AGS

Litigation notes

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In this issue

Simon Thornton
Senior Lawyer
T *02 6253 7287*
simon.thornton@ags.gov.au

Liam Boyle
Lawyer
T *02 6253 7077*
liam.boyle@ags.gov.au

NSW political donations laws valid

A majority of the High Court (6:1, Nettle J dissenting in part) dismissed a challenge, based on the implied freedom of political communication, to the validity of certain provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (the EFED Act) that:

- impose a cap on political donations
- prohibit property developers from making such donations
- prohibit certain indirect campaign contributions.

In doing so a majority of the Court (French CJ and Kiefel, Bell and Keane JJ) set out a more structured approach for determining whether a law impermissibly infringes the implied freedom of political communication on governmental and political matters.

McCloy v New South Wales
High Court of Australia, 7 October 2015
[2015] HCA 34; (2015) 89 ALJR 857

Background

The general purpose of the EFED Act is to secure and promote the actual and perceived integrity of the Parliament of NSW, the Government of NSW and local government bodies in NSW ([7]). The provisions challenged in this case are in Pt 6 of the EFED Act, entitled 'Political donations and electoral expenditure', and:

- impose a cap on the amount of political donations that can be made in relation to State elections per financial year
- prohibit the making of certain indirect contributions to election campaigns
- prohibit the making of any political donations by 3 classes of donors, relevantly including corporate property developers and individuals closely associated with them.

In addition to regulating political donations, the EFED Act provides for the public funding of parliamentary election campaigns in NSW, requires the disclosure of certain political donations and electoral expenditure for parliamentary or local government election campaigns and seeks to regulate electoral funding and expenditure in a transparent manner.

Other provisions of the EFED Act were recently held invalid in *Unions NSW v New South Wales* (2013) 252 CLR 530.

Constitutional issues

The plaintiffs (2 of whom are property developers) allege that the challenged provisions impermissibly burden the implied freedom of political communication and are thus invalid. The provisions were said to burden the implied freedom by:

a) restricting the funds available to political parties and candidates to meet the costs of political communication in circumstances where the public funding is not sufficient to meet any shortfall ([24])

b) preventing a donor from making substantial political donations to gain access and make representations to politicians and political parties and to thus 'build and assert political power' ([25]).

The plaintiffs argued that these burdens were not justified as proportionate to a legitimate end and were therefore impermissible under the implied freedom ([20]).

'In doing so, the plurality articulated 'a more structured, and therefore more transparent, approach' to determining whether legislation is consistent with the implied freedom ...'

The High Court's decision

The High Court unanimously upheld the validity of the cap on political donations and the prohibition on indirect campaign contributions. A majority of the High Court also upheld the validity of the prohibition on political donations from property developers (French CJ and Kiefel, Bell and Keane JJ (the plurality); Gageler J and Gordon J; Nettle J dissenting).

In doing so, the plurality articulated 'a more structured, and therefore more transparent, approach' to determining whether legislation is consistent with the implied freedom ([23]), which involves proportionality analysis ([3]).

The plurality's proportionality analysis

The plurality's approach to the implied freedom involves a number of steps ([2]):

1. Does the law effectively burden the freedom in its terms, operation or effect?

   If the answer is no then the law does not exceed the implied limitation and the enquiry as to validity ends.

2. If the answer to question 1 is yes, are the purpose of the law and the means adopted to achieve that purpose legitimate in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? (This is known as 'compatibility testing'.)

   The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.

   If the answer to question 2 is no then the law exceeds the implied limitation and the enquiry as to validity ends.

3. If the answer to question 2 is yes, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to as 'proportionality testing' to determine whether the restriction that the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are 3 stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

a) **suitable** – as having a rational connection to the purpose of the provision

b) **necessary** – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose that has a less restrictive effect on the freedom

c) **adequate in its balance** – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

   If the measure does not meet (all) these criteria of proportionality testing then the answer to question 3 will be no and the measure will exceed the implied limitation on legislative power.

'... the "structured nature [of the approach] assists members of the legislature, those advising the legislature, and those drafting legislative materials, to understand how the sufficiency of the justification for a legislative freedom will be tested" ...'

The plurality stated that this approach to the implied freedom helps avoid a mere 'impressionistic judgment' by a court ([23], [75]) and encourages a 'more objective analysis' ([76]), while making value judgments 'more explicit' ([78]). They noted that the 'structured nature [of the approach] assists members of the legislature, those advising the legislature, and those drafting legislative materials, to understand how the sufficiency of the justification for a legislative freedom will be tested' ([74]).

Step 1 – Do the challenged provisions burden political communication?

Applying the new approach to the plaintiffs' challenge, the plurality held that, by restricting the funds available to political parties and candidates to meet the costs of political communication, the challenged provisions burdened the freedom ([24], [30]). However, their Honours rejected the plaintiffs' argument that the ability to make substantial donations to acquire political influence is protected by the freedom. This argument, their Honours said, 'appears to mistakenly equate the freedom … with an individual right' ([29]) and would be antithetical to the 'great underlying principle' that 'the rights of individuals were sufficiently secured by ensuring each an equal share in political power' ([27]–[28]).

Step 2 – Is the purpose of the law, and the means adopted to achieve it, legitimate?

The plurality accepted that the donation caps were directed to the object of 'the prevention of "corruption and undue influence in the Government of the State" ' ([33]). They also accepted that the provisions had the ancillary purpose of 'overcoming perceptions of corruption and undue influence, which may undermine public confidence in government and the electoral system itself' ([34]). Further, the plurality held that it is permissible to regulate not only with respect to 'quid pro quo' corruption but also the 'more subtle' danger that office holders will decide issues not on the merits but according to the wishes of those who have made large donations ('clientelism') ([36]).

In addition to the threat to governmental decision-making from these forms of corruption, the plurality also held that the power of money poses a threat to the electoral process itself ([38]). For this reason, regulation to 'level the playing field to ensure that all voices may be heard' is also permissible in Australia ([41]–[42]). Their Honours added that '[e]quality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our Constitution' ([45]), noting that the 'risks that large political donations have for a system of representative government have been acknowledged since Federation' ([46]).

'In addition to the threat to governmental decision-making from these forms of corruption, the plurality also held that the power of money poses a threat to the electoral process itself'

Consequently, the plurality found that 'the purpose of [the cap on political donations] and the means employed to achieve that purpose are not only compatible with the system of representative government; they preserve and enhance it' ([47]). Both the purpose and the means were therefore legitimate.

Their Honours reached a similar conclusion on the ban on political donations from property developers ([53]), accepting NSW's submission that '[p]roperty developers are sufficiently distinct to warrant specific regulation in light of the nature of their business activities and the nature of the public powers which they might seek to influence in their self-interest' ([49]–[50]).

The prohibition on certain indirect campaign contributions had an 'anti-avoidance' purpose and its validity depended upon the validity of these other provisions ([22]).

Step 3 – Is the law reasonably appropriate and adapted to advance the legitimate object?

Addressing the proportionality of the impugned laws, their Honours found that the provisions had a 'rational connection' to the purpose of targeting corruption ([56]) and that the plaintiffs did not identify any equally practicable alternatives ([61]–[63]). The challenged provisions were therefore 'suitable' and 'necessary' for the purposes of the

first 2 stages of proportionality testing. The plurality rejected the other proportionality arguments that the plaintiffs raised ([64]–[65]).

The third stage of proportionality testing – the balancing or 'strict proportionality' exercise – requires consideration of the importance of the legislative purpose sought to be achieved ([87]). The 'positive effect of realising the law's proper purpose' must be compared to 'the negative effect of the limits on constitutional rights or freedoms' ([87]). It follows that 'the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate' ([87]).

In this case, the plurality found 'the third stage of the test presents no difficulty for the validity of the impugned provisions' ([93]). They held that the impugned provisions 'support and enhance equality of access to government, and the system of representative government which the freedom protects', concluding that the 'restriction on the freedom is more than balanced by the benefits sought to be achieved' ([93], see also [5]).

Other majority judgments – Gageler J and Gordon J

In separate judgments, both Gageler and Gordon JJ agreed with the answers to the questions in the special case proposed by the plurality ([98], [275]) but did not adopt the plurality's structured proportionality analysis ([98], [140]–[152], [308]–[311]). Thus Gordon J noted that the tools of analysis used in answering the 2 questions under implied freedom are 'known and have been applied without apparent difficulty since the decision in [*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (*Lange*)]' ([310]). Therefore, there was no need in the present case to engage in a different analysis ([311]).

After observing that '[t]he content and consequences of the approach now propounded by a majority of this Court must await consideration in future cases' ([141]), Gageler J recorded 'two principal reservations' to that approach. They were that he was:

- 'not convinced that standardised criteria, expressed in unqualified terms of "suitability" and "necessity", are appropriate to be applied to every law which imposes a legal or practical restriction on political communication' ([142])
- 'not convinced that to require a law which burdens political communication to be "adequate in its balance" is to adopt a criterion of validity which is sufficiently focussed adequately to reflect the reasons for the implication of the constitutional freedom and adequately to capture considerations relevant to the making of a judicial determination as to whether or not the implied freedom has been infringed' ([145]).

Partial dissent – Nettle J

In his separate judgment, Nettle J also identified the relevant test for validity as that set out in *Lange* ([220]). His Honour concluded that the cap on political donations passed that test because the burden it imposed was not great and it was rationally connected to the object of eliminating or reducing corruption and undue influence. His Honour reached the same conclusion on the ban on indirect campaign contributions ([256]).

However, Nettle J concluded that, because the ban on donations by property developers 'arbitrarily' discriminates against a particular segment of the community, it was not sufficiently justified ([257], [266]). There was an insufficient basis to infer that all political donations, of any amount, from property developers were or would be of a corrupt or unduly influential character ([268]). His Honour therefore found the ban invalid ([269]).

AGS (Liam Boyle, Simon Thornton and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Solicitor-General, Justin Gleeson SC, and Craig Lenehan as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2015/34.html

Niamh Lenagh-Maguire
Senior Lawyer
T *02 6253 7557*
niamh.lenagh-maguire@ags.gov.au

Andrew Buckland
Senior Executive Lawyer
T *02 6253 7024*
andrew.buckland@ags.gov.au

Detention at sea authorised by Maritime Powers Act

In *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 the High Court has held that maritime officers acted lawfully in detaining the plaintiff at sea for the purposes of taking him to a place outside Australia. A majority of the Court (French CJ and Crennan, Gageler and Keane JJ) held that the plaintiff's detention at all relevant times was authorised by s 72(4) of the *Maritime Powers Act 2013* (Cth) and that the power conferred by that section is not subject to an obligation to give the plaintiff an opportunity to be heard.

Having held that the plaintiff's detention had statutory authority, a majority of the Court declined to answer the questions reserved concerning the existence and limitations of any non-statutory executive power to detain non-citizens and prevent their entry into Australia.

CPCF v Minister for Immigration and Border Protection
High Court of Australia, 28 January 2015
[2015] HCA 1; (2015) 89 ALJR 207; (2015) 316 ALR 1

Background

On 29 June 2014 the officer in charge of an Australian border protection vessel authorised the interception and detention of an Indian-flagged vessel in the Indian Ocean about 16 nautical miles from Christmas Island. The interception was authorised under s 17 of the Maritime Powers Act on the basis of the officer's suspicion that the Indian vessel was involved in a contravention of the *Migration Act 1958* (Cth).

The plaintiff, a Sri Lankan of Tamil ethnicity who claims to have a well-founded fear of persecution in Sri Lanka on grounds that would qualify him as a refugee, was on the Indian vessel along with 156 other passengers. The Indian vessel became unseaworthy and the passengers were taken on board the Australian vessel, where they were detained under s 72(4) of the Maritime Powers Act. That section relevantly confers power on a maritime officer to detain a person and take them to a place outside the migration zone, including a place outside Australia.

On 1 July 2014 the National Security Committee of Cabinet decided that the passengers should be taken to India, and the Australian vessel began to sail there. On about 10 July 2014 the Australian vessel arrived at a location near India. It remained in that location until about 22 July 2014, when the Minister for Immigration and Border Protection directed that the vessel should sail instead to the Australian territory of the Cocos (Keeling) Islands. The passengers then disembarked and were taken into immigration detention under the Migration Act.

The plaintiff argued that his detention on the Commonwealth vessel was unlawful and sought damages. The matter proceeded by way of special case, with 8 questions referred to a Full Court of the High Court.

The Court's decision

A majority of the High Court (French CJ and Crennan, Gageler and Keane JJ) held that s 72(4) of the Maritime Powers Act authorised the actions of maritime officers in detaining the plaintiff and attempting to take him to a place outside Australia (being India). Justices Hayne and Bell, and Kiefel J, would have held that the plaintiff's detention was unlawful.

Maritime powers may be exercised in a chain of command

All members of the Court rejected the plaintiff's argument that maritime officers acted impermissibly under dictation in carrying out the decision of the National Security Committee of Cabinet that the plaintiff and his fellow passengers should be taken to India.

The Court accepted the Commonwealth's argument that the Maritime Powers Act confers a range of powers on maritime officers (including members of the Australian Defence Force and the Australian Customs and Border Protection Service) in circumstances where those officers act in a chain of command and are not required to consider independently whether to exercise a particular power (French CJ at [39]; Hayne and Bell JJ at [132]; Crennan J at [225]; Kiefel J at [293]; Gageler J at [361]; Keane J at [423]).

The power to take to a place outside Australia does not require prior agreement from a receiving state

By a 4:3 majority the Court held that the Maritime Powers Act does not limit the places outside Australia to which a person may be taken under s 72(4) to those countries that have already agreed with Australia to take such persons (French CJ at [47]; Crennan J at [204]; Gageler J at [382]; Keane J at [453]). The plaintiff had argued that detention of a person for the purpose of taking them to a place outside Australia is only valid if the Commonwealth can discharge the person lawfully at that place. Otherwise, it was argued, detention under s 72(4) would be potentially indefinite if a person could be detained and taken somewhere they were unable to be discharged.

'... the Maritime Powers Act does not limit the places outside Australia to which a person may be taken to those ... countries that have already agreed with Australia to take such persons ...'

While French CJ and Crennan, Gageler and Keane JJ all rejected the necessity of a prior agreement with the country to which a person is taken under s 72(4), they each indicated that the power in s 72(4) is limited. Thus French CJ held that the power did not extend to 'a futile or entirely speculative taking' ([46]). Similarly, Crennan J accepted that 'it might be beyond power (including for want of good faith) to commence a journey to a place if the facts and circumstances are that there is no prospect of successful disembarkation' ([208]).

More generally, both Gageler J and Keane J noted that the choice of place to which a detained person is to be taken 'must be consistent with the legislatively identified purposes for which the maritime power ... is available to be exercised' and 'consistent with any applicable geographical limitation on the exercise of the maritime power' (Gageler J at [378]; see also Keane J at [450]). Furthermore, the time involved in taking the person to a place must not extend beyond a reasonable period (Gageler J at [381]; Keane J at [451]).

For all majority justices, in the circumstances disclosed in the special case the exercise of power under s 72(4) could not be said to be invalid (French CJ at [50]; Crennan J at [208]; Gageler J at [382]; Keane J at [458]).

In contrast, Hayne and Bell JJ (dissenting) emphasised that the powers conferred by s 72 of the Maritime Powers Act are 'compulsive and exorbitant', which is a reason to construe the provision strictly ([83], [89]). Their Honours held that s 72(4) confers a composite power to 'detain and take' to 'a place' (being a place identified at the time the taking begins). Their Honours held ([92]; see also [104]):

> Because the place to which a person may be taken is an identified place at which the person may be discharged from Australian custody, the destination of the taking must be a place which, at the time it is selected, the person has the right or permission to enter.

'The Court held unanimously that s 72(4) does not require that a person be given an opportunity to be heard before being taken to a place outside Australia or on the choice of place to which the person is taken ...'

There was no basis, on the evidence in the special case, to conclude that India was such a place for the plaintiff ([100]). Justice Kiefel would also have held that, in the absence of an arrangement or agreement with India to accept the plaintiff, the decision to take him to India was not authorised under s 72(4) ([317]–[323]). Her Honour observed that the limited purpose that makes detention by the executive valid (in this case, the purpose of effecting the expulsion of an alien from Australia) cannot expand the scope of s 72(4) so that it authorises indefinite detention on the high seas ([321]).

Relevance of non-refoulement obligations to the exercise of powers

One of the questions reserved for the Full Court concerned whether the power under s 72(4) was limited by reference to Australia's non-refoulement obligations under the 1951 Convention relating to the Status of Refugees. A majority of the Court did not decide whether there was such an implied limitation, because the facts agreed between the parties as part of the special case were not sufficient for the Court to determine whether, if the plaintiff was taken to India, there was a risk that he would be sent from there to Sri Lanka, where he claimed to fear persecution.

However, Australia's non-refoulement obligations may be relevant to the exercise of powers under the Maritime Powers Act in another way. Maritime officers are required not to 'place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place' (s 74). A majority of the Court held that this means that a maritime officer cannot discharge a person at a place outside Australia unless the officer is satisfied on reasonable grounds that the person will be safe (French CJ at [11]–[12]; Crennan J at [227]; Gageler J at [369]–[370]; Keane J at [426]–[429]). Of the 4 majority judges, 3 (French CJ, Crennan J and Gageler J) suggested that the prospect of refoulement might be relevant to the assessment of whether a particular place is a safe place for a person to be under s 74 (French CJ at [12]; Crennan J at [227]; Gageler J at [370]), as did Hayne and Bell JJ ([126]) and Kiefel J (at [307]).

The limited facts included in the special case did not, however, establish that India was not a safe place for the plaintiff.

Non-statutory executive power to detain and take

Because a majority of the Court held that the plaintiff had validly been detained under s 72(4), they did not need to decide whether the detention and taking of the plaintiff to a place outside Australia was a valid exercise of non-statutory executive power

(French CJ at [42]; Crennan J at [229]; Gageler J at [336]). Nonetheless Keane J addressed this issue and accepted the Commonwealth's argument that the executive power of the Commonwealth extends to preventing non-citizens from entering Australia, including by detaining them for that purpose, and that the Maritime Powers Act has not abrogated that non-statutory power ([484], [492]).

In dissent, Kiefel J held that the Maritime Powers Act has abrogated any non-statutory executive power to detain and remove an alien from Australia in the circumstances of this case ([283]–[284]). For Hayne and Bell JJ, it was unnecessary to reach the question of whether that non-statutory executive power had been abrogated; their Honours held that the executive power does not extend to the detention of a person on the high seas without statutory authority for the purpose of preventing their unauthorised entry to Australia ([148], [150]).

No hearing required as to where person to be taken

'... a maritime officer may not discharge a person at a place to which they have been taken unless an officer believes on reasonable grounds that the person will be safe.'

The Court held unanimously that s 72(4) does not require that a person be given an opportunity to be heard before being taken to a place outside Australia or on the choice of place to which the person is taken (French CJ at [53]; Hayne and Bell JJ at [115]; Crennan J at [227]; Kiefel J at [306]; Gageler J [368]; Keane J at [502]). The nature of the power conferred by s 72(4) and the circumstances in which the power may be exercised were significant factors weighing against the argument that the common law imposes a duty on maritime officers to afford procedural fairness in their exercise of maritime powers. However, as noted above, a maritime officer may not discharge a person at a place to which they have been taken unless an officer believes on reasonable grounds that the person will be safe.

AGS (Andras Markus, Peter Melican and Joe Edwards of AGS Dispute Resolution, with Niamh Lenagh-Maguire and Andrew Buckland of the Constitutional Litigation Unit) acted for the Commonwealth, with the Solicitor-General, Justin Gleeson SC, Stephen Donaghue SC, Chris Horan and Perry Herzfeld as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2015/1.html

Emilie Sutton
Senior Lawyer
T *02 6253 7596*
emilie.sutton@ags.gov.au

Emily Kerr
Lawyer
T *02 6253 7354*
emily.kerr@ags.gov.au

Cancellation of mining licences valid – no exercise of judicial power by NSW Parliament

The High Court unanimously upheld the cancellation of 3 mining exploration licences by the NSW Parliament in circumstances where no compensation was paid to the licensees. In particular the Court held that the NSW Parliament did not exercise judicial power in enacting Sch 6A to the *Mining Act 1992* (NSW).

Duncan v New South Wales; NuCoal Resources Ltd v NSW; Cascade Coal Pty Ltd v NSW
High Court of Australia, 15 April 2015
[2015] HCA 13; (2015) 89 ALJR 462; (2015) 318 ALR 375

Background

The Independent Commission Against Corruption (ICAC) conducted an investigation into the circumstances surrounding the decisions to grant the 3 licences. In particular, it investigated the conduct of the former Minister for Primary Industries and Minister for Mineral Resources, the Hon Ian Macdonald MLC (the former Minister); the Hon Edward Obeid MLC and members of his family; Mr John Maitland; and certain company directors, shareholders and investors of the then licence holders. ICAC reported to the NSW Parliament that a number of those individuals, including the former Minister, had engaged in corrupt conduct in relation to the issuing of the 3 licences ([15]–[18]). After considering ICAC's reports the NSW Parliament passed the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* (NSW) (Amending Act) ([21]–[23]).

The Amending Act inserted Sch 6A into the Mining Act. The stated purposes of Sch 6A are to restore public confidence in the allocation of resources; promote integrity in public administration above all other considerations; and place the State in a position as near as possible to the position it would have occupied had the licences not been granted. These statutory purposes are preceded by a statement that:

> *The Parliament, being satisfied* because of information that has come to light as a result of investigations and proceedings of the Independent Commission Against Corruption known as Operation Jasper and Operation Acacia, *that the grant of the relevant licences*, and the decisions and processes that culminated in the grant of the relevant licences, *were tainted by serious corruption* (the *tainted processes*), and recognising the exceptional nature of the circumstances, enacts the [Amending Act] for the following purposes ... [Emphasis added]

Schedule 6A cancelled the 3 exploration licences without compensation. However, the former licence holders remain required to provide reports on prospecting activities under the Act, and the NSW Government may require the production of certain information about the cancelled licences. Furthermore, the Act provides that no intellectual property right or duty of confidentiality prevents the use or disclosure of

that information by the government and that no liability attaches to the State or other person for such use or disclosure of information.

The plaintiffs commenced 3 separate proceedings in the original jurisdiction of the High Court, which the High Court decided to hear together.

Constitutional issues

The validity of the Amending Act was challenged on 3 grounds ([3]):

1. The Amendment Act is not a 'law' within the meaning of s 5 of the *Constitution Act 1902* (NSW).
2. The Amending Act was a legislative exercise of judicial power by the Parliament, contrary to an implied limitation on the ability of a State Parliament to exercise judicial power.
3. Certain provisions relating to the use and disclosure of information that the licensees are required to provide are inconsistent with the provisions in the *Copyright Act 1968* (Cth) and therefore invalid under s 109 of the Constitution.

The High Court's decision

In a unanimous judgment, the Court (French CJ and Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ) held that none of the grounds of invalidity were established. In particular, the Court held that the Amending Act was a 'law' within the competence of the NSW Parliament and was not an exercise of judicial power. The question of any implied limitation on the ability of the NSW Parliament to exercise judicial power therefore did not arise. Further, the Court held that the facts agreed in the special cases did not disclose any 'real controversy' about the question of inconsistency and so the Court declined to consider the s 109 issue ([4]).

'In a unanimous judgment, the Court ... held that none of the grounds of invalidity were established. In particular, the Court held that the Amending Act was a "law" within the competence of the NSW Parliament and was not an exercise of judicial power.'

Is the Amending Act a law within the meaning of s 5 of the Constitution Act?

Some of the plaintiffs argued that Sch 6A was invalid because it was not a 'law' for the purposes of s 5 of the Constitution Act. That section relevantly provides:

> The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever.

The plaintiff argued that Sch 6A was not a 'law' because it destroyed existing rights 'by way of punishment' for what the Parliament has judged to be 'serious corruption'. The High Court rejected this argument, holding (at [39]):

> The word 'laws' in s 5 of the Constitution Act implies no relevant limitation as to the content of an enactment of the New South Wales Parliament. In particular, the word carries no implication limiting the specificity of such rights, duties, liabilities or immunities as might be the subject of enactment or the purpose of their enactment.

Is the Amending Act an invalid exercise of judicial power?

The plaintiffs sought to characterise the Amending Act as being in the nature of a bill of pains and penalties because it imposed a punishment (deprivation of a licence) for breach either of the law or of a novel norm of conduct. The plaintiffs then argued this meant the Amending Act involved an exercise of judicial power which, they said, the NSW Parliament could not do ([32]–[33]).

The Court held that the Amending Act does not, either in form or in substance, exhibit either of the 2 features that are commonly considered to identify a bill of pains and penalties – a legislative determination that a person has breached a standard of conduct; and the legislative imposition of punishment on that person because of that breach (at [43]).

Significantly, the Amending Act does not adopt any of the specific findings made by ICAC about any individual and those individuals remain subject to the ordinary criminal law. While the Amending Act deprived certain persons of valuable assets, the Court found that it did not follow that they were being 'punished' in a relevant sense. As the Court observed, '[l]egislative detriment cannot be equated with legislative punishment' (at [46]). This was so despite a statutory purpose in the Amending Act of 'deterring future corruption' (at [47]).

The Court also held that the absence of any 'necessary connection' between ICAC's administrative findings and the licence cancellations tended against characterising the Amending Act as an exercise of judicial power (at [50]).

More broadly, the Court held that the termination of a statutory right is not an exclusively judicial function ([41]) and that the Amending Act did not exhibit any of the 'typical features' of an exercise of judicial power ([42]).

As the Amending Act could not be characterised as an exercise of judicial power, it was unnecessary for the Court to consider the plaintiff's further argument that there is an implied limitation, which was said to derive either from an historical limitation on colonial legislative power unaffected by the *Australia Act 1986* (Cth) or from Ch III of the Constitution, on the ability of a State Parliament to exercise judicial power ([31], [51]).

'As the Amending Act could not be characterised as an exercise of judicial power, it was unnecessary for the Court to consider the plaintiff's further argument that there is an implied limitation, ... on the ability of a State Parliament to exercise judicial power ...'

Is the Amending Act inconsistent with provisions in the Copyright Act?

The High Court does not decide a constitutional question unless it is satisfied that there exists a state of facts that makes it necessary to do so. The Court found that the parties had failed to show by their special cases that there existed a state of facts that made it necessary to decide whether any clause in Sch 6A is inconsistent with the Copyright Act and therefore did not consider this question further ([52]–[54]).

AGS (Andrew Buckland, Emilie Sutton and Emily Kerr from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Solicitor-General, Justin Gleeson SC, and James Stellios as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2015/13.html

Niamh Lenagh-Maguire
Senior Lawyer
T 02 6253 7557
niamh.lenagh-maguire@ags.gov.au

Gavin Loughton
Senior Executive Lawyer
T 02 6253 7203
gavin.loughton@ags.gov.au

High Court considers the question: 'What is a corporation?'

In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* the High Court held unanimously that Queensland Rail is a 'trading corporation' within the meaning of s 51(xx) of the Constitution and so is a 'national system employer' for the purposes of the *Fair Work Act 2009* (Cth) (FW Act). In so holding, the High Court threw some light on the meaning of the word 'corporation' as it is used in s 51(xx) of the Constitution.

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail
High Court of Australia, 8 April 2015
[2015] HCA 11; (2015) 89 ALJR 434; (2015) 318 ALR 1

Background

The case arose from industrial disputes between the entity known as 'Queensland Rail' and various trade unions (who represent employees of Queensland Rail). The parties were in dispute about whether Queensland Rail and its employees are covered by the FW Act and industrial agreements made under it. That depended on whether Queensland Rail is a 'trading corporation' within the meaning of s 51(xx) of the Constitution.

'Queensland Rail' is an entity established by the *Queensland Rail Transit Authority Act 2013* (Qld) (QRTA Act). The QRTA Act confers on Queensland Rail 'all the powers of an individual' (including 'to enter into contracts', 'acquire, hold, dispose of, and deal with property' and 'employ staff'). The QRTA Act also provides that Queensland Rail 'may sue and be sued in the name it is given'. Thus Queensland Rail is an artificial legal person that has most or all of the features of a 'corporation' as that term is usually understood.

'... Queensland Rail is an artificial legal person that has most or all of the features of a "corporation" as that term is usually understood.'

On the other hand, s 6(2) of the QRTA Act declares that Queensland Rail is 'not a body corporate'. Further, Queensland Rail has no shareholders or members (only a board and employees). Thus, to the extent that Queensland Rail is a corporation, it is a corporation without corporators. This type of entity, now quite common, is relatively new and was not known to the common law world at federation. The first example was apparently the Commonwealth Bank of Australia (now the Reserve Bank of Australia), established under the *Commonwealth Bank Act 1911* (Cth). In *Heiner v Scott* (1914) 19 CLR 381, 392–393, Griffith CJ expressed puzzlement at this new kind of entity and wondered whether 'the Bank is a real entity cognizable by law'.

Queensland Rail, relying principally on s 6(2), took the view that it is not a 'trading corporation' within the meaning of s 51(xx), or indeed a 'corporation' at all, and therefore it is not a 'national system employer' bound by the FW Act. On that basis Queensland Rail had attempted to engage in enterprise bargaining and other industrial relations activity under the applicable Queensland law. The plaintiff unions argued that Queensland Rail is a trading corporation bound by the FW Act.

Constitutional issues

Several questions arising from the dispute were referred for consideration by a Full Court of the High Court. The 3 main questions were:

1. Is Queensland Rail a corporation within the meaning of s 51(xx) of the Constitution?
2. If it is a corporation, is Queensland Rail a 'trading corporation' within the meaning of s 51(xx)?
3. If Queensland Rail is a trading corporation, does the FW Act apply to Queensland Rail and its employees by the operation of s 109 of the Constitution, to the exclusion of the QRTA Act or the *Industrial Relations Act 1999* (Qld) (IR Act) or both?

The case also raised the significant question of whether the Court should depart from the 'current activities' test – adopted in *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 (*Adamson's case*) and later authorities – to determine what is a '*trading* corporation' for the purposes of s 51(xx). The Commonwealth Attorney-General submitted that the Court should not reopen or narrow the application of the established 'current activities' test, as several other interveners, particularly the Attorney-General for Victoria, had urged it to do.

Decision

Chief Justice French and Hayne, Kiefel, Bell, Keane and Nettle JJ wrote a joint judgment. Justice Gageler agreed in the result and gave separate, concurring reasons.

Queensland Rail is a 'corporation'

The joint judgment did not, in form, answer the first question described above: the question of whether Queensland Rail is a 'corporation' within the meaning of s 51(xx). However, in substance their Honours addressed that question in the course of answering the second question and holding that Queensland Rail is a 'trading corporation'.

The joint judgment emphasises that 'the subject matter of s 51(xx) is not "corporations"; it is "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" ' ([10]). The word 'corporations' needs to be construed in the context in which it appears in the Constitution. Nonetheless, their Honours held that, although it was unnecessary to state exhaustively the defining characteristics of a corporation in order to decide whether Queensland Rail is a trading corporation ([15]), by any measure Queensland Rail has 'the full character of a corporation' ([38]).

Justice Gageler, in contrast, treated the question of whether Queensland Rail is a 'corporation' as anterior to the question of whether it is a 'trading corporation' ([48]) and would have answered that question separately and in the affirmative ([49], [67] and [75]).

Section 51(xx) should not be interpreted narrowly to accord with a historical concept of what constitutes a 'corporation'

Chief Justice French and Hayne, Kiefel, Bell, Keane and Nettle JJ held that Queensland Rail was correct to accept that the power conferred under s 51(xx) is not confined to the categories of corporation that were recognised at federation; indeed, as their Honours note, '[t]o read the provision in that way would hobble its operation' ([22]).

Justice Gageler also held that s 51(xx) should not be construed narrowly. He held that '[t]he term "corporations" is, and was in 1900, readily capable of encompassing all artificial legal persons; that is to say, all entities, not being merely natural persons, invested by law with capacity for legal relations' ([65]).

A taxonomy of legal persons – artificial statutory legal persons are corporations

Neither the joint judgment nor the judgment of Gageler J accepted that artificial legal persons should be divided into 2 categories: 'corporations', and 'other artificial legal entities' (see French CJ and Hayne, Kiefel, Bell, Keane and Nettle JJ at [26]; Gageler J at [65], [67]). The joint judgment held that an artificial right- and duty-bearing entity is a corporation. 'Corporation' is not a subset of right- and duty-bearing entities and States cannot create such artificial entities that bear rights and duties but are not corporations ([37]–[38]). Justice Gageler held that '[t]he constitutional reference to corporations formed within the limits of the Commonwealth encompasses all artificial entities invested with legal personality under Australian law' ([66]). Queensland Rail has legal personality because it has the capacity to own property, to contract and to sue.

'... States cannot create such artificial entities that bear rights and duties but are not corporations ...'

The effect of s 6(2) of the QRTA Act

Queensland Rail urged the Court to give significant weight and effect to s 6(2) of the QRTA Act as evidence of the Queensland Parliament's intention to create a non-corporate statutory body. The joint judgment responded to that argument in this way (at [23]):

> [T]his answer gave no fixed content to what is a 'corporation'. The Authority's submissions proffered no description, let alone definition, of what it means to say that the entity created is or is not a 'corporation'. Hence the 'intention' to which the Authority referred, and upon which it relied as providing the sole criterion for determining what is or is not within the legislative power of the Commonwealth, was an intention of no fixed content. Rather, it was an intention to apply, or in this case not to apply, a particular label. A labelling intention of this kind provides no satisfactory criterion for determining the content of federal legislative power.

So what work does s 6(2) do? The joint judgment was prepared to accept (at least for the purposes of argument) that one purpose of the provision was to place Queensland Rail beyond the reach of s 51(xx) and, therefore, the FW Act. If that is all s 6(2) does, their Honours noted that 'it would be necessary to observe that a State Parliament cannot determine the limits of federal legislative power' ([28]).

However, their Honours concluded that s 6(2) is more than a statutory label designed to avoid s 51(xx). The provision engages with other Queensland legislation (the *Government Owned Corporations Act 1993* and perhaps the *Acts Interpretation Act 1954*) to affect the rights and obligations of Queensland Rail under Queensland law ([30]):

> Understood in that context, s 6(2) provides that the entity which the QRTA Act creates is one with which other provisions of Queensland law engage in a particular way. Section 6(2) is not to be understood as providing that the entity created is one of a genus of artificial legal entities distinct from what s 51(xx) refers to as 'corporations'.

Justice Gageler observed that, whatever the effect of s 6(2) for the purposes of other Queensland legislation, the provision is not effective to prevent Queensland Rail from being a constitutional corporation ([49]).

Queensland Rail is a trading corporation

The High Court also declined to depart from the established 'current activities' test for identifying a trading or financial corporation under s 51(xx). The joint judgment concluded that 'no matter whether attention is directed to the constitution and purposes of the Authority, or what it now does, or some combination of those considerations, the Authority must be found to be a trading corporation' ([40]). For French CJ and Hayne, Kiefel, Bell, Keane and Nettle JJ, the conclusion that Queensland Rail was constituted with a view to engaging in trading for profit was 'irresistible' having regard to its statutory functions and purposes ([41]). Labour hire, which is effectively Queensland Rail's core activity, is a form of trading activity ([42]).

'The High Court also declined to depart from the established 'current activities' test for identifying a trading or financial corporation under s 51(xx).'

Justice Gageler endorsed the activities test (at [70]):

> The basic point that the constitutional description of trading is capable of being applied to a corporation either by reference to its substantial trading purpose (irrespective of activity) or by reference to its substantial trading activity (irrespective of purpose) is sound in principle and is supported by authority.

His Honour held that Queensland Rail's statutory functions are sufficient, irrespective of its activities from time to time, to characterise it as a trading corporation ([73]). His Honour held, alternatively, that the supply of labour under contract, even to a single customer that is a related entity of the corporation in question, and even on a cost-recovery basis, is 'trading activity' for the purposes of s 51(xx) ([74]).

The fact that Queensland Rail does not make a profit does not mean that it is not engaged in trading activity (see French CJ and Hayne, Kiefel, Bell, Keane and Nettle JJ at [43]; Gageler J at [73]).

Queensland Rail is a 'national system employer'

It followed from the Court's conclusion that Queensland Rail is a trading corporation that it is a 'national system employer' within the meaning of the FW Act. Chief Justice French and Hayne, Kiefel, Bell, Keane and Nettle JJ identified the particular provisions of the QRTA Act and the IR Act that were invalid under s 109 as a result of that conclusion (see [44], [46]). Justice Gageler would have answered simply that the FW Act applies to Queensland Rail and its employees by the operation of s 109 of the Constitution, to the exclusion of the QRTA Act and the IR Act ([75]).

AGS (Gavin Loughton, Niamh Lenagh-Maguire, Emily Kerr and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with Solicitor-General, Justin Gleeson SC, and Kathleen Foley as counsel.

The text of the decision can be found at:
http://www.austlii.edu.au/au/cases/cth/HCA/2015/11.html

Simon Thornton
Senior Lawyer
T 02 6253 7287
simon.thornton@ags.gov.au

Andrew Buckland
Senior Executive Lawyer
T 02 6253 7024
andrew.buckland@ags.gov.au

Media regulator's power to determine breach of broadcasting licence upheld – not judicial power

In allowing an appeal by the Australian Communications and Media Authority (the Authority) from the Full Court of the Federal Court, the High Court (French CJ and Hayne, Kiefel, Bell and Keane JJ in a joint judgment; Gageler J writing separately) unanimously held that:

- the Authority has power under the *Broadcasting Services Act 1992* (Cth) (BSA) to make a finding that a commercial radio broadcasting licensee had breached a licence condition by using a broadcasting service in the 'commission of an offence' and take enforcement action, even where the relevant offence had not been proven before a court exercising criminal jurisdiction
- in making the determination that the licence condition has been breached or taking enforcement action arising out of the breach, the Authority was not exercising judicial power contrary to the requirements of Ch III of the Constitution.

Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd
High Court of Australia, 4 March 2015
[2015] HCA 7; (2015) 89 ALJR 382; 317 ALR 279

Background

Today FM holds a commercial radio broadcasting licence under the BSA. The licence is subject to various conditions (s 42(2)(a)), including that 'the licensee will not use the broadcasting service or services in the commission of an offence against another Act or a law of a State or Territory' (the cl 8(1)(g) licence condition).

On 4 December 2012, Today FM broadcast a prank phone call in which 2 of its presenters telephoned King Edward VII Hospital in London, where the Duchess of Cambridge was an inpatient. The Authority conducted an investigation into the broadcast of the segment and, as part of a preliminary investigation report, made a preliminary finding that the broadcast contravened s 11(1) of the *Surveillance Devices Act 2007* (NSW) (SDA).

Furthermore, because Today FM had used its broadcasting service in the commission of this offence, the Authority also made a preliminary finding that the cl 8(1)(g) licence condition had been breached ([14]). Breach of a licence condition is subject to a range of enforcement mechanisms, including suspension or cancellation of the licence by the Authority under s 143(1) of the BSA.

Statutory construction and constitutional issues

In response to the preliminary investigation report, Today FM commenced proceedings in the Federal Court challenging the Authority's power to make a finding that a licensee had used its broadcasting service in the commission of a criminal offence. In particular, Today FM argued that ([16]):

- as a matter of statutory construction, the BSA did not authorise the Authority to find that the cl 8(1)(g) licence condition had been breached 'unless and until a competent court adjudicated that it had committed the SDA offence' (the construction argument)
- if, properly construed, the BSA did authorise the Authority to find that the cl 8(1)(g) licence condition had been breached, the empowering provisions were invalid because they purported to confer judicial power on the Authority, contrary to the requirements of Ch III of the Constitution (the constitutional argument).

At first instance, Edmonds J dismissed Today FM's application ([17]). However, on appeal the Full Court of the Federal Court accepted Today FM's construction argument, applying what it described as a 'general principle' that 'it is not normally expected that an administrative body … will determine whether or not particular conduct constitutes the commission of a relevant offence' ([26]–[27]). Applying this general principle in combination with the principle of legality, the Court held that, 'absent clear language, the legislature is not to be taken to have intended to confer upon the Authority the power to make an administrative determination or finding of the commission of a criminal offence' ([20]). In light of this conclusion, the Court did not address the constitutional argument.

'More generally, "it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action".'

The Authority was granted special leave to appeal the Full Court's decision to the High Court. Before the High Court, Today FM's constitutional argument was narrowed to focus on whether the Authority 'would exercise judicial power were it to act on its own view that conduct constitutes the commission of an offence in going on to exercise the power conferred on it by s 143(1) [of the BSA] to suspend or cancel a commercial radio broadcasting licence on the basis of breach of the condition of that licence in cl 8(1)(g)' ([78]; see also [55]–[56]).

High Court's decision

The scope of the Authority's power – the construction argument

Rejection of the Full Court's interpretive approach

The joint judgment rejected the general principle on which the Full Court's construction of the BSA was premised, finding that it was 'expressed too widely and does not follow from the constitutional constraint stated in the joint reasons in [*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1] on the *adjudgment and punishment of criminal guilt* under Commonwealth law' ([32], emphasis in original).

Their Honours noted that it is not uncommon for 'courts exercising civil jurisdiction [to be] required to determine facts which establish that a person has committed a crime' ([32]). More generally, their Honours continued, 'it is not offensive to principle that

an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action'. As such, it was an error for the Full Court to construe cl 8(1)(g) in light of the 'posited principle' ([33]–[34]).

Gageler J similarly rejected the Full Court's 'general principle' ([63]), noting that the High Court 'has repeatedly held that a power of inquiry and determination takes its legal character from the purpose for which it is undertaken' and that such a power undertaken for an administrative purpose can 'encompass formation and expression of an opinion about an existing legal right or obligation' ([64]). His Honour also noted that the application of the 'principle of legality' outside the 'established categories of protected common law rights and immunities' should be approached with caution and that the principle 'should not be extended to create a common law penumbra around constitutionally imposed structural limitations on legislative power' ([67]).

The Authority's powers not dependent on a court finding the offence committed

Having rejected the Full Court's approach to construction, the joint judgment concluded that ([50]):

> the provisions of the BSA which empower the Authority to investigate the breach of a license condition, report on the investigation and take administrative enforcement action do not require, in the case of cl 8(1)(g) license condition, that any such action be deferred until after (if at all) a court exercising criminal jurisdiction has found that the relevant offence is proven.

Their Honours went on to explain that '[w]hether a licensee has used the broadcasting service in the commission of a relevant offence is a question of fact' that is able to be determined by the Authority as a 'preliminary step to the taking of administrative enforcement action' ([44]). They noted that to condition the power of the Authority to take such action upon a finding by a criminal court that the offence is proven 'would significantly confine the Authority's enforcement powers' and that there is 'nothing in the text of cl 8(1)(g) to support that confinement' ([45]).

'The joint judgment also dismissed any concern that the Authority's factual finding might conflict with a subsequent finding by a criminal court trying the offence ...'

The joint judgment also dismissed any concern that the Authority's factual finding might conflict with a subsequent finding by a criminal court trying the offence, noting that a criminal court 'must determine guilt upon admissible evidence beyond reasonable doubt'. These are constraints that do not apply to the Authority's fact-finding task; the Authority 'may come to a contrary view' to a criminal court 'based on the material and submissions' before it ([48]–[49]).

Gageler J reached the same conclusion on the question of construction. In particular, Gageler J expressly recognised a common law principle of construction which requires 'the manifestation of unmistakeable legislative intention for a statute to be interpreted as empowering an administrative body publicly to inquire into and determine whether or not a person has committed a criminal offence' ([68]; see also joint judgment at [41]).

That principle does not apply to the construction of the cl 8(1)(g) licence condition, compliance with which should be capable of objective determination from time to time and not be contingent on:

(a) a decision by prosecutorial authorities to prosecute an offence

(b) subsequent conviction for that offence by a court ([70]–[73]).

The principle also did not apply to constrain the Authority's powers of investigation, because 'the concerns of the common law which invoke the common law principle of construction are specifically addressed and given a precise statutory measure of protection' ([74]; see also joint judgment at [42]).

The scope of the Authority's power did not infringe Ch III of the Constitution

The constitutional issue was dealt with relatively briefly in both judgments, with each rejecting Today FM's constitutional argument ([59], [79]). Both the joint judgment and Gageler J emphasised that the Authority's finding that there had been the 'commission of an offence' and a consequential breach of the cl 8(1)(g) licence condition was merely a step on the way to deciding to take enforcement action under s 143(1) ([58], [80]). Gageler J specifically characterised such a finding of breach of a licence condition, for the purposes of s 143(1) of the BSA, as 'a "jurisdictional fact" in the sense that it is a fact which must exist as a precondition to the valid exercise of the discretion of the Authority to cancel or suspend a licence' ([80]). The joint judgment also noted that it 'is well settled that functions may be judicial or administrative depending upon the manner of their exercise' ([59]).

'Both judgments also rejected the characterisation of the exercise of the Authority's enforcement power under s 143, predicated on its own finding about the 'commission of an offence' under cl 8(1)(g), as judicial in nature ...'

Both judgments also rejected the characterisation of the exercise of the Authority's enforcement power under s 143, predicated on its own finding about the 'commission of an offence' under cl 8(1)(g), as judicial in nature ([58]–[59], [81]). They both did so by reference to the well-settled indicia of judicial power:

- The finding does not resolve a controversy respecting pre-existing rights or obligations ([58], [79]).
- The cancellation or suspension of a licence does not amount to the imposition of a penalty ([57]) or punishment for the commission of an offence ([79]).

AGS (Joe Edwards and Andras Markus from AGS Dispute Resolution) acted for the Authority and for the Commonwealth Attorney-General intervening (Simon Thornton and Andrew Buckland from the Constitutional Litigation Unit), with Solicitor-General for the Commonwealth, Justin Gleeson SC, Neil Williams SC and Anna Mitchelmore as counsel.

The text of the decision is available at: http://www.austlii.edu.au/au/cases/cth/HCA/2015/7.html

Emilie Sutton
Senior Lawyer
T *02 6253 7596*
emilie.sutton@ags.gov.au

Gavin Loughton
Senior Executive Lawyer
T *02 6253 7203*
gavin.loughton@ags.gov.au

High Court rejects challenge to the constitutional validity of the Jobs and Competitiveness Program

In *Queensland Nickel Pty Ltd v Commonwealth of Australia* [2015] HCA 12 the High Court unanimously rejected the plaintiff's challenge to the validity of certain provisions in the (now repealed) *Clean Energy Regulations 2011* that provided for the issue of free carbon units under the Jobs and Competitiveness Program (JCP) to nickel producers.

The plaintiff contended that the impugned provisions were contrary to s 99 of the Constitution, which prohibits the Commonwealth, 'by any law of regulation of trade, commerce or revenue', giving 'preference to one State or any part thereof over another State or any part thereof'.

Queensland Nickel Pty Ltd v Commonwealth of Australia
High Court of Australia, 8 April 2015
[2015] HCA 12; (2015) 89 ALJR 451; (2015) 318 ALR 182

Background

The plaintiff owns and operates a nickel refinery in northern Queensland. In very general terms, the plaintiff, like other operators of facilities in Australia that produce large amounts of greenhouse gases, was liable under the *Clean Energy Act 2011* and related legislation to pay a tax on its greenhouse gas emissions. This tax was known as a 'unit shortfall charge'. The plaintiff, like other emitters of large amounts of greenhouse gases, was liable to pay the 'unit shortfall charge' unless the plaintiff surrendered a number of 'eligible emissions units' equating to the number of tonnes of greenhouse gases the plaintiff produced during the financial year in question. The Act, Regulations and cognate legislation have since been repealed.

The Act recognised that the legislative scheme might have an adverse impact on certain emissions-intensive and 'trade-exposed' (EITE) industries. This is because international competitive pressures could have restricted the ability of participants in those industries to pass on the cost of the tax to purchasers for fear of losing business to overseas competitors that are not liable (in their countries) to any analogous tax. In the absence of transitional assistance, there was a risk that participants in EITE activities might decide to relocate their activities to foreign countries that had not implemented climate change policies to the same effect as Australia. The JCP therefore provided certain persons with free carbon units that could be surrendered so as to reduce the 'unit shortfall charge' for which the entity would otherwise be liable. The JCP identified 51 activities for which assistance was provided. One of those activities was the 'production of nickel'.

The number of free units that could be issued to a nickel producer was calculated using a formula specified in the Regulations. The formula was based on historical industry averages of greenhouse gases emitted per unit of nickel production. Crucially, the number of free units that could be issued to a nickel producer was the same per unit of production regardless of where in Australia the product was produced, the production process that was used or the amount of greenhouse gas emitted per unit of production. For example, if nickel producers A (in one State) and B (in another State) each produced 100 tonnes of nickel in a specified period, they would each have been entitled to the same number of free carbon units in that period, even if nickel producer A produced twice the number of tonnes of emissions than nickel producer B and would therefore be liable for a higher unit shortfall charge.

The consequence was that 'the more environmentally inefficient an eligible person's production facility (in the sense of the greater number of tonnes of covered emissions emitted from the facility per unit volume of nickel produced by the facility … the greater was the unit shortfall charge payable by the eligible person per unit volume of production' ([49]).

The plaintiff's challenge

The plaintiff claimed that there were differences between its raw materials, production processes and outputs and those of its major Australian competitors, which all produced nickel in Western Australia. According to the plaintiff, these differences were caused, at least in part, by different natural, business or other circumstances in different States. By not making any allowance for these differences, the JCP treated as alike (under the rubric of nickel production) activities that were not alike (that is, production of different kinds of nickel products by different production processes). This (the plaintiff said) led to an unequal taxation outcome for nickel producers – to the advantage of the plaintiff's Western Australian competitors.

The High Court's decision

Justice Nettle (with whom all the other Justices agreed) noted that, on an orthodox application of s 99 jurisprudence, the JCP did not offend against s 99 ([53], footnotes omitted):

> the view consistently taken in relation to taxation laws has been that it is not enough, in order to demonstrate discrimination in the relevant sense, to show only that a taxation law may have different effects in different States because of differences between circumstances in those States. Thus, in *R v Barger*, Griffith CJ observed:
>
> > The fact that taxation may produce indirect consequences was fully recognized by the framers of the Constitution. They recognized, moreover, that those consequences would not, in the nature of things, be uniform throughout the vast area of the Commonwealth, extending over 32 parallels of latitude and 40 degrees of longitude.

Thus (at [56]):

> Construed accordingly, it is apparent that the JCP did not discriminate between States. In terms, it applied equally to eligible persons carrying on the production of nickel regardless of the State of production and, in terms of practical effect, the plaintiff did not suggest that the differences in inputs, production processes and outputs were due to anything other than differences in natural, business and other circumstances as between the States of production.

However, the plaintiff sought to distinguish the present case from all previous s 99 cases. The plaintiff contended that none of the Court's previous decisions concerning the application of s 99 of the Constitution involved the validity of a Commonwealth taxation law that treated activities that are necessarily carried out differently in different parts of Australia as if they were the same activity.

Justice Nettle did not express a final view on the proposition that 'there might be cases in which s 99 is attracted to a Commonwealth taxing act because it produces different consequences in different States as the result of differences between States in natural, business or other circumstances' ([57]). Instead, Nettle J held (at [58], emphasis added):

> *even allowing that there might be cases in which s 99 is attracted to a Commonwealth taxing Act because it produces different consequences in different States as the result of differences between States in natural, business or other circumstances*, in this case it does not appear that any of the differences between the plaintiff's and the other Western Australia's nickel producers' inputs, production processes or outputs were due to differences between Queensland and Western Australia in natural, business or other circumstances.

'... the plaintiff's choice ... was based on economic considerations which had nothing to do with the State in which the plaintiff conducted its processing operations ...'

The evidence before the Court showed that during the relevant period the plaintiff processed a kind of nickel-containing ore from Asia even though it could have obtained a similar kind of nickel-containing ore (which was used by some of its competitors in Western Australia) from other parts of Australia. The evidence also showed that the particular production process that the plaintiff used was able to extract higher volumes of nickel from the ore it imported from Asia than from the ore it could have obtained from Australia. Nettle J concluded from this that the plaintiff's choice of ore 'was based on economic considerations which had nothing to do with the State in which the plaintiff conducted its processing operations' ([60]).

The production process the plaintiff used was, to an extent, influenced by geography in one sense. At the time the plaintiff's refinery was constructed in Queensland in the 1970s, the plaintiff opted for a production process considered to be the most feasible method of processing the body of ore that was nearby. However, the evidence before the Court showed that 2 of the plaintiff's key competitors in Western Australia also produce nickel using a similar kind of ore to the plaintiff, although they do so using different (and more efficient) production processes. Nettle J gave this analysis of that circumstance (at [64]–[65]):

> Of course, circumstances could have changed between the 1970s, when the plaintiff made its decision to adopt the Caron process [that is, the production process used by the plaintiff to produce its nickel products], and the 1990s, when Murrin Murrin and First Quantum [nickel producers in Western Australia] made their decisions to employ acid leaching processes. Over the last 40 years, energy prices have altered significantly and the technical efficiency and environmental safety of production processes have increased. Hence, it might be that, if the plaintiff's choice of system for processing [its] ... deposit had been delayed until, say, the late 1990s, the plaintiff would have chosen an acid leaching processing system like Murrin Murrin or First Quantum.
>
> But all that would go to show is that the plaintiff's technological disadvantages relative to Murrin Murrin and First Quantum – and thus the plaintiff's fiscal disadvantage under the JCP relative to Murrin Murrin and First Quantum – were due to the plaintiff having made its choice of processing system when the available technology was not as advanced by the time Murrin Murrin and First Quantum chose their systems. It would not imply or make any more likely that such difference in technology was caused by differences between States in natural, business or other circumstances.

Finally, while the Court accepted that there were differences between the outputs produced by the plaintiff and the output produced by 2 of its competitors in Western Australia, it was unable to conclude that the 'differences were significant in terms of each operation's liability to the unit shortfall charge' ([65]). Moreover, even if there were any significant differences ([66]):

> they were the necessary consequence either of the differences between the inputs and production processes of each producer or, possibly, of discretionary decisions not necessarily dictated by either inputs or production processes. Since the differences between inputs and production processes are not shown to have been caused by differences between circumstances in different States, it cannot be inferred that the differences in outputs were caused by differences in circumstances between States.

AGS (Emilie Sutton and Gavin Loughton) acted for the Commonwealth, with the Commonwealth Solicitor-General, Justin Gleeson SC, and David Thomas as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2015/12.html

Simon Thornton
Senior Lawyer
T *02 6253 7287*
simon.thornton@ags.gov.au

Andrew Buckland
Senior Executive Lawyer
T *02 6253 7024*
andrew.buckland@ags.gov.au

Queensland anti-bikie legislation held valid

A majority of the High Court (6:1, Hayne J dissenting in part) dismissed a challenge to the validity of Queensland legislation applying to participants in criminal organisations (and commonly referred to as anti-bikie legislation). In doing so the Court:

- rejected a challenge to provisions of the Criminal Code (Qld) (Code) and the *Liquor Act 1992* (Qld) as being contrary to the principle in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 (*Kable* principle)
- found that the plaintiff did not have standing to challenge the *Vicious Lawless Disestablishment Act 2013* (Qld) (VLAD Act), other provisions of the Code and certain provisions of the *Bail Act 1980* (Qld).

Kuczborski v Queensland
High Court of Australia, 14 November 2014
[2014] HCA 46; (2014) 254 CLR 51; (2014) 89 ALJR 59; (2014) 314 ALR 528

Background

This proceeding involved a challenge by a member of the Hells Angels Motorcycle Club to the constitutional validity of some aspects of a package of legislation enacted by the Queensland Parliament with the express aim of 'tackling criminal gangs'. The package of legislation targets participants in 'criminal organisations', including by amending various other Acts to:

- introduce mandatory additional sentences for participants convicted of specified offences (VLAD Act) and apply a special sentencing regime to participants convicted of certain offences, regardless of whether the offence is otherwise linked to their participation in a criminal organisation (ss 72(2), 92A(4A), 320(2), and 340(1A) of the Code) (referred to here as the sentencing laws) ([134])
- create new offences to stop participants from congregating in public, attending certain premises or recruiting others to join the criminal organisation (ss 60A, 60B and 60C of the Code) and effectively preventing a person who is wearing or carrying a prohibited item (for example, a motorcycle club patch, insignia or logo) from entering or remaining in licensed premises (ss 173EB, 173EC, 173ED of the Liquor Act) (referred to here as the new offences) ([135])
- make it more difficult for alleged participants to get bail (Bail Act) (referred to here as the bail laws) ([136]).

The legislation also enacted the *Criminal Code (Criminal Organisations) Regulation 2013* (Qld), which directly prescribes a number of motorcycle clubs, including the Hells Angels, as criminal organisations and prescribes places, including at least 1 Hells Angels clubhouse, as places that participants are prohibited from attending.

The plaintiff is a member of the Hells Angels. Although he was not charged with any offence, he challenged the constitutional validity of the new offences and the sentencing and bail laws.

Constitutional issues

The plaintiff alleged that the package of legislation was invalid because it impaired the institutional integrity of Queensland courts (contrary to the *Kable* principle) by ([141]):

- breaching a fundamental notion of equality before the law (because the sentencing and bail laws were said to require courts to treat offenders differently by reason of who they associate with rather than their own personal and individual culpability)
- impermissibly enlisting the courts in a scheme to destroy associations that are not directly made unlawful or
- usurping judicial power by branding certain clubs, such as the Hells Angels, as 'criminal organisations' without judicial process.

However, a threshold issue arose as to whether the plaintiff had a sufficient interest to challenge the sentencing and bail laws.

High Court's decision

A majority of the High Court rejected the plaintiff's *Kable* challenge to the laws creating the new offences. The majority consisted of 3 judgments: French CJ; Crennan, Kiefel, Gageler and Keane JJ (the joint judgment); and Bell J. Justice Hayne dissented in part. The Court also unanimously held either that the plaintiff did not have standing to challenge the sentencing and bail laws described above or that the challenge to those provisions did not give rise to a 'matter'.

Plaintiff did not have standing to challenge sentencing and bail laws

The Court accepted that the question of standing was inextricably intertwined with the constitutional question of the Court's jurisdiction to hear a 'matter' ([5]–[8] French CJ; [98] Hayne J; [175] joint judgment; [278] Bell J).

The sentencing laws only applied to persons convicted of certain offences. The validity of those offences was not challenged. Furthermore, the plaintiff had not been charged with, let alone convicted of, those offences and he did not indicate an intention to engage in conduct that could lead to such charges ([151]). Those circumstances led the joint judgment to conclude that 'none of [the sentencing laws] materially affect the plaintiff's legal position' ([151], [182]) or his 'freedom of action' ([168], [178]); thus he did not have standing to challenge the validity of those laws ([151], [188]).

'... the plaintiff had not been charged with, let alone convicted of, those offences and he did not indicate an intention to engage in conduct that could lead to such charges .... thus he did not have standing to challenge the validity of those laws ...'

For much the same reasons the plaintiff also did not have standing to challenge the bail laws ([259]). More generally, the joint judgment noted that it 'is inconceivable that a court would entertain a claim for an indication, in advance of the commission of an offence, of the extent of the punishment to be imposed on a person contemplating the commission of the offence' ([187]).

French CJ reached the same conclusion as the joint judgment for essentially the same reasons ([19], [30], [34]). Justice Bell also relied on the same factors as the joint judgment but concluded that the plaintiff's challenge to the sentencing and bail laws was hypothetical and did not give rise to a 'matter'. For that reason the plaintiff had

no standing to seek the relief he sought ([280], [283], [285]). Hayne J also held that the plaintiff's challenge to the sentencing and bail laws failed, without deciding whether that was 'for want of standing, or because, being hypothetical questions, there is no "matter" ... or for both want of standing and absence of "matter"' ([100]).

New offences not contrary to *Kable* principle

The Court's decision on standing meant that it was only necessary to consider the merits of the plaintiff's challenge to the new offences in the Code and Liquor Act as being contrary to the *Kable* principle. By a majority of 6:1, the Court held that the new offences were not invalid.

Joint judgment

The joint judgment began by noting that 'there can be no doubt that these provisions are capable of having a wide operation which might be thought to be unduly harsh' ([208]) but also that 'to demonstrate that a law may lead to harsh outcomes, even disproportionately harsh outcomes, is not, of itself, to demonstrate constitutional invalidity' ([217]). The joint judgment then held that the new offences in the Code did not invalidly 'enlist' the Queensland Supreme Court in a scheme of the legislature or executive, and distinguished the legislation previously held invalid in *South Australia v Totani* (2010) 242 CLR 1 ([224]–[225]).

"to demonstrate that a law may lead to harsh outcomes, even disproportionately harsh outcomes, is not, of itself, to demonstrate constitutional invalidity"

Also, the new Code offences did not 'cloak the work of the legislature or executive in the neutral colours of judicial action' contrary to the *Kable* principle ([229]). Instead, the provisions simply require a court to perform the characteristically judicial function of 'find[ing] facts and impos[ing] punishment as a result of a contravention of norms of conduct laid down by the legislature' ([225]). Furthermore 'it is abundantly clear that the responsibility for any perceived harshness or undue encroachment on the liberty of the subject by these laws lies entirely with the political branches of government' ([229]).

The new offences also did not usurp judicial power, despite the role of the legislature or the executive in declaring an organisation to be a 'criminal organisation'. In making such a declaration the legislature or executive 'does not purport to adjudge or punish the criminal guilt of any person' or to adjudicate rights, duties or liabilities ([234]). Furthermore, the availability of a defence where an accused can prove that the criminal organisation in question does not have, as one of its purposes, an intention to engage in criminal activity highlighted that a declaration 'is not to be equated with a presumptive finding of fact' ([245]).

The joint judgment also found that the new offences in the Liquor Act were valid ([254]–[255]), emphasising that the 'Kable principle is not a limitation on the competence of a State legislature to make laws of general application to determine what acts or omissions give rise to criminal responsibility'.

French CJ and Bell J

French CJ and Bell J also rejected the challenge to the validity of the new offences ([47], [49], [305]–[306]). As with the joint judgment, their Honours each held that the declaration that a particular organisation was a 'criminal organisation' was no more than a 'factum, in relation to an entity, which has consequences provided by law' and does not intrude impermissibly into the judicial function ([40]–[41] French CJ; [303]

Bell J). They each noted that the courts are left free to determine 'whether a person is a member of a criminal organisation and whether circumstances attracting a penalty or disability are established' ([41] French CJ; [303] Bell J).

Hayne J

Although Hayne J also upheld the validity of the new offences in the Liquor Act, his Honour dissented in relation to the validity of the new offences in the Code ([127]). The invalidity of the Code offences was said to result from the fact that the definition of 'criminal organisation' had 3 limbs, 2 of which resulted in an entity being established to be a 'criminal organisation' as a result of judicial action, while the third resulted from a declaration made by the legislature or the executive (which his Honour described as the 'political branches of government').

Hayne J found that this resulted in 'a legislative or regulatory determination of what is a criminal organisation being afforded the same legal significance as a judicial determination of that question, against stated criteria, in accordance with accepted judicial methods' ([115]). His Honour concluded that to 'require the courts to treat the two radically different kinds of judgment as equivalent is repugnant to and incompatible with the institutional integrity of the courts' ([116]). In contrast, French CJ described this as being 'in the end, a matter of labelling' ([45]).

AGS (Simon Thornton, Andrew Buckland and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Solicitor-General of the Commonwealth, Justin Gleeson SC, and Craig Lenehan as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2014/46.html

Thomas Wood
Lawyer
T *02 6253 7193*
thomas.wood@ags.gov.au

Gavin Loughton
Senior Executive Lawyer
T *02 6253 7203*
gavin.loughton@ags.gov.au

Supreme Court has power to grant freezing order in relation to prospective foreign judgment

In *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36, the High Court unanimously held that:

- the Supreme Court of Western Australia has the power to make an assets-freezing order in support of a possible future judgment of a foreign court. This is on the proviso that the foreign judgment, when handed down, would be registrable and enforceable in Australia under the *Foreign Judgments Act 1991* (Cth) (FJ Act).
- the making of such a freezing order is within the inherent power of the Supreme Court (being a superior court of record) to protect its own processes
- O52A of the *Rules of the Supreme Court 1971* (WA) (SC Rules) appropriately regulates the exercise of that power and is validly made under the *Supreme Court Act 1935* (WA) (SC Act)
- the application for a freezing order in support of a prospective foreign judgment is within federal jurisdiction because the prospective enforcement process to be protected by a freezing order depends on the existence of a Commonwealth statute – the FJ Act.

PT Bayan Resources TBK v BCBC Singapore Pte Ltd
High Court of Australia, 14 October 2015
[2015] HCA 36

Background

BCBC Singapore, the respondent, is a company incorporated in Singapore. BCBC Singapore entered into a joint venture agreement with PT Bayan (Bayan), the appellant – a company incorporated in Indonesia. Subsequently, the 2 companies fell into dispute.

BCBC Singapore commenced proceedings against Bayan in the High Court of Singapore. BCBC Singapore claims damages against Bayan for breach of their deed of agreement. That proceeding is yet to be resolved.

After commencing proceedings in Singapore, BCBC Singapore applied to the Supreme Court of Western Australia, under O52A of the SC Rules, for a freezing order over Australian shares held by Bayan. This application was prompted by a concern that BCBC Singapore would not be able to enforce any future judgment in the Singapore proceedings against Bayan's assets in Indonesia. The Supreme Court made Interim freezing orders on 5 April 2012.

Bayan commenced proceedings in which it challenged the jurisdiction or power of the Supreme Court to make the freezing orders. At first instance in the Supreme Court of

Western Australia, Le Miere J found that the Supreme Court has jurisdiction to make the freezing orders. Le Miere J continued the interim order against Bayan. Bayan appealed to the Western Australia Court of Appeal, which unanimously dismissed the appeal. On 13 March 2015, the High Court granted Bayan special leave to appeal.

The High Court's decision

French CJ and Kiefel, Bell, Gageler and Gordon JJ wrote a joint judgment (the majority). Keane and Nettle JJ wrote a separate judgment in which they agreed with the majority's reasons and conclusion ([57]) and made some additional observations of their own.

Inherent power of the Supreme Court

Bayan argued that the making of a freezing order in the circumstances of this particular case was beyond the inherent power of the Supreme Court. That argument was rejected. The Court held that the Supreme Court has the power to make a freezing order in relation to a prospective judgment of a foreign court which, when handed down, would be registrable by order of the Supreme Court under FJ Act.

'Both judgments rejected a limitation to the effect that freezing orders are available only to protect the processes of the court "once set in motion" or about to be set out in motion.'

The majority noted that it is 'well-established' that that a Supreme Court has an inherent power (as a superior court of record) to make orders, of which freezing orders are 'the paradigm example', that are appropriate 'to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction' ([43], see also Keane and Nettle JJ at [64]).

Although Bayan accepted this general principle, it argued that the Supreme Court only has the capacity to make a freezing order in circumstances where a substantive proceeding in that court has already commenced or is imminent, or at least is available. (Here no 'cause of action' yet exists under the FJ Act and will not exist unless and until the High Court of Singapore hands down a judgment awarding damages in favour of BCBC Singapore – something that might not ever happen.) Bayan also drew on a statement of the High Court in an earlier freezing order case which referred to a court's power to protect its processes 'once set in motion' (see the majority at [44]; Keane and Nettle JJ at [69]).

Both judgments rejected a limitation to the effect that freezing orders are available only to protect the processes of the court 'once set in motion' or about to be set out in motion. The majority did not consider the use of the phrase 'once set in motion' in an earlier case to be 'exhaustive of the capacity of … [a] superior court of record, to protect the integrity of its processes' ([45]). Nettle and Keane JJ considered Bayan's view of the inherent power to be 'too narrow' ([59]).

The 'critical point' for the majority was that, regardless of whether substantive proceedings have commenced or are imminent, 'the process which the order is designed to protect is "a prospective enforcement process" ' ([46]). As explained by Lord Nicholls in *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 at 306 and quoted by both judgments here ([46], [67]):

> [A freezing order] is not granted in aid of the cause of action asserted in the proceedings, at any rate in any ordinary sense. It is not so much relief appurtenant to a money claim as relief appurtenant to a prospective money judgment. It is relief granted to facilitate the process of execution or enforcement which will arise when, but only when, the judgment for payment of an amount of money has been obtained.

The relevant focus is on the prospective enforcement of a future judgment, not on the existence or otherwise of a substantive proceeding presently on foot (see also Keane and Nettle JJ at [81]).

That reasoning led to the majority's ultimate conclusion that the Supreme Court has the power to make freezing orders in the circumstances 'because the making of the order is to protect a process of registration and enforcement in the Supreme Court which is in prospect of being invoked' ([50]).

Keane and Nettle JJ emphasised that, although a court's inherent power to protect its own processes is 'a broad one' ([71]), it is limited by the court's judgment 'as to what is "appropriate to the case in hand" rather than the mechanical application of a hard and fast rule' ([74]). An order will be 'appropriate to the case in hand' if it is demonstrated that there is 'sufficient connection' between the proposed order and the future process that the order is designed to protect. That proceedings have been 'set in motion' may be a 'positive indication' that the relevant sufficient connection exists. But it is not a 'necessary condition' – the sufficient connection may be 'demonstrated in ways other than the pendency or imminent pendency of proceedings' ([75]).

'An order will be "appropriate to the case in hand" if it is demonstrated that there is "sufficient connection" between the proposed order and the future process that the order is designed to protect.'

Order 52A is valid

Order 52A governs the circumstances in which the Supreme Court may grant freezing orders. In particular, O52A r 5 sets out various criteria for the grant of such an order (see [9]). Bayan argued that those criteria were too wide (see [44]).

Section 167(1)(a) of the SC Act confers power on the Supreme Court to make rules 'regulating and prescribing the procedure … and the practice to be followed in the Supreme Court' in matters in or with respect to which it has jurisdiction. That power extends to regulating 'the range of orders capable of being made by the Supreme Court in the exercise of its inherent jurisdiction, but it is not available to expand the range of those orders' ([40]).

After accepting that the inherent power of the Supreme Court extends to making freezing orders in the circumstances, the majority considered that 'the criteria are set out in O52A r 5 are appropriately tailored to the exercise' ([50]) of that power and were therefore validly made under s 167(1)(a) of the SC Act ([2]).

Relevance of the FJ Act regime

Bayan also argued that the FJ Act provided a 'comprehensive scheme' for the enforcement of foreign judgments in Australia. Therefore, according to Bayan, the Supreme Court could not grant freezing orders under O52A of the SC Rules because that rule is inconsistent with the FJ Act scheme (and thus inoperative because of s 109 of the Constitution) (see [62]).

The majority closely examined Pt 2 of the FJ Act to demonstrate that there is nothing in its operation that limits the existing inherent powers of the Supreme Court and it is not inconsistent with O52A r 5.

Part 2 of the FJ Act sets out the registration and enforcement regime for certain foreign judgements, specifically those judgements that are prescribed by regulation. Relevantly, the regulations 'have the effect of applying Pt 2 to a money judgment of the High Court of Singapore but not to a non-money judgment of the High Court of Singapore' ([22]).

Bayan accepted that Pt 2 would apply to any money judgment that may ultimately be delivered by the High Court of Singapore in the dispute between BCBC Singapore and Bayan.

An application for the registration of a foreign judgment is made under s 6(1). Such an application cannot be made until *after* a foreign judgment to which Pt 2 applies is delivered. Bayan argued that this 'inherent temporal limitation to argue that the regime established by Pt 2 impliedly excludes any power of the Supreme Court of a State to make a freezing order in anticipation of a foreign judgment coming into existence' ([28]). In rejecting this argument, the majority drew on the 'general principle' of statutory interpretation that 'a law of the Commonwealth is not to be interpreted as withdrawing or limiting a conferral of jurisdiction unless the implication appears clearly and unmistakably' ([29]).

Recognising that s 10 of the FJ Act expressly affects the jurisdiction that the Supreme Court might otherwise have to register and enforce judgments to which Pt 2 would apply, they held 'no further exclusion of any jurisdiction or power of a State Supreme Court is expressed in the *Foreign Judgments Act* and none should be implied' ([29]). Keane and Nettle JJ similarly found that nothing in the FJ Act 'manifests an intention to exclude the power of the Supreme Court to grant a freezing order in anticipation of proceedings for the enforcement of a prospective foreign judgment' ([63]).

It was relevant that the Pt 2 regime itself 'relies on the ordinary processes of the Supreme Court having application to the enforcement of a judgment of a foreign court once that judgment has been registered' ([30]) – or, as Nettle and Keane JJ put it, 'the FJA proceeds on the assumption that the court in which the judgment is registered is expected to deploy the full range of powers which might be deployed to vindicate its own judgments' ([63]).

Federal jurisdiction

All of the parties accepted that BCBC Singapore's application for freezing orders was, from the outset, within federal jurisdiction. However, the majority considered it 'appropriate to record how that federal jurisdiction arises' ([52]).

The majority concluded that a freezing order application in the circumstances is 'sufficiently characterised' as a matter 'arising under' a law of the Commonwealth within the meaning of s 76(ii) of the Constitution 'on the basis that the prospective enforcement process to be protected by the making of the freezing order depends on the present existence of the *Foreign Judgments Act*' ([55]). They also noted that '[i]t is not necessary that the form of relief claimed also depends on Commonwealth law' ([54]).

Being a matter within s 76(ii) of the Constitution, federal jurisdiction with respect to the matter is conferred on the Supreme Court by s 39(2) of the *Judiciary Act 1903* (Cth), to the exclusion of any State jurisdiction, because of s 109 of the Constitution ([53]). Both judgments recognised that O52 of the SC Rules therefore applied to the proceedings by force of s 79 of the Judiciary Act ([2], [51], [62]).

AGS (Gavin Loughton, Niamh Lenagh-Maguire and Thomas Wood from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with Stephen Lloyd SC and David Hume as counsel.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2015/36.html

About the authors

Andrew Buckland *is the team leader of the AGS Constitutional Litigation Unit in the Office of General Counsel.*

Gavin Loughton *is a Senior Executive Lawyer in the AGS Constitutional Litigation Unit who also has extensive experience in native title litigation.*

Simon Thornton *and* ***Niamh Lenagh-Maguire*** *are both Senior Lawyers in the AGS Constitutional Litigation Unit within the Office of General Counsel.*

Emilie Sutton *was a Senior Lawyer in the AGS Constitutional Litigation Unit and is now Counsel in the AGS People, Security and Information team within the Office of General Counsel.*

Emily Kerr, ***Liam Boyle*** *and* ***Thomas Wood*** *are all Lawyers in the AGS Constitutional Litigation Unit within the Office of General Counsel.*

AGS contacts

AGS has a team of lawyers specialising in constitutional litigation.
For further information on the articles in this issue, or on other constitutional litigation issues, please contact Andrew Buckland or Gavin Loughton.

Andrew Buckland
Senior Executive Lawyer
T 02 6253 7024
andrew.buckland@ags.gov.au

Gavin Loughton
Senior Executive Lawyer
T 02 6253 7203
gavin.loughton@ags.gov.au

For information on general litigation and dispute resolution matters and services, please contact any of the lawyers listed below.

National Group Leader Dispute Resolution
Matthew Blunn 02 6253 7424

Chief Solicitor Dispute Resolution
Simon Daley PSM 02 9581 7490

Chief Counsel Dispute Resolution
Tom Howe PSM QC 02 6253 7415

All AGS emails are firstname.surname@ags.gov.au

Offices

Canberra	*4 National Circuit, Barton ACT 2600*
Sydney	*Level 42, 19 Martin Place, Sydney NSW 2000*
Melbourne	*Level 21, 200 Queen Street, Melbourne VIC 3000*
Brisbane	*Level 11, 145 Ann Street, Brisbane QLD 4000*
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