

## The Commonwealth's Implied Constitutional Immunity from State Laws

**The High Court's *Henderson* decision has important implications for Commonwealth activities conducted in the States.**

*Re the Residential Tenancies Tribunal of New South Wales and Henderson; Ex parte Defence Housing Authority*, High Court of Australia, 12 August 1997 (*Henderson's case*)

The High Court decided that the Defence Housing Authority ('the DHA') was subject to the *Residential Tenancies Act 1987 (NSW)* ('the NSW Act') and rejected the broad proposition that State laws cannot by their own force bind the Commonwealth. However, it also rejected the argument that the Commonwealth's constitutional immunity from State law is no greater than the immunity which the States enjoy from Commonwealth laws which discriminate against States or impair their capacity to function as governments.

In defining the scope of Commonwealth immunity, four Justices (Brennan CJ in a separate judgment, and Dawson, Toohey and Gaudron JJ in a joint judgment) drew a distinction between the executive capacities of the Commonwealth and the exercise of those capacities. In the view of these Justices, State law cannot restrict or modify the executive capacities of the Commonwealth, but a State law of general application can operate to regulate activities or transactions which the Commonwealth chooses

### From the Interim Chief Executive Officer

Welcome to the first issue of *Litigation Notes*. This newsletter, publishing generally three times a year, will focus on current and developing litigation in Australia. Although there will be considerable attention given to matters before the High Court, we will also cover developments in cases from the Federal Court and other Commonwealth courts and tribunals. Subsequent issues will track litigation of key cases, in particular results of judgments and appeals. Trends and other points of special interest in Commonwealth litigation will also be monitored.

Dale Boucher

to undertake, for example, entering into contracts. In *Henderson's case*, the majority held that, to the extent (if any) that the DHA was exercising the Commonwealth's executive capacity, the NSW Act 'neither alters nor denies that capacity notwithstanding that it regulates its exercise'. Accordingly, there was no constitutional objection to the NSW Act applying to leases entered into by the DHA.

The Court also rejected the argument that the Commonwealth's exclusive powers under s.52(ii) of the Constitution precluded the NSW Act from applying to the DHA. The Court held that the intention underlying s.52(ii) was confined to ensuring that State laws did not follow the persons or property of a department of the State public service which was transferred by the Constitution into the Commonwealth public service. On this view, the force of s.52(ii) is largely spent.

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## IMPLICATIONS OF THE DECISION

The High Court's decision means that the Commonwealth and its agents may no longer assert a broad constitutional immunity from State laws. State laws of general application that seek to regulate activities carried out by the Commonwealth in the exercise of its executive capacities may be applicable to the Commonwealth and its agents. However, the Commonwealth and its agents will not be bound by State laws which purport to restrict or modify the executive capacities of the Commonwealth. It will continue to be important to determine whether, as a matter of statutory construction, a particular State law is intended to bind the Commonwealth. The High Court emphasised the legislative supremacy given to the Commonwealth by section 109 of the Constitution and the ability of the Commonwealth Parliament to exclude the operation of a State law with respect to the Commonwealth executive or its agencies.

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## Freedom of Speech – Is it a Constitutional Right?

**These cases concern the scope of the freedom of political communication implied in the Commonwealth Constitution.**

*Lange v Australian Broadcasting Corporation*; *Levy v Victoria*, High Court of Australia, 8 July 1997 (*Lange*) and 31 July 1997 (*Levy*)

### LANGE

In the 1994 *Theophanous* and *Stephens* decisions a majority of the High Court decided that the implied constitutional freedom of political communication can itself provide a defence to a defamation action involving political material. In *Lange* a joint judgment of all 7 Justices re-examined the

constitutional basis of the implied freedom of political communication and its effect on the common law of defamation. The judgment in substance reflects the submissions made by the Commonwealth. The Court decided that:

- there is to be derived from the text and structure of the Constitution concerning Commonwealth elections a 'freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors';
- this implied freedom operates as a restriction on legislative and executive power but (contrary to *Theophanous* and *Stephens*) does not confer personal rights on individuals and therefore does not itself provide a private right of defence to a defamation action;
- the common law of defamation should be developed to conform with the constitutional freedom of political communication and provide a defence of qualified privilege to a defamation action involving political material where the conduct of the publisher was reasonable and not actuated by malice.

### LEVY

In this case the High Court upheld the validity of the Wildlife (Game) (Hunting Season) Regulations 1994 (Vic). The Regulations prohibited a person from entering a permitted hunting area during a prohibited time without authority to do so. The plaintiff argued that the Regulations were invalid as they infringed the implied constitutional freedom of political communication by restricting his capacity to engage in conduct to protest against duck shooting. The Court unanimously held that the Regulations were valid.

In *Lange* and *Levy* the High Court said that the constitutional freedom of political communication was not absolute and a law would not be invalid for infringing the freedom if it was reasonably

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appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

The Court held that the Regulations in *Levy* were valid as, even if they burdened political communication, they were reasonably appropriate and adapted to securing a legitimate end, being the protection of public safety.

The Court accepted that conduct (such as that at issue in *Levy*) could amount to political communication and therefore attract the constitutional protection.

The decision does not resolve issues such as the extent to which the freedom implied in the Commonwealth Constitution protects communications on State political matters and whether any freedom of political communication is implied in the Victorian Constitution.

#### **IMPLICATIONS OF THE LANGE DECISION**

The Attorney-General issued a press release welcoming the High Court's decision in *Lange*. The decision affirms an approach to constitutional interpretation which involves basing implications securely on the text and structure of the Constitution and not on free-standing concepts such as 'representative and responsible government'.

The decision also affirms that the constitutional freedom of political communication is not a source of personal rights but a restriction on legislative and executive power and that development of a common law defence of qualified privilege is the appropriate means for protecting free political speech in the defamation context.

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## **Removal of Aboriginal Children – The Legal Issues**

**The High Court's *Kruger* decision rejects the plaintiffs' claims based on constitutional invalidity of the *Aboriginals Ordinance 1918–1953 (NT)*.**

*Kruger v Commonwealth; Bray v Commonwealth*, High Court of Australia, 31 July 1997

In this case the High Court upheld the constitutional validity of the now repealed *Aboriginals Ordinance 1918–1953 (NT)*. The Ordinance authorised the removal of Aboriginal children from their families during the period when the Northern Territory was administered by the Commonwealth. The plaintiffs had sought a declaration that the Ordinance was constitutionally invalid and also damages for breach of their constitutional rights.

Essentially, the High Court held that the Ordinance was valid and that an action for damages for breach of a constitutional right cannot be maintained. The Court said that the Ordinance was authorised by s.122 of the Constitution (the Territories power) and was not invalidated by reference to express or implied constitutional freedoms or rights asserted by the plaintiffs (including due process, separation of powers, legal equality, freedom of movement and association, genocide and freedom of religion).

Generally speaking, the Court addressed the issue of validity on the basis that the Ordinance conferred powers to be exercised in the interests of the Aboriginal persons affected and not adversely to those interests. Some members of the Court commented on the policy behind the Ordinance as, for instance, appearing to have been ill-advised or mistaken, particularly by contemporary standards (Dawson J) but this did not determine validity.

#### **IMPLICATIONS OF THE DECISION**

The High Court's decision rejects the plaintiffs' claims based on constitutional invalidity of the Ordinance.

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However, over 700 writs had been filed in the High Court claiming damages in respect of causes of action (separate from constitutional validity) such as whether detention was ultra vires the Ordinance, breach of duty as a guardian, breach of statutory duty, breach of a duty of care and breach of fiduciary obligations. Some of these actions have been remitted to the Federal Court (the *Katona* litigation). These claims are not resolved by the High Court's *Kruger* decision and the Commonwealth is denying liability and defending the claims, including relying on limitation periods.

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## Can a Commonwealth Employee Sue for Employment-Related Injury?

**Section 44 of the *Safety, Rehabilitation and Compensation Act 1988* cannot be relied upon as a defence to any cause of action arising before 1 December 1988 where an employee sues for damages for an injury occurring in the course of Commonwealth employment.**

*Commonwealth v Mewett; Commonwealth v Brandon; Commonwealth v Rock*, High Court of Australia, 31 July 1997

These three cases had been dealt with together on account of common issues relating to s.44 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('SRC Act'). In each case, the plaintiff's cause of action arose before 1 December 1988 (the date on which s.44 took effect) but proceedings were commenced after 1 December 1988 outside the applicable limitation period.

The Court decided in each case that s.44 could not validly extinguish the plaintiff's claim. A majority held that s.44 could only purport to apply to a cause of action as it stood on 1 December 1988 (the date

on which s.44 took effect). In each case, as at 1 December 1988, either no limitation provision applied to any of the plaintiffs' causes of action or, if a limitation period did apply, it had not itself extinguished the cause of action – in the sense that either the original limitation period had not expired or, if it had, the cause of action could still be revived by a successful application for an extension of time.

To the extent that a limitation provision did apply, the Court's earlier decision in *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, was applied and, as at 1 December 1988, each plaintiff's cause of action or right to seek to have the cause of action revived by an extension of time, as the case may have been, constituted property protected by the guarantee in s.51(xxxi) of the Constitution against acquisition of property on other than just terms. Accordingly, s.44, to the extent that it purported to take away this property by extinguishing the cause of action without provision of just terms, was constitutionally invalid.

### IMPLICATIONS OF THE DECISION

The High Court's decision means that where a present or former Commonwealth employee sues the Commonwealth for damages for injury or disease arising from events occurring in Commonwealth employment before 1 December 1988, but the relevant limitation period has expired prior to the institution of the suit, s.44 of the SRC Act cannot extinguish the employee's cause of action to the extent that the employee can still apply to have the limitation period for the action extended.

For practical purposes, this means that s.44 cannot be relied upon as a defence to any cause of action arising before 1 December 1988 where an employee sues for damages for an injury occurring in the course of Commonwealth employment. The Commonwealth could, however, still rely on an applicable limitation period and oppose an extension of time.

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In addition, where the Commonwealth employee's action is being determined by a court in a different State or Territory to that in which the events giving rise to the injury or disease occurred, the effect of legislation in each State and Territory – for example, the *Choice of Law (Limitation Periods) Act 1993* (NSW) – is that the court in such a case is required to apply the limitation of action laws of the State or Territory where the events occurred.

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## Duties of Excise – The Commonwealth's Exclusive Power

**The majority of the High Court acknowledged that their decision on this topic 'has the most serious implications for the revenues of the States and Territories'.**

*Ha & Lim v New South Wales;*  
*Walter Hammond and Associates Pty Ltd v New South Wales*, High Court of Australia, 5 August 1997

These cases concerned the validity of business franchise fees imposed by the *Business Franchise Licences (Tobacco) Act 1987* (NSW) on wholesalers and retailers of tobacco. The High Court by a 4–3 majority held that the fees were invalid as they were duties of excise. Section 90 of the Constitution confers on the Commonwealth Parliament exclusive power to impose duties of excise.

The majority of the High Court (Brennan CJ, McHugh, Gummow and Kirby JJ) reaffirmed the broad interpretation of 'excise' which has been consistently applied by a majority of the High Court since 1949. The majority said that an excise is any tax on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin. The majority therefore rejected the view of the minority (Dawson, Toohey and Gaudron JJ) that

excise duties are limited to discriminatory taxes on Australian manufacture or production.

Since the High Court's decision in the 1960 case *Dennis Hotels Pty Ltd v Victoria*, the States have relied on the so-called '*Dennis Hotels* exception' to the broad interpretation of s.90 to impose business franchise fees on retailers and wholesalers of liquor, tobacco and petroleum products where the fees were calculated by reference to the value of past sales of those products. In *Dennis Hotels* and later cases the fees were characterised as being for a licence to engage in business rather than a tax on the goods sold in the business and so were not prohibited to the States by s.90. The rates of fees imposed by the States under this exception has steadily increased.

In the *Ha* and *Walter Hammond* cases the majority of the High Court did not overrule the *Dennis Hotels* exception but confined it strictly to the principles and circumstances set out when that exception was developed. The majority also held that the NSW Act under challenge clearly did not fall within those principles and was invalid.

### IMPLICATIONS OF THE DECISION

The majority of the High Court acknowledged that its decision 'has the most serious implications for the revenues of the States and Territories'.

The High Court's decision strictly confines the scope of the *Dennis Hotels* exception to relatively modest regulatory charges which can properly be characterised as fees for a licence to engage in the wholesaling or retailing of a product. The practical effect is that those State and Territory business franchise fees which are clearly designed as revenue-raising inland taxes on goods will be invalid under s.90 of the Constitution.

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## Commonwealth Acquisition of Property

**This recent High Court decision has implications for Commonwealth legislation relating to the acquisition of property in the Territories.**

*Newcrest Mining (WA) Ltd v Commonwealth*,  
High Court of Australia, 14 August 1997

The High Court held by majority that a number of mining leases held by Newcrest Mining (WA) Ltd over parcels of land in the Northern Territory were in force when the land was included within Kakadu National Park by proclamations made in 1989 and 1991 under the *National Parks and Wildlife Conservation Act 1975* ('the Act'). The mining leases are in the area of Coronation Hill. Under the Act, 'operations for the recovery of minerals' are prohibited within the Park and no compensation is payable by reason of the prohibition.

The Court also held by majority (4-3) that, by reason of the prohibition on mining, the inclusion of the mining lease areas in the Park would have effected an acquisition of property from Newcrest otherwise than on the just terms required by s.51(xxxi) of the Constitution. The Court did not overrule its 1969 decision in *Teori Tau* which held that the territories power in s.122 of the Constitution is not subject to s.51(xxxi) of the Constitution. However, a 4-3 majority held that s.51(xxxi) will apply where a law relies on another head of power as well as on s.122. In the present case, as the Act was referable to the external affairs power in s.51(xxix) as well as to s.122, s.51(xxxi) applied and the proclamations were invalid to the extent to which they effected acquisitions of Newcrest's property otherwise than on just terms.

### IMPLICATIONS OF THE DECISION

The decision has implications for Commonwealth legislation relating to the acquisition of property in the Territories. Although the Court by majority did not overrule *Teori Tau*, Toohey J (a member of that

majority) was also part of the majority which held that s.51(xxxi) will apply where a law is referable to another head of legislative power as well as to s.122. Toohey J observed that it is particularly unlikely, following the grant of Northern Territory self-government, that a Commonwealth law acquiring property in the Northern Territory will be a law referable only to s.122. On this basis, his Honour considered that 'any implications overruling *Teori Tau* would have would likely be for the past rather than the future.'

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