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High Court rejects challenge to validity of conferral of Commonwealth administrative power on state officers

The High Court, in a 6:1 decision (Kirby J dissenting), has rejected a challenge to the validity of state magistrates determining under s 19 of the *Extradition Act 1988* (Cth) whether persons are 'eligible for surrender' to the requesting country: *O'Donoghue v Ireland; Zentai v Hungary; Williams v United States of America* [2008] HCA 14 (23 April 2008).

The constitutional issue before the High Court concerned whether the Commonwealth and a state could agree at the *executive* level for the holder of a state statutory office, such as a magistrate, to perform administrative functions under a Commonwealth law or whether conferral by the Commonwealth of such a function on a state magistrate required *legislative* approval of the state. The appellants had argued that the administrative function under s 19 of the Extradition Act was imposed on state magistrates as a *duty* and that it was an implication from the federal structure of the Constitution that a Commonwealth law could not impose a *duty* on holders of state *statutory* offices (such as magistrates) without the state giving *legislative* (rather than executive) approval.

The case is significant for federal–state relations as there are a wide range of Commonwealth administrative functions—beyond those under the Extradition Act—which are performed by state officers.

The High Court rejected the challenge to validity on the basis that s 19 of the Extradition Act did not impose a duty but conferred a power. The Court therefore did not need to decide whether the constitutional limitation asserted by the appellants, relating to the imposition of duties by Commonwealth laws, should be accepted.

However, the underlying premise of the majority judgments is that there is no constitutional limitation precluding the conferral by the Commonwealth of, at least, administrative powers on state officers in the absence of state legislative consent. This removes a potential threat to those existing federal–state arrangements under which administrative powers are exercised by state officers under Commonwealth legislation.

Background

O'Donoghue v Ireland and *Zentai v Hungary* involved determination by WA magistrates as to whether the appellants were 'eligible for surrender' under s 19 of the Extradition Act, whereas *Williams v United States of America* concerned performance of this function by NSW magistrates. In accordance with s 46 of the Extradition Act, arrangements had been made

between the Governor-General and the Governors of WA and NSW respectively for magistrates in those states to perform functions under the Extradition Act.

In each matter the Full Federal Court had held that there was state legislative approval for the performance of the functions by WA magistrates (under s 6 of the *Magistrates Court Act 2004* (WA)) and by NSW magistrates (under s 23 of the *Local Courts Act 1982* (NSW)), so the constitutional issue did not need to be considered.

The three matters were heard together by the High Court on 5 and 6 December 2007.

The High Court

The main arguments put by the appellants to the High Court (see [13]) were:

1. It is an implication from the federal structure of the Constitution (reflected in the Melbourne Corporation doctrine) that the Commonwealth Parliament cannot impose an administrative *duty* on the holder of a state *statutory* office without state *legislative* approval. (The Melbourne Corporation doctrine prevents the Commonwealth from enacting laws that in their 'substance and operation' constitute 'in a significant manner, a curtailment or interference with the exercise of State constitutional power': *Austin v Commonwealth* (2003) 215 CLR 185 at 246 [115], 265 [168] (Gaudron, Gummow and Hayne JJ).)

2. Section 19 of the Extradition Act imposes an administrative duty on magistrates as holders of state statutory offices.

3. The imposition of that duty is not approved by any legislation of the parliaments of WA or NSW.

4. A member of the state executive, such as the Governor, has no power under a state constitution to alter or add to the functions of an office such as that of a magistrate created by state legislation.

Gummow, Hayne, Heydon, Crennan and Kiefel JJ delivered a joint judgment dismissing each of the appeals. In a separate judgment, Gleeson CJ also dismissed the appeals.

The joint judgment

Unnecessary to decide Melbourne Corporation and state legislative approval questions

From a constitutional perspective, the joint judgment's key finding (at [57]) was that it was unnecessary to decide whether the Melbourne Corporation doctrine prevents a Commonwealth law imposing an administrative *duty* on the holder of a state statutory office without state legislative approval. This was because, as the Commonwealth submitted, s 19 of the Extradition Act merely confers an administrative power rather than imposing a duty on state magistrates to determine eligibility for surrender for extradition purposes (see also [47], [68], [79]). For the same reason it was not necessary to decide whether WA and NSW legislation provided legislative consent to the performance of functions under the Extradition Act by state magistrates (at [78]).

Extradition Act confers power rather than imposes duty on state magistrates

The joint judgment noted (at [40]) that it was settled by authority, including *Pasini v United Mexican States* (2002) 209 CLR 246 and *Vasiljkovic v The Commonwealth* (2006) 227 CLR

614, that the determination by state magistrates under s 19(1) of the Extradition Act of eligibility to surrender 'involves the exercise of administrative functions and not the exercise of the judicial power of the Commonwealth'.

The joint judgment then addressed the appellants' argument that s 19(1) of the Extradition Act imposed an administrative duty on state magistrates. As explained by the joint judgment (at [39]), s 19(1) provides that, where the preceding steps in the extradition process have been taken and the state magistrate considers there has been a reasonable time to prepare, the magistrate '*shall* conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence' (emphasis added).

The appellants conceded that particular heads of power under s 51 of the Constitution (such as the defence power in s 51(vi)) might by their 'subject matter or context' allow the Commonwealth to 'compel the performance of duties under federal law even without State legislative approval' (at [45], emphasis added). The joint judgment noted that this concession was in apparent response to the *First Uniform Tax Case* (1942) 65 CLR 373, which upheld wartime tax legislation authorised by the defence power, enabling the Commonwealth to 'take over from the States their officers, premises and equipment concerned with the assessment and collection of income tax'. The appellants argued that, in contrast to laws enacted under the defence power, the Commonwealth could not impose administrative duties on the states in legislation authorised by the external affairs power in s 51(xxix) of the Constitution, such as the Extradition Act.

The joint judgment noted the appellants' concession that their case must fail if s 19(1) of the Extradition Act 'confers a power but does not impose a duty' (at [47]). This concession was said to reflect the reasoning in *Aston v Irvine* (1955) 92 CLR 353 at 364, where the High Court said that provisions of the *Service and Execution of Process Act 1901* (Cth) merely conferred powers upon state magistrates or other officers in respect of interstate service of process, and that this involved no interference with the executive governments of the states.

The central conclusion of the joint judgment was that s 19(1) of the Extradition Act must be read with s 4AAA of the *Crimes Act 1914* (Cth) and did not impose an administrative *duty* on state magistrates (at [57], [59]). Section 4AAA sets out:

> the rules that apply if, under a law of the Commonwealth *relating to criminal matters*, a function or power that is neither judicial nor incidental to a judicial function or power [such as an administrative extradition function under the Extradition Act] is conferred on … a magistrate'. [Section 4AAA(1); emphasis added.]

The provision states that a function or power to which it applies is conferred on a magistrate 'only in a personal capacity and not … as a court or a member of a court' (s 4AAA(2)), and, significantly—in s 4AAA(3)—that 'the person need not accept the function or power conferred'. While this latter provision appears to make it clear that any Commonwealth law to which s 4AAA applies does not impose a duty on a state magistrate, this can be countered by the operation of s 4AAA(6A), which states that 'a rule set out in this section does not apply *if the contrary intention appears*' (emphasis added).

The appellants accepted that if s 4AAA(3) of the Crimes Act applied to s 19(1) of the Extradition Act then their case must fail (joint judgment, [60], [67]). The Court decided that s 4AAA(3) did apply so that s 19(1) conferred only a power on state magistrates to determine eligibility to surrender rather than imposing a duty to do so. It rejected the appellants' argument that s 4AAA was not a law of the Commonwealth 'relating to criminal matters' (at [70], [71]). The Court also rejected the argument that the Extradition Act contained a 'contrary intention' (derived from the use of the term 'shall' in s 19(1)) to the operation of

s 4AAA(3) (joint judgment, [66], [67]). The joint judgment said that any operative 'contrary intention' would need to state explicitly that 'a State magistrate is obliged to accept the obligation to perform the functions of a magistrate under the Act' in the first place (at [76]). This was not established merely by a function under the Act, such as s 19, being formulated in terms which, once the function is accepted, require the taking of steps by the magistrate if conditions precedent or jurisdictional facts be satisfied' (at [76]).

Chief Justice Gleeson's judgment

Gleeson CJ also found it unnecessary to decide whether, in accordance with the Melbourne Corporation doctrine, there was a prohibition implied from the federal structure of the Constitution that the Commonwealth cannot impose an administrative duty on state statutory office holders without the legislative approval of the state concerned (at [14]). He noted, however, (at [16]) that the capacity of the Commonwealth Parliament to enact laws which impose duties on officers of a state 'is a matter that has far-reaching consequences for Federal–State relations'. He observed that:

> Some of the arguments from both the Commonwealth and the States appeared to have a prophylactic purpose not directly related to the issues that have to be decided in the present cases. [at [16]]

As the joint judgment had concluded, Gleeson CJ also held that s 4AAA of the Crimes Act applied in this case in relation to s 19(1) of the Extradition Act, and that the conferral on state magistrates of the function of determining eligibility for surrender did not amount to the imposition by Commonwealth law of a 'duty' rather than the conferral of a power (at [21]–[25]).

In addition, Gleeson CJ rejected the appellants' argument that there was no state legislative approval for the performance by WA and NSW magistrates of functions under the Extradition Act. His Honour agreed with the Full Federal Court that such approval could be found in s 6 of the WA Magistrates Court Act and s 23 of the NSW Local Courts Act.

Justice Kirby's dissent

Kirby J said that the majority judgments ignored 'the deeper questions' raised by this case (at [117]), stating that:

> I do not agree that the problem presented by these cases can be circumvented in the manner suggested by my colleagues. I deprecate the avoidance of important constitutional questions by defining them out of existence. That is not the function of a constitutional court. [at [95]]

Kirby J said that the constitutional arguments of the appellants must be accepted. In his view, the Extradition Act:

> as a federal law, purported to impose ‘functions’ on State office-holders (so named as ‘magistrates’) without the approval of the State Parliament that created their offices and provided for the functions and duties of office. Without ’mirror’ or counterpart State laws, the imposition of such ‘functions’ by federal law alone could not be valid. [at [166]]

In Kirby J's view, magistrates are not 'minor State employees' but 'amongst the most senior office-holders of the State' (at [170]–[171]). Even when performing administrative functions in their personal capacity:

> where they are chosen to do so as ‘magistrates’ they inescapably retain the general character of their offices as such. Inferentially, they perform their functions in State facilities, using State

> resources, assisted by State officials, performing their functions in State time, by inference paid for in this respect by salaries and allowances drawn on the State Treasury. [at [170]]

There was a constitutional requirement, therefore, that 'the legal supplementation of the duties of State magistrates be authorised by State law' (at [171]). Kirby J concluded that:

> Because of the absence of State laws signalling clear consent to the purported conferral of federal functions on State magistrates by the Extradition Act 1988 (Cth) ('the Act'), that Act is, in this respect, invalid under the Constitution. The Federal Parliament cannot impose such functions in a unilateral manner. Nor can it do so by invoking executive arrangements. [at [97]]

AGS (Peter Prince, Thomas John, Heidi Willems and David Bennett QC from the Constitutional Litigation Unit and Stephen Vorreiter) acted for the Commonwealth in *Zentai* and the Commonwealth Attorney-General intervening in *O'Donoghue* and *Williams*, with the Commonwealth Solicitor-General David Bennett AO QC, AGS Chief General Counsel Henry Burmester AO QC and Graeme Hill of the Melbourne Bar as counsel.

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