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Federal Court decision on federal magistrates' superannuation entitlements

The decision of the Full Court of the Federal Court in *Baker v Commonwealth of Australia* [2012] FCAFC 121 (*Baker*) was handed down on 31 August 2012

Background

Baker involved a challenge by a number of federal magistrates to their current superannuation arrangements.

Federal magistrates are justices appointed under s 72 of the Constitution (Ch III justices). The applicants contended that an aspect of the constitutional requirement that a court be and appear to be independent and impartial is that Ch III justices must be afforded financial security, which includes a fixed and certain remuneration sufficient to ensure actual and apparent independence and impartiality. They said that 'uncertainty as to a judge's post-retirement financial position', and the need potentially to 'take post-retirement employment', may give rise to the appearance, to a reasonable and well-informed observer, that a judge may not be independent and impartial. To ensure that post-retirement financial insecurity would not become a perceived threat to judicial independence and impartiality, the applicants contended that it was necessary for Parliament to make provision for Ch III justices to receive a lifelong guaranteed pension.

The applicants challenged the validity of Sch 18 of the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth) (the Amendments Act) which amended the *Judges' Pensions Act 1968* (Cth) (the Pensions Act) to exclude federal magistrates from the operation of that Act. As a consequence, federal magistrates are not entitled to a pension under the Pensions Act. Instead, a determination made by the Governor-General under Sch 1 cl 8 of the *Federal Magistrates Act 1999* (the FM Act) provides for a Commonwealth contribution of 15.4% (previously 13.1%) of a federal magistrate's annual salary to be made either to a federal magistrate's 'complying superannuation fund' or a 'retirement savings account'. The applicants' principal claim for relief was a declaration that Sch 18 is invalid.

The proceeding was commenced in the High Court, and subsequently remitted to the Federal Court. The matter proceeded before the Full Court of the Federal Court by way of special case agreed between the parties.

Decision of the Full Court

The Full Court (constituted by Keane CJ, Lander and Perram JJ) held that the applicants were not entitled to the relief sought in their application.

Keane CJ and Lander J wrote a joint judgment. Perram J, who wrote a separate judgment, decided the case on a different basis.

Reasons of Keane CJ and Lander J

Keane CJ and Lander J:

- held that the express words of the Constitution did not support the applicants' claims for relief, and rejected the applicants' claims for relief based on the *implied* 'constitutional requirement that judges appointed under Ch III of the Constitution should enjoy, and be seen to enjoy, judicial independence'. Applying the test of the 'hypothetical reasonable well-informed bystander', their Honours held that a reasonable well-informed lay observer would not apprehend that a federal magistrates' 'impartiality and independence is put at risk by want of a judicial pension, at least when regard is had to their salaries and other safeguards of their independence and partiality'
- rejected a separate argument based on the language of s 72(iii) of the Constitution. Section 72(iii) provides that Ch III justices 'shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office'. The argument (ultimately rejected) was that: s 72(iii), by expressly prohibiting diminution of a Ch III justice's remuneration during their 'continuance *in office*', impliedly permitted diminution of their salary after they ceased to hold office; but diminution did not extend to *extinguishment*. As such, so it was said, 's 72(iii) obliges Parliament to continue some form of remuneration of Ch III justices after they have retired from office'.

Reasons of Perram J

Perram J did not answer the question whether 'there is a positive implication in Chapter III of the Constitution which requires that federal judicial officers should know in advance their financial position upon retirement'. In his Honour's view, even if that question were answered in the applicants' favour, they 'would not be entitled to the relief they claim' with the consequence that 'the constitutional issue does not arise and should not be determined'.

The applicants' case was principally directed at challenging the validity of Sch 18 of the Amendments Act. But his Honour found that their challenge was misdirected. From the time of enactment, the FM Act has made no express provision for federal magistrates' retirement, but the Governor-General has always had a 'general power' under Sch 1 cl 8 of the FM Act to 'deal with the terms and conditions on which Federal Magistrates … hold office'. The existence of *that* power was fatal to the applicants' argument that Sch 18 of the Amendments Act was invalid. If a pension (as the applicants contended) was constitutionally required, in principle it would have been possible for the Governor-General to have exercised their determination-making power under Sch 1 cl 8 to confer an entitlement to a pension, rather than to provide (as is the case) for a Commonwealth contribution to a 'complying superannuation fund' or a 'retirement savings account' at a fixed percentage of a federal magistrate's salary. The applicants did not challenge the Governor-General's determination-making power, or its exercise.

Implications of the decision

The majority judgment held that neither the express words of the Constitution nor any implication derived from the text or structure of the Constitution supported the applicants' claim. As a result, there was no finding that the Amendments Act nor anything to do with the existence or operation of the Federal Magistrates Court was invalid.

AGS acted for the Commonwealth.

Text of the decision is available at:

http://www.austlii.edu.au/au/cases/cth/FCAFC/2012/121.html

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