AGS

Litigation notes

Number 27 | 17 November 2017

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Decisions in brief

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Former Senator Robert Day held disqualified by reason of interest in Commonwealth lease agreement

The High Court sitting as the Court of Disputed Returns has held that, by reason of s 44(v) of the Constitution, former Family First Senator Robert Day was incapable of sitting as a senator on and after 26 February 2016 and, further, that he was incapable of being elected to the Senate at the July 2016 federal election. It followed that there was a vacancy in the representation of South Australia in the Senate for the place for which Mr Day was returned at the July 2016 federal election. The Court held that that vacancy should be filled by a special count of the ballot papers.

Re Day (No 2)
High Court of Australia, 5 April 2017
[2017] HCA 14; (2017) 91 ALJR 518

Background

On 7 November 2016, the Senate resolved under s 376 of the *Commonwealth Electoral Act 1918* (Cth) to refer to the High Court sitting as the Court of Disputed Returns questions concerning Mr Day's eligibility to have been elected as a senator at the 2016 election, how any vacancy in the Senate should be filled, and whether Mr Day had become incapable of sitting prior to the dissolution of the 44th Parliament.

The question as to Mr Day's eligibility focused particularly on s 44(v) of the Constitution, which provides that:

> Any person who:
>
> ...
>
> (v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member in common with the other members of any incorporated company consisting of more than twenty-five persons;
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

The Attorney-General, Mr Day and Ms Anne McEwen, an unsuccessful candidate for the Australian Labor Party, were each joined as a party to the proceeding.

Factual background

Mr Day was first elected to the Senate in October 2013. His term did not commence until 1 July 2014. One of the benefits provided to members of Parliament under the *Parliamentary Entitlements Act 1990* (Cth) is office accommodation in the parliamentarian's electorate. Mr Day wished to establish his electorate office at premises at 77 Fullarton Road, Kent Town, South Australia (the Fullarton Road property). Mr Day had a pre-existing connection with the Fullarton Road property: it was owned by a corporation, B&B Day Pty Ltd (B&B Day), which was the trustee of a discretionary trust known as 'the Day Family Trust'. Mr Day was one of the beneficiaries of that trust.

From late 2013, Mr Day believed that the Commonwealth was unwilling to take a lease of part of the Fullarton Road property for use as his electorate office so long as an entity in which he had an interest owned the freehold. Accordingly, in April 2014 B&B Day sold the Fullarton Road property to another company, Fullarton Investments Pty Ltd. Fullarton Investments was also a trustee company, being the trustee of a discretionary trust known as 'the Fullarton Road Trust'. The sole director of this trustee company (Mrs Smith) was the wife of a business associate of Mr Day (Mr Smith). Also, B&B Day was one of the beneficiaries of the Fullarton Road Trust.

The nominal purchase price for the sale of the Fullarton Road property was $2.1 million. No money actually changed hands. B&B Day and Fullarton Investments executed a document that acknowledged the provision of a 'vendor finance' loan by B&B Day to Fullarton Investments in the sum of $2.1 million. Under an arrangement between Mr Day, Mr Smith and Mrs Smith, Fullarton Investments 'would simply hold [the property] and collect rent on a regular basis'. That rent would then 'pass back to the Day Family Trust'.

Eventually, on 1 December 2015, a lease of the Fullarton Road property was entered into between Fullarton Investments and the Commonwealth. Pursuant to the lease, on 26 February 2016 Fullarton Investments nominated a bank account in the name of 'Fullarton Nominees' for receipt of rent. Fullarton Nominees was a business name owned by Mr Day and the bank account was his. As it turned out, the Commonwealth did not in fact pay any rent under the lease.

At all relevant times there was a loan facility provided by the National Australia Bank (NAB) to B&B Day and other companies with which Mr Day was associated. This loan facility was secured by a mortgage over the Fullarton Road property (even after the sale to Fullarton Investments) and by a guarantee and indemnity given by Mr Day and his wife.

Scope and purpose of s 44(v) of the Constitution

The main issue for the Court was the scope and purpose of s 44(v) of the Constitution. This required the Court to consider the only previous High Court case in which s 44(v) had been considered: *In Re Webster* (1975) 132 CLR 270 (*Re Webster*). In that case, Barwick CJ, sitting alone, held that the purpose of s 44(v) was the same as that of the *House of Commons (Disqualification) Act 1782* (UK) – namely, to prevent influence of parliamentarians by the executive.

The Court's decision

'The Court unanimously held that Mr Day was ineligible to have been elected at the 2016 election ...'

Application of s 44(v) of the Constitution

The Court unanimously held that Mr Day was ineligible to have been elected at the 2016 election by reason of s 44(v) of the Constitution and that the vacancy should be filled by a special count of the ballot papers. The Court further held that the fact that Mr Day was the owner of the bank account nominated as the recipient of the rental monies for the lease with the Commonwealth was sufficient to engage s 44(v) of the Constitution. Because the nomination was given on 26 February 2016, a majority of the Court considered that to be the date Mr Day became incapable. (Gageler, Nettle and Gordon JJ, however, considered that Mr Day had an indirect pecuniary interest by the earlier date of 1 December 2015, which was the date of the lease.)

All members of the Court agreed that the approach to s 44(v) that Barwick CJ adopted in *Re Webster* was too narrow, finding that its purpose is not limited to protecting parliamentarians from influence by the executive.

There were 4 sets of reasons.

Joint reasons of Kiefel CJ, Bell and Edelman JJ

In affording s 44(v) a wider purpose and operation than Barwick CJ did in *Re Webster*, Kiefel CJ, Bell and Edelman JJ had regard to the Constitutional Convention debates. These suggested that part of the impetus for s 44(v) was the need to separate the personal interest of a parliamentarian from the exercise of his public duties ([33], [39]; see also [50]).

Their Honours did not attempt to formulate an overarching test as to what amounts to an 'indirect pecuniary interest in an agreement' for the purposes of s 44(v). However, they did observe that '[n]o narrow view of the operation of s 44(v) can be said to be warranted by its terms, read consistently with its purpose' ([75]). So, for example, one need not actually be a party to an agreement to be able to be said to have a 'pecuniary interest' in it ([66]).

To resolve this case, it was sufficient for their Honours that 'Mr Day ... was the owner of the bank account nominated as the recipient of the rental monies' for the lease in question ([12]). Their Honours said ([13]):

> It is quite difficult to comprehend that this does not amount to an interest in the lease of a monetary kind. It is not difficult to infer from other facts that Mr Day brought the nomination [ie that rental payments for the lease be paid into a bank account owned by Mr Day] about and that it was his purpose to apply the monies to the loan facility. These matters may be

> put to one side. It is sufficient for the resolution of the questions referred to the Court to focus upon the fact that he was to receive the rental monies payable under the lease.

Thus ([76]):

> It follows that on and from 26 February 2016, when the direction for the payment of rent to Mr Day was given, s 44(v) operated to disqualify Mr Day from sitting as a senator because he had an interest of a pecuniary nature in the lease. As a result, a vacancy arises in the representation of South Australia in the Senate.

Gageler J

Justice Gageler also held that the interpretation of s 44(v) of the Constitution adopted in *Re Webster* was unsatisfactory. It was founded on 'too narrow a view of the purpose of the disqualification' and adopted a criterion for the operation of the disqualification that was 'vague and unduly evaluative and that involves a gloss on the constitutional language' ([98]).

As to the meaning of 'any direct or indirect interest' in s 44(v), Gageler J adopted the interpretation of a similar provision considered in *Ford v Andrews* (1916) 21 CLR 317 ([108]):

> A man is directly interested in a contract if he is a party to it, he is indirectly interested if he has the expectation of a benefit dependent on the performance of the contract …

Applying this understanding, Gageler J held that Mr Day had an 'indirect pecuniary interest' within the meaning of s 44(v) of the Constitution from the time the Commonwealth entered into the lease with Fullarton Investments on 1 December 2015 ([92]–[93]). This indirect pecuniary interest existed because Mr Day stood to gain financially in 1 or more of 3 distinct ways from the Commonwealth performing its obligation to pay rent under the lease ([87]):

- First, Mr Day was the holder of the bank account into which rent was to be paid by the Commonwealth ([88]).
- Second, Mr Day was a guarantor of the loan facility provided by NAB. Ultimately, payment of the rent would 'have the prospect in practical effect of reducing the extent of Mr Day's contingent liability to NAB' ([89]).
- Third, Mr Day was a beneficiary of the Day Family Trust. The Day Family Trust was in turn one of the beneficiaries of the Fullarton Road Trust. The Fullarton Road property formed part of the property of the Fullarton Road Trust. Mr Day 'in that way had the prospect of receiving, through the sequential exercise of discretions on the parts of Fullarton Investments and B&B Day, a distribution of the whole or some part of such funds as Fullarton investments as trustee of the Fullarton Road Trust might receive from rent paid to it under the lease' ([90]).

Keane J

Justice Keane also expressed the view that in *Re Webster* Barwick CJ had taken too narrow a view of the scope of s 44(ii) ([161]). His Honour expressed the view that the purpose of s 44(v) is 'to ensure that the conscientious discharge of a parliamentarian's duties is not affected by considerations of pecuniary benefit which might be made available to members of the legislative branch of government by reason of their position by officers of the executive government' ([183]).

As construed, his Honour found that Mr Day had fallen foul of s 44(v). From no later than 26 February 2016 (when the direction was given that rent be paid into the bank account of Fullarton Nominees), Mr Day had an expectation of a financial benefit dependent on the performance of the lease by the Commonwealth. That was sufficient

to enliven s 44(ii): '[g]iven the constitutional context, it is enough that the person's pockets were or might be affected' ([191]; see also [195]).

His Honour found it unnecessary to determine whether Mr Day's position as a beneficiary of the Day Family Trust, either on its own or in combination with his position as guarantor of B&B Day's financial obligations, was a sufficient indirect interest for the purpose of s 44(v) ([195]–[196]).

Nettle and Gordon JJ

Justices Nettle and Gordon held that s 44(v) is 'concerned with more than one species of influence – influence by the executive over the parliamentarian and, independently of the executive, the parliamentarian preferring their own private interests over public duty' ([282], see also [263]).

In relation to the meaning of 'direct or indirect pecuniary interest', their Honours propounded the following test ([252]):

> A 'pecuniary interest' within the meaning of s 44(v) should be understood as an 'interest sounding in money or money's worth'. The direct or indirect interest must be pecuniary in the sense that, through the possibility of a not insubstantial *financial gain or loss* by the existence, performance or breach of the agreement with the Public Service of the Commonwealth, that person could conceivably be influenced ... by the potential conduct of the executive in performing or not performing the agreement or because that person could conceivably prefer their private interests over their public duty. [Citations omitted.]

Their Honours explained that this test is not evaluative or impressionistic but is put on the basis of 'conceivable influence'. Accordingly, it does not depend on external perceptions, unlike apprehended bias cases. The question is whether the interest could conceivably influence the person ([263]–[264]).

Applying s 44(v) as construed, Nettle and Gordon JJ concluded that Mr Day had an indirect pecuniary interest which arose no later than 1 December 2015, which was the date of the lease ([277]). Their Honours concluded that Mr Day was exposed to the possibility of a not insubstantial financial gain or loss by the existence, performance or breach of the lease in the following ways:

- because the bank account into which rent was to be paid was owned by Mr Day ([279])
- because the Fullarton Road property was used as security for loan facilities provided by NAB to companies associated with Mr Day. Mr Day had provided a guarantee and indemnity in relation to those facilities. In the event that the Commonwealth did not pay rent on the Fullarton Road property, Fullarton Investments had no other source of income and funds to pay the purchase price of the Fullarton Road property to B&B Day or to make loan repayments to NAB. Funds would have had to come from other sources, including, if need be, Mr Day as guarantor ([280]).

Justices Nettle and Gordon were also of the view that, if rent had been passed back to the Day Family Trust (as per the original arrangement) rather than directly to Mr Day, he would still have had a disqualifying pecuniary interest in the lease ([287]–[288]).

In the upshot, because of his interest in the lease, Mr Day 'could conceivably have been influenced [in the exercise of his powers or the performance of his duties as a parliamentarian] by the potential conduct of the executive in performing or not performing the lease or because he could have preferred his private interests over his public duty' ([288]).

Are routine agreements captured by s 44(v)?

In identifying the correct construction of s 44(v), one of the issues for the Court was whether routine agreements entered into by a parliamentarian with the executive engage s 44(v).

Chief Justice Kiefel, Bell and Edelman JJ accepted that such agreements would be excluded, explaining ([69]):

> There can be no relevant interest if the agreement is one ordinarily made between government and a citizen. Were it otherwise, every day-to-day dealing which a citizen has with government could result in the disqualification of a citizen who happens to be a parliamentarian.

Justices Gageler and Keane were also of the view that agreements entered into in the execution of a law of general application should not be caught by s 44(v).

Justice Keane said ([200]):

> Given the purpose that informs s 44(v), there is no reason to expand its disqualifying effect to any person who might obtain a pecuniary benefit conferred by the Commonwealth which is available generally to the community. Such a benefit does not fall within the spirit of s 44(v).

His Honour suggested that a textual basis for this restriction on the operation of s 44(v) is the fact that the provision is only engaged 'if the agreement is made with "the Public Service of the Commonwealth" ' ([199)]. However, his Honour added that 'it is unnecessary to reach a concluded view upon the outer limits of the disqualifying operation of s 44(v) because in the present case Mr Day's interest falls squarely within its scope' ([201]).

Justice Gageler endorsed Keane J's proposed reading of s 44(v). Justice Gageler said that anxiety about s 44(v) being enlivened by 'routine or otherwise patently benign agreements with the Executive Government' ([101]) is 'substantially alleviated … when "any agreement with the Public Service of the Commonwealth" is read, as Keane J suggests and as I agree with him that it should be, as having no application to an agreement entered into by the Executive Government of the Commonwealth in the execution of a law of general application enacted by the Parliament' ([102]). For 'not every agreement with the Commonwealth can properly be characterised as an agreement with the Public Service of the Commonwealth' ([105]).

Justices Nettle and Gordon did not expressly address the question.

Manner of filling the vacancy

Following *Re Wood* (1988) 167 CLR 145 and *Re Culleton [No 2]* [2017] HCA 4, all members of the Court held that the vacancy should be filled by a special count of the ballot papers cast at the 2016 Senate election for South Australia, disregarding preferences indicated for Mr Day. That is, the vacancy should be dealt with in the same manner as where a deceased candidate's name appears on the ballot paper – namely, that such a vote 'shall be counted to the candidate next in order of the voter's preference and the numbers indicating subsequent preferences shall be taken to be altered accordingly' ([77] Kiefel CJ, Bell and Edelman JJ). The Court rejected arguments put on behalf of Ms McEwen that in the special count all votes 'above the line' for Family First should be disregarded.

AGS (Brooke Griffin and Simon Daley PSM from AGS Dispute Resolution and Nerissa Schwarz, Emilie Sutton, Simon Thornton and Gavin Loughton from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Solicitor-General, Stephen Donaghue QC, Neil Williams SC, Craig Lenehan and Brendan Lim as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2017/14.html

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Mr Rodney Culleton ineligible to have been elected as a senator by reason of conviction

The High Court sitting as the Court of Disputed Returns has unanimously held that, by reason of s 44(ii) of the Constitution, Mr Rodney Culleton was not eligible to have been elected at the 2016 federal election. This was because, at the time of the election, Mr Culleton stood convicted of and was awaiting sentence for an offence of the kind described in s 44(ii) – even though that conviction was later 'annulled' under the *Crimes (Appeal and Review) Act 2001* (NSW) (Appeal and Review Act). The Court held that the resulting vacancy in the representation in the Senate should be filled by a 'special count' of the ballot papers cast at the election, disregarding preferences for Mr Culleton.

Re Culleton (No 2)
High Court of Australia, 3 October 2017
[2017] HCA 4; (2017) 91 ALJR 311; (2017) 341 ALR 1

Background

On 7 November 2016, the Senate resolved under s 376 of the *Commonwealth Electoral Act 1918* (Cth) (Electoral Act) to refer to the High Court sitting as the Court of Disputed Returns a question concerning Mr Culleton's eligibility to have been elected as a senator. The Senate also referred the question of how any vacancy caused by Mr Culleton's ineligibility should be filled.

On 25 March 2016 Mr Culleton was convicted, in his absence, of the offence of larceny by the Local Court of New South Wales. He had not yet been sentenced for that offence by the time of the 2016 federal election. After the election, on 8 August 2016, that conviction was 'annulled' under the Appeal and Review Act.

The question for the High Court was whether s 44(ii) of the Constitution operated so as to disqualify Mr Culleton from election. Section 44(ii) provides that:

> Any person who:
> ...
> (ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer;
> ...
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

One of the issues for the Court was whether the 'annulment' of the conviction had the effect that Mr Culleton should be taken never to have been 'convicted' for the purposes of s 44(ii) of the Constitution. This raised questions concerning the construction of s 44(ii) of the Constitution as well as the Appeal and Review Act. In particular, the question arose whether the annulment nullified the conviction with retrospective effect and, if so, whether s 44(ii) had been engaged. Could s 44(ii) operate upon the *fact* of a conviction, even if that conviction was subsequently held to be of no effect?

The High Court's decision

The High Court unanimously held that Mr Culleton was ineligible to have been elected and that the vacancy should be filled by a special count of the ballot papers.

Joint judgment of Kiefel, Bell, Gageler and Keane JJ

The joint judgment held that, properly construed, the Appeal and Review Act operated so as to annul Mr Culleton's conviction with prospective effect only. Therefore, as a matter of fact and a matter of law, *at the time of the election* Mr Culleton stood convicted. It followed that Mr Culleton's conviction rendered him incapable of being chosen as a senator ([26]–[30]). Their Honours found it unnecessary to express a view on the broader constitutional issue of whether s 44(ii) would be engaged merely by a conviction in fact – ie a conviction that was nullified with retrospective effect. In particular, their Honours did not decide the question of how s 44(ii) would operate if a conviction were procured by procedural unfairness or fraud or by other circumstances which would warrant the conclusion that it was always and entirely a legal nullity ([31]).

'Therefore ... at the time of the election Mr Culleton stood convicted.'

Their Honours also rejected an argument put on behalf of Mr Culleton that s 44(ii) was not engaged because he had not yet been sentenced for the offence and was therefore not 'under sentence'. Their Honours held that the text of s 44(ii) made it clear that the section would be engaged if a person were 'subject to be sentenced'. Their Honours said (at [22]):

> It is evident from the terms of s 44(ii) that the framers of the Constitution were concerned to ensure that not only should a person who has already been sentenced to a term of imprisonment of one year or longer be disqualified from being chosen or from sitting as a Senator; so too should a person who is able to be so sentenced. The circumstance sought to be guarded against was that such a person might not be able to sit and should for that reason not be able to be chosen.

As to how the vacancy should be filled, their Honours followed the approach in *Re Wood* (1988) 167 CLR 145 that, in Senate elections, the whole election is not rendered void where an ineligible candidate stands but that the vacancy should be filled by a special count of the votes, disregarding preferences for Mr Culleton. It was held that such a count would reflect 'the true legal intent of the voters' so far as would be consistent with the Constitution and the Electoral Act ([43]).

Nettle J – concurring judgment

In a separate concurring judgment, Nettle J went further than the joint judgment. His Honour accepted the Attorney-General's argument that s 44(ii) would be engaged by a conviction in fact, even if that conviction were subsequently annulled with retrospective effect. His Honour regarded the need for certainty in the electoral process as bearing on this conclusion. His Honour said (at [59]):

> Now, as at the time of Federation, the need for certainty in the electoral process makes it highly desirable that, if a person is convicted of a relevant offence, he or she should forthwith cease to be eligible for election, or, if already elected, should cease to be capable of sitting, until

> and unless the conviction is quashed or annulled or the sentence is spent. If it were otherwise, there could be long periods following conviction of a relevant offence until an appeal or application for annulment is finally heard and determined in which it would be impossible to say whether the person so convicted is or is not eligible to be elected, or is or is not eligible to continue to sit as a senator or member of the House of Representatives. If the framers of the Constitution had foreseen that a process of annulment might bring about that possibility it is inherently unlikely that they would have intended that to be the result. The disqualification imposed by s 44(ii) must be read in light of the system of representative and responsible government established by the text and structure of the Constitution. An understanding of s 44(ii) as requiring order and certainty in the electoral process accords with that system.

His Honour's view of the operation of an 'annulment' under the Appeal and Review Act was different from that expressed in the joint judgment. His Honour held that an annulment has retrospective operation in the sense that 'a person's convict status in relation to events occurring *after* annulment is that he or she is not regarded as having been convicted' ([61]). His Honour accepted that a conviction 'susceptible to annulment under the Appeal and Review Act continues to have effect up to the date of annulment' and, as such, 'remains determinative of the convicted person's convict status in relation to events occurring up to that point' ([62]). His Honour rejected the other arguments put on behalf of Mr Culleton and therefore concluded that s 44(ii) of the Constitution was engaged.

His Honour agreed with the joint judgment in relation to how the vacancy should be filled ([67]).

AGS (Nerissa Schwarz and Gavin Loughton from the Constitutional Litigation Unit and Simon Daley PSM and Brooke Griffin from AGS Dispute Resolution) acted for the Commonwealth Attorney-General intervening, with Neil Williams SC, Craig Lenehan and Brendan Lim as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2017/4.html

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Commonwealth involvement in detention on Nauru upheld

The High Court by majority upheld the validity of the Commonwealth's involvement in the detention of the plaintiff asylum seeker in Nauru under Australia's regional processing arrangements. The Commonwealth's conduct was held to be validly authorised by s 198AHA of the *Migration Act 1958* (Cth); therefore, the Court did not need to decide whether the Commonwealth's conduct would have been authorised by any other law or, absent statutory authority, by s 61 of the Constitution.

Plaintiff M68/2015 v Minister for Immigration and Border Protection
High Court of Australia, 3 February 2016
[2016] HCA 1; (2016) 257 CLR 42; (2016) 90 ALJR 297; (2016) 327 ALR 369

Background

The case was brought by a Bangladeshi national who arrived in Australia by boat without a visa. On entering the migration zone, she became an 'unauthorised maritime arrival' (UMA) under s 5AA of the Migration Act. The Migration Act relevantly requires that an unauthorised maritime arrival be detained and taken to a designated 'regional processing country' (s 189 and s 198AD). The plaintiff was detained by officers of the Commonwealth and taken to Nauru. The Minister for Immigration and Border Protection had previously designated Nauru as a regional processing country pursuant to s 198AB of the Migration Act.

Regional processing arrangements in Nauru

On 3 August 2013, Australia and Nauru entered into a memorandum of understanding (MOU) in which Nauru agreed to accept the transfer to Nauru of persons who travel irregularly by sea to Australia and to assess whether a transferee is a refugee under the Convention Relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) (Refugees Convention). On 11 April 2014, the governments of Australia and Nauru made administrative arrangements to give effect to the MOU. The MOU confirmed that transferees will remain on Nauru while their claims to refugee status under the Refugees Convention are processed.

Under Nauruan law, transferees brought to Nauru were required to reside at the Nauru Regional Processing Centre (RPC) while their claims were processed. If Nauru recognised a person as a refugee then the person was no longer required to reside at the RPC. Until October 2015, transferees were prohibited from leaving the RPC (which is surrounded by a high metal fence) without the approval of certain authorised persons, and it was an offence to attempt to do so.

The Commonwealth contracted for the construction and maintenance of the RPC, and funded all costs associated with it, in accordance with the MOU. The Commonwealth also provided fencing, lighting towers and other security infrastructure. Third-party service providers were contracted to provide services at the RPC. In particular, the Commonwealth engaged the third defendant, Transfield Services (Australia) Pty Ltd (subsequently known as Broadspectrum), to provide security, cleaning and catering services to transferees and personnel at the RPC. Transfield then subcontracted its contract to Wilson Security Pty Ltd. Staff of Wilson were authorised by the law of Nauru to exercise certain powers in relation to the RPC.

'The Commonwealth contracted for the construction and maintenance of the RPC, and funded all costs associated with it, in accordance with the MOU.'

The plaintiff's case

The plaintiff resided at the Nauru RPC from 24 March 2014 to 2 August 2014, when the Commonwealth brought her to Australia for medical treatment, pursuant to s 198B of the Migration Act. A person brought to Australia for a temporary purpose under that section is liable to be removed from Australia as soon as practicable after the person no longer needs to be in Australia for that purpose (s 198(1A); see further *Plaintiff M96A v Commonwealth*, also discussed in this edition of *Litigation notes*).

While the plaintiff was in Australia, she commenced this proceeding in the High Court seeking a declaration that the Commonwealth's past involvement in her detention in Nauru was unlawful. She also sought orders:

- to prevent her from being returned to Nauru
- prohibiting the Commonwealth from making future payments to Transfield.

A large number of other transitory persons in Australia brought similar proceedings in the High Court seeking to prevent their return or removal to Nauru and Papua New Guinea.

Amendment to Migration Act – section 198AHA

After the plaintiff commenced this proceeding, the Commonwealth Parliament enacted the *Migration Amendment (Regional Processing Arrangements) Act 2015*, which inserted s 198AHA into the Migration Act with retrospective effect from August 2012. The Commonwealth relied on s 198AHA to authorise its conduct in Nauru.

Section 198AHA relevantly applies where the Commonwealth enters into an arrangement with a person or body in relation to the regional processing functions of a country. It authorises the Commonwealth to engage in conduct, including to:

a. take action in relation to the arrangement or the regional processing functions of the country
b. make payments in relation to the arrangement or the regional processing functions of the country
c. do anything else that is incidental or conducive to the taking of such action or the making of such payments.

('Action' includes 'exercising restraint over the liberty of a person' (s 198AHA(5)).)

Nauru implements open centre arrangements

In early 2015 the Government of Nauru implemented 'open centre' arrangements, whereby persons residing in the RPC could be granted permission to leave the RPC. Shortly before hearing of this matter in early October 2015, the Government of Nauru announced that it was expanding those arrangements to allow most transferees residing in the RPC to have freedom of movement 24 hours per day, 7 days per week.

The Court's decision

A majority of the Court rejected the plaintiff's arguments (Chief Justice French CJ and Kiefel and Nettle JJ delivered a joint judgment, with Bell J, Gageler J and Keane J writing separately; Justice Gordon dissented).

'... the expanded open centre arrangements meant that it was unlikely that the plaintiff would be detained if she were returned to Nauru.'

The High Court concluded that the expanded open centre arrangements meant that it was unlikely that the plaintiff would be detained if she were returned to Nauru. Accordingly the Court focused on the plaintiff's challenge to the validity of the Commonwealth's conduct in the past ([17] (French CJ, Kiefel and Nettle JJ); [63] (Bell J); see also [186] (Gageler J); [265] (Keane J); [416] (Gordon J)).

Plaintiff had standing to challenge validity of Commonwealth's past conduct

The Court unanimously held that the plaintiff had standing to challenge the validity of the Commonwealth's past conduct, because that would resolve the question as to the lawfulness of the Commonwealth's conduct with respect to her detention ([23], [64], [112], [235], [350]). That question was not hypothetical, because the answer would determine whether the Commonwealth could repeat that conduct in the future ([23] (French CJ, Kiefel and Nettle JJ); [64] (Bell J); [235] (Keane J)), and the declarations that the plaintiff sought may have given her grounds to claim damages for false imprisonment ([350] (Gordon J)).

Section 198AHA purported to authorise Commonwealth's past conduct

The Commonwealth argued that its past conduct in relation to the plaintiff's past detention was authorised by:

- s 198AHA of the Migration Act
- s 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth), read with reg 16 and certain items of Sch 1AA to the *Financial Framework (Supplementary Powers) Regulations 1997* (the financial framework provisions), and/or
- the executive power of the Commonwealth under s 61 of the Constitution.

The Court held unanimously that s 198AHA of the Migration Act provided authority for the Commonwealth to engage in the relevant conduct in Nauru, including in relation to the plaintiff's detention.

Arrangements with Nauru fall within section 198AHA

As outlined above, s 198AHA relevantly applies where the Commonwealth enters into an arrangement with a person or body in relation to the regional processing functions of a country.

The Court held that Nauru was a 'person or body' within the meaning of s 198AHA(1) ([44]–[45] (French CJ, Kiefel and Nettle JJ); [74] (Bell J); [177] (Gageler J); [363]–[364] (Gordon J)). Furthermore, the Commonwealth had power to enter into the MOU with Nauru:

- in exercise of the executive power of the Commonwealth 'with respect to aliens ... in order to facilitate regional processing arrangements' ([45] (French CJ, Kiefel and Nettle JJ))
- in exercise of the executive power to establish and conduct relations with other countries ([68] (Bell J); [178] (Gageler J))
- as 'an act in execution of the statutory power given in s 198AHA' ([365] (Gordon J); see also [24] (French CJ, Kiefel and Nettle JJ); [201] (Keane J)).

Accordingly, s 198AHA was engaged.

Conduct authorised by section 198AHA

The Court further held that, as a matter of construction, s 198AHA purported to authorise the impugned conduct by the Commonwealth, including participating in the plaintiff's detention ([46] (French CJ, Kiefel and Nettle JJ); [71] (Bell J); [180] (Gageler J); [242] (Keane J); [366] (Gordon J)).

'... as a matter of construction, s 198AHA purported to authorise the impugned conduct by the Commonwealth, including participating in the plaintiff's detention ...'

The Court further held that, as a matter of construction, s 198AHA purported to authorise the impugned conduct by the Commonwealth, including participating in the plaintiff's detention ([46] (French CJ, Kiefel and Nettle JJ); [71] (Bell J); [180] (Gageler J); [242] (Keane J); [366] (Gordon J)). However, s 198AHA only authorises the Commonwealth to participate in detention in a regional processing country to the extent that the detention is sufficiently related to the country's regional processing functions. Thus, as French CJ, Kiefel and Nettle JJ held (at [46], emphasis added):

> The nature and duration of [the Commonwealth's] action, including participation in the exercise of restraint over the liberty of a person, is limited by the scope and purpose of s 198AHA. Section 198AHA is incidental to the implementation of regional processing functions for the purpose of determining claims by UMAs to refugee status under the Refugees Convention. The exercise of the powers conferred by that section must also therefore serve that purpose. **If the regional processing country imposes a detention regime as a condition of the acceptance of UMAs removed from Australia, the Commonwealth may only participate in that regime if, and for so long as, it serves the purpose of processing.** The Commonwealth is not authorised by s 198AHA to support an offshore detention regime which is not reasonably necessary to achieve that purpose.

(See also [101] (Bell J); [185] (Gageler J); and [262] (Keane J).)

Section 198AHA is constitutionally valid

The majority held that s 198AHA is supported by the Commonwealth Parliament's power to make laws with respect to aliens (s 51(xix) of the Constitution). This was because s 198AHA:

- supported by a head of power
- not contrary to Ch III of the Constitution.

Section 198AHA is supported by a head of power

The majority held that s 198AHA is supported by the Commonwealth Parliament's power to make laws with respect to aliens (s 51(xix) of the Constitution). This was because s 198AHA:

- authorised actions connected to the processing of protection claims made by aliens who have been taken by the Commonwealth from Australia to the regional processing country for that processing, which provides a sufficient connection with the subject matter of 'aliens' ([42] (French CJ, Kiefel and Nettle JJ); [77] (Bell J); [182] (Gageler J))
- facilitates the removal of aliens from Australia by seeking to ensure there is a country willing and able to receive aliens removed from Australia ([259] (Keane J); cf [394] (Gordon J)).

Justice Gageler further held that s 198AHA is also supported by the external affairs power (s 51(xix) of the Constitution), insofar as the section authorises the executive government to take action outside Australia in relation to an arrangement entered into by the executive and the government of a foreign country ([182]).

Section 198AHA is consistent with Chapter III of the Constitution

The plaintiff relied on the High Court's earlier decision in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (*Lim*) to argue that s 198AHA was contrary to Ch III of the Constitution. In *Lim* the Court relevantly held that:

- A Commonwealth officer requires statutory authority to detain a person (including an alien) in custody without judicial warrant.
- An officer cannot be authorised to detain a person for penal or punitive purposes, because that would amount to the conferral of judicial power on the officer.
- Parliament can validly authorise the detention in custody of an alien for the non-punitive purpose of their removal from Australia or for the purposes of enabling an application by the alien to enter and remain in Australia to be investigated and determined.

(See eg [40] (French CJ, Kiefel and Nettle JJ); [98] (Bell J).)

The critical question in the present case was the extent to which these principles applied to conduct by the Executive Government in another country.

***Lim* did not apply (French CJ, Kiefel and Nettle JJ; Keane J)**

A majority of the Court held that the principle from *Lim* did not apply to the facts of this case. That is because the limitation in *Lim* is not relevant where detention is 'not actually implemented' by the Commonwealth and its officers, and *Lim* has 'nothing to say about the validity of actions by the Commonwealth and its officers in participating in the detention of an alien by another State' ([41] (French CJ, Kiefel and Nettle JJ); [238]–[239] (Keane J).

'... Lim has "nothing to say about the validity of actions by the Commonwealth and its officers in participating in the detention of an alien by another State ..." '

***Lim* applies but is not infringed (Bell and Gageler JJ)**

In contrast, Bell J and Gageler J each held that legislation authorising the executive to detain a person in another country was subject to the principles in *Lim* but found that s 198AHA was not contrary to Ch III of the Constitution.

For Bell J, it was sufficient for the application of *Lim* that the plaintiff's detention was, as a matter of substance, caused and effectively controlled by the Commonwealth ([93]). In that respect, there was no reason in principle why the constitutional limitations that apply to the detention of aliens in Australia should not apply when the Commonwealth causes and controls the detention of an alien in a regional processing country ([99]). However, the requirement for transferees in Nauru to be detained while their protection claims were being determined was not punitive ([100]; see also Keane J at [263]–[264]). Importantly, s 198AHA only authorised action that can reasonably be seen to be related to Nauru's regional processing functions. If detention were to exceed that which was reasonably necessary for the performance of those functions then the Commonwealth's participation would be unlawful ([101]).

Justice Gageler also held that legislation conferring a capacity on the Executive Government to detain a non-citizen in another country, pursuant to the laws of that country, was subject to the *Lim* principle ([184]). In that respect, a law authorising detention by the executive, whether in Australia or elsewhere, will be characterised as punitive unless the duration of that detention meets at least 2 conditions ([184]):

- The duration of detention must reasonably be necessary to effectuate a purpose identified in the law which is capable of fulfilment.
- The duration of detention must be capable of objective determination by a court at any time.

Both of those conditions were satisfied in the present case, as the detention was limited to that reasonably necessary to effectuate the regional processing functions of Nauru, and a court could determine the duration of the detention by reference to what remains to be done ([185]).

Lim applies and is infringed (Gordon J in dissent)

Like Bell J and Gageler J, Gordon J also held that the *Lim* principle applies to the detention of a person outside Australia that is effected by the Commonwealth's acts and conduct ([379], [395]). However her Honour held that, here, the plaintiff's detention did not fall within either of the recognised exceptions in *Lim* ([391]), and there was no basis for creating any new exception to the 'rule that the Commonwealth Parliament cannot give to the Executive a power to detain an alien for purposes outside the *Lim* exceptions' ([401]). Accordingly s 198AHA could not validly authorise the Commonwealth's conduct ([400]).

Other issues not resolved

Statutory authority – financial framework provisions

As the Court found that the Commonwealth's conduct was validly supported by s 198AHA of the Migration Act, it was not necessary to consider whether the conduct was also supported by the financial framework provisions ([41], [54] (French CJ, Kiefel and Nettle JJ); [66] (Bell J); [197], [265] (Keane J); [367] (Gordon J); cf [175], [188] (Gageler J concluding that the plaintiff's case was well founded until the enactment of s 198AHA)).

Non-statutory authority – unnecessary to decide (French CJ, Kiefel, Nettle, Bell, Keane JJ)

A majority of the Court also found it unnecessary to decide whether the Commonwealth's involvement in the plaintiff's detention was authorised as a matter of non-statutory executive power by s 61 of the Constitution ([41] (French CJ, Kiefel and Nettle JJ, describing this as a 'hypothetical question'); [66] (Bell J); [265] (Keane J)). It was also unnecessary to address a wider submission made by Transfield that the Commonwealth Executive may be invested with functions not forming part of the executive power of the Commonwealth ([66] (Bell J); cf [162], [174] (Gageler J)).

No non-statutory executive power (Gageler J and Gordon J)

However, both Gageler J and Gordon J held that the Executive Government could not detain a person, whether in Australia or elsewhere, without statutory authority ([162] (Gageler J); [372] (Gordon J)). According to Gageler J, the inability of the Executive Government to authorise or enforce a deprivation of liberty is an 'inherent constitutional incapacity' commensurate with the scope of habeas corpus to compel release from detention not authorised by statute ([159]–[162]). Thus the Commonwealth does not have non-statutory executive power to engage in action that involves 'de facto control over the liberty of a person' ([165]–[166]). The 'procurement' of the plaintiff's detention in Nauru by the Commonwealth was beyond the non-statutory executive power of the Commonwealth ([174]).

Was the plaintiff's detention in Nauru contrary to the Nauruan Constitution?

It was also unnecessary for the Court to determine whether the plaintiff's detention was consistent with the Nauruan Constitution. For the majority, that was because the authority given by s 198AHA does not depend on the constitutional validity of laws of a regional processing country ([51]–[52] (French CJ, Kiefel and Nettle JJ); [102] (Bell J); [181] (Gageler J); [248]–[253] (Keane J)). And, for Gordon J (in dissent), Nauruan law was not relevant because 'the Executive cannot, by entering into an agreement with a foreign state, agree the Parliament of Australia into power' ([413]–[414]).

AGS (Niamh Lenagh-Maguire and Andrew Buckland from the Constitutional Litigation Unit and Rogan O'Shannessy and Emily Nance from AGS Dispute Resolution) acted for the Commonwealth and Minister for Immigration and Border Protection, with the Solicitor-General Justin Gleeson SC, Geoffrey Kennett SC, Anna Mitchelmore and Perry Herzfeld as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2016/1.html

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Challenge to Senate electoral reforms dismissed

The High Court unanimously dismissed a challenge to changes to the Senate ballot paper and the process for marking it which were enacted in advance of the 2016 double dissolution election.

Day v Australian Electoral Officer (SA)
High Court of Australia, 13 May 2016
[2016] HCA 20; (2016) 90 ALJR 639; (2016) 331 ALR 386

Background

In March 2016 the Parliament enacted the *Commonwealth Electoral Amendment Act 2016* (Cth). That Act made the most significant changes to the Senate voting system since 1983.

The pre-2016 Senate voting system gave voters 2 options:

- to place a number for every candidate in the election 'below the line' on the ballot paper
- to place the number 1 for a single group 'above the line'.

The above-the-line option was known as 'group ticket voting': in voting above the line, a voter would adopt a group ticket lodged by the group with the Australian Electoral Commission and be deemed to have expressed a preference for each candidate in accordance with the ticket. A voter who had not reviewed the group ticket or tickets for their chosen group would not ordinarily know the order in which their preferences would be distributed to candidates outside the group.

The 2016 changes affected both above-the-line and below-the-line voting:

- Voters could continue to vote above the line, but the group ticket system was abolished. Under the new system, a voter could mark at least 6 squares above the line, in order of the voter's preference, although a savings provision ensured that any vote marking at least 1 square would be counted. Preferences of above the line voters would be determined not by a group ticket but by the voters' choice as between the groups listed above the line on the ballot paper.
- Voters who voted below the line were no longer required to mark every square. The ballot paper would instruct a voter to mark at least 12 squares, although a savings provision ensured that any vote marking at least 6 squares would be counted.

Mr Robert John Day, a senator elected in 2013, brought proceedings in the High Court challenging the validity of the amendments. A separate application brought by 7 other plaintiffs was heard with Mr Day's challenge.

The Court heard the proceedings on an expedited basis. The proceedings, which had been initiated on 22 March 2016, were heard on 2 and 3 May. The Court handed down its judgment on 13 May. The reason for the expedited proceedings was that on 9 May the Governor-General dissolved both Houses of Parliament for an election to be held on 2 July.

The decision

The Court issued a single joint judgment of all 7 justices (French CJ and Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ). The judgment was framed around the 5 grounds upon which the plaintiffs challenged the amendments.

Ground 1: No uniform method, contrary to section 9 of the Constitution

The plaintiffs argued that the 2016 amendments provided for 2 separate methods of voting in a Senate election: above the line and below the line. The plaintiffs further argued that this contravened s 9 of the Constitution, which provides: 'The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States.' According to the plaintiffs, the provision of multiple voting methods contravened the requirement in s 9 for a single uniform method of choosing senators.

The Commonwealth's argument, which the Court accepted, was that the term 'method' in s 9 should be interpreted broadly: it permits different manners of voting within the one election, so long as the method of voting as a whole is nationally uniform. The Court accepted that the availability of above the line and below the line voting was no more than a provision to voters of discretion in the manner in which they voted. According to the Court, 'the availability of that discretion does not involve the creation of more than one method of choosing Senators' ([45]).

Ground 2: Senators not directly chosen by the people, contrary to section 7 of the Constitution

Section 7 provides that the Senate will be 'directly chosen by the people' of each State. This means, for example, that it is not possible for a senator to be elected through an intermediary such as an electoral college or (apart from casual vacancies) to be appointed by a State Parliament or governor.

The plaintiffs argued that above the line voting under the 2016 changes would contravene the requirement of 'direct choice'. The contravention was said to arise from the fact that an above the line vote would be a vote cast for a group or party as intermediary rather than directly for individual candidates.

The Court rejected this argument, noting that, by operation of the Act, a vote marked above the line against a group or party is the expression of sequential preferences for each candidate within that group or party appearing below the line ([48]). The Court repeated the view expressed by a number of justices in *Attorney-General (Cth)*; *Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 that 'the requirement of direct choice excludes indirect choice by an electoral college or some other intermediary' ([49]), which was not the case with the 2016 changes.

Ground 3: Infringement of principle of directly proportionate representation

The plaintiffs argued that in various ways the 2016 changes infringed a constitutional principle of 'directly proportionate representation' in the Senate. One aspect of the complaint was that the amendments would disenfranchise voters for so called 'minor parties'.

The Court found this argument to be 'elusive' ([52]). The Court noted that any principle of proportional representation by reference to population is 'plainly not applicable to the Senate', given that the Constitution provides for each State to be represented by the same number of senators regardless of population ([51]).

The Court further rejected the contention that any adverse effect on minor parties gave rise to a constitutional issue, stating: 'The plaintiffs' argument, based upon effects adverse to the interests of so called "minor parties", was in truth an argument about the consequences of elector choices between above the line and below the line voting and in the number of squares to be marked' ([54]).

Ground 4: Misleading ballot paper

The plaintiffs alleged that the ballot paper for which the 2016 amendments provided misled voters:

- It instructed voters to number at least 6 squares above the line and did not alert voters to savings provisions enabling them to number as few as 1 square.
- It instructed voters to number at least 12 squares below the line and did not alert voters to savings provisions enabling them to number as few as 6 squares.
- It failed to inform voters that expressing fewer preferences than the number of candidates on the ballot paper would risk a vote being exhausted.

In misleading voters in these ways, the ballot paper instructions were said to contravene the implied freedom of political communication in the Constitution.

'The Court rejected the premise that the ballot paper instructions misled voters.'

The Court rejected the premise that the ballot paper instructions misled voters. According to the Court, the ballot paper correctly stated the effect of the statutory provisions. The Court further noted that it was 'hardly surprising' that the ballot paper did not inform voters of savings provisions and did no more than state the core statutory requirement that voters mark at least 6 squares above the line or at least 12 squares below the line ([56]). It was therefore not necessary for the Court to consider the circumstances in which the ballot paper instructions, if misleading, would give rise to any constitutional issue.

Ground 5: Representative government

The plaintiffs put forward a fifth ground that encapsulated many of the arguments in the other grounds in arguing that the constitutional principle of representative government and the implied freedom of political communication were impaired. It followed from the Court's reasons in relation to grounds 1 to 4 that ground 5 was also rejected.

AGS (Simon Daley PSM, Tony Burslem, Elizabeth McCallum, Andrew Chapman and Simon Thornton) acted for the Commonwealth, with Neil Williams SC, Nicholas Owens and Craig Lenehan as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2016/20.html

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Western Australian Bell Group Act wholly invalid

The High Court has unanimously held the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (Bell Act) to be invalid by operation of s 109 of the Constitution.

The Bell Act purported to put in place a bespoke regime for the winding-up of WA-registered Bell Group companies and for the distribution of the property of those companies among their creditors. However, the High Court found that the Act was wholly inconsistent with Commonwealth taxation laws.

Bell Group NV (in liquidation) v Western Australia;
WA Glendinning & Associates Pty Ltd v Western Australia;
Maranoa Transport Pty Ltd (in liquidation) v Western Australia

High Court of Australia, 16 May 2016

[2016] HCA 21; (2016) 90 ALJR 655

Background

The 'Bell Group' companies are a group of more than 2 dozen companies that went into liquidation in the early to mid-1990s following the collapse of Alan Bond's business empire. The liquidation of the Bell Group companies led to nearly 2 decades of litigation between the liquidators and certain banks in which around $1.7 billion in Bell Group assets was ultimately recovered to distribute to creditors. The major creditors of the Bell Group companies include the Insurance Commission of Western Australia, the Federal Commissioner of Taxation (in respect of unpaid tax liabilities), Bell Group NV (in liq) (BGNV) and WA Glendinning & Associates Pty Ltd (WA Glendinning).

A dispute then arose between the major creditors about how the $1.7 billion should be distributed. This was complicated by the fact that during the long course of the Bell Group litigation the main creditors had entered into agreements about the funding of the litigation and how any proceeds thereof should be distributed. The creditors have been engaged in litigation in the Supreme Court of Western Australia for several years over the meaning and effect of those agreements. Years of further litigation were in prospect.

In 2015 the State of Western Australia sought to shorten the winding-up process by enacting the Bell Act. The Bell Act purported to establish (in place of the provisions of the *Corporations Act 2001* (Cth) that would otherwise govern the winding-up) a bespoke winding-up regime to provide for a quick and final disposition of the assets and affairs of the Bell Group companies. The Bell Act purported to:

- take all of the Bell Group companies' assets out of the hands of the liquidator and vest those assets, freed from any encumbrance or interest of any kind, in a new body corporate established by the Bell Act, called the 'WA Bell Companies Administrator Authority' (the WA Authority)
- confer upon the WA Authority the functions of determining the property and liabilities of each WA Bell Company and recommending to the Minister to whom, and in what amounts, the assets of the WA Bell Group companies should be disposed
- provide for the Governor of WA to make a 'final and conclusive' determination as to the distribution of the assets to particular persons. By s 74 of the Bell Act, this determination 'must not be challenged, appealed against, reviewed, quashed, or called into question in any court'.

There were also provisions which purported to stay all current litigation concerning the Bell Group and prevent any further litigation from commencing.

Three plaintiffs commenced separate proceedings in the original jurisdiction of the High Court to challenge the validity of the Bell Act. The matters were heard together. The Commissioner of Taxation and then the Attorney-General of the Commonwealth intervened in each proceeding.

Constitutional issues

The plaintiffs challenged the constitutional validity of the Bell Act on 3 main grounds:

1) The Bell Act was inconsistent with various provisions of the *Income Tax Assessment Act 1936* (1936 Act), the *Income Tax Assessment Act 1997* (1997 Act) and the *Taxation Administration Act 1953* (TAA) (together, the Commonwealth Tax Acts) and was thereby rendered invalid in its entirety by the operation of s 109 of the Constitution.
2) The Bell Act was also inconsistent with the winding-up provisions of the *Corporations Act 2001*. The 'roll-back' provisions in ss 5F and 5G of that Act, which the Bell Act invoked, were said to be insufficient to remove the inconsistency.
3) The operation of the Bell Act involved an interference with the judicial power of the Commonwealth that was contrary to Ch III of the Constitution.

The High Court's decision

'... their Honours concluded that the Bell Act was invalid in its entirety by operation of s 109 of the Constitution.'

Chief Justice French and Kiefel, Bell, Keane, Nettle and Gordon JJ wrote a joint judgment in which their Honours concluded that the Bell Act was invalid in its entirety by operation of s 109 of the Constitution. Justice Gageler agreed in the result, but on a narrower basis, and wrote a separate judgment.

Standing

In each proceeding, WA initially contested the standing of the plaintiffs to challenge the validity of the Bell Act on the basis that it was inconsistent with the Commonwealth Tax Acts. The joint judgment found that the issue of standing fell away 'when the Attorney-General of the Commonwealth intervened and adopted the proposed submissions of the Commissioner' ([7], referring to *Williams v The Commonwealth* (2012) 248 CLR 156 at 181 [9], 223–224 [112], 240 [168], 341 [475] and 361 [557]).

In any event, the joint judgment found that 'the plaintiffs have standing in their own right to challenge the validity of the Bell Act ... because, like the Commissioner, they have an interest in the due administration of the liquidation of debtor companies' ([8]).

Inconsistency with Commonwealth Tax Acts

The joint judgment began its discussion of inconsistency between the Bell Act and the Commonwealth Tax Acts by noting ([53]) that the Commonwealth is a substantial creditor of a number of Bell Group companies. The joint judgment further noted ([54]–[55]) that, prior to the Bell Act, the Commissioner of Taxation was entitled to rely upon notices of assessments as conclusive evidence of taxation liabilities and to proceed on the basis that those liabilities formed debts due to the Commonwealth (referring principally to former s 177 of the 1936 Act (now s 350–10 of Sch 1 to the TAA), as well as former ss 208 and 209 of the 1936 Act (now s 255–5 of Sch 1 to the TAA)).

However, the Bell Act purported to 'create a scheme under which Commonwealth tax debts are stripped of the characteristics ascribed to them by the Tax Acts as to their existence, their quantification, their enforceability and their recovery' and to 'override the Commonwealth's accrued rights under a law of the Commonwealth as a creditor of each of the WA Bell Companies'. The Commonwealth was 'reduced to the position of a mere supplicant for the exercise of a favourable discretion on the part of the Executive of the State of Western Australia' ([60]; footnotes omitted).

'The Commonwealth was "reduced to the position of a mere supplicant for the exercise of a favourable discretion on the part of the Executive of the State of Western Australia ..." '

The Bell Act thereby significantly altered, impaired or detracted from the operation of the Commonwealth Tax Acts so as to engage s 109 of the Constitution ([61]).

The joint judgment also found that the Bell Act was inconsistent with a number of the liquidator's obligations to the Commissioner of Taxation under the Commonwealth Tax Acts, including:

- for pre-liquidation tax debts – the liquidator's obligation to set aside assets to meet taxation liabilities under (former) s 215 of the 1936 Act
- for post-liquidation tax debts – the liquidator's obligation to retain funds sufficient to pay tax which is or will become due and payable under s 254 of the 1936 Act ([62]–[63]).

The Bell Act prevented the liquidator from complying with these obligations by transferring all WA Bell Group company property to the WA Authority. This also amounted to a significant alteration, impairment or detraction from the operation of the Commonwealth Tax Acts ([65]–[66]).

Severance and reading down

The joint judgment dismissed WA's argument that the offending provisions of the Bell Act could be 'read down' to avoid s 109 inconsistency. The offending provisions were 'so fundamental to the scheme of the Bell Act and thus so bound up with the remaining provisions that severance of the offending provisions would leave standing a residue of "provisions which the State Parliament never intended to enact" ' (referring to *Wenn v Attorney-General* (Vic) (1948) 77 CLR 84, 122 (Dixon J)) ([70]). Section 109 'does not permit reading down that results in provisions that the State Parliament could never have intended to enact' ([71]). Accordingly, the Bell Act was invalid in its entirety ([73]).

Other matters – Corporations Act and Chapter III

As each case could be answered on the basis that the Bell Act was inconsistent with the Commonwealth Tax Acts, the joint judgment found that it was unnecessary to consider the other challenges to the validity of the Bell Act based upon inconsistency with the *Corporations Act 2001* and Ch III of the Constitution ([74]–[75]).

Separate judgment of Gageler J

Justice Gageler delivered a separate judgment in which his Honour agreed with the conclusions reached by the joint judgment that the Bell Act was invalid by reason of inconsistency with the Commonwealth Tax Acts and that it was therefore unnecessary to deal with the other grounds of invalidity ([78]). However, Gageler J held that the Bell Act was invalid on a narrower basis than the joint judgment, focusing on inconsistency with (former) ss 215 and 254 of the 1936 Act dealing with obligations of the liquidator ([79]).

Justice Gageler finished his judgment by noting ([98]):

> The Commissioner concludes his written submissions with the observation that the basic problem here is that the drafter of the Bell Act either has forgotten the existence of the Tax Acts or has decided to proceed blithely in disregard of their existence. That, indeed, is the basic problem.

AGS (Anthony Hall, Anna Lehane, Simon Thornton and Gavin Loughton from the Office of General Counsel) acted for the Commonwealth Attorney-General and Federal Commissioner of Taxation intervening, with the Solicitor-General, Justin Gleeson SC, James Watson, Michael O'Meara and Zelie Heger as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2016/21.html

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High Court rejects challenge to the close of the electoral rolls

The High Court unanimously (7:0) rejected a challenge to the validity of provisions of the *Commonwealth Electoral Act 1918* (Cth) that closed the Commonwealth Electoral Roll before a federal election. Those provisions suspend the processing of new claims for enrolment and claims to transfer enrolment received during the period from 8 pm on the day of the close of the rolls (7 days after the writs for a federal election are issued) until the close of the poll. The Court held that this suspension period was not inconsistent with the requirement in ss 7 and 24 of the Constitution that senators and members of the House of Representatives be directly chosen by the people.

Murphy v Electoral Commissioner
High Court of Australia, 5 September 2016
[2016] HCA 36; (2017) 90 ALJR 1027; (2017) 334 ALR 369

Background

The *Commonwealth Electoral Act 1918* (Cth) sets out a detailed scheme for the conduct of federal elections. Importantly, a person is only entitled to vote in a federal election if they are enrolled on the Electoral Roll. Since 1911 enrolment has generally been compulsory. Once the writs for an election are issued, there is a final 7-day grace period during which claims for enrolment or transfer of enrolment can be made and accepted. After this grace period, the suspension period operates to prevent the processing of new enrolments and transfers of enrolment until after the close of the poll. Consequently, in past federal elections a number of persons who had not enrolled or transferred their enrolment in time were either not entitled to vote or not entitled to vote in their current electorate.

The plaintiffs claimed that the suspension period was invalid because it was inconsistent with the requirement in ss 7 and 24 of the Constitution that senators and members of the House of Representatives be 'directly chosen by the people'. They argued that the suspension period effectively disenfranchised, disqualified or excluded persons who had (or would have) sought to enrol or transfer their enrolment during the suspension period and that this disenfranchisement was not justified. The plaintiffs emphasised that the electoral laws of some States now permit enrolment on or shortly before polling day and pointed to changes in technology that are said to facilitate polling day enrolment. They argued that those developments meant that, while the suspension period may once have been valid, that was no longer the case (described by Keane J as 'creeping unconstitutionality' ([191]–[201])).

The plaintiffs also argued that the suspension period 'distorted' the popular choice mandated by the Constitution, because an elector who did not transfer their enrolment in time could end up casting a vote for a division (and potentially a State) other than the one in which they currently reside.

In 2 earlier cases a majority of the High Court had held as invalid amendments to the Electoral Act that legally disqualified certain prisoners from voting (*Roach v Electoral Commissioner* (2007) 233 CLR 162), and amendments that created a practical impediment to voting by largely abolishing the grace period (*Rowe v Electoral Commissioner* (2010) 243 CLR 1). The plaintiffs sought to draw from these cases a general principle that any 'burden' on the constitutional mandate of direct choice by the people is invalid unless the burden is for a 'substantial reason'. They argued that, in determining whether a burden is justified by a substantial reason, the Court should apply the 'structured proportionality' test as set out by a majority of the High Court in *McCloy v NSW* (2015) 257 CLR 178 (*McCloy*) (a case concerning the implied freedom of political communication, discussed in *Litigation notes 26*).

As the first plaintiff, Mr Murphy, was in fact enrolled to vote in the electoral division in which he resided, the Commonwealth challenged his standing to bring the proceeding. Consequently, a second plaintiff, Ms Scurry, joined the proceeding. Ms Scurry intended to nominate as a candidate in the next election for the House of Representatives and had stood as an independent candidate in previous federal elections. In those circumstances the Commonwealth conceded, and the Court accepted, that Ms Scurry had standing to make the arguments advanced by the plaintiffs because she had a 'special interest in the size, composition and validity of the pool of electors from which she may have sought nomination and votes' ([229] per Nettle J; see also [2], [49], [175], [229], [334]). The Court thus did not need to decide the question of Mr Murphy's standing ([49], [175], [229], [334]; see also [2016] HCATrans 108 at lines 175–240, 260–270).

The Court's decision

Although the Court was unanimous in rejecting the plaintiffs' challenge to validity, it delivered 6 separate reasons for judgment: a joint judgment of French CJ and Bell J, and separate judgments of Kiefel, Gageler, Keane, Nettle and Gordon JJ.

'... there is no constitutional imperative for Parliament to maximise voter participation in a federal election...'

The Court generally endorsed the Commonwealth Parliament's broad law-making power with respect to elections ([53], [75], [95], [178], [245], [254], [263], [302]). While broad, that power is subject to express and implied limitations. In particular, Parliament may not establish an electoral system that does not comply with the requirement in ss 7 and 24 of the Constitution that senators and members be directly chosen by the people. However, there is no constitutional imperative for Parliament to maximise voter participation in a federal election ([42], [58], [109], [116], [180], [316]). Furthermore, it was significant here that the Electoral Roll has long been a central feature of the electoral system and that closing the roll enables a number of steps to be taken to facilitate the orderly and efficient conduct of elections ([7]–[11], [16], [41], [66], [69], [78], [103]–[104], [112]–[113], [185], [247]–[250], [274]–[287], [326]–[327]).

The judgments all agreed that the suspension period was valid but differed as to the reasons for that conclusion.

What does direct choice relevantly require?

Several justices began their analysis by noting that previous decisions had established that ' "chosen by the people" bespeaks universal adult suffrage and thus an "entitlement to vote" ' (Nettle J at [244]; see also [54], [84], [291]; see also [28]; cf [179]).

Although they expressed it in different language, Kiefel, Gageler, Nettle and Gordon JJ (cf Keane J) all then proceeded on the basis that a law that relevantly restricts the franchise, or burdens the ability to vote, requires a substantial reason or justification to be valid. That will be the case for 'any detriment to, or burdening of, the ability to vote' (Kiefel J at [60]); 'an exclusion from the franchise', including by a law that 'has the practical effect of excluding [persons] from voting in a particular election' (Gageler J at [85], [97]); a measure that 'can have a substantive effect on the entitlement to vote' (Nettle J at [244]); or 'a relevant restriction on, or exclusion from, the franchise' (Gordon J at [308]). Chief Justice French and Bell J asked an apparently similar question: does the law here impose a 'burden upon the *realisation* of the constitutional mandate of popular choice'?

'... a law that relevantly restricts the franchise, or burdens the ability to vote, requires a substantial reason or justification to be valid.'

Does the suspension period burden the constitutional mandate?

The Court significantly split on the question of whether the suspension period imposed a relevant burden, restriction or exclusion that had to be justified.

A majority of the Court (French CJ and Bell, Keane and Gordon JJ) held that the suspension period did not impose a relevant burden. The suspension period was a longstanding design feature of the electoral system established by the Act that, taken as a whole, did not burden the constitutional mandate or its realisation ([41], [181], [183], [204], [321], [333]). The plaintiffs' complaint was, rather, that better arrangements might be made to fulfil the mandate; but that did not establish that the current arrangements relevantly burdened the franchise ([39], [42], [181], [202], [308]).

In contrast, Kiefel, Gageler and Nettle JJ held that there was such a burden or restriction that had to be justified as being for a substantial reason ([60], [97], [244], [255]–[256]). That was because any law with the practical or substantive effect of burdening the ability to vote has to be justified ([60], [97], [244]). All 3 agreed, however, that the suspension period was for a 'substantial reason' and was justified (for essentially the same reasons as those the other justices gave for holding that there was no burden in the first place) ([69]–[74], [104], [255]–[256]; see also [332]).

Determining whether any burden is justified as being for a substantial reason

The judgments also differed as to the test to apply in determining whether a burden is justified as being for a substantial reason. A majority of 5 justices (French CJ and Bell J, and Gageler, Nettle and Gordon JJ) accepted that the relevant question in determining whether a burden is for a substantial reason is whether the burden is 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government' ([33], [85], [104], [244], [327], [332]).

The other 2 justices significantly differed as to what the test should be. For Keane J the only question was whether the law was compatible with the constitutional requirement of direct choice, bearing in mind Parliament's express legislative powers with respect to the electoral system ([205]). In contrast, Kiefel J applied the more structured proportionality analysis from *McCloy* ([65]–[74]). And, while Gageler, Keane

and Gordon JJ expressly rejected the application of structured proportionality analysis ([102], [202], [303]), French CJ and Bell J stated that it 'may be relevant depending upon the character of the law said to diminish the extent of the realisation of the mandate' ([38], emphasis added).

Relevance of alternative legislative schemes

The Court was also divided as to whether and to what extent it was appropriate to consider alternative legislative schemes but generally agreed that the relevant schemes (the electoral laws of New South Wales, Victoria and Queensland) were of limited or no use in this case ([38], [42], [72]–[73], [101], [109], [211]–[214], [251]–[253], [304]–[305]). That is because the Court would not entertain the policy or 'electoral reform' questions underlying the plaintiffs' reliance on alternative schemes: different electoral systems that could or should be devised, further resources that should be applied to the administration of the electoral system, and costs to competing priorities ([42], [72], [109], [215]–[216], [253], [304]). As Kiefel J stated ([72]):

> Reference to these other statutory schemes shows that there is more than one electoral system to choose from. It does not show that these systems are capable of achieving the same objectives that the Electoral Act does. They reflect policy choices of those States' legislatures, which no doubt balance the delays and costs, which must inevitably be associated with keeping the Roll open, against other objectives.

Distortion

The plaintiffs' argument that preventing transfers resulted in a distortion of the popular choice by the people was generally dealt with, and rejected, as part of their broader complaint. However, Keane J expressly found that the Constitution does not require maximising the geographical appropriateness of the franchise ([201]). Similarly, Gordon J observed that if the plaintiffs' argument were correct 'it would render unconstitutional those provisions which permit persons to vote who no longer reside in Australia' ([323]).

AGS (Liam Boyle, Kim Pham and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth, with the Solicitor-General, Justin Gleeson SC, Nicholas Owens and Kathleen Foley as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2016/36.html

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Changes to parliamentarians' superannuation and Life Gold Pass valid

The High Court unanimously held that changes to the retiring allowances (superannuation) of former federal parliamentarians did not effect an acquisition of their property otherwise than on just terms contrary to s 51(xxxi) of the Constitution. A majority of the Court also upheld the validity of restrictions to the Life Gold Pass travel scheme for former parliamentarians.

Cunningham v Commonwealth
High Court of Australia, 12 October 2016
[2016] HCA 39; (2016) 90 ALJR 1138; (2016) 335 ALR 363

Background

The plaintiffs were former members of federal Parliament who had retired prior to the changes made in 2011 to the method by which parliamentary retiring allowances (superannuation) were calculated. The third and fourth plaintiffs also held a Life Gold Pass.

Parliamentary retiring allowances

Section 48 of the Constitution provides for the payment of allowances to members of Parliament in the following terms:

> Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat.

Since 1907 Parliament has 'otherwise provided' by legislating for the payment of parliamentary allowance (salary) to sitting parliamentarians. Whilst parliamentary allowances have generally increased over time, Parliament has at times – for example, during the Great Depression – also decreased the amount payable.

Furthermore, since 1948 a 'retiring allowance' has also been payable to former parliamentarians pursuant to s 18 of the *Parliamentary Contributory Superannuation Act 1948* (Cth) (Superannuation Act). Initially, that Act provided for the payment of a fixed weekly amount as retiring allowance. Subsequently, the amount of the allowance was set as a percentage (the method of calculating which varied over time) of the parliamentary allowance payable to the member before they retired. Then, for a period before 2011, the rate of the retiring allowance for former parliamentarians was calculated as a fixed percentage of the rate of parliamentary allowance payable from time to time to sitting members of Parliament.

Following a report of the Committee for the Review of Parliamentary Entitlements in 2010 (the Belcher Review), the method of calculating retiring allowances was again varied in 2011 by amendments made to the Superannuation Act (and the *Remuneration Tribunal Act 1973* (Cth)). Those amendments enabled the Remuneration Tribunal to decouple retiring allowances from the allowances payable to sitting members. In particular, the Tribunal could determine that a proportion of the allowance paid to sitting members was to be excluded from the amount of 'parliamentary allowance' by reference to which retiring allowance was calculated.

The Remuneration Tribunal then made determinations to that effect. However, because the total allowance payable to sitting members was also increased, the net effect was that the amount of retiring allowance actually received by each plaintiff had increased since 2011. Nonetheless the plaintiffs argued that the effect of the amendments and the Remuneration Tribunal's determinations was that they received less by way of retiring allowance than they would have received without the amendments.

Life Gold Pass scheme

The Life Gold Pass was a longstanding benefit conferred by the executive government which allowed former parliamentarians to travel at government expense. From 1976, it became the subject of determinations made by the Remuneration Tribunal. In 2002, the *Members of Parliament (Life Gold Pass) Act 2002* (Cth) (Life Gold Pass Act) was enacted to cap the number of return trips that could be claimed under the scheme to a maximum of 25 per year. In 2012, the Life Gold Pass Act was amended to reduce the cap to 10 return trips per year for existing passholders and to close the scheme by stopping the issue of any further passes.

'In 2012, the Life Gold Pass Act was amended to reduce the cap to 10 return trips per year for existing passholders and to close the scheme by stopping the issue of any further passes.'

Constitutional issue

The plaintiffs argued that, upon their retirement from Parliament, they became entitled to a fortnightly benefit, defined by reference to a fixed percentage of the parliamentary allowance payable to sitting parliamentarians from time to time. This benefit was said to be a presently existing debt and therefore property for the purpose of s 51(xxxi). The 2011 and 2012 amendments to the statutory scheme substantially modified this property by decoupling retiring allowances from the parliamentary allowance payable to sitting parliamentarians. This, they argued, amounted to an 'acquisition of property' otherwise than on just terms.

The third and fourth plaintiffs also argued that their entitlement to a Life Gold Pass was a vested right to the benefits provided by the pass ([49]), which was property for s 51(xxxi) purposes and which had accrued to them upon retirement. The Commonwealth was said to have acquired this property with the 2002 and 2012 amendments and they were therefore entitled to reasonable compensation pursuant to a 'historic shipwrecks' clause (which required the Commonwealth to pay compensation if the Life Gold Pass Act effected an acquisition of property otherwise than on just terms).

The High Court's decision

The Court delivered 5 separate judgments: a judgment from French CJ, Kiefel and Bell JJ (the plurality) and then separate judgments from Gageler J (in partial dissent), Keane J, Nettle J and Gordon J.

The retiring allowance

The Court unanimously held that neither the amendments to the retiring allowance nor the Remuneration Tribunal's determinations constituted an acquisition of property.

A majority of the Court reached that conclusion on the basis that the entitlements to retiring allowances were inherently liable to variation and depended for their content upon the will of the Parliament as exercised from time to time. Thus, according to the plurality, the entitlement to a retiring allowance is an example of a statutory right which, 'having regard to [its] character and the context and purpose of the statute creating [it], can be regarded as inherently variable' ([43]). In that regard, the plurality emphasised that, at all relevant times, retiring allowances have been expressed to be payable 'in accordance with this section' and to be 'subject to this Act'. These words were held 'clearly enough' to refer to the whole Act and to the form which it may take from time to time (including amendments to the method of calculating retiring allowance) ([39]). In addition, these words were analogous to the statutory scheme, amendments to which were found not to effect an acquisition of property in *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 ([41]).

Justice Keane also relied on those words in finding that the right to a retiring allowance was dependent on the terms of the Act from time to time, thus allowing for the possibility of subsequent amendment ([166]–[167]). His Honour found that the right to payment of a retiring allowance is of the same character as the right of serving parliamentarians to remuneration in office ([155]), and that remuneration can be reduced at any time ([134]).

For Nettle J, whether those words are sufficient to render a statutory right subject to amendment from time to time will depend on 'the context and ultimately the apparent purpose of the legislation' ([237]). Here the words were indicative of a legislative intention that the amounts payable were subject to the Act as it may be amended from time to time ([238]), in the context of the 'long and varied legislative history of the scheme' ([239]). That legislative intention was also supported by the fact that, up to the 2011 amendments, a reduction in parliamentary allowance would automatically flow through to reduce the amount to be paid as retiring allowance, which could thus 'be reduced to a fraction of what it is now, or even perhaps to nothing, without engaging the operation of s 51(xxxi)' ([240]).

Like Nettle J, Gordon J also relied on the text, as well as the history of retiring allowances and the context in which such allowances exist, in finding that there was no relevant property protected from acquisition and no acquisition of property within s 51(xxxi) ([289], [329]). That view was further reinforced for her Honour by the history, purpose and object of the 2011 amendments – that is, to give effect to recommendations of the Belcher Review. Relevantly, the Belcher Review considered it would be desirable if various allowances (such as electorate allowance and overseas study travel entitlements) were folded into the salary of sitting parliamentarians. To prevent any such folding-in of allowances for sitting parliamentarians from flowing through to retirement allowances, the Belcher Review recommended what became the 2011 amendments ([330]–[332]). In that context, the 2011 amendments (and the resulting determinations) have 'nothing to do with the acquisition of property on just terms' because they 'permit removal of allowances that would otherwise not be relevant to, and would improperly inflate, the retiring allowance', and it would 'weaken the effect of the principle of probity and good governance … to place the laws within s 51(xxxi)' ([335]).

Justice Gageler took a different approach. After rejecting the plaintiffs' claim that they had a right to be paid a fixed percentage of whatever might be capable of being regarded as the salary of a sitting parliamentarian ([102]), his Honour noted that the 2011 amendments did not reduce the *amount* of retiring allowance payable to the plaintiffs or remove the protection of s 22T of the Superannuation Act (which prevented the amount they were entitled to receive from being reduced). Accordingly, the 2011 amendments could not be characterised as taking their property or of conferring a financial benefit on the Commonwealth capable of being characterised as an acquisition of property ([104]). For that reason the 2011 amendments did not meet the threshold condition of a law with respect to an acquisition of property ([105]), and it was thus unnecessary to consider the further steps in the analysis that his Honour identified at [58]–[60].

'... the Life Gold Pass had no statutory basis but was a gratuity provided by the executive government which was liable to both modification and extinguishment ...'

The Life Gold Pass

In comparison to the detailed analysis the Court gave to the statutory scheme regulating the retiring allowance, the majority judgments dealt with the amendments to the Life Gold Pass relatively briefly.

For the plurality, assuming that the Life Gold Pass was put on a statutory footing as an 'allowance' by a determination of the Remuneration Tribunal in 1976, it was liable to variation because the Tribunal's power to determine allowance was expressed to be 'from time to time as provided by this Part' ([50]). That would be sufficient to dispose of the plaintiffs' arguments, for the same reasons given with respect to retiring allowances ([51]). However, their Honours went on to find that, before the 2002 and 2012 legislation, the Life Gold Pass had no statutory basis but was a gratuity provided by the executive government which was liable to both modification and extinguishment ([55]).

Justices Keane, Nettle and Gordon also held that the words 'from time to time' made the Life Gold Pass liable to variation, including by the Life Gold Pass Act and the 2012 amendment to that Act ([189]–[190] (Keane J); [244] (Nettle J); [352]–[353], [357] (Gordon J, referring also to the administrative and legislative history of the Life Gold Pass)). Unlike the plurality, however, these Justices considered that the Life Gold Pass was given a statutory footing in 1976 when it became the subject of determinations by the Remuneration Tribunal (s 7(1) of the Remuneration Tribunal Act) ([192], [242], [345]).

Justice Gageler dissented on this issue, holding that the third and fourth plaintiffs' rights to the Life Gold Pass were statutory rights which had accrued to them on their retirements in accordance with the then Remuneration Tribunal's determinations under s 7(1) of the Remuneration Tribunal Act ([107]). There was nothing in the legislative scheme that was inherently variable about the rights attaching to the Life Gold Pass ([111]). Thus, the alteration to these accrued statutory rights in 2002 and 2012 imposed a liability on the Commonwealth to pay compensation to the plaintiffs on just terms in accordance with the historic shipwrecks clause ([114]).

AGS (Emily Kerr, Andrew Chapman and Andrew Buckland from the Office of General Counsel) acted for the Commonwealth, with the Solicitor-General, Justin Gleeson SC, and David Thomas of counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2016/39.html

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Validity of Northern Territory's 'paperless arrest' laws upheld

A majority of the High Court (6:1, Gageler J dissenting) dismissed a challenge to the validity of Northern Territory legislation conferring powers on Northern Territory police to detain persons in custody for short periods of time. In reaching that conclusion, a majority of the Court found it unnecessary to decide whether or not the doctrine of the separation of judicial power which operates at the Commonwealth level also operates at the level of the (self-governing) Northern Territory.

North Australian Aboriginal Justice Agency Ltd v Northern Territory
High Court of Australia, 11 November 2015
[2015] HCA 41; (2015) 256 CLR 569; (2015) 90 ALJR 38; (2015) 326 ALR 16

Background

Police in all States and Territories have powers to arrest and detain persons whom they suspect of having committed a crime. Although the specifics of these powers vary from jurisdiction to jurisdiction, in the broad they generally do not go further than a power to detain a person:

- for the purpose of bringing that person before a judge, which must be done promptly
- for a limited time, for investigative purposes.

These usual police powers of detention therefore do not include a power to detain a person as a *punishment* for an offence. That latter power is reserved for the courts.

Consistent with the ordinary position, in the Northern Territory s 123 of the Police Administration Act (PA Act) confers a power on Northern Territory police officers to arrest and take into custody any person that an officer believes on reasonable grounds has committed, is committing or is about to commit an offence. Section 137(1) provides that a person taken into custody must, as soon as practicable, be brought before a justice or a court. Section 137(2) provides that, notwithstanding this general requirement, a police officer may hold a person in custody for a reasonable period to enable that person to be questioned or to enable investigations to be carried out.

By amendments made in 2014, these usual police powers were supplemented by the insertion of a new Div 4AA into the PA Act that deals with 'infringement notice offences'. An 'infringement notice offence' is defined in s 133AA of the PA Act as a prescribed offence for which an infringement notice may be served. There are 35 such offences under Northern Territory legislation. Many are minor offences that are not punishable by a period of imprisonment ([18]). Within Div 4AA, s 133AB(2) empowers

a police officer who has arrested a person under s 123 for an infringement notice office to hold the person in custody 'for a period up to 4 hours' (or longer if the person is intoxicated). Section 133AB(3)(a)–(d) provides that a person detained under s 133AB(2) can be:

a) released unconditionally
b) released and issued with an infringement notice
c) released on bail, or
d) brought before a justice or court for the offence for which they were arrested or any other offence allegedly committed by them.

The purpose of the amendments, as described in the second reading speech for the Bill that contained them, was:

> to provide members of the Northern Territory Police Force with an alternative post-arrest option, where a person who has committed certain prescribed offences may be held by police for up to four hours and can then be released with an infringement notice, as opposed to requiring that the person be charged and have those charges be heard by a court.

In the view of the plaintiffs, Div 4AA confers on Northern Territory police the power to punish people by detaining them (albeit for a short period). That is, in the view of the plaintiffs, Div 4AA takes a power that is ordinarily reserved to the judicial branch of government and confers it on the executive branch of government (the police).

The second plaintiff, an Indigenous person, was arrested for an infringement notice offence and taken into custody by the Northern Territory police. She was then detained pursuant to s 133AB ([16]). After being held for nearly 12 hours, the second plaintiff was issued with an infringement notice for 2 alleged offences and released from detention.

Constitutional issue

The plaintiffs challenged the validity of Div 4AA on 2 constitutional grounds:

- *Separation of powers*: Division 4AA was said to confer an exclusively judicial power on the Northern Territory executive (the police) – namely, the power to detain persons in custody for a punitive purpose. The conferral of that power was said to be invalid because Ch III of the Constitution requires the separation of judicial power from executive and legislative power – including at the level of the Northern Territory Government.
- *Kable*: Division 4AA was said to be contrary to the principle in *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24 (*Kable*) because it impairs the institutional integrity of Northern Territory courts.

The High Court's decision

In 4 separate judgments (French CJ, Kiefel and Bell JJ; Gageler J; Keane J; Nettle and Gordon JJ) all members of the High Court rejected the plaintiffs' separation of powers challenge to Div 4AA. However, only Gageler J and Keane J found it necessary to consider whether the doctrine of the separation of judicial power operates at the level of the (self-governing) Northern Territory Government. Both justices held that it does not. A majority of the High Court (Gageler J dissenting on this point) also rejected the *Kable* argument.

Construction of section 133AB

Joint judgments

Chief Justice French and Kiefel and Bell JJ gave Div 4AA a confined operation. Their Honours held that s 133AB 'does no more than impose a cap on what is a reasonably practicable time to make a determination about which one of the options under s 133AB(3) is to be exercised' ([28]). More particularly, s 133AB does not displace the operation of s 137. The obligations imposed on police by s 137 – to bring an arrested person before a justice or a court as soon as reasonably practicable – continue to apply to detentions covered by Div 4AA (with one minor qualification, not presently relevant: [28]). And even absent s 137 'the common law would have imposed the like requirement that a person arrested under s 123 be taken before a justice of the peace as soon as practicable after arrest' anyway ([24], [28]). Thus the 'obligation imposed by the common law and given a statutory form by s 137(1) was not modified by the four hour time limit' ([28]). In accordance with the 'principle of legality', clear words would be required to displace that obligation. The implication was that clear words were not used here ([11], [23]).

Justices Nettle and Gordon similarly held that the power to detain a person under s 133AB(2) 'arises simultaneously with the duty imposed under s 137(1)' ([214]). In their view, Div 4AA 'operates as a specific elaboration of the general powers and duties under s 137 for application to arrest for infringement notice offences with an outer limit on custody of up to four hours' ([216]). Where a person was arrested under s 123 for an infringement notice offence then 'as soon as practicable after the person is taken into custody, he or she must be either released unconditionally or with an infringement notice, granted bail, or taken before a justice or court under s 137(1)' ([231]). For their Honours, Div 4AA does not add to but, rather, caps the period of time a person can be detained consistently with s 137.

Gageler J

According to Gageler J, s 133AB added to the time that a person can be detained by the police ([84]). The statutory language ([82]), context ([83]) and purpose ([86]–[89]) of s 133AB and Div 4AA tended towards a construction which gave ss 133AB and 137 a 'natural sequential operation in relation to persons taken into custody without warrant for infringement notice offences' ([90]). He concluded that ([91]):

> On its proper construction, s 133AB(2)(a) authorises a member of the Police Force to detain a person arrested and taken into custody for an infringement notice offence for any period up to a maximum of four hours. The period of detention, up to that maximum period of four hours, is left to the discretion of the member.

Although 'the discretion as to the period of detention is not unconfined' (ie it must be exercised in good faith and for a proper purpose), it is 'nevertheless undefined' ([92]). It is not constrained by the duty under s 137(1) or any requirement that it 'be exercised in a manner which ensures that the detention is protective of the person or of other persons or preventative of harm' ([92]).

Keane J

Somewhat unusually, Keane J resolved the case by dealing only with the constitutional issues, which he considered as being 'on any view, straightforward' ([149]) and without 'any substantial difficulty' ([153]). His Honour considered that 'the difficult issues of statutory construction involved may be better left to a case which is a better vehicle for their resolution' ([149]).

Characterisation of the power conferred by section 133AB as non-punitive

Joint judgments

The plaintiffs sought to invoke the principle established in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (*Lim*) that (at 28):

> putting to one side the exceptional cases … the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

Chief Justice French and Kiefel and Bell JJ held that Div 4AA did not authorise punitive detention. They accepted that s 133AB confers a discretionary power upon police officers to detain people for up to 4 hours. However, that discretion is not 'unfettered' – it is limited by the 'subject matter, scope and purpose of the statute' ([34]). Their Honours held that Div 4AA only operates in circumstances where arrest under s 123 is appropriate, having regard to various non-punitive factors such as preservation of public order and of the safety or welfare of the public of the person detained ([35], cf Gageler J at [92]): 'Thus confined in its operation, Div 4AA does not disclose a punitive purpose. To keep a person in custody under Div 4AA in order to punish that person's conduct would be unlawful' ([36]).

'To keep a person in custody under Div 4AA in order to punish that person's conduct would be unlawful …'

Justices Nettle and Gordon, having construed Div 4AA as not 'permitting the detention of a person for a period longer than is reasonably necessary to bring the person before a justice or court' ([237]), also found that the detention authorised by s 133AB and Div 4AA was not punitive in character. This was because the detention fell within the 'most important' exception to the principle identified in *Lim* – namely, 'the arrest and detention in custody … of a person accused of crime to ensure that he or she is available to be dealt with by the courts' ([236]–[237]). Detention for that purpose is not punitive.

Gageler J

In contrast, Gageler J, having found that s 133AB authorised detention for any period up to 4 hours, said ([103]):

> This is not an occasion to mince words. The form of executive detention authorised by Div 4AA is punitive. Because it is punitive, the imposition of the detention involves the exercise of a function which our constitutional tradition treats as pertaining exclusively to the exercise of judicial power.

His Honour stated that 'any form of detention is penal or punitive unless justified as otherwise' ([98]), and 2 conditions that must be met before 'executive detention in the exercise of a statutory power to detain can escape characterisation as punitive' ([99]):

- 'the duration of the detention is reasonably necessary to effectuate a purpose which is identified in the statute conferring the power to detain and which is capable of fulfilment'
- 'the duration of the detention is capable of objective determination by a court at any time and from time to time'.

In Gageler J's view, the 'detention authorised by Div 4AA plainly satisfies neither' of the above conditions. That is because the duration of the detention within the 4-hour maximum specified in s 133AB(2)(a) is not limited by reference to the time needed to effectuate any identified statutory purpose and is at the discretion of the police ([101]).

Constitutional issues

The separation of powers issue

Even if Div 4AA confers on the Northern Territory police a power to punish people by detaining them, that would not be fatal to Div 4AA's validity – unless the doctrine of the separation of judicial power (that applies at the Commonwealth level) applies in the Northern Territory.

Because they characterised the power conferred by s 133AB as non-punitive, French CJ, Kiefel and Bell JJ ([38]) and Nettle and Gordon JJ ([237]) did not need to consider this issue. By contrast Gageler J, having found that the detention authorised by Div 4AA was punitive, did need to address the question whether the doctrine of separation of powers applies in the Northern Territory. Justice Keane, who determined the case by resolving the constitutional issues, likewise dealt with the question.

Both Gageler J and Keane J observed that the decision in *Kruger v Commonwealth* (1997) 190 CLR 1 (*Kruger*) precludes the doctrine of separation of powers operating in the Northern Territory (Gageler J at [107]; Keane J at [161]) and both declined to reopen that case. Their reasons included that:

- The 'most significant development' since *Kruger* has been the recognition that the *Kable* principle applies to Territory courts (Gageler J at [111]). That recognition is consistent with *Kruger* (Gageler J at [117]). The application of the *Kable* principle would be redundant if a strict separation of powers doctrine applied in the Northern Territory (Gageler J at [115]).
- Territory legislatures have relied upon *Kruger* and established bodies which exercise both judicial and non-judicial functions (Gageler J at [117]; Keane J at [169]). Reopening *Kruger* would cause 'disruption and instability' – a result which 'militates powerfully against' its reopening (Keane J at [169]; see also [175]).

In addition to the authority of *Kruger*, any different conclusion would also be contrary the High Court's decisions in *Spratt v Hermes* (1965) 114 CLR 226 and *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 (Gageler J at [110]; Keane J at [174]).

Even aside from authority, at the level of principle both justices rejected the plaintiffs' argument that all judicial power exercised in the Northern Territory is necessarily the judicial power of the Commonwealth. Justice Gageler stated that the judicial power of the Commonwealth is 'vested in such courts as the *Parliament* [ie of the Commonwealth] invests with federal jurisdiction' ([114], emphasis in original). Keane J noted that the language of s 71 of the Constitution 'denies all possibility that some other organ might effect the vesting of the judicial power of the Commonwealth' ([176]). Therefore, it is impossible that a Territory law which conferred judicial power on a body would be conferring the judicial power of the Commonwealth.

Gageler J summarised his position on the separation of powers issue thus ([118]):

> *Kruger* should not be reopened. The legislative power of the Legislative Assembly is not constrained by the doctrine of separation of powers enshrined in Ch III of the Constitution. Division 4AA therefore cannot infringe that doctrine.

His Honour's conclusion did not expressly embrace the larger proposition that the legislative power of the *Commonwealth Parliament* under s 122 is unconstrained by the doctrine of the separation of judicial power. That said, his Honour's reasoning (and the decision in *Kruger*) do not seem to be inconsistent with that larger proposition.

The reasoning of Keane J appears to embrace the larger proposition, at least to some extent (see [165]–[167]). Although his Honour noted that the power conferred upon the Northern Territory Legislative Assembly is 'an independent and unqualified law-making power' ([171]), he also stated that a separation of powers limit upon s 122 of the Constitution would be 'at odds with the long-accepted understanding that s 122 is a source of power to be exercised by the Commonwealth with all the flexibility necessary to deal with the particular needs of Territories with different political circumstances' ([167]; see also [168]).

The Kable *issue*

As French CJ, Kiefel and Bell JJ explained ([41]):

> The plaintiffs' complaint did not concern a function or power conferred upon courts of the Territory. Nor did it concern a function or power conferred upon judicial officers of the Territory. Rather they submitted that Div 4AA effects a kind of de facto preclusion of the traditional judicial supervisory function in relation to persons held in involuntary detention.

That submission 'did not fall within any of the existing principles developed in [*Kable*] and its sequelae' ([41]). Rather, on their Honours' construction, the 'relationship between the custodial process and the judicial process under Div 4AA is not materially different' from the relationship between those 2 processes when a person is arrested and taken into custody in normal circumstances ([43]). Accordingly, the plaintiffs' *Kable* challenge failed ([44]).

Justices Nettle and Gordon briefly disposed of the *Kable* argument on a similar basis: 'Div 4AA does not grant police a power to detain for a period longer than provided for by ss 123 and 137' ([239], see also [194]).

In rejecting the *Kable* argument, Keane J noted (and the plaintiffs recognised) that the principle 'is typically concerned with situations where a particular function that is apt to impair the court's institutional integrity has been conferred on a court' ([184]). Consistent with this, it is 'laws which directly affect the actual functioning of courts' which offend the principle ([185]). Division 4AA did not have that effect: it invests a power in the executive; it 'is not directed at the courts' ([186]). In arguing that the courts were sidelined, the plaintiffs' argument 'confuses the *Kable* principle with the requirements of the constitutional separation of powers at the level of the Commonwealth' ([187]).

In contrast, Gageler J, having held that the challenged provisions authorised punitive detention, found Div 4AA to be invalid on the basis of the *Kable* principle. The problem was not that the courts were 'kept out' of the Div 4AA process. Rather, the 'constitutional flaw in the design of Div 4AA' was that, unless the police officer unconditionally releases the detained person under s 133AB(3)(a), the other 3 options under s 133AB(3) necessarily introduce a court into the process ([133]). However, no subsequent action by a court can change the 'historical fact' that the 'person will already have been punished through the executive detention that has occurred' ([133]). For this reason, Gageler J would have found Div 4AA invalid ([136]).

AGS (Thomas Wood, Simon Thornton and Gavin Loughton from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Solicitor-General, Justin Gleeson SC, and Dr James Stellios as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2015/41.html

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Compulsory examinations in a voluntary winding-up – judicial power

The High Court unanimously upheld the validity of s 596A of the *Corporations Act 2001* (Cth), which confers power on various courts to summon persons for examination about the affairs of a corporation in external administration. The Court rejected the plaintiffs' arguments that s 596A purported to confer non-judicial power on federal and State courts contrary to Ch III of the Constitution. In doing so, the Court provided some guidance on the relevance of historical context and analogues in determining whether a function or power is judicial.

Palmer v Ayres; Ferguson v Ayres
High Court of Australia, 8 February 2017
[2017] HCA 5; (2017) 91 ALJR 325; (2017) 341 ALR 18

Background

The plaintiffs, Mr Palmer and Mr Ferguson, were former directors of Queensland Nickel Pty Ltd (Qld Nickel) which operated, a nickel refinery in northern Queensland. Qld Nickel was placed under external administration and subsequently the creditors resolved that it be wound up in insolvency. The defendants were appointed to the company as special purpose liquidators to investigate certain dealings and transactions involving Qld Nickel, its directors and officers.

The defendants applied to the Federal Court for a summons under s 596A of the Corporations Act for Mr Palmer and Mr Ferguson to attend the Court to be examined. Mr Palmer and Mr Ferguson then commenced proceedings in the High Court seeking, among other things, a declaration that s 596A of the Act is invalid.

What are the features of an examination under s 596A of the Corporations Act?

Section 596A relevantly provides for a court to summon certain persons to attend before the court to be examined on oath about a corporation's examinable affairs (defined broadly in s 9 of the Act) (s 596D(1)). The court is required to summon a person if an 'eligible applicant', including a liquidator of the corporation, applies for the summons and if the person to be summonsed is within the categories of persons subject to s 596A. Those categories include, relevantly, an officer or former officer of a corporation that is under external administration within Ch 5 of the Act.

The court controls the conduct of an examination and can give directions about the matters inquired into and procedure to be followed (ss 596F and 597). The court can also put questions to the examinee or 'allow' questions to be put about the corporation or any of its examinable affairs as the court thinks appropriate (s 597(5B)). An examinee is required to answer questions put and is not excused because the answer might tend to incriminate them or make them liable to a penalty (s 597(12)).

Constitutional issue

The plaintiffs argued that the power of a court to summon a person for examination under s 596A was invalid as contrary to Ch III because:

- The power does not fall within the 'core' judicial power under s 71 of the Constitution and does not satisfy a functional test of judicial power.
- The power is not incidental or ancillary to the exercise of judicial power, at least in the context of voluntary winding-up.
- The power is not sufficiently analogous to judicial powers historically exercised by the courts or, in the alternative, historical analogues should no longer be followed.
- The power is incompatible with, or falls outside, the judicial power of the Commonwealth and gives rise to a real risk that the court may not be or be seen to be independent or impartial in the exercise of its judicial functions in subsequent proceedings arising from the examinations.
- There was no 'matter' in a constitutional sense to engage the judicial power of the Commonwealth.

The Attorney-General of the Commonwealth intervened to support the validity of s 596A. Several State Attorneys-General also intervened to support validity.

The High Court's decision

The High Court unanimously held that s 596A is not invalid as contrary to Ch III of the Constitution. The Court delivered 2 judgments: a joint judgment of Kiefel, Keane, Nettle and Gordon JJ (the plurality); and a separate judgment of Gageler J.

The plurality – a sufficient connection to a controversy through a forward-looking approach

The plurality framed the constitutional issue in terms of whether the jurisdiction conferred on a court in respect of s 596A concerned a 'matter' in the constitutional sense, such as to engage the judicial power of the Commonwealth. The plaintiffs argued that s 596A was invalid because 'the examination commenced under s 596A was an inquisitorial or investigative exercise that did not concern "some immediate right, duty or liability to be established by the determination of the Court" ' ([25], footnotes omitted).

The plurality rejected this analysis, emphasising that a 'matter' means the subject-matter for determination in a legal proceeding rather than the proceeding itself ([26]). Here, the s 596A power looks forward to the possibility that information gathered in the course of an examination will support a potential claim for relief against the examinee ([30]). And it is that potential future claim that is the relevant 'matter', being 'a controversy relating to the pecuniary rights or liabilities or wrongdoing of the corporation and the examinee or some other person' ([30]).

The controversy so identified could be resolved (and relevant rights and liabilities established) by a determination of the court in possible future litigation. Thus, in summoning a person to be examined, the court is not involved in a fact-gathering exercise divorced from a controversy. Instead, the making of a summons order is a procedure designed to lead to a controversy regarding potential rights and liabilities in possible future litigation ([36]). In that context, an order made under s 596A is made in the exercise of judicial power ([31]) and is analogous to pre-trial procedures such as discovery ([36]).

The plurality also identified a second basis on which an order made under s 596A involved the exercise of judicial power in a matter – that is, the order itself determines rights and liabilities, including the right of an eligible applicant to apply for and be granted the order; and the corresponding loss of privileges for the examinee, who is obliged to be examined and may not remain silent ([32]–[34]). In that context, it was relevant that the examination remains subject to the court's control and supervision and that the court can set aside a summons order on the ground of abuse of process or for some other reason ([35]).

Significance of history

Much of the argument in the case had been directed to the relevance of history in characterising a power as judicial and the application of the Court's earlier decision in *R v Davison* (1954) 90 CLR 353. According to the plurality, however, '[h]istory alone does not provide a sufficient basis for defining the exercise of a power as judicial power' ([37]). Nonetheless, the plurality, having apparently already concluded that s 596A conferred judicial power, went on to state that it was 'relevant' here that s 596A conferred a power that is 'not, in any sense, a new power' ([37]). Indeed, the historical rationale allowing pre-action discovery in the Court of Chancery (a judicial power) was said to apply with 'equal, if not greater, force' to the examination of officers of a corporation ([37]–[40]).

'[h]istory alone does not provide a sufficient basis for defining the exercise of a power as judicial power ...'

Justice Gageler – the historical role of courts in supervising administration

Justice Gageler agreed with the plurality that s 596A was valid but for markedly different reasons. In contrast to the plurality, his Honour's reasons focused primarily on the question whether the power to make an examination order under s 596A was judicial or not, rather than whether it was with respect to a 'matter'.

According to his Honour, whether a power conferred on a court to do an act or thing is judicial power depends on the end to which the act or thing is directed ([48]). Thus, whether a power to make an order requiring or permitting the conduct of an inquiry or investigation is judicial 'turns on the end to which the inquiry or investigation is directed'. Unlike the plurality, it was not sufficient for Gageler J that the making of such an order can, in a 'technical, but artificial, sense be said to quell a controversy about whether the order itself should be made' ([49]; cf [32] (plurality)).

His Honour also implicitly disagreed with the plurality as to the end to which an examination order under s 596A is directed. Because an examination order can be made in the absence of a *lis* – a claim or controversy as to legal right – it could not be said that the examination order was directed to resolving any such claim or controversy in the same way that a power to obtain evidence in proceedings or an order for preliminary discovery is ([50]–[52]). It was also not sufficient that an examination might yield some information that might be used to pursue some (future) claim of legal right ([61]).

It is at this point of the analysis that a historical understanding of judicial power became crucial when interpreting the meaning, nature and scope of 'the judicial power of the Commonwealth' within s 71 of the Constitution ([43]). That is not because the content of judicial power is determined by a 'snap shot of the historical position at a

moment in time', which is to take too narrow a conception of constitutional history ([61], [69]). Instead ([69]):

> [t]he fundamental question is as to how [a] particular function is now to be characterised having regard to the systemic values on which the framers can be taken to have drawn in isolating the judicial power of the Commonwealth and in vesting that power only in courts.

Those systemic values were reflected in the classic works of Montesquieu and Blackstone, being the protection of liberties of the subject from oppression by arbitrary control and excesses of power which can occur when 'judging be not separated from the legislative and executive powers' ([76]–[77]).

In that context, then, the relevant question for his Honour was: '[w]hat … does history relevantly teach about the relationship between a power of investigation or inquiry and the essence of the judicial function' ([75])?

That history included, on the one hand, a traditional objection in the common law to compulsory interrogations (dating back to the abolition of the Star Chamber) and a practice by courts administering the common law not to inquire into subject-matters unconnected with the determination of some claim of legal right ([79]–[82]). For that reason, the Court should be 'extremely cautious about accretion to the judicial power of a power to inquire which is unrelated or tenuously related to the core judicial function of quelling controversies about legal rights' ([93]).

On the other hand, a unifying theme of the equitable jurisdiction historically exercised by the Court of Chancery can be said to be 'supervision of administration' including, by the middle of the nineteenth century, the supervision of companies in winding-up ([84]–[87]). Equivalent powers came to be conferred on the Supreme Courts of the Australian colonies. By the end of the nineteenth century those powers included, critically, power to make orders for the examination of bankrupts and officers and other persons in relation to the affairs of companies in winding-up ([89]).

Here, the purpose of an examination under Pt 5.9 of the Act (which includes s 596A) is to aid persons who are responsible for the external administration of a corporation to carry out their duties ([98]). Construed in that way, the duty s 596A imposes on a court to order an examination is part of the (historical) role of courts in supervising an administration ([99]). On that basis, s 596A confers a judicial power ([101]).

Finally, Gageler J identified the relevant 'matter' to which the exercise of that supervisory power is directed as 'external administration under and in accordance with the Corporations Act' ([103]).

AGS (Laura John, Danielle Gatehouse and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the acting Solicitor-General, Tom Howe QC, James Watson and Ryan May as counsel (with David Hume assisting with written submissions)

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2017/5.html

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Detention of non-citizens brought to Australia for a temporary purpose

The High Court unanimously dismissed a challenge to the validity of provisions of the *Migration Act 1958* (Cth) authorising the detention of unlawful non-citizens that have been brought back to Australia for a temporary purpose (in this instance, medical treatment). In so doing, the Court held that the purpose of the detention is not the same as the temporary purpose for which the person was brought to Australia; instead, it is for the purpose of removal once that temporary purpose no longer exists. Furthermore, the duration of the detention is capable of objective determination by a court at any time and from time to time.

Plaintiff M96A/2016 v Commonwealth
High Court of Australia, 3 May 2017
[2017] HCA 16; (2017) 91 ALJR 579

Background

Section 198B of the *Migration Act 1958* (Cth) provides that an officer may, for a temporary purpose, bring a 'transitory person' (a term that relevantly includes persons taken to a regional processing country) to Australia from a country or place outside Australia. This power operates as an exception to the prohibition upon a non-citizen travelling to Australia without a valid visa (s 42(1), (2A)(ca)). However, the transitory person remains an unlawful non-citizen and is subject to mandatory detention in Australia under ss 189 and 196 of the Act. Furthermore, the transitory person must be removed from Australia as soon as reasonably practicable after they either:

- request removal under s 198(1) of the Act
- no longer need to be in Australia for the temporary purpose ([18]).

The plaintiffs – a mother and her daughter – are Iranian citizens who arrived in Australia at Christmas Island and were ultimately transferred to and detained in Nauru. In November 2014, the plaintiffs were brought to Australia for medical treatment. From this time, the plaintiffs were detained in Australia until 16 December 2016. At that time, the Minister made a residence determination under s 197AB of the Act, permitting them to reside at a specified place in the community subject to certain restrictions.

Constitutional issues

The plaintiffs challenged their detention in Australia on that basis that ss 189 and 196 of the Act would be invalid to the extent they provide for the detention of persons brought to Australia for a temporary purpose under s 198B. The plaintiff's argument proceeded on 2 grounds:

- Sections 189 and 196 of the Act were not necessary or reasonably capable of being seen as necessary for any legitimate non-punitive executive purpose.
- The duration of the plaintiffs' detention was not and had not been capable of objective determination by a court at any material time, and the temporal limits on the detention were not connected to the limited permissible purposes of administrative attention and were thus unconstrained.

These grounds reflected limits on the Executive Government's ability to detain non-citizens in custody identified in previous cases. In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, the Court held that laws authorising such detention will not contravene Ch III of the Constitution if, and only if, 'the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered' (at 33). This requires consideration, and determination, of both the purpose of the detention (*Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 231 [26]) and the time necessarily involved to deport the non-citizen or to receive, investigate, consider and determine an application for permission to remain in Australia (*Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369–70 [139]).

The High Court's decision

The Court unanimously rejected the plaintiff's arguments, delivering 2 judgments.

'... the purpose of the plaintiffs' detention while in Australia was not the same as the temporary purpose for which they had been brought to Australia (ie medical treatment) ...'

Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ (the plurality)

As to the first ground, the plurality found that the plaintiffs had misidentified the purpose of their detention. Contrary to the plaintiffs' submissions, the purpose of the plaintiffs' detention while in Australia was not the same as the temporary purpose for which they had been brought to Australia (ie medical treatment) ([24]). Instead, the purpose of the detention of transitory persons brought to Australia 'are the same purposes, and governed by the same provisions (ss 189 and 196), as all other instances involving unlawful non-citizens under s 189' ([27]). In this case the plaintiffs were detained for the purpose of their subsequent removal from Australia in the circumstances provided for in the Act ([27]).

In light of this, the plurality found it unnecessary to address 2 of the Commonwealth's further submissions. Those were, first, that the list of permissible purposes of executive detention of non-citizens within Ch III of the Constitution was not closed, and might extend beyond:

- removal from Australia
- receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia, or
- determining whether to permit a valid application for a visa ([22]).

Secondly, the validity of executive detention turns on whether that detention is for punitive or non-punitive purposes ([22]). The plurality also found it unnecessary to determine whether the temporary purpose for which the person is brought into Australia (and subsequently removed) is a subjective purpose of the relevant officer(s) or whether it is a purpose objectively ascertained from the circumstances ([24]).

The plurality also rejected the plaintiffs' second ground concerning the duration of their detention. Their Honours found the duration of the detention of transitory persons was able to be objectively determined at any time, as at any time it could be concluded that detention in Australia would conclude upon any of the relevant preconditions being met. One of these preconditions is that the person no longer needs to be in Australia for the temporary purpose ([32]). Additionally, the plurality accepted the Commonwealth's argument that a person can request removal in writing under s 198(1) while they are in Australia for a temporary purpose, this being another precondition that would bring detention to an end ([16], [32]). (In that regard, it was 'sufficient to proceed on the basis' that s 198(1) would not permit removal of an unlawful non-citizen to a place contrary to their wishes ([16]).)

Finally, the plurality rejected the plaintiffs' contention that the temporal limits of detention are not connected with the limited permissible purposes of administrative detention. This argument either wrongly assumed that the purpose of detention is the temporary purpose for which the plaintiffs were brought to Australia (medical treatment) or assumed that detention for the purpose of removal would be unlawful if the duration of the detention was predicated on an apparently unrelated factum. The plurality affirmed that the detention 'was for the purpose of removal from Australia when preconditions are met', and '[t]he detention does not become an exercise of judicial power merely because the precondition, and hence the period of detention, is determined by matters beyond the control of the executive' ([33]).

Gageler J

Justice Gageler broadly agreed with the plurality, holding that the purpose of the detention is removal once the temporary purpose no longer exists ([44]) and that the duration of detention is capable of objective determination ([45]). Accordingly, his Honour held that the plaintiffs' detention was valid.

Unlike the plurality, which found it unnecessary to decide ([24]), his Honour held that whether a transitory person no longer needs to be in Australia for that temporary purpose (so as to trigger the obligation imposed on an officer by s 198(1A) or s 198AD(2) to remove that person) is an objective question. As s 198(1A) is drafted in objective terms – eschewing the use of '[e]stablished drafting techniques' for conditioning a power on a state of mind ([39]) – and does not impose the duty to remove on any particular officer(s), whether a duty to remove a transitory person has arisen 'must be capable of discernment independently of the state of mind of a particular officer' ([41]) and is a question 'which in the event of dispute falls to be answered by a court' ([42]).

AGS (Andras Markus and Ashlee Briffa from AGS Dispute Resolution and Simon Thornton and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth and the Minister for Immigration and Border Protection, with the Solicitor-General, Stephen Donaghue QC, and Perry Herzfeld as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2017/16.html

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Trial by judge alone not permitted by section 80 of the Constitution

A majority of the High Court (6:1, French CJ dissenting) held that New South Wales legislation providing for trial by judge could not be applied to the trial on indictment of a Commonwealth offence, because this would be inconsistent with s 80 of the Constitution. In reaching this conclusion, the Court declined to overrule its decision in *Brown v The Queen* (1986) 160 CLR 171 (*Brown*).

Alqudsi v The Queen
High Court of Australia, 15 June 2016
[2016] HCA 24; (2016) 258 CLR 203; (2016) 90 ALJR 711; (2016) 332 ALR 20

Background

Offence against Commonwealth law

Mr Alqudsi was charged on indictment with 7 offences against s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (Foreign Incursions Act). The offences carried a maximum penalty of imprisonment for 10 years. Prosecution for an offence against that Act was required to be on indictment (s 9A).

Jurisdiction and procedure of the Supreme Court of New South Wales

As the charged offences were allegedly committed in New South Wales, Mr Alqudsi was committed to stand trial in the Supreme Court of New South Wales, which exercised the jurisdiction conferred by s 68(2) of the *Judiciary Act 1903* (Cth). Mr Alqudsi was arraigned on the indictment and pleaded 'not guilty' to each count.

The procedure for Mr Alqudsi's trial was regulated by the *Criminal Procedure Act 1986* (NSW) (CPA), which applied pursuant to s 68(1)(c) of the Judiciary Act. Significantly, s 132 of the CPA provided that an indictable offence can be tried by judge alone – that is, without a jury – if:

- the prosecution and the accused agree to a trial by judge alone (CPA s 132(2))
- the accused requests a trial by judge alone, and the court decides that it is in the interests of justice for that to occur (notwithstanding that the prosecution does not agree) (CPA s 132(4)) or
- the court is of the opinion that there is a substantial risk of corruption, intimidation or external influence of any jury or juror which may not reasonably be mitigated by other means (CPA s 132(7)).

Mr Alqudsi applied for an order that his trial be by judge alone.

Constitutional issue

The constitutional issue was whether s 80 of the Constitution required that Mr Alqudsi be tried by jury rather than by judge alone. Section 80 of the Constitution provides:

> *The trial on indictment of any offence against any law of the Commonwealth shall be by jury*, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes. [Emphasis added.]

Upon application by the Attorney-General of the Commonwealth, French CJ ordered that Mr Alqudsi's application for trial by judge alone be removed into the High Court. His Honour then stated a case for the consideration of the Full Court that contained a question in the following terms:

> Are ss 132(1)–(6) of the *Criminal Procedure Act 1986* (NSW) incapable of being applied to the Applicant's trial by s 68 of the *Judiciary Act 1903* (Cth) because their application would be inconsistent with s 80 of the Constitution?

Previous authority on s 80 – *Brown v The Queen*

Section 80 of the Constitution was previously considered by the High Court in *Brown*. In that case, the High Court had to decide whether a South Australian law that permitted an accused *unilaterally* to elect to be tried by judge alone applied to Mr Brown's trial on indictment for a Commonwealth offence.

In that case the High Court held (3:2) that s 80 of the Constitution mandates that the trial on indictment of a Commonwealth offence must be by jury. In doing so the majority distinguished United States jurisprudence that held that trial by jury was a personal right of the accused which could be waived, and emphasised the role of s 80 of the Constitution in the structure of government and distribution of judicial power more generally.

In the present case, both the Commonwealth and Mr Alqudsi sought to distinguish the decision in *Brown* because, unlike the South Australian legislation in issue in *Brown*, the CPA did not provide for 'unilateral waiver' of trial by jury. If *Brown* could not be distinguished, Mr Alqudsi and the Commonwealth invited the Court to reopen and overrule the decision on the basis that it did not give appropriate consideration to the purposes underlying s 80, the history and development of trial by jury and relevant US authorities.

The High Court's decision

A majority of the High Court answered 'yes' to the question stated for the consideration of the Full Court, holding that the application of s 132 of the CPA to Mr Alqudsi's trial would be contrary to s 80 of the Constitution.

The majority consisted of 3 judgments: Kiefel, Bell and Keane JJ (the plurality); Gageler J; and Nettle and Gordon JJ. Chief Justice French dissented. Aside from Gageler J, each of the judgments expressly found that *Brown* was not distinguishable from the present case ([56], [95], [216]), although only French CJ in dissent would have overruled it ([76]).

The plurality

The plurality considered the history of elective mechanisms for non-jury criminal justice in some detail and emphasised the long-established distinction between trial on indictment and summary proceedings ([99]–[100]). Their Honours stated that the historical analysis adopted in *Brown* paid appropriate regard to the place of s 80 as part of the structure of government and should be accepted ([115]).

The plurality rejected the Commonwealth's argument that Parliament had a (constrained) power to designate conditions on which a trial may proceed by judge alone. That argument did 'not sit well with the drafting history' of the provision, and the plurality concluded that the Commonwealth's 'strained, ahistorical and somewhat improbable construction provides no reason to doubt the correctness of *Brown*' ([108]–[109]).

The plurality also did not accept Mr Alqudsi's more general, 'purposive' argument that s 80 is not absolute or mandatory, having regard to the 'plain words of s 80' ([113]). They concluded that the commands of the section were 'neither … ambiguous nor qualified' ([113]), and the requirement that 'trial … "shall be by jury" admits of no other mode of trial on indictment for a Commonwealth offence' ([115]).

Justice Gageler

Justice Gageler held that the 2 purposes ascribed to s 80 by Mr Alqudsi – namely, the protection of liberty of those that are accused and the broader public interest in the administration of justice – were too limited ([127]). His Honour emphasised that the institution of trial by jury has long served 'to ensure a measure of democratic participation in the administration of criminal law' ([133]) and held that confining the operation of a constitutional prescription expressed in unqualified mandatory terms, in the context of s 80, would fail to accommodate 'the sweeping and unqualified language' of the provision, the content of the prescription it makes and the significance of trial by jury within Australia's constitutional tradition ([125]–[127]).

'… the commands of the section were "neither … ambiguous nor qualified" ([113]), and the requirement that "trial … 'shall be by jury' admits of no other mode of trial on indictment for a Commonwealth offence …" '

Justice Gageler also dismissed the Commonwealth's argument that s 80 did not apply in this case because there was no 'trial on indictment', holding that that was contrary to longstanding High Court authority on what constitutes a proceeding on indictment ([142]–[146]) and what had in fact occurred (both in substance and in form) in the present case ([147]–[149]).

Justices Nettle and Gordon

Like the plurality, Nettle and Gordon JJ focused on the text of s 80. According to their Honours:

> [i]t is not possible, as a matter of construction, to interpret the absolute and unqualified requirement [in s 80] as consistent with the idea that a trial on indictment for an offence against a law of the Commonwealth does not have to be before a jury. [At [173]; see also [178].]

Furthermore, their Honours held that the Commonwealth Parliament's power to determine which, if any, offences against a law of the Commonwealth are to be tried on indictment is not inconsistent with this understanding of s 80 but, rather, reflected a conscious decision by the framers ([181]–[183]). It is for the Commonwealth Parliament, and not State parliaments, to make this election ([184]).

Their Honours also held that the Commonwealth's submission that s 80 is not enlivened until all the procedures specified to determine whether a trial is to be before a jury have been exhausted to be 'contrary to the express words of s 80 and inconsistent with the limitations that s 80 places on the legislative and judicial power of the Commonwealth' ([179], see also [211]).

Chief Justice French in dissent

Chief Justice French dissented, finding that the principle underpinning the ruling in *Brown* was too broad and that, accordingly, *Brown* should be overruled ([76]). In doing so, his Honour emphasised that 'the final and paramount purpose of the exercise of federal judicial power is "to do justice" ' and that this purpose must inform interpretation of s 80 alongside reference to its text and context ([1], [3], [74]).

According to French CJ, there was 'an incongruity' between the line of authority establishing that the Commonwealth Parliament is free to decide which, if any, offences shall be prosecuted on indictment, and a construction of s 80 that precludes trial on indictment by judge alone of an indictable offence when it is in the interest of justice ([28], [74]). His Honour also found that, contrary to the analysis of the majority in *Brown*, the US authorities recognise both an institutional and a rights-protective dimension to trial by jury as mandated by Art III of the US Constitution ([45]).

Having determined that the application of the well-established criteria for overruling an earlier decision of the Court was finely balanced ([72]–[74]), French CJ concluded that there was 'no constitutional imperative' that required the 'degree of rigidity' of the construction adopted by the majority in *Brown* and that on this basis the decision should not be followed ([74]–[76]).

AGS (Emily Kerr, Simon Thornton and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Solicitor-General Justin Gleeson SC, Christopher O'Donnell and James Stellios as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2016/24.html

Decisions in brief


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External affairs power extends to conduct within Australia preparatory to engaging in hostile activity in another State

The New South Wales Court of Appeal / Court of Criminal Appeal unanimously dismissed a challenge to the validity of s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), holding that the section was supported by the external affairs power in s 51(xxix) of the Constitution.

Alqudsi v Commonwealth of Australia; Alqudsi v R
New South Wales Court of Appeal, 16 November 2015
[2015] NSWCA 351; (2015) 91 NSWLR 92; (2015) 332 ALR 94

Background

Under s 6 of the Act it was an offence for an Australian citizen or resident to enter a foreign state with the intention of engaging in hostile activity. Section 7 made it an offence for a person to engage in certain conduct with the intention of supporting or promoting the commission of an offence against s 6.

In December 2013 Mr Hamdi Alqudsi, an Australian citizen, was charged with offences under s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), namely performing services for a person with the intention of supporting or promoting that person entering Syria to engage in hostile activity contrary to s 6 of the Act. The charges were based on things allegedly done by Mr Alqudsi in Australia.

In 2 related proceedings, the trial judge rejected Mr Alqudsi's challenge to the constitutional validity of s 7(1)(e) of the Act. Mr Alqudsi then appealed to a jointly constituted Court of Appeal / Court of Criminal Appeal (Basten and Leeming JJA and McCallum J).

The Court's decision

The Court unanimously dismissed both appeals, holding that s 7(1)(e) was supported by s 51(xxix) of the Constitution, which confers power to make laws with respect to 'external affairs'. All members of the Court held that s 7(1)(e) was supported by the geographic externality aspect of the power, which encompasses 'laws with respect to places, persons, matters or things physically external to Australia' ([96]–[97]).

The Court held that this aspect of the power supports laws regulating conduct in Australia where the conduct has a sufficient connection to an external affair. In the present case it was 'artificial' and 'unduly narrow' to separate the offence into its physical and mental elements and then to argue, as Mr Alqudsi did, that the only 'external' element of the offence was the offender's intangible state of mind ([111], [171]). Instead, it was necessary to consider the offence as a whole: 'what is regulated is conduct intended to support something happening in a foreign State' ([113]). So understood, both the mental state required for the offence and the proscribed conduct have sufficient connection with a matter external to Australia ([112]–[114]; see also [3], [31]–[33], [171]).

The Court did not reach a concluded view on whether s 7(1)(e) was also supported by the foreign relations aspect of the external affairs power (cf [28], [125]). However, Leeming JA rejected the existence of any distinct power to legislate with respect to matters of 'international concern' or to implement recommendations made by international agencies ([128], [147], [150]; see also [3], [171]–[172]).

AGS (Thomas Wood and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth, with Craig Lenehan and Emma Bathurst as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/nsw/NSWCA/2015/351.html

State regulation of coastal fisheries

The Full Court of the Federal Court upheld the validity of New South Wales law regulating coastal fisheries.

Babington v Commonwealth
Full Federal Court of Australia, 21 March 2016
[2016] FCAFC 45; (2016) 329 ALR 737; (2016) 240 FCR 495

Background

On 14 October 2016 the High Court (Gageler and Gordon JJ) refused the applicants special leave to appeal from a decision of an expanded bench of the Full Federal Court (Kenny, Perram, Robertson, Griffiths and Perry JJ) upholding the validity of certain NSW legislation that directly and indirectly affected their ability to fish for abalone off the coast of NSW.

The Court's decision

The Full Federal Court held that these laws were within the power of New South Wales to make laws that have extra-territorial operation pursuant to s 5 of the *Constitution Act 1902* (NSW) and s 2 of the *Australia Act 1986* (Cth) ([41]). Consequently, it was unnecessary to address whether the *Coastal Waters (State Powers) Act 1980* (Cth), insofar as it effectively extends the legislative powers of the States to 3 nautical miles offshore, purports to alter the limits of the State of New South Wales in a manner not authorised by ss 123 or 128 of the Constitution ([47]).

The Court also rejected the applicants' submission that the power of the Commonwealth to make laws with respect to fisheries in s 51(x) of the Constitution was an exclusive power and that the States therefore had no power to legislate with respect to fishing outside their territorial limits. Rather, the Court held, the State and federal legislative powers in this area are 'concurrent' ([40]).

The Court also held that the challenged New South Wales laws were not inconsistent with the *Fisheries Management Act 1991* (Cth) for the purposes of s 109 of the Constitution ([44], [45]).

AGS (Liam Boyle, Simon Thornton and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth, with the Solicitor-General, Justin Gleeson SC, and Kate Richardson as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/FCAFC/2016/45.html

Right of individuals to acquire proprietary rights over *terra nullius* under international law

On 5 May 2016 the High Court (Nettle and Gordon JJ) refused an application for special leave to appeal from the decision of the Federal Court in *Ure v Commonwealth* (2016) 236 FCR 458. In that decision, the Full Court (Perram, Robertson and Moshinsky JJ), holding in favour of the Commonwealth, rejected an argument that there is a rule of international law that private individuals acting in a private capacity may acquire for themselves proprietary rights over land regarded as *terra nullius*, and those rights must be recognised by nation states. The High Court said that the application for special leave to appeal did not raise a question of general importance, and the applicant's proposed grounds of appeal did not have sufficient prospects of success to warrant the grant of special leave.

Ure v Commonwealth
Full Federal Court of Australia, 4 February 2016
[2016] FCAFC 8; (2016) 329 ALR 452; (2016) 236 FCR 458

Background

The Ure family had a long-running dispute with the Commonwealth and the Director of National Parks over Elizabeth and Middleton Reefs – 2 small islands in the Pacific Ocean about 80 nautical miles from Lord Howe Island. Elizabeth and Middleton Reefs have been known to exist since the 18th century. They have been visited from time to time since then, including by scientific expeditions. The islands are also the site of numerous shipwrecks.

It was not in dispute that, at some point during the 20th century, the Commonwealth acquired sovereignty over the 2 islands. However, the date of acquisition of sovereignty was in dispute. Mrs Ure (as successor to the rights of Mr Ure) alleged that the Commonwealth had not acquired sovereignty over the islands by March 1970, when Mr Ure (now deceased) was said to have visited the islands and taken steps to occupy them. Mrs Ure argued that these acts of occupation generated proprietary rights under international law in favour of Mr Ure and his then business partner as first occupants.

On 23 December 1987 the Elizabeth and Middleton Reef Marine Nature Reserve was proclaimed under the *National Parks and Wildlife Conservation Act 1975* (Cth). In November 2012 that declaration was revoked and, instead, the islands became included in the Lord Howe Commonwealth Marine Reserve. This occurred by proclamation under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Mrs Ure argued that these 2 statutes were constitutionally invalid on the ground that they provided for the acquisition of property (namely, Mr Ure's proprietary rights in the islands) otherwise than on just terms, contrary to s 51(xxxi) of the Constitution.

The Court's decision

The question of the date of the Commonwealth's acquisition of sovereignty over the 2 islands was put to one side, and a special case was stated for the Federal Court's consideration pursuant to rule 38.01 of the *Federal Court Rules*. One of the questions posed (and the only question relevant in the appeal to the Full Court) concerned whether there exists a rule of international law that individuals can acquire for themselves proprietary rights over *terra nullius*, and those rights must be recognised by nation states.

The Full Court held that the rule of law that Mr Ure asserted did not exist as a matter of customary international law ([41], [122], [161]) or as a general principle of law recognised by civilised nations ([144]), including as shown by the teachings of the most highly qualified publicists of the various nations ([150], [159], [162]). Accordingly, the s 51(xxxi) points did not fall for decision. The appeal was dismissed with costs.

AGS (Joe Edwards from AGS Dispute Resolution and Anthony Hall and Gavin Loughton from the Office of General Counsel) acted for the Commonwealth and the Director of National Parks, with Stephen Lloyd SC and Houda Younan as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/FCAFC/2016/8.html

Commonwealth funding of religious schools

The New South Wales Court of Appeal has confirmed that the Commonwealth can fund religious schools in the context of Commonwealth educational grants to the States.

Hoxton Park Residents Action Group Inc v Liverpool City Council
New South Wales Court of Appeal, 5 July 2016
[2016] NSWCA 157; (2016) 310 FLR 193

Background

The New South Wales Court of Appeal (Beazley P, Basten and Macfarlan JJA) dismissed an appeal challenging the Commonwealth's funding of the Malek Fahd Islamic School Ltd (in respect of its Hoxton Park campus) under the *Schools Assistance Act 2008* (Cth) and then the *Australian Education Act 2013* (Cth). The funding was provided via tied grants of financial assistance to the States pursuant to s 96 of the Constitution. The appellants, who had previously objected to the school's development, argued that the funding was beyond Commonwealth legislative power and contrary to s 116 of the Constitution ('Commonwealth not to legislate in respect of religion').

As to the Commonwealth's power to provide the funding, the Court held that it was well established that the Commonwealth Parliament can provide financial assistance to the States under s 96 of the Constitution on such conditions as it sees fit, even if the object of the funding falls outside Commonwealth legislative power ([61], [239], [295]). The Court accepted, however, that the Commonwealth could not provide financial assistance to the States pursuant to s 96 if to do so would be contrary to another provision of the Constitution ([61], [246], [295]).

As to s 116 of the Constitution, the appellants sought to rely on each of the section's first 3 limbs, namely that '[t]he Commonwealth shall not make any law for [the purpose of]':

- establishing any religion
- imposing any religious observance
- prohibiting the free exercise of any religion.

The Court agreed with the Commonwealth that the appellants' arguments regarding s 116 were foreclosed by High Court authority that could not be distinguished ([127]–[128], [247]). For each of the 'establishment', 'religious observance' and 'free exercise' limbs, the sole criterion s 116 selected for invalidity is the purpose of the law in question ([96], [265], [295]), rather than the purpose of persons who may happen to receive funding pursuant to the law in question ([105], [154], [281], [295]). The purpose of the Acts was funding education, not any of the purposes proscribed by s 116 ([128], [135], [150], [154], [279], [281]–[282], [295]). As Beazley P noted, '[t]he fact that the School imposes various religious observances on those students whose parents have exercised a choice to send them to a school which engages in such observances, does not mean that the Acts are laws that have any of the prohibited purposes contained in s 116'.

The Court also considered whether the appellants had standing to challenge the Commonwealth's funding of the School. In the court below the primary judge found that the appellants only had standing to challenge the validity of Commonwealth funding that remained current. On appeal the Court found it unnecessary to determine whether the primary judge erred in determining that the appellants had no standing to challenge the legislation in respect of past funding, as the outcome of the appeal would have been the same ([215], [293], [295]). However, Basten JA expressly doubted whether

the appellants had a sufficient interest in the Commonwealth's funding of the school to challenge the validity of the legislation even in relation to current funding ([293]), noting that the mere fact that a decision or law may have a physical or economic effect on a particular person does not mean that that person will have standing to challenge the decision or law ([290]).

AGS (Andras Markus from AGS Dispute Resolution, assisted by Liam Boyle and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth, with Stephen Free as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/nsw/NSWCA/2016/157.html

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ISSN 1329-458X (Print)
ISSN 2204-6542 (Online)
Approved Postage PP 233744/00042