AGS

Litigation notes

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Further challenge to the Commonwealth's power to contract and spend money on school chaplains

In *Williams v Commonwealth of Australia* [2014] HCA 23 (*Williams (No 2)*) the High Court unanimously found (6:0) that payments that the Commonwealth made to Scripture Union Queensland (SUQ) under a funding agreement between the Commonwealth and SUQ were unlawful. The SUQ funding agreement, which was made for the purposes of the National School Chaplaincy and Student Welfare Program (NSCSWP), was for chaplaincy services at the primary school attended by the plaintiff's children.

In reaching that conclusion the High Court held that neither the payments nor the funding agreement were validly authorised by s 32B of the *Financial Management and Accountability Act 1997* (FMA Act) and item 407.013 of Sch 1AA to the *Financial Management and Accountability Regulations 1997* (FMA Regulations) (the impugned provisions). This was because the impugned provisions, as far as they purported to authorise agreements and payments for the NSCSWP, were not supported by any of the legislative powers of the Commonwealth Parliament.

Williams v Commonwealth of Australia
High Court of Australia, 19 June 2014
[2014] HCA 23; (2014) 88 ALJR 701

Background

This case was argued and decided against the background of the High Court's decisions in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 (*Pape*) (see Litigation Notes No 19, p 1) and *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams (No 1)*) (see *Litigation Notes* No 22, p 7).

In *Pape*, the central issue was the source and extent of the Commonwealth's power to spend money. The Commonwealth had long acted on the view that s 81 of the Constitution confers a substantive power to spend money 'for the purposes of the Commonwealth' that is independent of any other Commonwealth power. However, in *Pape*, the High Court rejected the proposition that s 81 confers a spending power and held that the substantive power to spend money must be found elsewhere in the Constitution or the statutes made under it.

In *Williams (No 1)*, the High Court had to decide whether particular funding agreements between the Commonwealth and SUQ, and payments made under those funding agreements, were valid. The funding agreements were made for the then National School Chaplaincy Program (NSCP). Apart from annual appropriations, the NSCP was not supported by statutory authority. In *Williams (No 1)* the Court held (6:1) that the Commonwealth did not have executive power, under s 61 of the Constitution, to enter into the funding agreements or make payments under them and that the agreements and payments were therefore invalid.

Commonwealth legislative response – FMA Act and Regulations amended

In response to the Court's decision in *Williams (No 1)*, the Commonwealth Parliament enacted the *Financial Framework Legislation Amendment Act (No 3) 2012* (Amendment Act) to provide legislative authority for making agreements for the payment of public money, and for payments made or to be made under those agreements ([1], [6]). In particular, the Amendment Act inserted s 32B into the FMA Act (since renamed the *Financial Framework (Supplementary Powers) Act 1997* (Cth)). That section relevantly confers power on the Commonwealth to make, vary or administer an arrangement involving the payment of public money, where that arrangement was 'for the purposes of a program specified in the regulations'.

The Amendment Act also directly amended the FMA Regulations by inserting a new reg 16 and Sch 1AA into the FMA Regulations (since renamed the *Financial Framework (Supplementary Powers) Regulations 1997*). Together, those provisions specified programs for the purposes of s 32B of the FMA Act. One program specified was the NSCSWP, in item 407.013 of Sch 1AA. That item provides:

> 407.013 National School Chaplaincy and Student Welfare Program (NSCSWP)
>
> *Objective: To assist school communities to support the wellbeing of their students, including by strengthening values, providing pastoral care and enhancing engagement with the broader community.*

Williams (No 2) – challenge to the legislative response

The plaintiff challenged the constitutional validity of the legislative scheme both generally and as it applied to the NSCSWP. The challenge was brought against the Commonwealth, the Minister for Education and SUQ. The main reasons for judgment were delivered by French CJ, Hayne, Kiefel, Bell and Keane JJ in a joint judgment. In her separate reasons for judgment Crennan J substantially agreed with the joint judgment ([99]).

Plaintiff had standing in the circumstances of this case

The Court accepted that, in the circumstances of this case, the plaintiff had standing to challenge the making of the payments to SUQ ([28]). The Commonwealth parties had conceded the question of standing in light of the intervention of State Attorneys-General to support the plaintiff's challenge. The Court did not decide whether the plaintiff would otherwise have had standing ([29]). The Court also did not decide whether the plaintiff would have had standing to challenge the validity of any other arrangements or payments ([30]).

Section 32B is not invalid

The plaintiff contended that s 32B of the FMA Act is wholly invalid. However, the Court held that s 32B of the FMA Act is supported by every head of legislative power that supports the making of the payments that s 32B deals with ([35]). Furthermore, properly construed, s 32B provides power to the Commonwealth to make, vary or administer arrangements or grants only where it is within the power of the Parliament to do so ([36]). Thus it was sufficient for the Court to consider whether s 32B of the FMA Act and item 407.013, in their application to the NSCSWP (and the payments to SUQ), are supported by a Commonwealth head of legislative power, without considering the plaintiff's wider questions of construction and validity ([36]).

The impugned provisions were not supported by a head of Commonwealth legislative power

The Commonwealth and SUQ argued that s 32B of the FMA Act and item 407.013 were supported by:

- the 'benefits to students' limb of s 51(xxiiiA) of the Constitution
- the express incidental power (s 51(xxxix)) taken together with ss 61 or 81 of the Constitution.

SUQ also contended that the item was supported by the corporations power (s 51(xx)).

(i) Benefits to students (section 51(xxiiiA))

The Commonwealth primarily relied upon s 51(xxiiiA) of the Constitution as the head of legislative power supporting the impugned provisions. Section 51(xxiiiA) confers on the Commonwealth Parliament power to make laws with respect to:

> the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.

'... the constitutional expression "benefits to students" does not simply mean something that is of benefit to students ... [but] refers to ... the provision of aid to or for individuals for human wants arising as a consequence of ... being a student.'

The joint judgment held that the constitutional expression 'benefits to students' does not simply mean something that is of benefit to students 'in the sense of providing them with an advantage or a good' (at [43]). Rather, the term 'benefits' in s 51(xxiiiA) refers to ([46], emphasis added):

> *the provision of aid to or for individuals for human wants arising as a consequence of* the several occasions identified: being unemployed, needing pharmaceutical items such as drugs or medical appliances, being sick, needing the services of a hospital, or, as is relevant to this case, *being a student*. The benefits are occasioned by and directed to the identified circumstances. In the usual case, the assistance will be a form of material aid to relieve against consequences associated with the identified circumstances. Provision of the benefit will relieve the person to whom it is provided from a cost which that person would otherwise incur.

Accordingly the joint judgment concluded ([46], emphasis added):

> in the case of benefits to students, the relief would be *material aid provided against the human wants which the student has by reason of being a student*.

The joint judgment then held that the provision of chaplaincy services at a school is not the provision of material aid to provide for the human wants of students. This was because ([47]):

- the services were not rendered to or for any identified or identifiable student
- the Commonwealth did not make any payment of money for or on behalf of any identified or identifiable student
- the service was not directed to the consequences of being a student.

Writing separately, Crennan J also held that the impugned provisions were not supported by s 51(xxiiiA) of the Constitution. That was because the NSCSWP was not a 'scheme for the provision of government assistance to, or for … students … as *prescribed and identifiable beneficiaries'* ([102], emphasis added); that is, because students did not have a personal entitlement to any benefit under the program ([110]).

(ii) Corporations power (section 51(xx))

SUQ submitted that s 32B, in combination with item 407.013, was also supported by s 51(xx) of the Constitution. Section 51(xx) relevantly confers on the Commonwealth Parliament power to make laws with respect to trading or financial corporations formed within the limits of the Commonwealth.

The Court held that a law that simply gives the Commonwealth the authority to make an agreement with a trading or financial corporation to pay it money for the NSCSWP is not a law with respect to trading or financial corporations. The Court said that this was because ([50]):

> [t]he law makes no provision regulating or permitting any act by or on behalf of any corporation. The corporation's capacity to make the agreement and receive and apply the payments is not provided by the impugned provisions. Unlike the law considered in *New South Wales v The Commonwealth (Work Choices Case)*, the law is not one authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation; it is not one regulating the conduct of those through whom a constitutional corporations acts or those whose conduct is capable of affecting its activities, functions, relationships or business.

The Court therefore did not need to address whether SUQ was a trading or financial corporation ([51]).

(iii) Express incidental power (section 51(xxxix))

Section 51(xxxix) of the Constitution relevantly confers power on the Commonwealth Parliament to make laws with respect to 'matters incidental to the execution of any power vested by this Constitution in the … Government of the Commonwealth … or in any department or officer of the Commonwealth'. The Commonwealth submitted that this section supported s 32B of the FMA Act because, as a law that provides parliamentary recognition of expenditure by the Executive of funds that Parliament has appropriated (without purporting to regulate the recipients of those funds), it was incidental to the power to appropriate and/or the executive power to contract and spend under s 61 of the Constitution.

The Commonwealth's submissions focused on the FMA scheme being incidental to s 61 of the Constitution. This argument depended on reading the Court's decision in *Williams (No 1)* as not denying the existence of an executive power to contract and spend, and as instead imposing an additional condition on the lawful expenditure of appropriated funds: that in certain areas there needed to be legislative authorisation of that expenditure so as to engage the parliamentary process beyond an appropriation.

The High Court held (at [87]) that s 32B cannot be characterised as a law that is incidental to the execution of the executive power of the Commonwealth because the executive power of the Commonwealth does not extend 'to any and every form of expenditure of public moneys' (see further below).

The High Court also rejected the argument that, as far as the Appropriation Acts provided authority to spend appropriated moneys, the Appropriation Acts were supported by the incidental power as laws incidental to the power to appropriate. The High Court held

that this argument was foreclosed by the Court's holding in *Pape*, because it would mean that 'any and every appropriation of public moneys in accordance with ss 81 and 83 brings the expenditure of those moneys within the power of the Commonwealth' (at [86]).

Did the annual Appropriation Acts authorise contracting and spending on the NSCSWP?

The Commonwealth submitted further or alternatively that the annual Appropriation Acts in each of the relevant years authorised the SUQ funding agreement and the making of payments under that agreement. This was because, as a matter of construction, the relevant Appropriation Acts performed the dual functions of appropriating funds and authorising the expenditure of those funds on (at least) administered items (as defined).

The High Court held that it was unnecessary to deal with the submissions made about the effect of the Appropriations Acts. The joint judgment reasoned that, even if the Appropriation Acts are to be construed as providing statutory authority to make either the funding agreement or any of the payments in issue, the conclusions reached about the validity of s 32B and item 407.013 would equally apply to the relevant provisions in the Appropriation Act (that is, in that operation they were not supported by a Commonwealth head of legislative power) (at [55]).

'... the executive power of the Commonwealth is that of a "central polity in a federation in which independent governments exist in the one area and exercise powers in different fields of action carefully defined by law", not that of a unitary state having no written constitution where Parliament is supreme ...'

Commonwealth executive power – application to reopen *Williams (No 1)* refused

The Commonwealth also contended that the payments to SUQ were valid independent of any statutory authorisation because they were made in exercise of the executive power of the Commonwealth conferred by s 61 of the Constitution. The Commonwealth accepted that, to put this argument, it needed to obtain leave to reopen *Williams (No 1)*. However, the High Court refused the Commonwealth's application for that leave (at [66]).

As a result, the Court also rejected the Commonwealth's argument that it had executive power to spend money in the performance of the SUQ funding agreement (at [67]). In doing so the Court characterised the Commonwealth's argument as assuming that the executive power of the Commonwealth is no less than the executive power of the British Executive ([78]). The Court rejected that assumption, noting that, while British constitutional history and practice can assist in identifying the ambit of Commonwealth executive power, it is also important to have regard to the 'basal consideration' that the Constitution effects a distribution of powers and functions between the Commonwealth and the States. Thus the executive power of the Commonwealth is that of a 'central polity in a federation in which independent governments exist in the one area and exercise powers in different fields of action carefully defined by law', not that of a unitary state having no written constitution where Parliament is supreme ([79]–[83]).

AGS (David Lewis, Emilie Sutton, Andrew Buckland and David Bennett QC) acted for the Commonwealth, with the Commonwealth Solicitor-General Justin Gleeson SC, Stephen Donaghue QC, Guy Aitken (AGS Chief General Counsel) and Nicholas Owens as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2014/23.html

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ACT same-sex marriage law inconsistent with the Commonwealth Marriage Act

In *Commonwealth v Australian Capital Territory* the High Court upheld the Commonwealth's challenge to the constitutional validity of the *Marriage Equality (Same-Sex) Act 2013* (ACT) (the Marriage Equality Act).

In a unanimous judgment, 6 judges (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) held that the whole of the Marriage Equality Act is inconsistent with the *Marriage Act 1961* (Cth) (the Marriage Act) and is of no effect by operation of s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (the Self-Government Act).

Commonwealth v Australian Capital Territory
High Court of Australia, 12 December 2013
[2013] HCA 55; (2013) 88 ALJR 118; (2013) 304 ALR 204

Background

Commonwealth regulation of marriage, divorce and matrimonial causes

The Constitution provides that the Commonwealth Parliament has power to make laws with respect to 'marriage' (s 51(xxi)) and 'divorce and matrimonial causes' (s 51(xxii)). For the first 60 years of federation, these powers were used sparingly; with limited exceptions, marriage, divorce and matrimonial causes were regulated under State and Territory law.

This changed in 1961, when the federal Parliament passed the Marriage Act. It had the stated purpose of ensuring uniform regulation of marriage throughout the Commonwealth. The *Matrimonial Causes Act 1959* (Cth), and later the *Family Law Act 1975* (Cth) (the Family Law Act), sought to achieve uniformity in Australian divorce law. In broad terms, the Marriage Act governs how the status of marriage is attained and the Family Law Act governs the dissolution of marriages and related matrimonial causes.

Until 2004 the Marriage Act did not define 'marriage'. The Act was amended in 2004 and since then has provided that marriage means 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life' (s 5).

Marriage Equality Act

On 22 October 2013 the Legislative Assembly of the Australian Capital Territory enacted the Marriage Equality Act. The long title to the Marriage Equality Act stated that it was 'an Act to provide for marriage equality by allowing for marriage between 2 adults of the same sex'. The Marriage Equality Act substantially mimicked the text and structure of the Marriage Act. However, whereas the Marriage Act only permits marriages

between a woman and a man, the Marriage Equality Act provided for marriages between persons of the same sex, to be performed by celebrants registered under that Act; it also provided for the dissolution of those marriages.

The main argument

Section 28 of the Self-Government Act provides that a provision of an enactment of the ACT Legislative Assembly has no effect to the extent that it is inconsistent with a Commonwealth law in force in the ACT, but 'such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law'.

The Commonwealth argued that the Marriage Equality Act was inconsistent with the Marriage Act because:

- the Commonwealth Parliament's purpose in enacting the Marriage Act was to establish a uniform set of rules for the nation to govern the essential substantive and formal requirements for attaining the status of marriage
- a lawful marriage for the purposes of Australian law must have the essential characteristics as determined by Commonwealth law from time to time. Currently that means, among other things, a union between a man and a woman
- it is not open to a State or Territory legislature to purport to clothe with the legal status of 'marriage' (or a form of marriage) some different union of persons – in particular, one that modifies any of those essential characteristics
- the Marriage Equality Act violated this rule by purporting to clothe with the legal status of marriage unions solemnised in the ACT between persons of the same sex.

'The High Court held that "the Commonwealth and the Territory were right to submit that s 51(xxi) gives the federal parliament power to pass a law providing for same sex marriage" ...'

The High Court's decision

The marriage power extends to same-sex marriage

The parties had both submitted that the marriage power in s 51(xxi) of the Constitution gives the federal Parliament the power to make a law providing for same-sex marriage (as did Australian Marriage Equality Inc, which was given leave to appear as *amicus curiae* ie friend of the court). The Commonwealth had also submitted that it was not necessary for the Court to decide that question in this case. The High Court held that this question had to be resolved as a step on the way to deciding whether the Marriage Equality Act was inconsistent with the Marriage Act, because the Marriage Equality Act 'would probably operate concurrently' with the Marriage Act if the marriage power did not extend to same-sex marriage ([9]).

The High Court held that 'the Commonwealth and the Territory were right to submit that s 51(xxi) gives the federal parliament power to pass a law providing for same sex marriage' ([10]).

Marriage as a 'juristic classification' whose content is not fixed at 1901

Section 51(xxi) confers legislative power with respect to marriage as a 'juristic classification' whose content is not fixed by reference to the social institution of marriage as it was understood in 1901 (at [16]):

> The status of marriage, the social institution which that status reflects, and the rights and obligations which attach to that status never have been, and are not now, immutable. Section

> 51(xxi) is not to be construed as conferring legislative power on the federal Parliament with respect only to the status of marriage, the institution reflected in that status, or the rights and obligations attached to it, as they stood at federation.

The Court noted that the legal status of marriage has changed significantly over time – in particular, with the increased availability of orders for judicial separation in the 19th century – and concluded that, historically, 'neither the social institution of marriage nor the rights and obligations attaching to the status of marriage (or condition of being married) were immutable' ([17]). The Court went on to hold (at [19]):

> Because the status, the rights and obligations which attach to the status and the social institution reflected in the status are not, and never have been, immutable, there is no warrant for reading the legislative power given by s 51(xxi) as tied to the state of the law with respect to marriage at federation.

The Court also examined the 19th century cases cited frequently as providing leading statements or definitions of what marriage meant at the time of federation, especially *Hyde v Hyde* (1866) LR 1 P&D 130. The Court noted that each of these cases needs to be understood in its historical context. None of them define the limits of the marriage power (or the divorce and matrimonial causes power) (see discussion at [25]–[33]).

A broader constitutional definition of 'marriage'

The High Court set out its own, broader, definition of 'marriage' for the purposes of s 51(xxi) (at [33]):

> '[M]arriage' is to be understood in s 51(xxi) of the Constitution as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.

The Court attached some significance to the fact that marriage is understood differently in different parts of the world (at [35]):

> The social institution of marriage differs from country to country. It is not now possible (if it ever was) to confine attention to jurisdictions whose law of marriage provides only for unions between a man and a woman to the exclusion of all others, voluntarily entered into for life. Marriage law is and must be recognised now to be more complex. Some jurisdictions outside Australia permit polygamy. Some jurisdictions outside Australia, in a variety of constitutional settings, now permit marriage between same-sex couples.

The Marriage Act deals exhaustively with the status of marriage in Australia

Noting that while the federal Parliament could legislate for same-sex marriage it has not done so, the Court held that 'the absence of a provision *permitting* same sex marriage does not mean that the Territory legislature may make such a provision. It does not mean that a Territory law *permitting* same sex marriage can operate concurrently with the federal law' ([56]).

The Court held that the Marriage Act in its present form provides a comprehensive and exhaustive statement of the law on the creation and recognition of the legal status of marriage. This is 'made plain (if it was not already plain)' by the 2004 amendments to the Marriage Act that introduce the present definition of marriage ([58]). The definition of marriage in s 5, coupled with s 88EA of the Marriage Act (which denies recognition in Australia of same-sex marriages solemnised overseas), read in the context of the Act as a whole, contains an 'implicit negative proposition that the kind of marriage provided for by the Act is the *only* kind of marriage that may be formed or recognised in Australia' ([59]).

The Court held that the Marriage Equality Act would alter, impair or detract from the Marriage Act by attempting to provide for 'marriage equality' by prescribing different conditions for attaining the same status – 'marriage' – which the Marriage Act regulates exhaustively (at [59]–[60]):

> By providing for marriage equality, the ACT Act seeks to operate within the same domain of juristic classification as the *Marriage Act*. And while the *Marriage Act* carves out a part of that domain for regulation of the creation and recognition of marriage, the *Marriage Act* also contains a negative proposition which governs the whole of that domain ... by providing that the only form of marriage which may be created or recognised is that form which meets the definition provided by the *Marriage Act*.

The Court therefore concluded that the Marriage Equality Act is inconsistent with the Marriage Act and is wholly inoperative. The Court did not need to consider whether the Marriage Equality Act is also inconsistent with the Family Law Act.

'The Court held that the Marriage Act in its present form provides a comprehensive and exhaustive statement of the law on the creation and recognition of the legal status of marriage.'

The operation of section 28 of the Self-Government Act

The parties had disagreed about whether s 28 of the Self-Government Act has a different operation from s 109 of the Constitution (which deals with inconsistencies between State and Commonwealth laws). The Court's reason make clear that s 28 is directed to the interpretation of an enactment of the ACT Legislative Assembly. It is not a law that requires federal statutes to be read down or construed in a way that would permit concurrent operation of Territory enactments ([53]). Rather, in applying s 28 the starting point is to determine the meaning of the relevant federal Act.

AGS (Gavin Loughton, Andrew Buckland, Niamh Lenagh-Maguire, Emily Kerr and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth, with the Solicitor-General Justin Gleeson SC, Michael Kearney SC, Graeme Hill and Craig Lenehan as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2013/55.html

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Criminal property forfeiture scheme valid – no acquisition of property on unjust terms

A majority of the High Court (6:1, Gageler J dissenting) upheld the validity of the property forfeiture scheme established by s 36A of the Misuse of Drugs Act (NT) (the MoD Act) and ss 44(1)(a) and 94 of the Criminal Property Forfeiture Act (NT) (the CPF Act) (the NT forfeiture scheme).

The High Court held that the NT forfeiture scheme did not infringe the *Kable* principle and was not a law with respect to the acquisition of property otherwise than on just terms. That was so even though under the scheme the first respondent forfeited all property as a declared 'drug trafficker', including property with no connection to any criminal offence.

Attorney-General (NT) v Emmerson
High Court of Australia, 10 April 2014
[2014] HCA 13; (2014) 88 ALJR 522

Background

Northern Territory forfeiture scheme

Under s 36A(3) of the MoD Act, if the Northern Territory Director of Public Prosecutions (DPP) applies to the NT Supreme Court for a declaration that a person is a 'drug trafficker', the Court must make that declaration if the person has 3 or more convictions for offences of a kind specified in s 36A(6) of the MoD Act in the previous 10 years. The offences listed in s 36A(6) include 'certain categories of cultivation and possession of drugs (which may involve minor quantities) as well as offences which might be commonly understood as directed to drug traffickers and cultivators of commercial or trafficable quantities of drugs' ([26]).

If a person is declared to be a drug trafficker then all property subject to a restraining order made under the CPF Act that is owned or effectively controlled by the person (and all property that was given away by the person) is forfeited to the NT (CPF Act, s 94(1)). The grounds for making a restraining order and the property that it may apply to are set out in s 44 of the CPF Act. The grounds include that a person has been charged with an offence that could lead to the person being declared to be a 'drug trafficker' under s 36A of the MoD Act if the person is convicted.

Background to High Court case

In 2011, on the basis of the first respondent's previous convictions and a current charge of supplying drugs, the NT Supreme Court (on the application of the DPP) made a restraining order, by consent, over 'all real and personal property owned or effectively

controlled by the first respondent'. Apart from an amount of cash, this property was legitimately derived and had no connection to any criminal offence ([6]–[8]).

After the first respondent was convicted on the 2011 charge, the NT Supreme Court (on the application of the DPP) declared the first respondent a 'drug trafficker' under s 36A of the MoD Act. As a consequence of that declaration, all of the first respondent's property (including the property that was not related to his criminal conduct), which had been restrained under s 44(1)(a) of the CPF Act, was forfeited to the NT under the CPF Act, s 94(1).

The first respondent challenged the constitutional validity of the NT forfeiture scheme in the NT Supreme Court and then the NT Court of Appeal. The NT Court of Appeal declared the scheme invalid and the NT Attorney-General appealed that Court's decision to the High Court.

Constitutional issues

The 2 constitutional issues on the appeals to the NT Court of Appeal and the High Court were:

- Does the NT forfeiture scheme undermine the institutional integrity of the NT Supreme Court contrary to the principle established in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*)? (That principle, derived from Ch III of the Constitution, prevents State or Territory laws from conferring on a court a function that 'substantially impairs the court's institutional integrity' ([40]) by depriving the court of its 'independence and institutional impartiality' ([44]).)
- Does the NT forfeiture scheme acquire property otherwise than on just terms contrary to s 50(1) of the *Northern Territory (Self-Government) Act 1978* (Cth) (the NTSG Act) (the acquisition argument)? Section 50(1) is in similar terms to s 51(xxxi) of the Constitution and limits the legislative power of the NT legislature by preventing the making of laws that acquire property otherwise than on just terms.

A majority of the NT Court of Appeal held that the NT forfeiture scheme was invalid because it contravened the *Kable* principle by enlisting the NT Supreme Court to give effect to executive decisions and/or legislative policy in a manner that undermined the NT Supreme Court's institutional integrity ([10], [47]). All members of the NT Court of Appeal rejected the acquisition argument ([11]).

The NT Attorney-General appealed the NT Court of Appeal's decision to the High Court on the basis that the Court erred on the *Kable* issue. The first respondent filed a notice of contention in the High Court arguing that the NT Court of Appeal had erred on the acquisition argument. The Commonwealth Attorney-General intervened in the proceedings to argue that the NT forfeiture scheme was not invalid on the basis of the acquisition argument. He did not put submissions on the *Kable* issue.

'Apart from an amount of cash, this property was legitimately derived and had no connection to any criminal offence ...'

The High Court's decision

In a single joint judgment, the majority (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) held that, contrary to the NT Court of Appeal's decision, the NT forfeiture scheme was not invalid in light of the *Kable* principle (in his separate judgment, Gageler J did not find it necessary to consider this issue). The majority (Gageler J dissenting) also upheld the validity of the NT forfeiture scheme because it did not involve an acquisition of property without just terms within s 50(1) of the NTSG Act.

The *Kable* argument

The majority held that the impugned provisions of the NT forfeiture scheme are compatible with the *Kable* principle because they did not require the NT Supreme Court to give effect to any decision made by the Executive (here the DPP) ([56]). They did not direct or require the court to 'implement a political decision or a government policy without following ordinary judicial processes' ([44]).

The DPP's exercise of discretion to make an application under the scheme was not 'the operative decision'; rather, 'two curial orders, following ordinary judicial processes [a restraining order under s 44 of the CPF Act and a declaration under s 36A of the MoD Act], are the cumulative conditions stated as necessary for the operation of s 94(1) of the [CPF Act]' ([73]).

'Further, "whether that punishment fits the crime" was a matter for the legislature, not the courts ...'

The majority held that the requirement in s 36A of the MoD Act that the NT Supreme Court declare a person a 'drug trafficker' if certain conditions are met was a function given to a court of a well-recognised kind. That is because '[i]t is well established that Australian legislatures can empower courts to make specified orders if certain conditions are satisfied, even if satisfaction of such conditions depends on a decision, or application, made by a member of the Executive' ([57]).

The majority said that the NT forfeiture scheme, by authorising the NT Supreme Court 'to determine whether the statutory criteria set out are satisfied' and, if they are, requiring it to make a declaration, and then by providing the statutory consequences that follow from that declaration, is 'an unremarkable example of conferring jurisdiction on a court to determine a controversy between parties which, when determined, will engage stated statutory consequences' ([60]). It continued '[t]hat the controversy is initiated by an officer of the Executive, the DPP, does not deprive the Supreme Court of its independence' ([61]) and noted that the DPP's decision to apply to the NT Supreme Court for a declaration under s 36A 'is a discretionary decision, similar to the well-recognised prosecutorial discretion to decide who is to be prosecuted and for what offences' ([61], see also [70]–[73]). Indeed, 'the role of the DPP in the statutory scheme reflects no more than procedural necessity in the adversarial system' ([61]).

The majority also held that there was nothing in the NT forfeiture scheme to suggest that the determination to be made by a court under s 36A is to be undertaken other than by following ordinary judicial processes ([65]–[69]). The determination of the statutory criteria in s 36A of the MoD Act for whether a person is a 'drug trafficker' retained its judicial character even though it 'may readily be performed, because of the ease of proof of the criteria' ([65]).

The acquisition argument

The majority judgment

The majority held that the NT forfeiture scheme did not effect an acquisition of property other than on just terms ([74]–[85]). This was because the scheme imposed forfeiture as a penal consequence of a person's conviction for crime ([74]–¬[75]). Further, 'whether that punishment fits the crime' was a matter for the legislature, not the courts ([75]). The majority emphasised that '[i]t is irrelevant (and wrong) for the courts to attempt to determine whether any forfeiture which may be worked by the [CPF Act] (or which is worked in this particular case) is proportionate to the stated objectives [of the CPF Act]' ([75]). Those penal objectives, set out in ss 3 and 10 of the CPF Act, were:

- to target the proceeds of crime to deter criminal activities
- to prevent unjust enrichment of persons involved in crime
- to compensate the NT community for the costs of deterring, detecting and dealing with criminal activities ([34]–[37]).

In addressing the acquisition of property argument, the majority applied High Court authorities dealing with s 51(xxxi) of the Constitution. Those cases established that s 51(xxxi) did not apply to an acquisition of property for which the provision of 'just terms' would be 'an inconsistent or incongruous notion'. This inquiry may involve 'difficult questions of degree and judgment' but is (citing *Theophanous v Commonwealth* (2006) 225 CLR 101 at 126 [60]):

> grounded in the realisation that to characterise certain exactions of government (such as levying of taxation, imposition of fines, exaction of penalties or forfeitures, or enforcement of a statutory lien) as an acquisition of property would be incompatible with the very nature of the exaction ([77]).

'A legislative purpose of protecting society by incapacitating a drug trafficker through forfeiture or confiscation of their assets was a method of deterring and dealing with criminal activities ...'

The majority rejected the first respondent's arguments that sought to distinguish the NT forfeiture scheme from other statutory forfeiture schemes on the basis that it was 'a non-regulatory revenue-raising scheme which played no legislative role in the enforcement of the criminal law in relation to drug offences or in the deterrence of such activities' ([79]). It was also argued that the ' "reality and scale" of the forfeiture under [the NT forfeiture scheme], including its targeting of 'legitimately derived wealth', was such that a point was reached "where the law is no longer inconsistent or incongruous with the guarantee" of just terms' ([54], [79]).

The majority said that these arguments invited 'speculative inquiry as to the topics which were the main preoccupation of the Territory's legislature in enacting the legislation' ([80]), which raised matters that were political and not legal in nature ([75], [85]).

Rather, the proper inquiry is the subject-matter of the NT forfeiture scheme and whether it 'can be properly characterised as a law with respect to forfeiture, that is, a law which exacts or imposes a penalty or sanction for breach of provisions which prescribe a rule of conduct' ([80]). The majority held that the NT forfeiture scheme is such a law because it is imposed as punishment for a crime ([75], [80]). It followed that the requirement of just terms is '"incompatible with the very nature of the exaction", being a punishment for crime' ([84]). This conclusion precluded 'any inquiry into the proportionality, justice or wisdom of the legislature's chosen measures' ([80]).

The majority concluded that the NT forfeiture scheme does not cease to be a '[law] with respect to the punishment of crime because some may hold a view that civil forfeiture of *legally acquired assets* is a harsh or draconian punishment' ([81], emphasis added). A legislative purpose of protecting society by incapacitating a drug trafficker through forfeiture or confiscation of their assets was a method of deterring and dealing with criminal activities ([83], [85]). The majority emphasised that it was 'within the province of a legislature to gauge the extent of the deleterious consequences of drug trafficking on the community and the soundness of measures, even measures some may consider to be harsh and draconian punishment, which are thought necessary to both "deter" and "deal with" such activities' ([85]). Complaints about the harshness, 'justice, wisdom,

fairness or proportionality' of such measures 'are complaints of a political, rather than a legal, nature' ([85]).

In considering the acquisition argument, the majority referred to the long history in English law of forfeiture of property where serious crime is committed, with rationales including 'vindicating a law and encouraging its observance', 'depriving criminals of profits' and preventing them from accumulating significant assets ([15]–[21]). The historical examples illustrated that 'overlapping rationales underpinning forfeiture as a criminal or civil sanction, which include both strong deterrence and the protection of society, are not especially novel' ([19]). Reflecting on the long history of forfeiture, the majority acknowledged that 'it was not suggested, nor could it be, that economic incapacitation of a repeat offender of drug crimes may not inform a political decision resulting in an enactment imposing "an economic penalty" rendering such crime "unprofitable"'([20]).

In his dissenting judgment, Gageler J observed that the operation of the NT forfeiture scheme on property with no connection to criminal activities distinguished it from most other forfeiture schemes ([105], cf [21])

'In his dissenting judgment, Gageler J observed that the operation of the NT forfeiture scheme on property with no connection to criminal activities distinguished it from most other forfeiture schemes ...'

Justice Gageler (dissenting)

Justice Gageler dissented and held that the NT forfeiture scheme was contrary to s 50(1) of the NTSG Act. In reaching this conclusion, his Honour held that the applicable test for determining whether a law validly acquires property without providing just terms is whether:

- the objective of the law is within power
- the acquisition of property is a necessary or characteristic feature of the means the law selects to achieve that objective
- the acquisition 'is reasonably appropriate and adapted, in the court's judgment, to the legitimate end in view' ([121], see also [118]).

Applying that test, his Honour observed that the legislature had declared the purpose of the forfeiture to be 'to compensate the Territory community for the costs of deterring, detecting and dealing with the [person's] criminal activities' ([132]). He concluded, however, that that 'legislative purpose cannot explain the extent of the forfeiture consonantly with the constitutional purpose of the just terms condition to prevent arbitrary acquisition ... because the means chosen by the law are not appropriate and adapted to achieve it' ([132]). No attempt was made in the scheme 'to link the value of the property forfeited to the amount of the costs identified' ([132], see also [104]–[105]).

In contrast, the majority concluded that the costs referred to in the statutory objects were not 'restricted to the "costs" of law enforcement, capable of mathematical calculation for the purposes of raising revenue' but extended to the social consequences of drug crime ([83]).

His Honour further held that the NT forfeiture scheme did not fall outside s 50(1) of the NTSG Act on the basis that it operated to deter the commission of a further drug offence by imposing a penalty or sanction for breach of a norm of conduct ([134]). The penalty imposed by the scheme was 'not imposed as part of the process of the adjudication and punishment of the offence by a court' ([134]); rather, the penalty 'lies in the threat of statutorily sanctioned executive expropriation: the forfeiture (or not) of all (or any)

property at the discretion of the DPP' ([135]). His Honour held that the conferral of such discretion on the DPP 'is not a necessary or characteristic feature of penal forfeiture' and that forfeiture that involves the conferral of such discretion 'is not appropriate and adapted to achieving an objective of imposing a penalty or sanction for breach of the identified criminal norm' ([139]).

Justice Gageler concluded that s 36A of the MoD Act and ss 44(1)(a) and 94 of the CPF Act 'do not have the characteristic of laws which acquire property for a purpose and by means consistent with the underlying purpose of the just terms condition to prevent arbitrary acquisitions' ([140]).

AGS (Andrew Buckland, Simon Thornton, Megan Caristo and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Solicitor-General Justin Gleeson SC and Christopher Horan as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2014/13.html

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High Court holds valid the scheme to designate regional processing countries

The High Court has upheld the validity of provisions of the *Migration Act 1958* that authorise the Minister for Immigration and Border Protection to designate a country as a 'regional processing country' and to direct that 'unauthorised maritime arrivals' (UMAs) be taken there.

In a unanimous joint judgment, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ held that the impugned provisions of the Migration Act are valid laws with respect to aliens under s 51(xix) of the Constitution. The Court also upheld the Minister's designation of the Independent State of Papua New Guinea (PNG) as a regional processing country and his direction that categories of UMAs be taken there.

Plaintiff S156/2013 v Minister for Immigration and Border Protection
High Court of Australia, 18 June 2014
[2014] HCA 22; (2014) 88 ALJR 690; (2014) 309 ALR 29

Background

The plaintiff is a citizen of Iran who arrived at Christmas Island by boat on 23 July 2013. He claims to be a refugee but, as a UMA, he could not make a valid application for a visa. In accordance with decisions that the Minister made under the Migration Act, the plaintiff was taken from Christmas Island to Manus Island in PNG, where he was effectively detained at an assessment centre.

Designation of Papua New Guinea as a 'regional processing country'

Section 198AB of the Migration Act provides that the Minister may, by legislative instrument, designate a country as a regional processing country if 'the Minister thinks that it is in the national interest to designate the country to be a regional processing country'. Section 198AB(3)(a) sets out the matters that the Minister must have regard to when considering the national interest for this purpose.

On 9 October 2012 the Minister designated PNG as a regional processing country under s 198AB (the designation decision). The Parliament subsequently approved that designation ([15]).

Direction to take unauthorised maritime arrivals to Papua New Guinea

Section 198AD(2) provides that, as soon as reasonably practicable, an officer must take a UMA from Australia to a regional processing country. If there are 2 or more regional processing countries, s 198AD(5) provides that the Minister must, in writing, direct an officer to take a UMA, or a class of UMAs, to a specified regional processing country. An officer must comply with this direction (s 198AD(6)).

On 29 July 2013, the Minister made a written direction under s 198AD for 4 classes of UMAs – family groups, adult females not part of a family group, adult males not part of a family group and unaccompanied minors (the taking direction). The taking direction required officers to take UMAs to either PNG or the Republic of Nauru (also designated as a regional processing country) if certain conditions set out in the direction were satisfied ([16]).

The issues

The plaintiff challenged the constitutional validity of ss 198AB and 198AD. The plaintiff argued that these provisions are not supported by the Commonwealth Parliament's power to make laws with respect to aliens (s 51(xix)), immigration (s 51(xxvii)) or external affairs (s 51(xxix)). In particular, the plaintiff argued that the Court should apply a test of proportionality in determining whether the relevant provisions had a sufficient connection with the subject-matter of those powers.

The plaintiff also argued that, even if ss 198AB and 198AD were valid, the designation decision and the taking direction were invalid on administrative law grounds.

'... the difficulty with the plaintiff's argument was that neither s 198AB nor s 198AD makes any provision for what happens to UMAs on their removal from Australia ...'

The High Court's decision

Sections 198AB and 198AD are supported by the aliens power

The Court first considered whether ss 198AB and 198AD are laws 'with respect to' aliens, noting that that requires a 'relevance to or connection with the subject' of aliens ([22]). The Court held that both s 198AB and 198AD 'operate to effect the removal of aliens from Australia' ([25]). The Court emphasised that provisions of this kind have a direct connection with the subject-matter of the aliens power under s 51(xix) and are clearly supported by that head of power ([23]–[25]): 'No further inquiry is necessary' ([25]). Thus it was not necessary to consider whether the provisions are supported by any other heads of power ([38]).

The Court rejected the plaintiff's argument that ss 198AB and 198AD were not supported by the aliens power because they did not satisfy a test of proportionality. The plaintiff had argued that the provisions established a scheme to detain UMAs in PNG, where their status as refugees may or may not be determined. They therefore went significantly further than merely regulating the entry of aliens to, or providing for their removal from, Australia ([31]). According to the Court, the difficulty with the plaintiff's argument was that neither s 198AB nor s 198AD makes any provision for what happens to UMAs on their removal from Australia ([32]–[33], [37]): 'The plaintiff's case for proportionality – that the sections do more than provide for the removal of aliens – therefore proceeds from a wrong premise' ([32]).

The Court also rejected the plaintiff's argument that the administrative arrangements between Australia and PNG for regional processing in PNG were relevant in assessing the validity of ss 198AB and 198AD: 'It is the operation and effect of the provisions themselves which fall for consideration, not Administrative Arrangements which are made independently of them' ([33]).

The designation decision and taking direction were not invalid on administrative law grounds

The Court rejected the plaintiff's arguments that the designation decision was invalid on various administrative law grounds. The plaintiff argued that the Minister should have taken various matters into account in making the designation decision (including Australia's and PNG's respective obligations under international law, the conditions in which UMAs would be detained in PNG and the possibility that the detention would be indefinite) ([39]; see also [46]).

The Court held that the only mandatory condition to the exercise of the Minister's power to designate a regional processing country was a statutory requirement to form an opinion that designation is in the national interest and that '[w]hat is in the national interest is largely a political question' ([40]). The only matter that the Minister is obliged to have regard to in considering the national interest is whether or not the country to be designated has given Australia any assurances as set out in s 198AB(3)(a) of the Act. There was no issue that these assurances had in fact been given ([40]). There was nothing in the text or scope of the provisions to support the implication of further conditions on the exercise of the Minister's power ([41]–[43]).

The Court also rejected the plaintiff's challenge to the taking direction. The Court held that the direction was sufficiently specific to enable officers to comply with it, as '[t]he three conditions which the direction placed on removal involved simple enquiries' ([49]).

AGS (Andras Markus and Ned Rogers from AGS Dispute Resolution, assisted by Andrew Buckland and Simon Thornton from the Constitutional Litigation Unit) acted for the Commonwealth, with the Solicitor-General Justin Gleeson SC, Stephen Donaghue QC and Nick Wood as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2014/22.html

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Validity of immigration detention revisited

In 4 judgments the High Court unanimously held that there had been an error of law in the process that the Minister used to consider whether to 'lift the bar' under s 46A of the *Migration Act 1958* to enable the plaintiff, as an 'offshore entry person', to apply for a protection visa.

As the process for considering whether to lift the bar had not been completed, the plaintiff's detention was validly authorised under the Act while the Minister completed that process and determined whether she was to be granted permission to remain in Australia.

In those circumstances a majority of the Court held that any reconsideration of the Court's earlier decision in *Al-Kateb v Godwin* (2004) 219 CLR 562 (*Al-Kateb*) (Litigation Notes No 13, 29 November 2005) can and should be left for another day. However, 3 Justices affirmed the correctness of the finding in *Al-Kateb* that the Act validly authorised the detention of an unlawful non-citizen, even in circumstances where their removal is not reasonably practicable in a reasonable time.

Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship
High Court of Australia, 12 December 2014
[2013] HCA 53; (2013) 304 ALR 135; (2013) 88 ALJR 324

Background

Refugee Status Assessment process

The Migration Act prevented an 'offshore entry person' from making a valid application for a visa unless the Minister for Immigration, Multicultural Affairs and Citizenship exercised his power under the Act to permit them to do so (known as 'lifting the bar'). In order to consider whether to exercise that power, the Minister had in place a 'Refugee Status Assessment' (RSA) process by which his Department assessed whether an offshore entry person who requested protection as a refugee was a person in respect of whom Australia owed protection obligations under the UN Convention Relating to the Status of Refugees 1951 (the Refugees Convention). In *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 (Litigation Notes No 21, 2 November 2011), the High Court held that the establishment and conduct of the RSA process reflected the Minister's decision to consider exercising the power under s 46A(2) to lift the bar in every case in which an offshore entry person claimed to be a person to whom Australia owed protection obligations ([6], [215]).

Plaintiff M76

The plaintiff, a national of Sri Lanka, entered Australia by boat and without a visa at Christmas Island. Not having a visa, she was taken into immigration detention as an

unlawful non-citizen. Furthermore, because of the circumstances of her arrival the plaintiff was an offshore entry person within the meaning of the Act and was thus unable to apply for a visa unless the Minister lifted the bar.

In July 2010 the plaintiff made a request to the Department of Immigration and Citizenship under the RSA process for protection as a refugee. While the RSA and related processes were undertaken, the plaintiff's continued detention was justified by reference to the Minister's consideration of whether to lift the bar ([227], see also [30], [96], [100], [103], [123], [135], [214]). In September 2011, the Department concluded that the plaintiff was a person to whom Australia owed protection obligations under the Refugees Convention.

Public Interest Criterion 4002

Subsequently ASIO made an 'adverse security assessment' in respect of the plaintiff. In April 2012, the Department advised the plaintiff that, on the basis of the adverse security assessment, she did not satisfy Public Interest Criterion 4002 (PIC 4002) (which was a primary criterion for the grant of a protection visa) and that, as a result, she was not eligible for a protection visa. For that reason, the plaintiff's case was not referred to the Minister for consideration of a determination under s 46A(2) on whether she should be permitted to make a valid application for a protection visa.

Subsequently, however, in *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46, the High Court held that PIC 4002 was invalid.

High Court proceedings

In July 2013 the plaintiff commenced proceedings in the High Court seeking a writ of habeas corpus requiring her release on such conditions as the Court sees fit, as well as declarations, including a declaration that her detention is unlawful. A special case in the matter was referred to the Full Court for hearing.

One of the questions in the special case concerned the lawfulness of the decision not to refer the plaintiff's case to the Minister because PIC 4002 could not be satisfied. Other questions focused on the lawfulness of the plaintiff's ongoing detention in circumstances where the Department had been relevantly unable to remove the plaintiff to another country.

The High Court's decision

Failure to refer matter was an error of law and a declaration should issue

The Court held that the Department's reliance on PIC 4002 as a basis for deciding that the plaintiff could lawfully have been refused a visa was an error of law ([29], [134], [222]). Furthermore, the Minister's decision on whether to lift the bar 'was foreclosed by the error concerning PIC 4002'. It was because of this error that the matter was not referred to the Minister for his consideration under s 46A of the Act ([228]). For this reason, the non-referral of the plaintiff's case revealed an error of law ([232]).

In reaching this conclusion, Kiefel and Keane JJ (Crennan, Bell and Gageler JJ agreeing) found that the existence of an alternative basis for non-referral of the plaintiff's matter to the Minister – namely, the existence of the adverse security assessment by ASIO – was irrelevant, because PIC 4002 was the basis in fact on which the process was halted ([230]–[231]). Their Honours considered it unnecessary to resolve whether the alternative basis rendered the reliance on PIC 4002 a harmless error ([231]) and left open whether, once started, the Minister could halt the s 46A process as a result of an adverse security assessment ([230]).

The Court further held that a declaration to the effect that the exercise of the Minister's power was affected by an error of law should be made, with Kiefel and Keane JJ finding that the plaintiff had a 'real interest' in raising the question ([238]–[240]).

In contrast to the other members of the Court, French CJ and Hayne J both concluded that the process of consideration under s 46A could not be halted once commenced, despite the power being non-compellable ([24], [91], [92]–[93]). Furthermore, Hayne J found that the Minister had identified only 1 issue relevant to lifting the bar – that is, whether the plaintiff fell within the Refugees Convention. Having detained the plaintiff for the purpose of determining whether to lift the bar *by reference to this criterion*, the Minister could not subsequently make the decision by reference to any other consideration ([91], [96], [99]–[103], [107]). The Minister was not bound to limit the inquiry in this way ([106], [108]), but, having done so, the Minister could not then take *any* consideration relevant to the public interest into account in deciding whether to lift the bar ([91], 107]).

'... it was not necessary to decide the correctness of the decision in Al-Kateb *and whether ss 189, 196 and 198 of the Act validly authorise the detention in custody of a non-citizen where there is no real prospect that removal of the non-citizen from Australia will be practicable in the reasonably foreseeable future.'*

Validity of detention – construction and constitutional issues

Having determined that the Department's decision not to refer the plaintiff's request to be allowed to apply for a protection visa to the Minister was informed by error, a majority of the Court concluded that the RSA process was yet to be completed and that the plaintiff remained (validly) detained for the purpose of determining whether to grant her a visa ([4], [30] (French CJ); [146] (Crennan, Bell and Gageler JJ); see also [93], [100]–[101], [109] (Hayne J)). On that basis it was not necessary for the Court to decide whether the Act will validly authorise the plaintiff's ongoing detention if she is not granted permission to remain in Australia.

More generally, it was not necessary to decide the correctness of the decision in *Al-Kateb* and whether ss 189, 196 and 198 of the Act validly authorise the detention in custody of a non-citizen where there is no real prospect that removal of the non-citizen from Australia will be practicable in the reasonably foreseeable future. For that reason those issues were not addressed by either French CJ ([4], [32]) or in the joint judgment of Crennan, Bell and Gageler JJ ([136]).

However, Hayne J considered it desirable to deal with both the construction and constitutional issues that were argued ([114]). He held that 'this Court should not depart from what was then held [in *Al-Kateb*] to be the proper construction of the relevant provisions' ([125]), namely 'that ss 189, 196 and 198 authorised and required the detention of an unlawful non-citizen, even if his or her removal from Australia was not reasonably practicable in the foreseeable future' ([124]). His Honour also held that the conclusion in *Al-Kateb* on the validity of the provisions should be affirmed ([128]), expressly stating that, when construed in the way described, they are valid laws of the Commonwealth ([129]).

Furthermore, Kiefel and Keane JJ concluded that the plaintiff's detention was validly authorised by the Act independently of any consideration of the RSA process ([167]–[209]). In doing so, their Honours concluded that 'it is difficult to accept that [the majority's construction in *Al-Kateb*] is not the better view of the relevant provisions of the Act' ([189]), but that, in any event, the decision should not be reopened ([199]). Their Honours

went on to hold that, even when construed as authorising detention where removal is not reasonably practicable in a reasonable time, the provisions were valid ([204], [207], [209]).

AGS (Dale Watson, Louise Buchanan and Peter Melican from AGS Dispute Resolution, assisted by Andrew Buckland and Simon Thornton from the Constitutional Litigation Unit) acted for the defendants, with the Solicitor-General Justin Gleeson SC, Stephen Donaghue SC and Nick Wood as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2013/53.html

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High Court declares New South Wales election funding laws invalid

The High Court unanimously (6:0) declared invalid New South Wales legislation that:

- prohibited political donations from anyone other than an individual enrolled on an electoral roll
- reduced the amount a political party could spend on a State election campaign by the amount spent by organisations treated as affiliated with the party (and vice versa).

The legislation was held to be contrary to the implied freedom of political communication.

Unions NSW v NSW
High Court of Australia, 18 December 2013
[2013] HCA 58; (2013) 88 ALJR 227; (2013) 304 ALR 266

Background

The plaintiff unions challenged the validity of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (the EFED Act) in the original jurisdiction of the High Court. The EFED Act relevantly:

- capped the amount that a political party, candidate for election to the NSW Parliament or anyone else ('third-party campaigner') could spend on a NSW election (ss 95F and 95I)
- aggregated the amounts that a political party and its 'affiliated organisations' had expended to determine whether the applicable cap had been exceeded (s 95G(6))
- prohibited political donations to political parties, third-party campaigners and candidates, other than donations from individuals enrolled on the roll of electors for a State, federal or local government election (s 96D).

Constitutional issues

The plaintiffs argued that the provisions for aggregating expenditure (s 95G(6)) and relevantly restricting who could make donations (s 96D) impermissibly burdened the freedom of communication on political or governmental matters implied in the Commonwealth Constitution (the implied freedom of political communication). The plaintiffs argued the provisions also impermissibly burdened an analogous freedom said to be implied in the *Constitution Act 1902* (NSW).

Further, the plaintiffs argued that s 96D impermissibly burdened a freedom of association said to be implied in the Commonwealth Constitution, and was inconsistent with s 327 and/or Pt XX of the *Commonwealth Electoral Act 1918* (Cth) and thus invalid by operation of s 109 of the Constitution.

The Commonwealth Attorney-General intervened to argue that the EFED Act was not inconsistent with the Commonwealth Electoral Act and to make general submissions on the application of the implied freedom of political communication to electoral funding laws.

The High Court's decision

The High Court unanimously held that ss 96D and 95G(6) of the EFED Act were invalid because they were contrary to the implied freedom of political communication. In light of this conclusion, the Court found it unnecessary to consider the other grounds of the plaintiffs' challenge. The main judgment was delivered by French CJ, Hayne, Crennan, Kiefel and Bell JJ (the joint judgment). Justice Keane delivered separate reasons for holding the laws invalid. Justice Gageler did not sit.

Implied freedom – sources of communication

The joint judgment reiterated the foundational point from earlier cases (confirmed in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (Lange)) that the implied freedom of political communication is an 'indispensable incident of that system of representative [and responsible] government for which the Constitution provides' ([17]). It protects the free flow of communication between all interested persons that is necessary to the maintenance of representative [and responsible] government ([27]). In that context, the joint judgment emphasised that political communication 'is not simply a two-way affair between electors and government or candidates' ([30]). Rather, persons and entities who are non-electors but who are governed and affected by government decisions 'have a legitimate interest in governmental action and the direction of policy' and may seek to influence electors' choices on who should govern ([30]). It follows that 'political parties and candidates may seek to influence these persons or entities because it is understood that they will in turn contribute to the discourse about matters of politics and government' ([30]; see also [144], [148] (Keane J)).

'... persons and entities who are non-electors but who are governed and affected by government decisions "have a legitimate interest in governmental action and the direction of policy" and may seek to influence electors' choices on who should govern ...'

The implied freedom applies to State electoral laws

A threshold issue was whether the implied freedom of political communication applies to restrictions on political communication arising in the course of a *State* (cf federal) election. The defendant submitted that political communication arising in the course of a State election might not affect the decision of electors at federal elections or their opinions of the federal government so as to engage the implied freedom ([18]).

The Court rejected this argument, with the joint judgment concluding that '[the] complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate ['across the federal divide'] necessitate that a wide view be taken of the operation of the freedom of political communication' ([25]). It follows that 'discussion of matters at a State, Territory or local level might bear upon the choice that the people have to make in

federal elections and in voting to amend the Constitution, and upon their evaluation of the performance of federal Ministers and departments' ([25]; see also [151]–[155], [159] (Keane J)). The result is that this discussion is within the scope of the implied freedom.

The Court also held that State legislation regulating the process for State elections is not quarantined from the operation of the implied freedom of political communication by the principle from the *Melbourne Corporation* case that the States are to continue as independent polities with their own constitutions and their own legislative functions (*Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82). That is because the States cannot legislate inconsistently with the Commonwealth Constitution, including its implications ([34]).

Section 96D – limiting donations to individuals on an electoral roll

The first Lange *question – section 96D burdens political communication*

'... States cannot legislate inconsistently with the Commonwealth Constitution, including its implications ...'

The Court accepted that the test to apply to determine the validity of a law in light of the implied freedom is the 2-step test set out in *Lange* as modified in *Coleman v Power* (2004) 220 CLR 1 ([35], [44] (joint judgment); [115], [134] – but cf [133] (Keane J)).

The first *Lange* question is whether the law 'effectively burdens the freedom of political communication either in its terms, operation or effect'. In answering that question it is important to bear in mind that the implied freedom is a limitation on legislative power; it does not protect any personal right or freedom to engage in political communication ([36]). Thus 'the question is not whether a person is limited in the way that he or she can express himself or herself, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally' ([36]; see also [119] (Keane J)). Rather, the 'central question is: how does the impugned law affect the freedom [generally]?' ([36]).

What amounts to an 'effective burden' on political communication for the purposes of the first *Lange* question has been the subject of debate in previous cases. According to the joint judgment, however, the question is simply whether the freedom 'is in fact burdened'; and in answering that question it is not necessary to identify the extent of the burden imposed on the freedom ([40] (joint judgment); see also [119] (Keane J)). Instead, questions on the extent of the burden arise later, in connection with the second *Lange* question.

The Court held that s 96D does substantially burden the freedom ([35] (joint judgment); [120] (Keane J)). Whether or not the making of a political donation is a form of political communication (which the joint judgment doubted at [37]–[38], and Keane J implicitly rejected at [100], [112]), s 96D burdens the freedom because it restricts the 'funds available to political parties and candidates to meet the costs of political communication by restricting the source of those funds' ([37]–[38] (joint judgment); see also [120]–[121] (Keane J)).

Shortly before the hearing the EFED Act was amended in an attempt to quarantine political donations made for federal election campaign purposes. The Court held that, while those amendments may ameliorate the burden on political communication imposed by s 96D, they do not eliminate it. That is because of the many contexts in, and levels at which, political communications occurs ([42] joint judgment; see also [155] (Keane J)).

The second Lange *question – no legitimate purpose identifiable*

The parties agreed that the overall purpose of the EFED Act was legitimate. The purpose is accepted as being 'to regulate the acceptance and use of political donations in order to address the possibility of undue or corrupt influence being exerted' ([51] (joint judgment); see also [141] (Keane J)). However, the joint judgment held s 96D was invalid because it does nothing calculated to promote the achievement of the EFED Act's legitimate aim and has no purpose other than to prohibit certain donations ([51]). The problem is that s 96D is selective in what it prohibits, but the 'basis for the selection was not identified and is not apparent' ([53]).

While a complete prohibition on political donations might be understood to further the anti-corruption purposes of the EFED Act, the purpose of the incomplete prohibition adopted by s 96D is 'inexplicable' ([59]). In that regard the joint judgment rejected the defendant's argument that corporations were a justifiable target of s 96D on the ground that the terms of s 96D extended beyond corporations to any person not enrolled as an elector and to any organisation, association or other entity ([54]–[55], [57]). Because s 96D did not have a legitimate purpose, the joint judgment held that the second limb of the *Lange* test could not be satisfied and that s 96D was invalid ([60]).

The first Lange *question – section 95G(6) burdens political communication*

All members of the Court held that s 95G(6) of the EFED Act burdened the freedom of political communication because it restricted the amount that a political party may spend on electoral communication ([61] (joint judgment); [163] (Keane J)). (The joint judgment identified the party affected by the provision as the Australian Labor Party (NSW Branch), with which industrial organisations are affiliated ([61]).)

The second Lange *question – no legitimate purpose identifiable*

The joint judgment reached the same conclusion on the application of the second *Lange* question to s 95G(6) that it did about s 96D – namely, that no legitimate purpose was identifiable. Their Honours concluded that the purpose of s 95G(6) appeared to be 'to reduce the amount which a political party affiliated with industrial organisations may incur by way of electoral communication expenditure and likewise to limit the amount which may be spent by an affiliated industrial organisation' ([64]). However, it was not clear how that purpose was 'connected to the wider anti-corruption purposes of the EFED Act, or how those legitimate purposes are furthered by the operation and effect of s 95G(6)' ([64]). In light of that, it was not possible to apply the second *Lange* question to s 95G(6) and the provision was invalid ([65]).

Justice Keane identified that certain sources of political communication are treated differently from others. That is because s 95G(6) differentiates between an entity affiliated with a political party (expenditure aggregated) and an entity that is not affiliated with a political party but that promulgates the same political message as the party (expenditure not aggregated). That discriminatory treatment distorts the free flow of political communication and cannot be regarded as appropriate and adapted to enhance or protect political communication within the federation ([167]–[168]). Accordingly s 95G(6) was also invalid.

AGS (Andrew Buckland, Louise Rafferty, Megan Caristo and David Bennett QC from the Constitutional Litigation Unit) represented the Commonwealth Attorney-General intervening, with Neil Williams SC and Craig Lenehan as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2013/58.html

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