AUSTRALIAN GOVERNMENT SOLICITOR

Litigation Notes

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Reversal of Decisions

The High Court has held that a decision maker who makes a sufficiently serious error can in effect 'remake' the decision in order to fulfil their statutory function. The judgment also contains interesting comments about the nature of administrative decisions and the description of erroneous administrative decisions as 'void' or 'voidable'.

The Immigration Review Tribunal made a 'decision' affirming the cancellation of the respondent's visa. However, through an administrative oversight, the Tribunal did not give the respondent an opportunity to attend a hearing to present evidence and argument before doing so. The Tribunal later conducted a further hearing and made a fresh decision. A majority of the High Court (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, Kirby J dissenting) held that the Tribunal was able to do this.

Minister for Immigration and Multicultural Affairs v Bhardwaj

High Court of Australia, 14 March 2002
[2002] HCA 11; (2002) 187 ALR 117

Background

The respondent's student visa was cancelled by a delegate of the Minister ('the appellant') under the *Migration Act 1958* ('the Act'). The respondent applied for review of that decision by the Immigration Review Tribunal ('the Tribunal'). The Tribunal invited the applicant to attend a hearing on 15 September 1998.

Late on 14 September 1998 the Tribunal received a letter from the respondent's agent requesting an adjournment of the hearing on the ground that the respondent was ill. That letter did not come to the attention of the member of the Tribunal to whom the review had been assigned, and on 16 September 1998 the Tribunal affirmed the cancellation decision ('the September decision'). The Tribunal communicated its decision to the respondent and his agent the next day.

The respondent's agent drew the attention of the Tribunal to the letter requesting an adjournment, after which a new hearing was arranged, at which the respondent presented evidence. On 22 October 1998 the Tribunal revoked the cancellation decision and published its decision ('the October decision').

The appellant applied to have the October decision set aside by the Federal Court on the basis that the Tribunal had no power to review the cancellation decision after making the September decision. That application was dismissed by a single judge and by a majority of the Full Court on appeal ((2000) 99 FCR 251). The matter came before the High Court after it granted the Minister's application for special leave to appeal.

Issue

The issue was whether the Tribunal was able to reconsider the respondent's review application and make the October decision, in particular in light of the statutory scheme in the Act.

Legislation

Part 5 of the Act concerned review by the Tribunal. Unless the Tribunal made a decision on the papers favourable to the respondent, s.360 required the Tribunal to give the respondent an opportunity to appear before it and give evidence and present arguments. Sections 367 and 368 made provision in relation to the Tribunal's 'decision on review', in particular specifying how the Tribunal was to record the reasons for its decision.

Part 8 of the Act provided for review by the Federal Court of various decisions, including decisions of the Tribunal, to the exclusion of most other jurisdiction of that Court (s.485). Review under Part 8 was on limited grounds, so that, for example, breach of the rules of natural justice was not a ground of review (s.476(2)(a)). Applications for review under Part 8 were strictly required to be made within 28 days (s.478).

Arguments

The appellant argued that the statutory scheme for review of decisions under Parts 5 and 8 of the Act then in force manifested an intention to preclude the reconsideration undertaken by the Tribunal, and that this was a contrary indication for the purposes of s.33(1) of the *Acts Interpretation Act 1901* ('the AIA'). Subsection 33(1) provides that where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires. The appellant accepted that the Tribunal had denied the respondent an opportunity to answer the case against him, but considered that the respondent's only remedy was to challenge the September decision before a court.

The respondent argued that it was consistent with general principles relating to administrative decisions reached in breach of the rules of natural justice for the Tribunal to reconsider the September decision, and that the September decision was not a 'decision on review' for the purposes of sections 367 and 368 of the Act and therefore had no legal effect.

Majority reasoning

By a 6–1 majority (Kirby J dissenting), the High Court dismissed the Minister's appeal. The majority judges all held that the Act permitted the action taken by the Tribunal.

The Tribunal's error was characterised by Gleeson CJ as not just a denial of procedural fairness, but a failure to conduct a review of the decision.

The remaining majority judges characterised the Tribunal's error as a jurisdictional error. In essence, the Tribunal had denied the respondent something the Act required him to be given, namely an opportunity to answer the case against him.

All the majority judges held that the Tribunal had failed to discharge its statutory function in making the September decision, such that the Tribunal's review function remained unperformed.

The Court held that nothing in the Act or the principles of administrative law required that a purported decision involving jurisdictional error should be treated as valid unless and until set aside by a court. Thus it was open to the Tribunal to reconsider the matter and make the October decision.

Gaudron and Gummow JJ (with whom McHugh J agreed in general) and Hayne J all decided that there was no need to rely upon s.33(1) of the AIA to support the Tribunal's action because, prior to the October decision, there had been no relevant exercise of power by the Tribunal. The reasoning of Gleeson CJ and Callinan J suggests that they would agree with this.

Minority reasoning

Kirby J held that, on its proper construction, the Act forbade the Tribunal from making the October decision. In his view, the Act envisaged a single exercise of the 'review' performed by the Tribunal which, perfect or imperfect, would be given effect in a 'decision'. He referred to the 'explicit provisions of considerable detail' constituting a 'formal process' relating to such a 'decision' and said that these provisions either had to be obeyed or they followed automatically by force of the Act itself. In his view the Act evinced a contrary intention for the purposes of s.33(1) of the AIA. Parliament had decided that there should be a high degree of clarity and certainty in relation to migration decisions, even if the result was administrative inflexibility. He also noted that if a decision unfavourable to a person could be treated as provisional, then so also could a decision favourable to a person.

Text of the decision is available at: http://scale.law.gov.au/html/highcourt/0/2002/0/2002031411.htm

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Validity of Child Support Scheme

The High Court unanimously upheld the constitutional validity of the scheme established by the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988*. The Court held that the Registration and Collection Act did not impose taxation on a liable parent and therefore did not contravene s.55 of the Constitution (concerning the form of tax bills).

The Court also held that the Acts did not contravene Chapter III of the Constitution by conferring the judicial power of the Commonwealth on the Registrar of Child Support (who is given a power to determine assessments of liability to pay child support).

Luton v Lessels and Child Support Registrar

High Court of Australia, 11 April 2002
[2002] HCA 13; (2002) 187 ALR 529

Background

The Assessment Act provides for the creation of child support liabilities upon the acceptance by the Registrar of an application for administrative assessment of child support. The amount of the child support liability is calculated in accordance with a statutory formula, unless a determination is made by the Registrar or an order is made by a court that the provisions relating to administrative assessment of child support should be departed from. The making of an assessment gives rise to a debt between the liable parent and the carer entitled to child support.

The Registration and Collection Act provides a mechanism by which child support liabilities may be registered and enforced. Registration replaces the debt owed by the liable parent to the carer entitled to child support with a debt owed by the liable parent

to the Commonwealth, and provides the carer entitled to child support with an entitlement to payment by the Commonwealth of an amount equivalent to that paid by the liable parent to the Commonwealth. This debt must be paid in the manner prescribed by the Act, and may be collected by, among other means, deductions from the liable parent's salary or wages, and by the application of certain amounts owing to the liable parent by the Commonwealth (for example, tax overpayments). The amounts collected are part of the Consolidated Revenue Fund and equivalent amounts are paid to the carer out of a child support account.

The plaintiff was subject to a registered child support liability arising from an assessment made under the Assessment Act. He brought proceedings in the original jurisdiction of the High Court challenging the constitutional validity of the Acts. Questions as to the validity of the Acts were reserved for the consideration of the Full Court of the High Court.

The High Court unanimously upheld validity in four separate judgments given by Gleeson CJ (with whom McHugh J agreed), Gaudron and Hayne JJ, Kirby J and Callinan J. Gummow J did not sit.

Section 55 of the Constitution and taxation

Section 55 of the Constitution provides in part that '[l]aws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.' The Senate may not originate or amend bills imposing taxation (Constitution, s.53) and s.55 is designed to protect the powers of the Senate by preventing 'tacking' (ie. attaching provisions not imposing taxation to a taxation bill). The plaintiff argued that the exaction of moneys from liable parents under the Registration and Collection Act involved the imposition of taxation and that the Act contravened s.55 and was of no effect.

The traditional description of a tax is 'a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered' (*Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263, Latham CJ). However, the Court did not treat the *Chicory Marketing Board* description as exhaustive of the factors relevant to the characterisation of an impost as a tax for constitutional purposes.

Gleeson CJ, Kirby J and Callinan J considered that the exaction of child support liabilities was not for the public purpose of raising revenue but for, in effect, enforcing the payment of a pre-existing private liability by a particular parent for the benefit of a particular child and that, on this basis, the exaction was not a tax. This collection mechanism involved no financial benefit to the Commonwealth.

Gaudron and Hayne JJ also found that the exaction was not a tax. They did not expressly rely on lack of revenue raising purpose. However, they similarly relied on the precise correspondence between the pre-existing obligation, the amount paid by the payer and the Commonwealth's substituted obligation to pay the carer to find that the exaction did not constitute a tax.

The precise correspondence between the pre-existing obligation, the amount paid and the Commonwealth's obligation to pay distinguished the child support legislation from the provision held to impose a tax in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480. In that case, the provision imposed a 'royalty' on persons who sold, let or distributed blank tapes which was to be paid direct to a collecting society for the benefit of copyright owners. The amounts received by copyright owners were not related to any right or consent granted by the copyright owner in relation to their copyright work.

Gleeson CJ, Gaudron and Hayne JJ and Kirby J took the view that the fact that an impost is part of the

Consolidated Revenue Fund is a relevant factor in favour of the characterisation of the impost as a tax but does not decisively determine the question (contrary to what had been suggested by a majority of the High Court in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 503).

Judicial power

Only the courts specified in s.71 of the Constitution may exercise the judicial power of the Commonwealth. The plaintiff argued that the Child Support Registrar (who is not a court) exercises judicial power in making administrative assessments and determinations departing from those assessments and in registering child support liabilities, and that the Assessment Act and the Registration and Collection Acts are invalid to the extent that they provide for the Registrar to exercise those powers.

The High Court has stated 'many times that it is impossible to give an exhaustive definition of judicial power' (Kirby J, para 124). A range of factors will be relevant. However, the exercise of judicial power is generally said to involve making binding and conclusive determinations of existing legal rights. All members of the Court agreed that the Registrar does not exercise judicial power, essentially because the Registrar's determinations involve creating rights and liabilities for the future, rather than determining existing rights, and are not binding or conclusive in the relevant sense.

The Court accepted that, although the powers exercised by the Registrar require the application of statutory criteria to facts, the Registrar's powers involve creation of future rights and liabilities. According to Gleeson CJ, Gaudron and Hayne JJ, the assessment or departure determination made by the Registrar is a *factum* by reference to which the Assessment Act itself operates to fix the rights and liabilities of the parties. Associated with this, the Court accepted that the Registrar performs classically administrative functions. Gleeson CJ said at paragraph 21 that '[t]he making of decisions by the application of legal criteria to facts as found is characteristic, but not distinctive, of the judicial function. It is also characteristic of many administrative functions.' He compared the powers exercised by the Registrar with those exercised by decision makers under the *Migration Act 1958*. Other judges relied on the limited fact finding role of the Registrar and the limited discretion of the Registrar, at least in making administrative assessments according to the statutory formula.

In relation to the more discretionary power to make a determination departing from the administrative assessment (similar to the departure power conferred on courts), none of the judges had any difficulty finding that the power is non-judicial. In this context, Gaudron and Hayne JJ noted that the Registrar can refuse to make a departure determination if the issues are 'too complex' and can refer the matter to a court. Kirby J considered that the discretion afforded to the Registrar reinforced the conclusion that the Registrar's determination involved the creation of new rights and liabilities in the exercise of non-judicial power.

The decisions of the Registrar under the Assessment Act and the Registration and Collection Act were held not to be binding so as to involve conferral of judicial power on the Registrar. The Court found that the Registrar could not enforce his or her own determinations; enforcement of child support liabilities involves the intervention of a court and the independent exercise of judicial power (in contrast with the HREOC determinations considered in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245). Also, the decisions made by the Registrar are not conclusive and are subject to a regime of internal review and appeal to a court, and a court can make a departure determination at any time overriding any determination previously made by the Registrar.

Callinan J considered it significant that provision is made for appeals by way of re-hearing rather than for a more limited form of judicial review such as review under the *Administrative Decisions (Judicial Review) Act 1978*. However, as Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ noted in *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 112, legislation conferring a power on an administrative tribunal was held valid by the High Court in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries* (1970) 123 CLR 361 even though the only form of review of the tribunal's decisions was an application to the High Court under s.75(v) of the Constitution for prohibition, mandamus or injunction.

Text of the decision is available at:
http://scale.law.gov.au/html/highcourt/0/2002/0/2002041113.htm

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Confidentiality of Information

In this appeal a majority of the High Court (Kirby J and Callinan J dissenting; McHugh J did not sit) held that an innocent recipient of illegally taped non-confidential information cannot be restrained from publishing that information. A majority declined to recognise an Australian tort of invasion of privacy, at least with respect to corporations, but indicated that *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 (a case in which the High Court held that there was no proprietary interest in a spectacle – in that case, a horse race) did not stand in the way of the development of such a tort with respect to natural persons.

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd

High Court of Australia, 15 November 2001
[2001] HCA 63; (2001) 185 ALR 1

Background

Lenah Game Meats slaughtered brush tail possums at its abattoir in Tasmania. Lenah asserted that unknown persons broke into its premises, installed video cameras and taped aspects of its operations, in particular, the stunning and killing of possums. It then asserted that Animal Liberation gave a copy of the tape to the ABC. Lenah pleaded that it was the intention of the ABC to incorporate excerpts of the tape in the '7.30 Report'. It was not alleged that the ABC was implicated in or privy to the trespass.

Lenah sought interlocutory injunctive relief in the Tasmanian Supreme Court seeking to restrain the ABC from broadcasting the tape. The action was dismissed at first instance on the basis that the statement of claim disclosed no cause of action against the ABC. On appeal the Full Court, by majority, granted the injunction.

The ABC appealed to the High Court. Lenah sought to uphold the order made by the Full Court on the ground that it was unnecessary to identify a recognisable cause of action in circumstances where the publication of the tape, as here, was unconscionable. It also submitted that the publication of the tape would constitute an actionable invasion of Lenah's right to privacy. The ABC contended that an interlocutory injunction could not be granted in the absence of a recognisable cause of action, that this was not an appropriate case to consider whether the common law recognises a tort of invasion of privacy, and that any formulation of a principle regarding injunctive relief must give effect to the implied freedom of political communication identified in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. The Commonwealth Attorney-General intervened in the High Court and argued that there was power to grant an injunction restraining publication in these circumstances and that this power did not infringe the *Lange* principle. The Attorney-General argued against the recognition of a tort of invasion of privacy.

Interlocutory injunctions

Gleeson CJ and in a separate judgment Gummow and Hayne JJ (with whom Gaudron J agreed) held that the legal or equitable rights in respect of which final relief is sought must be identified before an interlocutory injunction can be granted. No such rights could be identified against the ABC: the ABC had not broken any law, there was no breach of confidence, no conspiracy, no defamation, no breach of copyright, no infringement of trade secrets and, as an article of personal property, the video did not belong to Lenah. As no legal or equitable right against the ABC could be identified, interlocutory injunctive relief could not be granted. Unconscionable conduct on its own was not enough to found the grant of an interlocutory injunction (see paras 17, 55, 98–105).

Kirby J took a different approach. His Honour considered that there was no absolute rule that a cause of action must be established before an interlocutory injunction may be granted. Further, an interlocutory injunction could be granted where non-confidential information has been improperly obtained and publication of that information would be unconscionable (para 170). Unconscionability in these circumstances is to be determined by reference to all of the circumstances of the case including the sometimes competing public interests in upholding the integrity of private property and personal rights and defending freedom of speech and expression (para 181).

Callinan J recognised that an underlying cause of action against the person sought to be restrained was generally necessary to support the grant of an injunction. However, he considered that there was no strong reason in principle, modern authority, or in the interests of justice, why an injunction, without more, should not be granted to restrain the enjoyment of property unlawfully obtained, especially when the person sought to be enjoined knows or ought reasonably to know of its illegal genesis (para 287). Callinan J considered that because of its possession of the illegally obtained tape, the ABC was in a relationship of a fiduciary kind and of confidence with Lenah. Equity therefore required the ABC to deliver the tape to Lenah (para 297).

The implied freedom of political communication

The decision of the majority judges made it unnecessary for them to consider the application of the implied freedom of political communication to this case. The implied freedom was, however, considered by Kirby J and Callinan J.

Kirby J considered that the information contained on the illegally obtained tapes was prima facie protected by the implied freedom of political communication referred to in *Lange*, especially having regard to the fact that the ABC is a federally-established corporation with powers that extend to facilitating political and governmental discourse throughout Australia, his view that the Constitution contemplates

representative State Parliaments and the fact that Lenah was engaged in an export business (paras 197–198). However, the power to restrain the publication of that information was compatible with the constitutionally prescribed system of representative democracy. The existence of that power therefore did not infringe the *Lange* principle (paras 200–201). Nonetheless, the *Lange* principle was a relevant matter to be considered by a judge when deciding whether to grant an interlocutory injunction and the Full Court's exercise of its discretion miscarried because it failed to give appropriate consideration to it (para 214).

Callinan J indicated that he would not have found an implied freedom of political communication in the Constitution (paragraph 338, esp. footnote 486), would not have modified the common law of defamation (as the Court did in *Lange*) so as to comply with the constitutional implication (para 342) and would resist any expansion of the *Lange* principle (para 348). To apply the *Lange* principle to the facts of this case, in his view, would involve a considerable and unacceptable expansion of the principle.

Tort of invasion of privacy

Gleeson CJ declined to recognise a tort of invasion of privacy. In his view, if private activities are surreptitiously filmed, the law of breach of confidence is adequate to provide redress where appropriate. Those principles impose an obligation of confidence upon the person who surreptitiously obtains the film and upon those into whose possession the film comes if they know, or ought to know, the manner in which it was obtained (para 39). However, an activity is not 'private' for these purposes merely because it occurs on private property. Rather, an activity will often only be 'private' if the disclosure or observation of the activity in question would be highly offensive to a reasonable person of ordinary sensibilities (para 42). Gleeson CJ considered that Lenah failed to show that the activities secretly taped were private in the relevant sense. Having reached this conclusion, he found it unnecessary to consider whether, and in what circumstances, a corporation might invoke a right to privacy.

Gummow and Hayne JJ (with whom Gaudron J agreed) left open the question whether a tort of invasion of privacy should be developed with respect to natural persons. In particular, their Honours rejected the view that *Victoria Park* stands in the path of the development of such a tort (para 107). Their Honours considered, however, that there was no scope for such a tort to be developed in respect of corporations, such as Lenah (para 132).

Because of the decision he reached with respect to the power of a court to grant an interlocutory injunction, Kirby J considered it unnecessary to decide whether a tort of invasion of privacy existed. He acknowledged that there is doubt as to whether any right to privacy could be enjoyed by a corporation (para 190).

Callinan J tentatively expressed the view that *Victoria Park* was distinguishable from this case and was, in any event, unlikely to apply in a case in which there has been physical interference with a plaintiff's property (paras 313-320). He considered that the time was ripe for consideration of whether a tort of invasion of privacy should be recognised (para 335). Further, he did not rule out that in some circumstances a corporation might be able to enjoy the same or similar rights to privacy as a natural person (para 328). However, because of the decision he reached with respect to the power of a court to grant an interlocutory injunction, he found it unnecessary to deal with these issues.

Government information

Gummow and Hayne JJ (with whom Gaudron J agreed) considered that this appeal did not provide any occasion to reconsider the outcome in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 (a case in which Mason J held that the

unauthorised disclosure of government confidential information will be restrained only if it appears that the disclosure will be contrary to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced). They endorsed Mason J's view that when equity protects government information 'it will look at the matter through different spectacles' (para 137).

Kirby J also expressed the view that different considerations govern the provision of injunctive relief where the information in question concerns the activities of public bodies or governmental information (para 181).

Callinan J, however, tentatively expressed the view that, notwithstanding the decision in *Fairfax*, he would not rule out the possibility that a government or a governmental agency may enjoy a right to privacy over and above a right to confidentiality in respect of matters relating to foreign relations, national security or the ordinary business of government (para 328).

Text of the decision is available at: http://scale.law.gov.au/html/highcourt/0/2001/0/2001111563.htm

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Determining Whether a Duty of Care Exists

Two jointly decided appeals would seem the culmination of a reassessment by the High Court in recent years of the approach which should be taken in determining whether a duty of care under the law of negligence exists in a new category of circumstance.

The Court held that medical practitioners and social workers on the staff of a sexual assault unit in a hospital, as well as State government community welfare officers, in carrying out an investigation pursuant to statutory powers in a case of suspected child sexual abuse, did not owe a duty of care to a person under investigation (being in each case here the father of the child) to take reasonable steps to safeguard that person from nervous shock or psychiatric injury as a consequence of being a subject of investigation.

In neither case here did the investigation undertaken result in any successful prosecution or other action against the plaintiff father (though in one case a prosecution was instituted but later abandoned).

Sullivan v Moody, State of South Australia and Ors; Thompson v Connon, State of South Australia and Ors

High Court of Australia, 11 October 2001
[2001] HCA 59; (2001) 183 ALR 404

Background

Part IV of the *Community Welfare Act 1972* (SA) deals with support services for children. Under s.92(1) of Part IV, any person having the care of a child who maltreats the child is guilty of an offence punishable by fine or imprisonment. Under s.91(1) in the same Part, certain classes of person (specified in s.91(2)), including medical practitioners and hospital social workers, are required to notify an

officer of the State Department of Community Welfare where he or she suspects on reasonable grounds that an offence under Part IV has been committed. Subsection 91(5) provides that, where a person acts in good faith and in compliance with the provisions of s.91, he or she incurs no civil liability in respect of that action.

In *Sullivan*, the plaintiff sued:

- a medical practitioner working in a hospital sexual assault unit, who, upon examination of the plaintiff's daughter, formed the view that the daughter had been sexually abused
- two social workers employed by hospitals involved in the assessment of assault allegations in respect of the daughter, and
- those hospitals and, in the alternative, the State of South Australia, as being vicariously liable for the alleged negligence of the medical practitioner and that of the two social workers.

In addition, it was alleged against the State that it was negligent on its own account in the investigation of the suspected child abuse against the daughter. The plaintiff alleged negligence in the investigation, causing him nervous shock and psychiatric injury, which, among other things, led to the breakdown of his marriage. No criminal charges were laid against the plaintiff, but he alleged that this not dispel suspicion on the part of his wife that he was responsible for the sexual abuse of the daughter.

In *Thompson*, the facts were similar to *Sullivan*. The plaintiff sued:

- two medical practitioners working in the same sexual assault unit as was involved in *Sullivan*, who had between them examined each of the plaintiff's three sons and formed a suspicion that each had been the victim of sexual abuse
- the hospital operating the sexual assault unit and
- the State of South Australia. The plaintiff alleged that either the hospital or the State was vicariously liable for the negligence of the two medical practitioners.

In addition, it was alleged that the State was liable for negligent acts and omissions on the part of certain officers of the Department of Community Welfare affecting the conduct of the investigation (though none of those officers was sued individually). The plaintiff alleged negligence in the investigation causing him nervous shock and psychiatric injury. The State Police laid sexual assault charges against the plaintiff in respect of the matter, but later dropped them.

In each case, in an action in the Supreme Court of South Australia, the plaintiff alleged that the defendant medical practitioners and social workers and the officers of the Department of Community Welfare (in respect of whom the State was sued) owed a duty of care to carry out their duties and responsibilities, particularly the investigation of the sexual assault allegations, with due care.

Each appeal arose from the striking out by a master of the Supreme Court of the plaintiff's statement of claim as disclosing no reasonable cause of action. In each case, it was held that no duty of care of the type alleged could arise on the facts pleaded in the statement of claim. The Full Court of the Supreme Court of South Australia dismissed an appeal against the master's decision in each case. Each plaintiff was granted special leave to appeal to the High Court against the Full Court's orders.

The High Court, sitting five justices, dismissed each appeal with costs.

The High Court's Decision

The High Court (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ), in a joint judgment, observed that the argument of the plaintiffs was conducted on the basis that the harm which they had suffered was a foreseeable consequence of a want of care by those investigating the alleged sexual abuse

of the children concerned. However, the Court said that this of itself was not sufficient to attract a duty of care. If it were, the Court said (at para 42):

> at least two consequences would follow. First, the law would subject citizens to an intolerable burden of potential liability and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law and statutory provisions, which strike a balance of rights and obligations, duties and freedoms.

The Court looked to the question of what else must be present to attract a duty of care. Referring to the well known speech of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, the Court noted that Lord Atkin himself commented how difficult it was to find in the authorities statements of general application defining the relations between parties that give rise to a duty of care (see p. 579).

The Court said that, while the circumstances in which a duty of care arose had been sometimes depicted as involving a relationship of sufficient proximity between plaintiff and defendant, the notion of 'proximity' itself was not a formula for determining whether a duty of care comes into existence. The Court said (at para 48):

> Notwithstanding the centrality of that concept [i.e. proximity], for more than a century, in this area of discourse, and despite some later decisions in this Court which have emphasised that centrality, it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established. It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited.

The Court said that the three-stage approach of Lord Bridge of Harwich in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, at pp. 617–8, for determining whether a duty of care came into existence (i.e. (i) reasonable foreseeability of loss or injury; (ii) sufficient proximity of relationship, and (iii) is it fair, just and reasonable to impose a duty of care) does not represent the law in Australia. The Court said that 'the question of what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle' (see para 49).

The Court referred with approval to the statement of Lord Diplock in *Dorset Yacht Club v Home Office* [1970] AC 1004 that 'the judicial development of the law of negligence rightly proceeds by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationship between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care (see p. 1058)'. The Court went on to say (at para 53):

> Developments in the law of negligence over the last 30 or more years reveal the difficulty of identifying unifying principles that would allow ready solution of novel problems. Nonetheless, that does not mean that novel cases are to be decided by reference only to some intuitive sense of what is "fair" or "unfair". There are cases, and this is one, where to find a duty of care would cut across other legal principles as to impair their proper application and thus lead to the conclusion that there is no duty of care of the kind asserted.

The Court observed that the duty of care claimed by the plaintiffs here, in so far as it would potentially affect the publication of allegations adverse to the plaintiffs in the course of the sexual assault investigations, intersected with the law of defamation. The Court said that to apply the law of negligence to the aid of the plaintiffs here would 'allow recovery of damages for publishing statements to the discredit of a person where [having regard to defences under the law of defamation such as qualified privilege] the law of defamation would not (see para 54).'

The Court referred to the House of Lords decision in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 where it was held that, given the issues of policy and discretions that apply in the management of police operations and resources, it would have been inappropriate to impose upon police officers a duty of care to members of the public for loss or injury suffered though failure to apprehend a dangerous criminal. The Court also referred to the more recent statement of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, at p. 750, where he said that, if liability in damages were to be imposed in the circumstances of a local government authority and its servants performing statutory functions for the well-being of children, it may cause the local authorities to become more cautious and defensive in a way which could rebound to the disadvantage of the children being sought to be protected.

The Court said (at para 60):

> The circumstance that a defendant owes a duty of care to a third party, or is subject to statutory obligations which constrain the manner in which powers or discretions may be exercised, does not of itself rule out the possibility that a duty of care is owed to a plaintiff. People may be subject to a number of duties, at least provided they are not irreconcilable.

The Court went on to consider the statutory scheme in the present case and said (at para 62):

> It would be inconsistent with the proper and effective discharge of those responsibilities [borne by the defendants in the present cases under the statutory scheme] that they [the defendants] should be subjected to a legal duty, breach of which would sound in damages, to take care to protect persons who were suspected of being the sources of that harm. The duty for which the [plaintiffs] contend cannot be reconciled satisfactorily, either with the nature of the functions being exercised by the [defendants], or with their statutory obligation to treat the interests of the children as paramount.

The Court said that the 'logical consequence of the [plaintiffs'] argument must be that a duty of care is owed to anyone who is, or who might become a suspect' (see para 63). Once one rejects in the context of who may be a suspect for investigation a distinction between parents and everyone else, there was no relationship, association, or connection between the plaintiffs and the defendants here, other than that the plaintiffs were suspects for the child sexual abuse under investigation.

The Court concluded (at para 64): 'Ultimately, [the plaintiffs'] case rests on foreseeability; and that is not sufficient'. Accordingly, the Court held that the duty of care for which the plaintiffs argued did not exist.

Text of the decision is available at: http://scale.law.gov.au/html/highcourt/0/2001/0/2001101159.htm

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High Court Decisions in Brief

Regie National des Usines Renault SA v Zhang
14/3/02, [2002] HCA 10; (2002) 187 ALR 1

In this appeal the High Court changed the choice of law rules that apply to international torts (ie torts occurring in a foreign country but litigated in an Australian court). The case arose out of injuries to a NSW resident in an accident in New Caledonia involving a Renault car. The NSW resident brought proceedings in the NSW Supreme Court against two Renault companies (which had no presence in Australia) alleging negligence in the design of the motor vehicle. The question was whether the action should be stayed on the basis that NSW was an 'inappropriate forum'. This involved, in part, consideration of which law should be applied by the NSW Supreme Court in determining the action.

In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, the High Court changed the common law choice of law rules for intra-Australian torts, to which Australian courts now apply the substantive law of the State or Territory in which the tort occurred (rather than the substantive law of the State or Territory in which the proceedings are brought). In *Renault*, the High Court decided to extend this approach to foreign torts so that, in general terms, Australian courts should now apply the substantive law of the place where the tort occurred. Further, an Australian court would not be an inappropriate forum for a tort action merely because it would be required to apply foreign law; a proceeding should only be stayed if it would be oppressive or vexatious, and so productive of injustice, to hear the claim in the Australian court. However, the High Court reserved some matters for further consideration, such as the position of maritime and 'aerial' torts and the law which should be applied to assessment of damages.

http://www.austlii.edu.au/au/cases/cth/high_ct/2002/10.html

Pasini v United Mexican States
reasons published 14/2/02, [2002] HCA 3; (2002) 187 ALR 409

The High Court upheld the constitutional validity of the appeal provision in s.21 of the *Extradition Act 1988* (Cth), ruling that it did not invalidly confer an administrative function on the Federal Court.

A magistrate, acting administratively, determined that the applicant was eligible for surrender under the *Extradition Act*. Section 21 allowed an appeal against this determination to the Federal Court. The applicant challenged the constitutional validity of the Act, including on the ground that the appeal provision conferred non-judicial power on the Federal Court contrary to Chapter III of the Constitution.

In upholding the validity of s.21, the High Court followed the long-standing line of authorities which establish that there are some powers which appropriately may be treated as administrative when conferred on an administrative body and judicial when conferred on a court (the 'chameleon doctrine'). The decision affirms that the Parliament has flexibility in implementing schemes for conferring dispute resolution functions on administrative tribunals.

http://www.austlii.edu.au/au/cases/cth/high_ct/2002/3.html

Re McBain; Ex parte Australian Catholic Bishops Conference

Re McBain; Ex parte Attorney-General of the Commonwealth Ex rel Australian Episcopal Conference of the Roman Catholic Church

18/4/02, [2002] HCA 16; (2002) 188 ALR 1

The High Court dismissed the applications brought by the Catholic Bishops to overturn the judgment of the Federal Court in *McBain v Victoria* that the *Infertility Treatment Act 1995* (Vic) is inconsistent with the *Sex Discrimination Act 1984* (Cth) and invalid to the extent that it precludes a single woman from receiving IVF treatment in Victoria.

The Court delivered 6 separate judgments. (Gaudron and Gummow JJ gave a joint judgment.) None of the members of the Court dealt with the substantive issues which the Bishops had sought to raise. Gleeson CJ noted that cogent arguments were presented each way as to whether the Infertility Treatment Act was inconsistent with the Sex Discrimination Act. Callinan J doubted the assumption of all parties to the case that the Sex Discrimination Act is a law with respect to external affairs supported by s.51(xxix) of the Constitution.

The proceedings were disposed of on issues of jurisdiction and discretion. Sections 75 and 76 of the Constitution confer, or provide for the Commonwealth Parliament to confer, original jurisdiction on the High Court in specified 'matters'. Gleeson CJ and Gaudron and Gummow JJ (with whom Hayne J agreed on this issue) held that there was no 'matter' before the Court in either the relator proceeding for which the Commonwealth Attorney-General had granted his fiat or the Bishops' own application and the High Court therefore did not have jurisdiction to determine the proceedings. McHugh, Kirby and Callinan JJ held that there was a matter before the Court but would have refused the relief sought as a matter of discretion.

http://www.austlii.edu.au/au/cases/cth/high_ct/2002/16.html

SGH Ltd v Commissioner of Taxation
reasons published 1/5/02, [2002] HCA 18; (2001) 188 ALR 241

SGH Ltd was assessed to tax under the *Income Tax Assessment Act 1936* (Cth) on certain payments it received under Queensland legislation. SGH Ltd is a building society in Queensland formed under the *Building Societies Act 1886* (Qld) and controlled by Suncorp, a statutory corporation established by a Queensland Act. It was common ground that Suncorp was 'the State' for the purposes of s 114 of the Constitution (which prohibits the Commonwealth from imposing 'any tax on property of any kind belonging to a State'). SGH Ltd argued that it was also 'the State' for the purposes of s.114 and that imposition of the tax would constitute a tax on property of a State contrary to s.114. The High Court decided that SGH Ltd was not 'the State' for the purposes of s.114. It was significant to this decision that SGH Ltd had as members individual depositors, not being the State, whose interests had to be taken into account in its decision-making.

http://www.austlii.edu.au/au/cases/cth/high_ct/2002/18.html

Roxborough v Rothmans of Pall Mall Australia Ltd
6/12/01, [2001] HCA 68; (2001) 185 ALR 335

This appeal dealt with the restitutionary principles that apply where a business tax is held to be invalid, after the amount of the tax has been passed on to consumers. In 1997 the High Court ruled that the NSW business franchise tax imposed on sellers of tobacco products was invalid under s.90 of the Constitution (which gives to the Commonwealth exclusive power to impose excise duties). As a result, the wholesaler Rothmans was not required to pay the amount of the tax to NSW. However, the retailers had paid the amount of the tax to the wholesaler and had passed it on to consumers. The retailers sued the wholesaler for the amount of the tax they had paid to it. The High Court held that the retailers were entitled, in restitution, to be repaid by the wholesaler the amount of tax they had paid to it.

http://www.austlii.edu.au/au/cases/cth/high_ct/2001/68.html

Cheung v The Queen
22/11/01, [2001] HCA 67; (2001) 185 ALR 111

The High Court affirmed that it is the role of the trial judge to determine the facts relevant to sentencing in a criminal matter, including in Commonwealth prosecutions. The appeal raised the application of s.80 of the Constitution (which requires that the trial on indictment of Commonwealth offences be by jury) in the context of the sentencing process in which the judge may make findings of fact relevant to the level of penalty to be imposed. The High Court ruled that in sentencing, the judge may not

find as proven facts which would be inconsistent with factual implications of the jury's verdict (eg as to the establishment of elements of the offence), but there is no requirement that the judge sentence a person on the basis of the view of the facts most favourable to the person consistent with the verdict. Section 80 does not require a different approach for Commonwealth offences. The decision affirms that s.80 does not require different sentencing procedures for Commonwealth and State offences.

http://www.austlii.edu.au/au/cases/cth/high_ct/2001/67.html

Wong v The Queen; Leung v The Queen
15/11/01, [2001] HCA 64; (2001) 185 ALR 233

In this appeal, the High Court decided that the NSW Court of Criminal Appeal could not give 'guideline judgments' for sentencing for Commonwealth offences.

In the course of determining the appropriate sentence to be imposed in these cases, the NSW Court of Criminal Appeal had issued a 'guideline judgment' concerning sentencing for heroin importation and related offences under the *Customs Act 1901* (Cth). The judgment set out comprehensive quantitative but non-binding guidelines for the ranges of appropriate sentences assessed against specified factors (in particular, the amount of heroin). The High Court decided that the sentencing process undertaken by the NSW Court of Criminal Appeal was inconsistent both with general sentencing principles and with s 16A of the *Crimes Act 1914* (Cth) (which deals with sentencing for Commonwealth offences). This was because the 'guideline judgment' focussed on the result of the sentencing task and not on the principles supporting the result.

http://www.austlii.edu.au/au/cases/cth/high_ct/2001/64.html

Shergold v Tanner
23/5/02, [2002] HCA 19; (2002) 188 ALR 302

The High Court held that a decision to issue a conclusive certificate which has the effect of denying access to documents under the *Freedom of Information Act 1982* (Cth) is judicially reviewable. Mr Tanner MP sought Administrative Appeals Tribunal review of a decision of a delegate of the then Department of Employment, Workplace Relations and Small Business (DEWRSB) to exempt consultants' reports relating to waterfront reform issues from release under the FOI Act. Subsequent to the application to the AAT, Dr Shergold (then Secretary of DEWRSB), as delegate of the Minister, issued conclusive certificates under the FOI Act concerning the effect of disclosure on the Commonwealth's relations with the States and on the public interest. Mr Tanner sought judicial review in the Federal Court of the decisions to issue the certificates. The Federal Court held at first instance and, by majority, on appeal that the decisions were, on the grounds pleaded, judicially reviewable. The High Court agreed, ruling that while the certificates remained in force they were conclusive within the context of the FOI Act, but this did not preclude judicial review of the decision to grant them.

http://www.austlii.edu.au/au/cases/cth/high_ct/2002/19.html

Mobil Oil Australia Ltd v Victoria
26/6/02, [2002] HCA 27; (2002) 189 ALR 161

The High Court upheld the validity of Part 4A of the *Supreme Court Act 1986* (Vic) which provides for representative actions in the Victorian Supreme Court. The Victorian legislation substantially mirrors the 'group proceedings' provisions of Part IVA of the *Federal Court of Australia Act 1976*, the validity of which has also been challenged. This case arose out of a product liability claim brought against the plaintiff involving the production of allegedly contaminated aviation fuel in Victoria and its subsequent supply in Victoria and other States.

The High Court rejected arguments that the Victorian provisions exceed territorial limitations on the legislative power of the Victorian Parliament in their operation on group members resident outside Victoria and that the provisions contravene

requirements in Chapter III of the Constitution for the proper exercise of judicial power. The Court affirmed that Chapter III of the Constitution does not require that a State Supreme Court exercise only judicial powers. In any event, proceedings under Part 4A involved the exercise of judicial power.

http://www.austlii.edu.au/au/cases/cth/high_ct/2002/27.html

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