AUSTRALIAN GOVERNMENT SOLICITOR

Litigation Notes

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Validity of Ministerial Appointments

The High Court has upheld the constitutional validity of the practice adopted by successive governments since 1987 of appointing more than one minister to administer the same department of State. The Court has also upheld the appointment of Parliamentary Secretaries as ministers under ss 64 and 65 of the Constitution. Where more than one person is appointed to administer a department, it is a matter for the executive government to make arrangements as to how the department should be administered and for the Parliament to determine the way in which those persons should account to it for the department's administration.

Re Patterson; Ex parte Taylor

High Court of Australia, 6 September 2001
[2001] HCA 51; (2001) 182 ALR 657

Background

This was an application to the High Court challenging a decision of Senator Patterson, the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, to cancel Mr Taylor's visa under s.501(3) of the *Migration Act 1958*. Mr Taylor ('the applicant') was born in the United Kingdom and in 1966, as a child, came to Australia with his parents. He had not become an Australian citizen. However, subject to the cancellation of his visa, the applicant is entitled to remain permanently in Australia and, like other UK citizens who migrated to Australia before 1987, is entitled to vote at federal elections. The Parliamentary Secretary cancelled the applicant's visa on the basis that he was not of good character (he has a number of convictions for sexual assaults on children) and that it was in the national interest to cancel the visa.

High Court's Decision

The High Court overturned Senator Patterson's decision to cancel the visa, ruling that in making the decision she had exceeded her jurisdiction on bases related to the operation of the Migration Act. Gaudron, McHugh, Kirby and Callinan JJ also accepted the applicant's argument that he was not an 'alien' for the purpose of the Commonwealth's power to make laws with respect to aliens (s.51(xix) of the Constitution) and that the visa and deportation provisions of the Migration Act were therefore not valid in their application to him. In doing so they overruled the High Court's decision in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178. Although non-citizen British subjects who migrate to Australia today would be within the aliens power, the effect of the four majority judgments is that the deportation provisions of the Migration Act cannot apply to a person such as the applicant as a British subject who migrated to Australia before, at the earliest, 1973 (when the *Royal Style and Titles Act 1973* (Cth), referring to the Queen of Australia, was passed) and, in the view of three of the majority, 1987 (when changes to Australian citizenship laws came into effect), at least where the person has been absorbed into the

Australian community. Gleeson CJ, Gummow and Hayne JJ dissented on this point and upheld *Nolan*.

However, the Court (Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, McHugh J not deciding) rejected the applicant's argument that the Parliamentary Secretary was not validly appointed under ss 64 and 65 of the Constitution and s.4 of the *Ministers of State Act 1952* and was not 'the Minister personally' for the purposes of s.501(4) of the Migration Act. (Section 501(4) provides that only 'the Minister personally' can make a decision under s.501(3).) The Court accepted the submission, put by the Attorney-General who appeared personally as intervener on this issue, that there was nothing in ss 64 and 65 of the Constitution and the system of responsible government for which the Constitution provides that precludes the appointment of more than one Minister to administer a department and, in particular, the appointment of Senator Patterson as Parliamentary Secretary to administer the Department of Immigration and Multicultural Affairs with the Minister for Immigration and Multicultural Affairs.

Text of the decision is available through Scaleplus at: http://scaleplus.law.gov.au/html/highcourt/0/2001/0/HC000520.htm

Contacts for further information:

David Bennett
Senior Executive Lawyer

Tel: (02) 6253 7063
Fax: (02) 6253 7303
E-mail: david.bennett@ags.gov.au

Jenny Burnett
Senior Executive Lawyer

Tel: (02) 6253 7012
Fax: (02) 6253 7303
E-mail: jenny.burnett@ags.gov.au

End of the Road for the Highway Rule

The 'highway rule' had involved an 'immunity' for authorities responsible for the maintenance of public roads from liability (in the torts of negligence and nuisance) for non-feasance in relation to the conditions of roads and roadside footpaths. Non-feasance in this context involves a failure to do anything, thus allowing deterioration to take its course. On the other hand, the immunity did not extend to 'misfeasance'. Misfeasance involves doing something, but failing to do it adequately. In the jointly decided cases of *Brodie v Singleton Shire Council and Ghantous v Hawkesbury City Council,* the High Court examined the utility of the highway rule in Australian conditions. Five justices of the High Court, sitting its full complement of seven, rejected the highway rule as part of the common law of Australia. They saw the rule as not supportable in principle. On a more general level, the appeals show the way in which the High Court approaches the task of changing the common law in Australia.

Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council

High Court of Australia, 31 May 2001
[2001] HCA 29; (2001) 180 ALR 145

Background

In *Brodie*, a truck laden with pre-mix concrete was travelling along a road maintained by the defendant council. As fully laden, the truck weighed 22 tonnes. The truck had crossed one wooden bridge on the road. A sign on the approach to that bridge warned that it had a weight limit of 15 tonnes gross. A short time later the truck approached the next wooden bridge on the road. There was no weight limit sign for this second bridge. As the truck proceeded on to this bridge, the bridge collapsed under the truck's weight. The bridge's supporting wooden girders had

been undermined by dry rot or termites during its 50 year life. The collapse damaged the truck and injured its driver. Both the truck's owner and the driver sued the council in negligence and nuisance seeking damages for their respective losses.

In *Ghantous*, the plaintiff, while seeking to allow other pedestrians to pass, stepped on the edge of a roadside footpath at a point where the earth verge had subsided below the level of the footpath, lost her footing and fell. The plaintiff sued the local council for damages in respect of injuries she suffered through the fall.

In *Brodie*, the trial judge was bound by the highway rule, but ruled that the case was one of misfeasance rather than non-feasance because the defendant council had overlooked the state of the girders when it made repairs to the surface planks on the bridge roadway. However, this finding was rejected by the New South Wales Court of Appeal. The Court of Appeal held that the work done in repairing the surface planks had not extended to any consideration of the stability of the bridge's structure including any deterioration of its wooden girders. The case therefore should have been decided as one of non-feasance. The Court of Appeal said that the highway rule applied, and ordered that judgment be entered for the defendant. The plaintiffs sought special leave to appeal to the High Court against this decision.

In *Ghantous*, both the trial judge and New South Wales Court of Appeal had held that the case was one of non-feasance and the highway rule therefore applied to deny liability. The plaintiff sought special leave to appeal to the High Court.

High Court's Decision

Gaudron, McHugh and Gummow JJ, in a joint judgment, and Kirby J and Hayne J in separate judgments, held that the highway rule should be abolished. Gleeson CJ and Callinan J, by contrast, in separate judgments, held that the highway rule was so entrenched in the common law in Australia, with governments and local authorities dependent upon its continued existence, that any change to the rule should be a matter for the State and Territory legislatures, not the courts.

In *Brodie*, Gaudron, McHugh, Gummow and Kirby JJ granted special leave to the plaintiffs to appeal and allowed the appeal, ordering that the case be remitted to the New South Wales Court of Appeal to be determined on the basis that the highway rule did not apply. Hayne J held that on the facts the accident was caused by the driver not observing the weight limit sign on the previous bridge, not any failure on the part of the defendant council. This caused him to join with Gleeson CJ and Callinan J in granting special leave to appeal, but dismissing the appeal.

Gaudron, McHugh and Gummow JJ examined two earlier High Court decisions, *Buckle v Bayswater Road Board* (1937) 57 CLR 259 and *Gorringe v Transport Commission (Tas)* (1950) 80 CLR 357, which had generally been understood as authority for the highway rule's incorporation into the common law in Australia. *Buckle* involved a pedestrian who had suffered injury by stepping unsuspectingly into a hole on the roadside. In *Gorringe*, the driver of a truck and his passenger were killed when the driver failed to see a large hole in the road surface caused by a culvert underneath having recently collapsed through flooding from heavy rain still falling at the time of the accident. It was discovered that some of the wood in the culvert structure had decayed. In each of these cases, the defendant road authority was held not liable.

Gaudron, McHugh and Gummow JJ noted that, since *Buckle* and *Gorringe*, the law in other common law jurisdictions had moved away from the path said to be dictated by those two cases. In Canada, where there were distances and climatic conditions no less diverse than in Australia, the distinction between non-feasance and misfeasance, which underlay the

highway rule, was no longer observed. In the United Kingdom, the rule had been abolished by legislation in 1961.

The foundation of the highway rule lay in conditions in England which had not been replicated in Australia. Originally, the parish in England had been responsible for the upkeep of highways. The parish was not an incorporated body and had no common revenue. There was no-one to sue if the highway was not maintained and, in consequence, injury suffered. In the nineteenth century in England, the responsibilities of the parish for highways were transferred to new statutory local government corporations. Gaudron, McHugh and Gummow JJ noted that these conditions had never applied in Australia. Rather, the responsibilities borne by local government bodies in Australia for roads were created by legislation in the beginning, and have remained the province of legislation.

Gaudron, McHugh and Gummow JJ said (at para 102):

> Whatever may be the general significance today in tort law of the distinction between misfeasance and non-feasance, it has become more clearly understood that, on occasions, the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care. This may oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from the danger. In this regard, the factor of control is of fundamental importance.

These justices saw the persistence of the categories of misfeasance and non-feasance under the highway rule as continuing to give rise to illusory distinctions. This was particularly so in the case of the legal consequences of repair or maintenance work. In some cases, repair work which 'negligently fails to deal with' a danger, or causes the danger 'to recur more quickly than ordinarily', constitutes misfeasance. On the other hand, a failure to attempt such repairs would be non-feasance. They saw the highway rule as no longer commanding intellectual assent (see para 107).

In addition, to the extent that there was still an alternative cause of action to a plaintiff in highway accident cases under the older tort of nuisance to that under the tort of negligence, the majority ruled that the tort of negligence should now be the exclusive basis of tort liability in such cases.

Gaudron, McHugh, Gummow and Kirby JJ noted that legislation governing main roads in New South Wales at the time of the accident in *Brodie* (viz. 1992) provided that all the powers and immunities of a council in relation to a public road were to be enjoyed by the State Roads and Traffic Authority. However, this did not justify freezing the common law to continue its incorporation of the highway rule.

Gaudron, McHugh and Gummow JJ said that, following the abolition of the highway rule, authorities with statutory powers to construct and maintain roads are obliged to take reasonable care that their exercise or failure to exercise those powers does not create a foreseeable risk of harm to a class of persons (i.e. road users) which includes the plaintiff. They said (at para 151):

> The perception of the response by the authority calls for, to adapt the statement by Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40, at pp. 47–8, a consideration of various matters; in particular, the magnitude of the risk and the degree of probability that it will occur, the expense, difficulty and inconvenience to the authority in taking the steps described above to alleviate the danger, and any other competing or conflicting responsibility or commitments of the authority. The duty does

> not extend to ensuring the safety of road users in all circumstances. In the application of principle, much thus will turn upon the facts and circumstances disclosed by the evidence in each particular case.

Earlier in their judgment, Gaudron, McHugh and Gummow JJ said (at para 104):

> [F]inancial considerations and budgetary imperatives may fall for consideration with other matters when determining what should have been done to discharge a duty of care.

In *Ghantous*, all justices were agreed that, regardless of the highway rule, there had been no negligence on the part of the defendant council. Gleeson CJ (at para 7) quoted the words of Cumming-Bruce J in *Littler v Liverpool Corporation* [1968] 2 All ER 343, at p. 345: 'A highway is not to be criticised by the standards of a bowling green'. Similarly, Gaudron, McHugh and Gummow JJ said (at para 163) that persons 'ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes'. There is a strong implication in the judgment of Callinan J (see para 355), whose views on the *Ghantous* appeal were generally supported by five of the other justices, that the plaintiff's fall was caused by her own lack of care.

Text of the decision is available through Scaleplus at: http://scaleplus.law.gov.au/html/highcourt/0/2001/0/HC000300.htm

Contact for further information:

Paul Sykes
Senior Lawyer

Tel: (02) 6253 7050
Fax: (02) 6253 7302
E-Mail: paul.sykes@ags.gov.au

High Court Constitutional Decisions in Brief

Yougarla v Western Australia

9/8/01, [2001] HCA 47; (2001) 181 ALR 371

The High Court unanimously dismissed this appeal, ruling that the *Aborigines Act 1905* (WA) ('the 1905 WA Act') had been effective to repeal s.70 of the *Constitution Act 1889* (WA) ('the WA Constitution').

Section 70 of the WA Constitution (which is a schedule to the *Western Australia Constitution Act 1890* (Imp) ('the 1890 Imperial Act')) required the annual appropriation of certain amounts of money for the welfare of Aboriginal people. Section 73 of the WA Constitution required that a bill amending or repealing s.70 be 'reserved by the Governor for the signification of Her Majesty's pleasure thereon'. The High Court decided that requirements in 1842 and 1850 Imperial Acts, continued in force by s.2 of the 1890 Imperial Act, as to the manner and form of reservation for Royal Assent and the making known in the colony in question of the fact that Royal Assent had been given had either been complied with by or were not applicable to the 1905 WA Act, which was therefore effective to repeal s.70 of the WA Constitution.

This conclusion meant that it was unnecessary for the Court to decide issues raised by WA about s.106 of the Commonwealth Constitution, on which the Commonwealth Attorney-General had intervened. Section 106 provides that '[t]he Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth…until altered in accordance with the Constitution of the State'. WA argued that the Constitution of a State for the purposes of s.106 is confined solely to the legislation of that State and s.106 therefore excluded the need to comply with any manner and form requirements imposed by Imperial legislation. The Attorney-General argued

that a State 'Constitution' for the purposes of s.106 is not necessarily the same as the relevant State Constitution Act as in force at 1900, but would include the provisions of the Imperial Acts presently relevant which impose manner and form requirements for the repeal of provisions of the WA Constitution. The joint judgment in the High Court observed that WA's submission 'appears to be at odds with earlier judgments in this Court' (para 62) and its acceptance 'would require the rejection of what has been said in various decisions, including those most recently referred to by Brennan CJ in *McGinty v Western Australia* ((1996) 186 CLR 140 at 171–173)'. In a separate judgment, Kirby J agreed with the Commonwealth's submission that the Imperial manner and form provisions were part of the WA Constitution for the purposes of s.106 (paras 83–99).

http://scaleplus.law.gov.au/html/highcourt/0/2001/0/HC000480.htm

Brownlee v The Queen
21/6/01, [2001] HCA 36; (2001) 180 ALR 301

The High Court dismissed this appeal from the NSW Court of Criminal Appeal in which the appellant argued that features of his trial meant that it was not conducted 'by jury' as required by s.80 of the Constitution. The High Court unanimously held that the constitutional concept of 'trial by jury' required by s.80 for trials on indictment does not preclude the jurors from separating (for example, overnight or for weekends) after they have retired to consider their verdict and does not preclude a conviction by a jury consisting of less than 12 members, at least where the jury originally empanelled for the trial consisted of 12 members and two jurors were discharged in the course of the trial. The Attorney-General intervened to argue that s.80 did not invalidate the trial in this case.

http://scaleplus.law.gov.au/html/highcourt/0/2001/0/HC000370.htm

Contact for further information:

David Bennett
Senior Executive Lawyer

Tel: (02) 6253 7063
Fax: (02) 6253 7303
E-mail: david.bennett@ags.gov.au

Jenny Burnett
Senior Executive Lawyer

Tel: (02) 6253 7012
Fax: (02) 6253 7303
E-mail: jenny.burnett@ags.gov.au

For further information on litigation matters and services please contact:

Canberra	
Jenny Anderson	(02) 6253 7401
Elizabeth Lajos	(02) 6253 7419
New South Wales	
Julia Hall	(02) 9581 7432
Victoria	
Stephen Lucas	(03) 9242 1200
Queensland	
David Durack	(07) 3360 5700
Western Australia	
Graeme Windsor	(08) 6268 1102
South Australia	
Sarah Court	(08) 8205 4231
Northern Territory	
Rick Andruszko	(08) 8943 1444
Tasmania	
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