits Review (IMR)), pursuant to a further procedural manual developed by the Department, by a person supplied by a company the Commonwealth had contracted with for that purpose ([3], [44], [50]). If the officer conducting the RSA determined that Australia owed protection obligations to a claimant or the reviewer conducting the IMR recommended that Australia owed such obligations, the Department would prepare a submission for the Minister 'seeking his/her agreement to lift the bar under s 46A of the Act' or to exercise the power under s 195A ([44], [49]). However, if the conclusion of the RSA or IMR processes was that Australia did not owe protection obligations, no submission would go to the Minister.

The plaintiffs were found at both stages of the process not to be owed protection obligations. They each commenced proceedings in the High Court against the Commonwealth, the Minister and a departmental officer, and the IMR reviewer, seeking judicial review of the relevant RSA determination and IMR recommendation on the grounds of denial of procedural fairness and error of law ([5]). Plaintiff M69 also challenged the validity of the provision of the Act which precluded him from making a valid application for a protection visa (s 46A) ([6]). The Commonwealth parties argued that the RSA and IMR determinations were made in exercise of a non-statutory executive power to inquire and that that power was not limited by a requirement to afford procedural fairness, nor did it matter whether those undertaking the inquiries had misunderstood the law as to when Australia owed protection obligations ([15]).

The effect of s 46A(7) was not that there were no limits on the Minister's power, only that the Minister could not be compelled to consider whether to exercise the power.

The High Court's decision

Section 46A valid

The basis for the argument that s 46A was invalid was the stipulation in s 46A(7) that the Minister is not under a duty to consider whether to exercise the power to 'lift the bar' (s 46A(7)). Plaintiff M69 argued that:

(a) this meant there were no enforceable limits on the Minister's power to lift the bar

(b) there cannot be a valid grant of power without enforceable limits ([54]–[55]).

The High Court did not need to deal with the argument at this broad level, because the effect of s 46A(7) was not that there were no limits on the Minister's power, only that the Minister could not be compelled to consider whether to exercise the power ([55], [59]). If the power was exercised, 's 75(v) of the Constitution could be engaged to enforce those limits' ([59]). The Court held that a grant of power on these terms was not inconsistent with either s 75(v) of the Constitution or the rule of law ([57], [58]), and rejected the challenge to validity ([60]).

Power had a statutory foundation: administrative law obligations apply

The Court rejected the argument by the Commonwealth parties that RSA determinations and IMR recommendations were made in exercise of non-statutory executive power; as a result, the Court did not need to decide whether the exercise of non-statutory executive power is or may be limited by a requirement to afford procedural fairness ([73]) or the consequences for the exercise of such power of a person misunderstanding the law. The Court instead held that the inquiries undertaken in conducting an RSA and any subsequent IMR had a statutory foundation. This was because the Court concluded that the Minister, by establishing the RSA and IMR procedures, had decided to consider whether to exercise the power conferred by s 46A or s 195A in every case in which an offshore entry person claimed to be owed protection obligations by Australia ([66], [70]). Because of that statutory foundation, the principles governing the exercise of a power conferred by statute that affects a person's rights, interests or privileges were applicable ([73]–[75]), whether as a result of the common law or by implication from the statute ([74]). Relevantly, the RSA and IMR processes had to be procedurally fair and address the relevant legal question ([77]).

The Court ... held that the inquiries undertaken in conducting an RSA and any subsequent IMR had a statutory foundation.

Judicial review and contracting out

Finally, the Court accepted, for the purposes of this litigation, that the persons engaged by the contractor to conduct IMRs were not 'officers of the Commonwealth' within s 75(v) of the Constitution. However, that did not affect the Court's jurisdiction in the matter, including to grant relief against those persons, as this was found in s 75(iii) (matters in which the Commonwealth, or a person being sued on behalf of the Commonwealth, is a party), s 75(v) (as matters in which mandamus and injunction were sought against the Minister and departmental officers) 'and even, perhaps, s 75(i) (as matters arising under any treaty ...)' ([51]). It followed that ([51]):

> [I]t is appropriate to leave, for another day, the question whether a party identified as 'an independent contractor' nevertheless may fall within the expression 'an officer of the Commonwealth' in s 75(v) in circumstances where some aspect of the exercise of statutory or executive authority of the Commonwealth has been 'contracted out'.

Because of that statutory foundation, the principles governing the exercise of a power conferred by statute that affects a person's rights, interests or privileges were applicable.

Reviewable error and relief

In the circumstances of each plaintiff, the Court found there to have been reviewable error by the IMR reviewer. Because the Minister was under no duty to consider whether to exercise the power under s 46A or s 195A, mandamus would not issue to the Minister ([99]) and similarly there was no utility in granting certiorari to quash the reviewers' recommendations ([100]). However, the Court held that declaratory relief was available and should be granted ([103]–[105]).

AGS (Andras Markus from AGS Sydney and Maria Ngo from AGS Melbourne, assisted by Andrew Buckland and Danielle Forrester from the Constitutional Litigation Unit) acted for the defendants, with the Commonwealth Solicitor-General, Stephen Gageler SC, Stephen Donaghue and Damian O'Leary as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2010/41.html

DECLARATORY RELIEF AND 'MATTER' UNDER THE *NATIVE TITLE ACT 1993* (CTH)

In a unanimous decision, the High Court held that an application to the Federal Court for a declaration that involved considering the validity of a mining interest under State law could give rise to a 'matter' in federal jurisdiction as it would have 'real practical importance' for parties engaged in negotiating an Indigenous Land Use Agreement (ILUA) under the *Native Title Act 1993* (Cth) (NTA) and was 'integrally connected' with that Act. Here, the Federal Court had incorrectly denied that it had jurisdiction.

Edwards v Santos
High Court of Australia, 30 March 2011
[2011] HCA 8; (2011) 242 CLR 421

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Background

The plaintiffs, on behalf of the Wongkumara People, were the registered native title claimant under the NTA in respect of certain land in south-west Queensland and north-west New South Wales (claimed land). Santos Ltd and Delhi Petroleum Pty Ltd (petroleum defendants) were the holders of Authority to Prospect 259P (ATP) first granted in 1979 by Queensland under the *Petroleum Act 1923* (Qld) over land within the boundaries of the claimed land.

Under s 40 of the Petroleum Act the holder of an ATP could apply for a petroleum lease, which was to be granted by the relevant Queensland Minister upon the satisfaction of certain conditions. The petroleum defendants did not raise any doubt about their willingness to apply for the grant of a petroleum lease or their capacity to satisfy the conditions ([22]).

In 2001, representatives of the Wongkumara People (including 4 of the plaintiffs) and the petroleum defendants entered into an ILUA under the NTA. The purpose of the ILUA, which was to expire in 2006, was to give security to the petroleum defendants in their use of the land under claim and to give immediate advantages to the native title claimants while the native title claim was being processed ([24]). Under the ILUA the parties agreed to 'negotiate the terms of a new ILUA'. The plaintiffs alleged that from late 2005 the parties engaged in negotiations for a new ILUA in relation to proposed petroleum operations over the land.

As part of these negotiations, to secure their agreement to a new ILUA the Wongkumara sought from the petroleum defendants the gift of 2 pastoral leases valued at $20 million. The petroleum defendants asserted that, as the ATP pre-dated the NTA and gave rise to the 'automatic' grant of a petroleum lease, the grant of a lease would be a 'pre-existing rights-based act', which would be valid under the NTA without the need for the agreement of the Wongkumara under the 'right to negotiate' provisions. For this and other reasons, the petroleum defendants rejected the Wongkumara' s proposal for a gift of the pastoral leases.

Federal Court decisions

The plaintiffs applied to the Federal Court for a declaration that the grant of a petroleum lease would be an invalid 'future act' under the NTA and an order restraining the State of Queensland from granting the lease. They disputed the position that the grant of a petroleum lease on the strength of the ATP would be a 'pre-existing rights-based act', including on the basis that the ATP had expired at the end of 1982 and had not since been validly renewed under State law.

The petroleum defendants and Queensland successfully sought summary dismissal of the proceeding on the basis that the Federal Court did not have jurisdiction, as the plaintiffs' claim did not involve a 'matter' as required under Ch III of the Constitution. Under Ch III a federal court may only exercise jurisdiction in a 'matter', which requires that 'there is some immediate right, duty or liability to be established by the determination of the Court' (*In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265). Thus, a federal court cannot give an advisory opinion or a judgment on a hypothetical question.

Here, the Federal Court held that there was no 'matter'; rather, there was 'an impermissible attempt to secure an advisory opinion' ([31]). The Federal Court said that this was because the plaintiffs' application concerned nothing more than 'a difference in contractual negotiating positions' between the plaintiffs, who claimed native title that was yet to be determined in other proceedings, and the petroleum defendants, who might one day seek the grant of a petroleum lease, although it was not pleaded by the plaintiffs that a lease had been or was even imminently to be granted. The Court also said that the plaintiffs' status as a registered native title claimant did not give them standing to claim the relief they sought.

The plaintiffs sought leave to appeal to the Full Federal Court, which held that the decision below was not attended with sufficient doubt to warrant the grant of leave to appeal.

It was on this second basis that the High Court decided that the Federal Court had wrongly decided that it did not have jurisdiction.

High Court proceeding

As no appeal lay to the High Court from the refusal of leave to appeal by the Full Federal Court (s 33(4B)(a) of the *Federal Court of Australia Act 1976* (Cth)), the plaintiffs sought constitutional writs under s 75(v) of the Constitution in relation to the decisions of the Federal Court.

Heydon J, delivering the reasons of the Court on the issues (other than costs), considered there were 2 ways the plaintiffs could have established standing in a dispute that was not hypothetical ([34]):

— by seeking to vindicate an enforceable right of their own (for example, a native title right or a right to negotiate under the NTA)

— where the right asserted by the petroleum defendants to be granted a petroleum lease interfered with the plaintiffs' interests, by attacking that right, emanating from the ATP, on the ground that the ATP was void.

Heydon J observed that the Federal Court had concentrated on the first aspect, deciding it against the plaintiffs on the basis that they did not have any established native title or any right under the NTA that the plaintiffs negotiate with them. However, the Federal Court had not considered the second aspect, which did not depend on the plaintiffs actually having native title ([35]). It was on this second basis that the High Court decided that the Federal Court had wrongly decided that it did not have jurisdiction. It was not necessary for the High Court to consider the correctness of the first basis on which the Federal Court might have had jurisdiction.

The plaintiffs were not precluded from seeking declaratory relief from the Federal Court merely because it concerned conduct that might arise in the future.

Claim not hypothetical

The plaintiffs were not precluded from seeking declaratory relief from the Federal Court merely because it concerned conduct that might arise in the future ([37]):

> The jurisdiction to grant a declaration 'includes the power to declare that conduct which has not yet taken place will not be in breach of ... a law.' The jurisdiction also includes the power to declare that conduct which has not yet taken place will be a nullity in law.

Here, the plaintiffs claimed that the petroleum defendants had no right to the grant of a petroleum lease, as the ATP was no longer valid. The plaintiffs had a sufficient interest to make this claim because success 'would advance their interests in the negotiations which the parties were contractually obliged to conduct' ([37]). It concerned a question that was not hypothetical, as the petroleum defendants had sufficiently indicated an intention to apply for a petroleum lease the grant of which they had asserted would be automatic ([37], [42]). The factual circumstances showed that the resolution of this question would have 'foreseeable consequences for the plaintiffs and the petroleum defendants by allowing them to continue the process of negotiating the new ILUA armed with knowledge of the correct legal position in relation to the ATP' ([37]). The plaintiffs' request for a gift of the pastoral leases had been refused because they were valued at over $20 million, but this valuation depended in part on the validity of the ATP giving rise to the automatic grant of a petroleum lease. If the ATP were invalid, it might reduce the value of the pastoral leases, which would improve the Wongkumara's chances of obtaining the gift (at [35], [37]). Heydon J concluded ([38]):

> [W]hether or not the plaintiffs have rights enforceable against the petroleum defendants, the question whether the ATP is valid is not hypothetical, it is of real practical importance to the plaintiffs, they have a real commercial interest in the relief, the petroleum defendants (and Queensland) are plainly contradictors, and there is obviously a real controversy.

The plaintiffs had a sufficient interest to make this claim because success 'would advance their interests in the negotiations which the parties were contractually obliged to conduct'.

Claim involved a 'matter' in federal jurisdiction

Heydon J next considered whether, the claim not being hypothetical, it involved the exercise of federal jurisdiction conferred on the Federal Court by s 213(2) of the NTA and s 39B(1A) of the *Judiciary Act 1903* (Cth) in a 'matter arising under' the NTA (reflecting the subject matter of federal jurisdiction in s 76(ii) of the Constitution). Here, the dispute about the terms of the new ILUA 'turned on whether the petroleum defendants had the "immediate right" [to the grant of a petroleum lease] which they claimed'. As the existence of the immediate right (which depended on State law) affected the validity of a 'future act' under the NTA, the immediate right was 'integrally connected with the NTA' and hence there was a 'matter arising under the NTA' that involved the exercise of federal jurisdiction ([41], [43], [45]).

Accordingly, the Federal Court had mistakenly denied its jurisdiction over the plaintiffs' claims and the High Court issued a writ of certiorari quashing its decisions ([53]).

Costs

The High Court (Hayne J dissenting) held that, certiorari having been issued to quash the orders made by the Federal Court (including costs orders in favour of the petroleum defendants), s 32 of the *Judiciary Act 1903* (Cth) conferred power on the High Court in the exercise of its original jurisdiction under s 75(v) of the Constitution to make costs orders in favour of the plaintiffs in respect of the Federal Court proceedings as well as the High Court proceedings. The making of these costs orders gave effect to the requirement in s 32 that the Court grant remedies to 'completely and finally determine' all matters in controversy between the parties.

AGS (Gavin Loughton, Angel Aleksov and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening with the Commonwealth Solicitor-General, Stephen Gageler SC, AGS Chief General Counsel Robert Orr QC and Brendan Lim as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2011/8.html

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