29 Litigation notes

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DECISIONS IN BRIEF

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Competing regulation of political donations

By a majority of 4:3, the High Court rejected a challenge to the validity of Queensland legislation prohibiting property developers from making any gifts to political parties that endorse candidates in State or local government elections (the Queensland prohibition), including to parties that also participate in federal elections. In doing so the Court held invalid Commonwealth legislation expressly allowing gifts, that may be used for federal elections, to be made to political parties that are registered under the *Commonwealth Electoral Act 1918* (Cth) (the Cth Electoral Act).

Significantly, the Court's judgments address the extent of Commonwealth power to regulate federal elections and the principles relevant to characterising a law as being within a head of legislative power.

Spence v Queensland
High Court of Australia, 15 May 2019
[2019] HCA 15

Background

The plaintiff, Mr Spence, is the former president of the Liberal National Party of Queensland (LNP). He brought this proceeding in the High Court to challenge amendments to the *Electoral Act 1992* (Qld) and the *Local Government Electoral Act 2011* (Qld) which prohibit property developers from making gifts to a political parties which endorse and promote candidates for election to the Legislative Assembly of Queensland and to local government councils in Queensland. The prohibition operates in a context where political parties are typically organised geographically and participate in both federal and State/Territory elections. Thus, most of the political parties subject to the Queensland prohibition are also registered under the Cth Electoral Act and participate in and endorse and promote candidates for election to the Commonwealth Parliament.

After the case commenced, the Commonwealth Parliament amended the Cth Electoral Act to expressly permit a person to make a gift to a political party registered under the Cth Act if certain conditions were met (s 302CA(1)). Relevantly, s 302CA(1) permitted a gift to be made, despite any State or Territory electoral law, if the gift was required to be used, or may be used, 'for the dominant purpose of influencing voting in an election to the House of Representatives or to the Senate' (federal electoral purposes). Gifts required to be used for *State* electoral purposes, or that are actually used for *State* electoral purposes, were outside the permission granted by s 302CA(1) and thus remained subject to State regulation. Section 302CA(4) then conferred permission to *use* a gift (despite any State or Territory law) for federal electoral purposes; the use of a gift for any other purpose remaining unregulated by the Cth Act.

This set of circumstances gave rise to a number of constitutional issues, not all of which were necessary for the Court to decide.

The Attorney-General of the Commonwealth intervened in support of the plaintiff on most of the issues in dispute and became a 'principal protagonist' in the case ([10]). The Attorneys-General of all of the States and Territories (other than the Northern Territory) intervened in support of Queensland.

The High Court's decision

The majority, comprising Kiefel CJ and Bell, Gageler and Keane JJ, delivered a joint judgment, holding that:

- The Commonwealth's power to regulate federal elections is not exclusive, and the Queensland prohibition is not invalid merely because it touches and concerns federal elections more than incidentally.
- The Queensland prohibition does not infringe any intergovernmental immunity of the Commonwealth.
- The Queensland prohibition is not inconsistent with s 302CA of the Commonwealth Electoral Act because that section is invalid.
  - Section 302CA of the Cth Electoral Act is beyond Commonwealth legislative power to the extent it purports to immunise from State law the making of a gift which 'merely might' be used for federal electoral purposes.
  - The invalid parts of s 302CA cannot be severed and, accordingly, the section is wholly invalid.
- The Queensland prohibition is not inconsistent with the scheme for prohibiting gifts by foreign donors in Div 3A and for financial disclosure in Divs 4, 5 and 5A of Pt XX of the Cth Electoral Act.
- The Queensland prohibition is not contrary to the implied freedom of political communication.

'The Commonwealth's power to regulate federal elections is not exclusive, and the Queensland prohibition is not invalid merely because it touches and concerns federal elections more than incidentally.'

In 3 separate judgments, Gordon, Nettle and Edelman JJ dissented. They each held that the Queensland prohibition was inoperative to the extent it was inconsistent with s 302CA of the Cth Electoral Act, which was valid as within Commonwealth legislative power.

The Commonwealth does not have exclusive power to regulate federal elections

The plaintiff and the Commonwealth argued that the Commonwealth has exclusive legislative power to regulate federal elections and, as a consequence, the States lack power to enact an electoral law that touches and concerns federal elections more than incidentally. The Queensland prohibition was argued to be invalid on this basis.

The majority rejected this argument, holding that the Commonwealth's power to regulate federal elections is not exclusive. That is because:

- The Commonwealth Parliament's power to regulate federal elections is found in s 51 of the Constitution (and s 122 in the case of the Territories).
- In particular, s 51(xxxvi) of the Constitution expressly confers power on the Parliament to make laws with respect to 'matters in respect of which [the] Constitution makes provision until the Parliament otherwise provides', the relevant matters here being elections of senators and of members of the House of Representatives in each State, for which provision is made in ss 10 and 31 of the Constitution ([45]).

- That power is supplemented by the express conferral of power in s 51(xxxix) of the Constitution to make laws with respect to 'matters incidental to the execution of any power vested by [the] Constitution in the Parliament' ([45]; cf [344]).
- The powers conferred by s 51 of the Constitution are concurrent with State legislative power, and any conflict between Commonwealth and State legislative power is resolved through the operation of s 109 of the Constitution and the doctrine of intergovernmental immunities ([46]).

In addition to the power of the Commonwealth Parliament, the Constitution also:

- expressly confers power on State parliaments to make laws regulating certain specific aspects of the federal electoral process, generally 'until the Parliament otherwise provides' (ss 7, 9, 29)
- provides for certain State laws to apply, on a transitional basis, to federal elections – again until the Parliament otherwise provides (ss 10, 31).

'While there may be limits to the extent of State legislative power, that does not point to the existence of an exclusive Commonwealth power into which an exercise of State power cannot intrude.'

These limited references to State power do not imply that outside of these areas the Commonwealth's power to regulate federal elections is exclusive of State power ([46]). While there may be limits to the extent of State legislative power, that does not point to the existence of an exclusive Commonwealth power into which an exercise of State power cannot intrude ([47]). To the extent that the High Court held otherwise in *Smith v Oldham* (1912) 15 CLR 355, that decision was informed by the doctrines of 'reserved powers' and 'implied prohibitions' rejected in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (the *Engineers case*) ([41], read with [6]).

As a result, whatever may be the limits of State legislative power to regulate State elections, they are not exceeded by a law regulating State elections that:

- merely touches and concerns federal elections more than incidentally
- imposes obligations or prohibitions on participants in a State electoral process, even if performing those obligations or observing those prohibitions might have a practical impact on the ability of those participants also to engage in a federal electoral process ([48]).

Justice Edelman, who otherwise dissented with respect to the majority's orders, agreed with the majority that the Commonwealth's power with respect to federal elections is not exclusive ([305]). Justice Gordon also held the Queensland prohibition is a (valid) law about State elections, even though it has some operation on gifts for federal electoral purposes. Still, her Honour acknowledged that the States lack some power over federal elections and added that to refer to the Commonwealth power as 'exclusive' is to merely observe that absence of power ([267]).

In contrast, Nettle J held that the Commonwealth's power is 'essentially exclusive' ([120]), although ultimately his Honour did not decide whether the Queensland prohibition was invalid for impinging on the field of exclusive Commonwealth power (cf [133], [151]).

The Queensland prohibition does not infringe any intergovernmental immunity / Melbourne Corporation principle

The plaintiff (but not the Commonwealth) argued that the Queensland prohibition was invalid for infringing 'the doctrine of inter-governmental immunities expounded in the

Melbourne Corporation Case' ([98]). This principle is to the effect that ([100]):

> neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or 'obviously interfere with one another's operations' (*Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 74 (Starke J)).

The majority emphasised that this structural implication applies 'reciprocally' for the benefit of the States and the Commonwealth. This reciprocity has been, and should remain, constitutional doctrine ([107]). There is no returning to the idea that 'Commonwealth immunity from State legislation was absolute' ([106]) (although a State law imposing a burden on the enjoyment of a Commonwealth prerogative would be contrary to s 61 of the Constitution ([101])).

So far as the present case is concerned, the majority held that the Queensland prohibition does not infringe the Melbourne Corporation principle because it is 'not directed to the Commonwealth or to any bodies that who are uniquely or even primarily participants in the federal governmental process', and it '[does] not deny to the Commonwealth the capacity to regulate its own elections' ([109]).

Justice Edelman agreed with the majority that there was a 'symmetrical' *Melbourne Corporation* principle and held, for somewhat similar reasons to the majority, that the Queensland amendments did not infringe it ([306]–[320]).

'... the Queensland prohibition does not infringe the *Melbourne Corporation* principle because it is "not directed to the Commonwealth or to any bodies that are uniquely or even primarily participants in the federal governmental process", and it "[does] not deny to the Commonwealth the capacity to regulate its own elections". '

On the other hand, Gordon J held that it was unnecessary to decide whether a 'reverse' *Melbourne Corporation* principle protecting the Commonwealth exists beyond that identified in *Commonwealth v Cigamatic Pty Ltd (In Liq)* (1962) 108 CLR 372 at 377, because any such doctrine would not be infringed by the prohibition of a limited class of donations not directed at the Commonwealth ([266]). Justice Nettle did not address this argument.

Section 302CA is beyond Commonwealth power

Characterisation principles

An issue emerged late in the matter as to whether s 302CA of the Cth Electoral Act was invalid, at least insofar as it permitted the making of gifts that 'may' be used for federal electoral purposes. (The majority had little difficulty in concluding that s 302CA was within power to the extent it permitted donations that *must* be used for federal election purposes ([55]; see also [73]).)

The majority repeated the well-established characterisation principle that a law will be 'with respect to' the subject matter of a head of power if the legal or practical operation of the law is not 'so insubstantial, tenuous or distant' that the law ought not be regarded as enacted with respect to that subject matter ([57]). The majority then drew a distinction between a law that has a direct legal operation on the subject matter of a power and a law that does not. In the former case, nothing more is required to establish a sufficient connection between the law and the head of power ([58]). However, in the latter case, '[t]he more the legal operation of the law is removed from the subject matter of the power, the more questions of degree will become important' ([59]). (Such a law is sometimes described as operating in an area that is 'incidental', penumbral or 'peripheral' to the subject matter of the power ([59]).)

A law will be valid as 'incidental to the subject matter of a power' if there is a sufficient connection between the purpose or object of the law and the subject matter of the power ([60]). However, in that case it can also be relevant to consider the 'breadth and intensity of the impact of the law on other matters' ([62]). And, most significantly for the present case ([69]), 'it is not always irrelevant that the effect of the law is to invade State power' (citing *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227 at 240 (Gibbs CJ)).

Subject matter of federal elections

The majority identified the subject matter of the Commonwealth's power as being the process of federal elections ([71]). That includes, relevantly, nomination and grouping of candidates for election. The registration of political parties is not part of that process but is incidental to it ([71]). That does not mean that everything done by a registered political party or candidate is part of or incidental to the subject matter of federal elections ([72]). Instead, something more is required to establish a sufficient connection to the head of power.

Characterisation of s 302CA

Here, neither the fact that s 302CA relevantly applied only to a political party registered under the Cth Electoral Act, nor that a gift to a Commonwealth-registered political party is subject to the disclosure regime in Pt XX of the Cth Electoral Act, sufficiently connected s 302CA with the subject matter of the Commonwealth power ([73], [75]).

Instead, the majority considered that a sufficient connection could only be revealed by identifying the *purpose* of s 302CA in relation to the relevant subject matter ([76]–[81]). Extrapolating from the relevant explanatory memoranda, that purpose could be described as being to protect a source of funds which might, but need not be, used in the federal electoral process ([79]). According to the majority, however, protecting the availability of funds to engage in federal political activities had only a 'slight' connection with the federal electoral process compared with the 'much greater impact' that s 302CA had on the availability of funds to engage in other activities ([81]), including activities in the 'heartland of State legislative power' ([80]; cf [215]). From that, the majority inferred that the real purpose of s 302CA was to ensure political entities could receive donations to fund *any* activities from donors who would otherwise be prohibited from making those donations ([81], [83]).

'... protecting the availability of funds to engage in federal political activities had only a "slight" connection with the federal electoral process compared with the "much greater impact" that s 302CA had on the availability of funds to engage in other activities, including activities in the "heartland of State legislative power". '

As the majority recognised, both the Queensland prohibition and s 302CA impacted on the ability of a party to fund its activities. However, the majority held that the connection between the operation of s 302CA and the actual use of donated funds for federal electoral purposes was no more than insubstantial, tenuous and distant, explaining that conclusion by 'adapt[ing] one of the examples used rhetorically by Dixon CJ in the *Second Uniform Tax Case*' ([82]; cf [353] per Edelman J).

Section 302CA cannot be severed

The majority then considered whether the invalid part of s 302CA could be severed, leaving the section to continue to permit gifts that *must* be used for federal electoral purposes.

According to the majority, s 302CA could not be severed for 2 reasons.

First, s 302CA was expressed to operate in spite of any State or *Territory* law. The invalidity identified above only arose insofar as s 302CA protected certain gifts from State law; it was wholly valid insofar as it protected those same gifts from *Territory* law. Given this dissonance, there was no basis to sever the impugned aspects of the provision only in relation to State law ([88]).

Secondly, severance would require significant work to the provision or 'major surgery'. In that circumstance, severance could not save the valid remainder of s 302CA ([89]–[91]).

Minority view – s 302CA is valid

Justices Nettle, Gordon and Edelman disagreed. Their Honours rejected the relevance to characterisation of any notion of 'invading State power' ([137] (Nettle J); [215] (Gordon J); [352] (Edelman J)). Unlike the majority, the minority considered that the characterisation of s 302CA was informed by its location within Pt XX of the Cth Electoral Act ('Election funding and financial disclosure') and the subject matter of the prohibited donor and disclosure regime established by that Part ([140]; [216]–[217]; [357]). Their Honours noted that there was no dispute as to the validity of that regime in prohibiting donations from foreign donors and requiring the disclosure of donations above a threshold ([216]; [345]–[346]; see also [140]), even though that regime is not limited to donations that are required to be used for federal elections ([345]–[346]). But the Commonwealth's power to control donations relating to federal elections allows the Commonwealth not just to prohibit classes of donors but to 'mark out who may donate' ([216] (Gordon J)) and to make the Commonwealth regime exclusive ([355] (Edelman J)). Further, as Gordon J in particular emphasised, 4 specific aspects of the law's operation established a sufficient connection to the head of power. Those were the *character* of the recipients regulated by s 302CA, the *purpose* of the gifts that are regulated, that s 302CA only excludes State and Territory *electoral* laws, and that it expressly leaves room for such laws to operate in relation to gifts for State and Territory electoral purposes ([203]; see also [138], [141]).

Unnecessary to decide whether s 302CA infringes the Melbourne Corporation principle

In holding s 302CA invalid, it was unnecessary, in the majority's view, to consider whether s 302CA infringed the *Melbourne Corporation* principle or any supposed area of exclusive State power ([84]).

In contrast, Gordon J, having found s 302CA was within legislative power, rejected the argument that it infringed the *Melbourne Corporation* principle. Her Honour held that s 302CA left intact the ability of the States to determine how State elections will be conducted ([234]) because 'to find that s 109 inconsistency amounts to an effect on the States' capacity to exercise functions or powers would be to "subvert not only the position established by the decision in the *Engineers' Case* but also s 109 of the Constitution"' ([233]–[234]). The judgments of Nettle J ([148]–[150]) and Edelman J were to similar effect, with Edelman J also noting the significance of s 302CA for the capacity of the *Commonwealth* to govern ([366]–[367]).

Queensland prohibition not inconsistent with Cth Electoral Act

Based on the above, the majority held that, because s 302CA was invalid, there was no inconsistency between the Queensland prohibition and the Cth Electoral Act. On the other hand, Nettle J ([145]), Gordon J ([271]) and Edelman J ([283]), having found that s 302CA is valid, held that the Queensland prohibition was inconsistent with s 302CA.

The majority also rejected the plaintiff's argument that, regardless of s 302CA, the Queensland prohibition was inconsistent with the broader operation of the Cth Electoral Act – that is, the scheme for prohibiting gifts by foreign donors in Div 3A and for financial disclosure in Divs 4, 5 and 5A of Pt XX ([110]–[111]). Justice Gordon also held that there was no such inconsistency ([272]–[274]). Justices Nettle and Edelman did not address this argument.

Queensland prohibition does not infringe implied freedom of political communication

The High Court unanimously rejected the plaintiff's argument that the Queensland prohibition was invalid by reason of the implied freedom of political communication. The High Court did so on the basis of *McCloy v New South Wales* (2015) 247 CLR 178 (*McCloy*), rejecting the plaintiff's attempt to distinguish the legislative facts that supported an equivalent ban in New South Wales from the legislative facts in Queensland ([95]–[97] (Kiefel CJ; Bell, Gageler and Keane JJ); [113] (Nettle J); [264] (Gordon J); [322]–[326] (Edelman J)).

'The High Court unanimously rejected the plaintiff's argument that the Queensland prohibition was invalid by reason of the implied freedom of political communication.'

Although Nettle J held that the decision in *McCloy* dictated the result in this case, he did so reluctantly. He endorsed his dissenting view in *McCloy* – that is, that the discriminatory nature of the ban on property developer gifts cannot be justified and would be invalid for infringing the implied freedom ([113]–[119]).

The Commonwealth's legal team

AGS (Andrew Buckland, Vanessa Austen, Emily Kerr and Shona Moyse from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor-General Dr Stephen Donaghue QC, Perry Herzfeld and Christopher Tran as counsel.

The text of the decision is available at:

https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2019/15.html

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Legislation preventing disclosure of information to court held to be invalid

A majority of the High Court has held that Parliament cannot prevent the disclosure of information to a court if the effect would be to deny the ability of the High Court, when exercising jurisdiction under s 75(v) of the Constitution, to enforce the limits on power of a Commonwealth officer; or the same ability of any other court exercising jurisdiction by reference to s 75(v).

Accordingly, s 503A(2) of the *Migration Act 1958* is invalid to the extent that it would prevent the Minister for Immigration and Border Protection from being required to divulge or communicate information to the High Court where it is exercising jurisdiction under s 75(v) of the Constitution, or to the Federal Court when exercising jurisdiction under ss 476A(1)(c) and (2) of the Migration Act, to review a purported exercise of power by the Minister under s 501, s 501B or s 501C of the Act to which the information is relevant.

Graham v Minister for Immigration and Border Protection;
Te Puia v Minister for Immigration and Border Protection
High Court of Australia, 6 September 2017
[2017] HCA 33; (2017) 91 ALJR 890; 347 ALR 350

Background

Mr Graham (the plaintiff) is a New Zealand citizen who had resided in Australia since 1976. Mr Te Puia (the applicant) is also a New Zealand citizen and had resided in Australia since 2005.

On 2 November 2015 and 9 June 2016 respectively, the Minister informed Mr Te Puia and Mr Graham that he had decided to cancel their Subclass 444 Temporary Visas under s 501(3) of the Migration Act. (Section 501(3) relevantly provides that the Minister may cancel a person's visa if the Minister reasonably suspects that the person does not pass the character test and is satisfied that cancelling the visa is in the national interest.) The Minister advised the applicants that, in reaching those decisions, he had considered information that was protected from disclosure under s 503A of the Act. Neither of the applicants was provided with a copy or details of that information.

Section 503A(2) of the Migration Act relevantly provides that the Minister cannot be required to divulge certain information to any person or to a court – that is, information that:

- is relevant to an exercise of power under s 501
- was communicated by a gazetted agency on condition that it be treated as confidential. (A gazetted agency is a body that deals with law enforcement, criminal

> intelligence or investigation or security intelligence specified in a notice in the *Gazette* and equivalent bodies in any foreign country specified in such a notice; a total of 42 Australian bodies and 285 countries had been specified ([51]).)

The plaintiff commenced a proceeding in the original jurisdiction of the Court seeking a writ of prohibition to stop the Minister acting on the decision to cancel his visa and certiorari to quash that decision. The applicant applied to the Federal Court of Australia under s 476A of the Migration Act, seeking an order setting aside the Minister's decision. That matter was removed into the High Court by order of Gordon J. Both matters proceeded by way of special case, with 5 questions referred to the Full Court of the High Court.

Constitutional issues

The central issue for the High Court was whether s 503A(2) is invalid on the ground that it either:

- requires a federal court to exercise judicial power in a manner inconsistent with the essential character of a court or the nature of judicial power
- so limits the right or ability of affected persons to seek relief under s 75(v) of the Constitution as to be inconsistent with the place of that provision in the constitutional structure.

'... it is well accepted that 'laws may regulate the method or burden of proving facts' ([32]), and there is no constitutional principle which requires the courts to be the arbiter of when the public interest requires that admissible evidence should be withheld.'

The High Court's decision

The High Court delivered 2 separate judgments: a joint judgment of Kiefel CJ and Bell, Gageler, Keane, Nettle and Gordon JJ (the plurality); and a separate judgment of Edelman J.

Section 503A(2) is not inconsistent with the character of a court or judicial power

All members of the Court rejected the argument that s 503A(2) requires a federal court to exercise judicial power in a manner inconsistent with the essential character of a court or the nature of judicial power (the plurality at [35]–[37]; Edelman J agreeing at [72]).

The premise for this argument was that 'it is an essential function of courts to find facts relevant to the determination of rights in issue', but, as the Court observed, this premise requires qualification ([29]–[30]). In particular, it is well accepted that 'laws may regulate the method or burden of proving facts' ([32]), and there is no constitutional principle which requires the courts to be the arbiter of when the public interest requires that admissible evidence should be withheld ([35]):

> the question of where the balance may lie in the public interest has never been said to be in the exclusive preserve of the courts, nor has it ever been said that legislation may not affect that balance.

The Court further concluded that '[t]he fact that a gazetted agency and the Minister may control the disclosure of information does not affect the appearance of the court's impartiality' for the purposes of Ch III ([37]).

Section 503A(2) of the Migration Act transgresses a limitation derived from s 75(v)

However, the plurality held that s 503A(2) is invalid for transgressing a limitation derived from s 75(v) of the Constitution ([66]).

Their Honours framed this part of their analysis as requiring a 'return to first principles' ([38]): all power of government is limited by law, and the function of the judicial branch of government is to declare and enforce the law that limits the power of government ([39]). That explains the inclusion of s 75(v) in Ch III of the Constitution, which provides that the High Court has original jurisdiction in all matters 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth', as well as s 77(i) and (iii) which empowers the Commonwealth Parliament to invest equivalent statutory jurisdiction in other courts. The power of a court exercising jurisdiction under these provisions 'is a power to enforce the law that limits and governs the power of that officer' ([42]), which thus 'secures a basic element of the rule of law' ([44]).

From this, the plurality reasoned that where Parliament enacts a law which confers a decision-making power on an officer and then enacts some other provision which affects the ability of a court to review that decision then ([46], emphasis added):

> that other provision must … be invalid if and to the extent that it has the *legal or practical operation* of denying to a court exercising jurisdiction under, or derived from, s 75(v) the ability to enforce the limits which Parliament has expressly or impliedly set on the decision-making power.

The question whether the legal operation or practical impact of a law 'transgresses that constitutional limitation' is 'one of substance, and therefore of degree' ([48]). Thus general secrecy provisions in Commonwealth legislation could not be suggested to be invalid merely because they might operate incidentally in particular circumstances to deny the availability of particular evidence to a court conducting judicial review ([63]). However, here the practical effect of s 503A(2) is to ([52], [64]) prevent the High Court and the Federal Court 'from obtaining access to a category of information which, by definition, is relevant to the purported exercise of the power of the Minister that is under review … [and thus] relevant to the determination of whether or not the legal limits of that power … have been observed':

- irrespective of the importance of the information to that exercise of power; and
- irrespective of the importance of the interest that is sought to be protected by the non-disclosure of the information.

From this the plurality concluded that s 503A(2) 'operates in practice to shield the purported exercise of power from judicial scrutiny' ([53]) and strikes at 'the very heart of the review for which s 75(v) provides' ([65]). That this was so was illustrated by the facts of the 2 matters before the Court: in each case the Minister had regard to protected information both in forming the suspicion that the plaintiff/applicant did not pass the character test and in deciding that it was in the national interest to cancel their visas. Indeed, in the case of the applicant, the Minister only had regard to protected information in forming the suspicion that the applicant did not pass the character test ([58]). And, because of this, whether the Minister acted reasonably in forming the suspicion and exercising the discretion so as to have acted within legal limits 'cannot be known to the Court or to the Federal Court' ([59]).

'… s 503A(2) "operates in practice to shield the purported exercise of power from judicial scrutiny" and strikes at "the very heart of the review for which s 75(v) provides".'

Their Honours found that s 503A(2)(c) was only invalid to the extent it prevented the Minister from being required to divulge or communicate information to the High Court or Federal Court when exercising jurisdiction under s 75(v) of the Constitution (or equivalent) to review a purported exercise of power under s 501, s 501A, s 501B or s 501C to which the information is relevant. They concluded that the invalid application of s 503A(2)(c) was severable and read down the reference to 'court' in s 503A(2)(c) accordingly ([66]).

Consequence was that Minister had not properly exercised power to cancel visas

The plurality then held that the Minister, in taking into account protected information when deciding to cancel the visas, had proceeded on an erroneous understanding of s 503A. That is, the Minister had proceeded on the basis that s 503A was valid in its entirety and operated to prevent the Minister from being required to divulge the protected information to a court engaging in judicial review. That error was 'as to an important attribute of the decision to be made: whether or not the decision would be shielded from review by a court' ([68]). The consequence of this error was that there was a purported, but not real, exercise of power by the Minister ([68]).

Consequently, their Honours ordered writs of prohibition to prevent action on the purported exercises of power by the Minister, and writs of certiorari to quash them ([69]). Their Honours declined to answer the remaining administrative questions concerning the Minister's decision.

Justice Edelman's dissent – no relevant limitation from s 75(v)

Justice Edelman disagreed with the plurality that there is a relevant constitutional limitation to be derived from s 75(v) and would have held s 503A valid in its entirety. His Honour based this on 'two, or possibly three' reasons ([78]), being that the plaintiff's submissions:

- were 'ahistorical' in that they:
  - required 'recognition of a constitutional constraint on judicial review which would have the effect that the Constitution would invalidate legislation which is considerably less extreme than legislation which had existed for more than 150 years before Federation, and which had become a standardised restriction in the mid-nineteenth century'
  - were inconsistent with the recognition by the courts 'for nearly half a century before Federation' that a certificate from the executive, that disclosure would be prejudicial to the public service, was a conclusive basis to resist production of evidence ([80]–[81], [96]–[97], [160], [173])
- did not 'fit' with existing jurisprudence of the Court upholding other limits on judicial review ([85], [98]–[99], [174]–[175])
- possibly faced a 'difficulty of principle' in that the limitation would prevent Parliament from impairing the unreasonableness ground of judicial review, but that ground only arises by implication from the relevant statute ([86], [176]–[178]).

Justice Edelman also disagreed with the plurality's conclusion as to the validity of the Minister's decisions. His Honour rejected the plaintiff's challenge to the Minister's reasoning process in concluding that cancellation was in the national interest ([182]). And his Honour held that the applicant's submissions 'essentially invited this Court to conduct a fresh assessment of the merits of whether the Minister could be satisfied that cancellation of the applicant's visa was in the national interest, which is "largely a political question". Those submissions could not have succeeded even if the information had been disclosed' ([183]).

The Commonwealth's legal team

AGS (Simon Thornton, Niamh Lenagh-Maguire and Andrew Buckland from the Constitutional Litigation Unit, and Emily Nance and Ned Rogers from AGS Dispute Resolution) acted for the Commonwealth Attorney-General and the Minister for Immigration and Border Protection, with the Solicitor-General, Dr Stephen Donaghue QC, Craig Lenehan and Brendan Lim as counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2017/33.html

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Application of State criminal laws in federal jurisdiction

The High Court has unanimously held that s 80 of the Constitution (trial by jury) does not apply to the trial of a criminal offence against a Western Australian statute. This was so, even though the trial took place in federal jurisdiction, because the accused was a resident of New South Wales. The High Court's judgment is likely to become a leading case on the topic of 'federal jurisdiction'.

Rizeq v State of Western Australia
High Court of Australia, 21 June 2017
[2017] HCA 23; (2017) 262 CLR 1; 91 ALJR 707; 344 ALR 421

Background

The appellant, a resident of New South Wales, was convicted in the District Court of Western Australia of 2 offences against s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA) (WA Drugs Act). The jury was unable to reach a unanimous verdict. In consequence, the decisions of 11 of the 12 jurors were taken by the District Court to be a verdict of guilty under s 114(2) of the *Criminal Procedure Act 2004* (WA) (Procedure Act).

The Court of Appeal dismissed an appeal against conviction. The appellant appealed, by special leave, to the High Court.

Constitutional issue

The question before the High Court was whether s 80 of the Constitution applied to the appellant's trial. It is settled law that, in cases in which s 80 applies, an accused cannot be convicted unless the jury returns a unanimous verdict of guilty. A majority verdict is insufficient. Accordingly, if s 80 applied to the appellant's trial then he had been wrongly convicted.

By its terms, s 80 of the Constitution only applies to offences 'against any law of the Commonwealth'. The offence here was against a law of Western Australia. The law of Western Australia permits majority verdicts in criminal trials. On the face of things s 80 had no relevance to the trial of the appellant.

However, in this case, the District Court's jurisdiction to try the appellant did not come from the laws of Western Australia. Instead, the District Court's jurisdiction came from a Commonwealth law: s 39(2) of the *Judiciary Act 1903* (Cth).[1] This jurisdiction is exclusive of any jurisdiction that the District Court of Western Australia would otherwise have had under Western Australian law. The result was that the trial of the appellant was an

1 Subsection 39(2) invests 'the several Courts of the States' (including, relevantly, the District Court of Western Australia) with jurisdiction 'in all matters in which the High Court has original jurisdiction'. The trial of the appellant was such a case. This is because, under s 75(iv) of the Constitution, the High Court has original jurisdiction in all matters 'between a State [here, Western Australia] and a resident of another State [here, the appellant]'.

exercise of 'federal jurisdiction'. ('Federal jurisdiction' is the authority to decide cases that comes from Ch III of the Constitution or Commonwealth law, as opposed to the authority to decide cases that comes from State law.) This was common ground between the parties ([37]).

In that case, did s 80 apply to the trial?

'Although the trial took place by authority of Commonwealth law, it was not a trial of (to use the language of s 80) 'any offence against any law of the Commonwealth'. The offence was still an offence against a law of Western Australia.'

The High Court's decision

The High Court unanimously held that the answer is 'no'. Although the trial took place by authority of Commonwealth law, it was not a trial of (to use the language of s 80) 'any offence against any law of the Commonwealth'. The offence was still an offence against a law of Western Australia. The High Court therefore dismissed the appeal.

Justices Bell, Gageler, Keane, Nettle and Gordon (the plurality) delivered a joint judgment. Chief Justice Kiefel and Edelman J each delivered separate judgments.

Plurality judgment: s 79 operates to fill the gap caused by a lack of State legislative power to confer or govern the powers a court exercises in federal jurisdiction

Some kinds of State laws apply of their own force to a matter in federal jurisdiction

Section 79 of the *Judiciary Act 1903* says that State laws are 'binding on all Courts exercising federal jurisdiction' (save where the Constitution or a Commonwealth statute otherwise provides). Before *Rizeq*, the conventional view was that s 79 is needed to pick up State laws of any and all kinds in order for such laws to apply in federal jurisdiction. Without a provision like s 79, no State law would apply in any case being heard in federal jurisdiction. That could leave a large gap in the applicable law in those cases. Section 79 fixed that by 'picking up' State laws and making them apply as if those State laws were actually Commonwealth laws. That is, by virtue of s 79, State laws apply in federal jurisdiction as 'surrogate Commonwealth law'.

Proceeding on this conventional view, did it not mean that, in the trial of the appellant, s 79 picked up s 6 of the WA Drugs Act and made it apply as 'surrogate Commonwealth law'? If so then the appellant was being tried for an offence 'against a law of the Commonwealth'. So s 80 applied to his trial.

The plurality rejected that analysis. In so doing the plurality also rejected the conventional view of s 79. The plurality held that s 79 does not operate to 'pick up' and apply as 'surrogate federal law' any and all kinds of State laws. The purpose and effect of s 79 is only to pick up certain kinds of State laws: laws that 'confer or govern powers' to be exercised by courts ([87]). Such laws may be contrasted with 'a law having application independently of anything done by a court' ([105]) – for example, a State criminal law that creates a substantive criminal offence. The latter kinds of laws apply of their own force even in federal jurisdiction. They already form part of the 'single though composite body of law' that applies in Australia ([48]). There is no need for s 79 to pick them up. (Indeed, the Commonwealth Parliament 'has no power, express or implied, to impose liabilities or confer rights on persons who are parties to a justiciable controversy merely because the adjudication of that controversy is or has come within' federal jurisdiction ([46]).)

Why is s 79 of the Judiciary Act needed?

Section 79 of the Judiciary Act has a more modest role than the conventional view supposed. Section 79 is directed at a gap in the law which arises from the 'incapacity of State laws to affect the exercise of federal jurisdiction' ([57]).

This incapacity is 'a manifestation of the general incapacity of any Parliament or legislature other than the Parliament of the Commonwealth to affect the exercise of federal jurisdiction' ([58]). A State parliament has 'no power to command a court as to the manner or exercise of federal jurisdiction conferred on or invested in that court' ([61]).

The plurality explained that s 79 fills this gap by picking up State laws and applying them as Commonwealth law in cases that are being heard in federal jurisdiction ([87]):

> By making State laws that are 'binding' on courts also binding on courts exercising federal jurisdiction, s 79 of the Judiciary Act takes the text of State laws conferring or governing powers that State courts have when exercising State jurisdiction and applies that text as Commonwealth law to confer or govern powers that State courts and federal courts have when exercising federal jurisdiction.

Their Honours concluded that the purpose of s 79 is fulfilled by 'aligning s 79's description of State laws as "binding" on courts with the gap in the law governing the exercise of federal jurisdiction which exists ... by reason of the absence of State legislative power to govern what a court does in the exercise of federal jurisdiction' ([90]).

In reaching this conclusion, the plurality held that the scope of s 79 is not resolved by reference to the 'sometimes elusive' distinction between procedure and substance ([83]). Instead, the scope of s 79 is more usefully identified by reference to the distinction between 'the "jurisdiction" and a "power" that a court is required or permitted to use in the execution of jurisdiction' ([84]). Section 79 is directed to laws dealing with the latter.

... the scope of s 79 is more usefully identified by reference to the distinction between 'the "jurisdiction" and a "power" that a court is required or permitted to use in the execution of jurisdiction'. Section 79 is directed to laws dealing with the latter.

Application to the appellant's case

The plurality held that s 6(1)(a) of the WA Drugs Act was 'a law having application independently of anything done by a court' ([105]). The provision applied to prohibit the defendant's conduct independently of any exercise of jurisdiction. As a result, s 6(1)(a) was outside the operation of s 79 of the Judiciary Act. Therefore, the appellant was not tried for an 'offence against any law of the Commonwealth'. Section 80 of the Constitution was not engaged.

Kiefel CJ: s 79 operates in relation to laws 'directed to courts'.

Chief Justice Kiefel dismissed the appeal on a similar basis. Her Honour held that s 79 'fills the gap created by any absence of Commonwealth laws which provide a court with powers necessary for the hearing and determination of a matter and the presence of State laws of this kind which cannot operate of their own force in federal jurisdiction' (at [16]).

As did the plurality, Kiefel CJ rejected reliance on distinctions between procedure and substance for an understanding of the operation of s 79 ([19]). Her Honour emphasised the distinction between laws dealing with the 'rights and duties of persons' on the one hand, and laws dealing with the regulation of matters coming before the courts on the other ([20]ff). The purpose of s 79 is 'to fill the gaps created by a lack of Commonwealth

law governing when and how a court exercising federal jurisdiction is to hear and determine a matter and the inability of a State law to apply directly to that court whilst exercising federal jurisdiction' ([32]; see also [20]–[23]).

Edelman J: the preferable construction of s 79 is that it picks up only laws that 'govern' or 'regulate' the powers a court exercises as part of its authority to decide.

Edelman J also dismissed the appeal. His Honour began by describing 4 competing constructions of s 79. The first construction, for which the appellant argued, is that, where a State court exercises federal jurisdiction, s 79 picks up all statutory laws of the State and applies them as laws of the Commonwealth ([115]). The second construction is that s 79 applies to 'statutory laws which confer powers on courts or which *govern* or *regulate* a court's powers', which his Honour took to be the construction favoured by the rest of the Court ([116]). The third construction is that s 79 applies to 'statutory laws which govern or regulate the powers that a court (in this case, a State court) exercises as part of its authority to decide' ([120]). Finally, the fourth construction is that s 79 applies to 'laws concerning procedure rather than substantive laws' ([122]).

His Honour rejected the fourth construction and, for broadly similar reasons to those provided by the other members of the Court, rejected the first construction ([125]–[180]). That left the second and third as the only viable constructions. As s 6(1)(a) would not be picked up by s 79 under either construction, this was sufficient to dismiss the appeal ([111]). However, his Honour went on to say that the third construction was preferable to that favoured by the rest of the Court ([198]) for reasons relating to the text, context and purpose of s 79 ([183]–[187]), constitutional restrictions ([188]–[191]) and principles of conflict of laws relating to the applicable law ([192]–[197]).

The Commonwealth's legal team

AGS (Andrew Buckland, Simon Thornton and Emily Kerr of the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor-General, Dr Stephen Donaghue QC, Kristen Walker QC and Graeme Hill as counsel.

The text of the decision is available at:

http://austlii.edu.au/au/cases/cth/HCA/2017/23.html

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State parentage laws do not apply in determining who is a parent under the Family Law Act

The High Court unanimously held that, under the *Family Law Act 1975* (Cth), the appellant is a 'parent' of his biological daughter, who was conceived via an artificial conception procedure. The Court overturned the judgment of the Full Court of the Family Court, which had held that the question of whether the appellant was a 'parent' must be determined by reference to an irrebuttable presumption in s 14 of the *Status of Children Act 1996* (NSW) (State Act). The High Court held that the Full Family Court erred in finding the relevant State provision was 'picked up' by s 79 of the *Judiciary Act 1903* (Cth), instead holding that the Family Law Act was complete on its face and therefore inconsistent with the application of the State presumption in the proceeding.

Masson v Parsons
High Court of Australia, 19 June 2019
[2019] HCA 21; (2018) 93 ALJR 848; 368 ALR 583

Background

The appeal arose from an application brought under Pt VII of the *Family Law Act* for parenting orders concerning 2 children, referred to as 'B' and 'C'. B is the biological child of the appellant and the first respondent. She was conceived by artificial conception. The appellant is listed as B's father on her birth certificate and has provided material and emotional support to her throughout her life ([3]). B and C live with the first and second respondents, who wished to relocate to New Zealand with B and C. The appellant opposed the relocation on the grounds that it would make it impossible for him to maintain a relationship with B (and C). On this basis he applied for parenting orders in relation to B (and C) under the *Family Law Act*.

In the High Court, the critical issue was whether the appellant is a 'parent' of B under the *Family Law Act*. The answer to this turned in part on whether, in Pt VII proceedings under the *Family Law Act*, B's parentage was governed by an 'irrebuttable' parentage presumption in s 14(2) of the State Act. Section 14(2) provides that, if a woman becomes pregnant by means of artificial conception using sperm obtained from a man who is not her husband, the man is presumed not to be the father of any child born as a result of the pregnancy (State presumption). Section 15 of the State Act provided that the State presumption was irrebuttable. Accordingly, if it applied in the proceeding, the State presumption would have meant that the appellant was not B's parent.

Constitutional issue

The Full Court of the Family Court had held that s 79 of the *Judiciary Act* picked up and applied the State presumption in the case. In the High Court, the central constitutional question was whether the State presumption was a law of a kind which s 79 could pick up and, depending on the answer to this question, whether the Family Law Act 'otherwise provided' for the purposes of s 79 or was inconsistent with the State presumption for the purposes of s 109 of the Constitution. The first and second respondents primarily submitted that the State presumption was picked up by s 79 ([35]) and that the test for determining whether a Commonwealth law 'otherwise provides' within the meaning of s 79 of the *Judiciary Act* is narrower than the test for inconsistency under s 109 of the Constitution. By contrast, the appellant contended that the State presumption was not a law of the kind to which s 79 applied and that, whether or not that was the case, the Family Law Act otherwise provided or was inconsistent with the State presumption ([40], [42]).

The High Court's decision

The High Court unanimously held (Edelman J writing separately) that the appellant was B's 'parent' within the meaning of the Family Law Act. This was because:

a. the irrebuttable parentage presumption in the State Act was not a law of the kind able to be 'picked up' and applied in federal jurisdiction by s 79 of the Judiciary Act ([39], [72])

b. the State presumption could not apply of its own force in the Pt VII proceedings, as it was inconsistent with the Family Law Act and therefore inoperative to that extent due to s 109 of the Constitution ([51]–[52], [72])

c. on the proper construction of the Family Law Act, 'parent' bears its ordinary contemporary meaning as modified by the Act and, in the circumstances of this case, the appellant fell within that meaning ([27], [55], [73]).

Section 79 does not pick up 'irrebuttable' presumptions

The Court unanimously held that irrebuttable presumptions in State legislation are not laws which can be 'picked up' by s 79 of the Judiciary Act.

The joint judgment (Kiefel CJ and Bell, Gageler, Keane, Nettle and Gordon JJ) reaffirmed the reasoning in *Rizeq v State of Western Australia* (2017) 262 CLR 1, stating that s 79(1) of the Judiciary Act 'is not directed to, and … does not add to or subtract from, laws which are determinative of the rights and duties of persons as opposed to the manner and exercise of jurisdiction' ([30]). Their Honours held that the State law in this case was not one 'relating to evidence or otherwise regulating the exercise of jurisdiction' ([34]). Rather, the irrebuttable State presumption was properly characterised as 'a conditional rule of law determinative of the parental status of the persons to whom it applies which operates independently of anything done by a court' ([39]; see also [34]). Therefore, the State law was not one 'to which s 79(1) of the Judiciary Act is capable of applying' ([39]).

Justice Edelman expressed different views about the kinds of laws to which s 79 of the Judiciary Act is directed ([60]–[63]). However, his Honour ultimately agreed that the State presumption was not a law of a kind capable of being picked up by s 79 ([69], [72]).

The State presumption is inconsistent with the Family Law Act

While the State presumption was not a law able to be picked up by s 79 of the Judiciary Act, the joint judgment affirmed that, subject to the operation of s 109 of the Constitution, it was part of the 'single composite body of law operating throughout

the Commonwealth' ([50]). As such, the State presumption applied 'of [its] own force in federal jurisdiction as a valid law of the State of New South Wales unless and to the extent that [it was] rendered inoperative by reason of s 109 of the *Constitution* as inconsistent with a valid law of the Commonwealth' ([49] and [50]; Edelman J also held that s 14(2) 'is a law that applies of its own force' ([72]).

The joint judgment considered the Family Law Act in detail ([26]–[27], [44]–[48]) and concluded that the Commonwealth legislative scheme for determining who is a parent under the Act was 'complete upon its face' and had 'left no room' for the State irrebuttable presumption. In this way, the Family Law Act contained an 'implicit negative presumption that nothing other than what it provides with respect to parentage is to be the subject of legislation' ([45]).

'... the Commonwealth legislative scheme for determining who is a parent under the Act was "complete upon its face" and had 'left no room' for the State irrebuttable presumption.'

The State presumption was, therefore, inconsistent with the Family Law Act and inoperative in proceedings under that Act due to s 109 of the Constitution ([51]–[52], Edelman J agreeing at [72]).

'Parent' in the Family Law Act bears its ordinary contemporary meaning unless the Act indicates otherwise

The joint judgment held that, although the Family Law Act 'contains no definition of "parent" as such, a court will not construe a provision in a way that departs from its natural and ordinary meaning unless it is plain that Parliament intended it have some different meaning' ([26]). Their Honours discerned no such intention in the Act. Rather, it was 'implicit [in the text and structure of the Act] that the *Family Law Act* proceeds from the premise that the word "parent" refers to a parent within the ordinary meaning of that word except when and if an applicable provision of the *Family Law Act* otherwise provides' ([27]). Accordingly, their Honours held that the question of whether a person is a parent of a child is one 'of fact and degree to be determined according to the ordinary, contemporary Australian understanding of "parent" and the relevant circumstances' ([29]; see also [44]).

The Court then considered whether the appellant fell within the 'ordinary and natural meaning' of 'parent'. The joint judgment found that it was not necessary to reach a concluded view on the outer boundary of the meaning of 'parent' ([29]). For example, it was not necessary to decide whether, in circumstances of an artificial conception procedure, a person who 'does no more than' donate their genetic material falls within the ordinary meaning of 'parent' under the Family Law Act ([55]). Ultimately, the joint judgment held that in the circumstances of the case there was no reason to doubt the trial judge's conclusion that the appellant was a parent within the ordinary meaning of that word ([55]).

The joint judgment also considered s 60H of the Family Law Act, which concerns children (such as B) born as the result of carrying out an artificial conception procedure. The first and second respondents had argued that s 60H should be read 'exhaustively', with the effect that it would have excluded the appellant from being a parent. On this construction, they argued, the State presumption could operate consistently with the Family Law Act. The Commonwealth Attorney-General argued that the text and context of s 60H did not support the section being given an exhaustive construction that would, by negative implication, preclude the appellant from being a parent. The joint judgment accepted the Attorney-General's argument and held that s 60H is 'not exhaustive of

the persons who may qualify as a parent of a child born as a result of an artificial conception procedure' ([26]; see further at [28]).

The tests for s 109 inconsistency and when a Commonwealth law 'otherwise provides' are the same

While it was not strictly necessary for the Court to address the issue ([41]), the joint judgment (with which Edelman J agreed at [72]) clarified that the meaning of the expression 'otherwise provided' in s 79 of the Judiciary Act is equivalent to the concept of inconsistency in s 109 of the Constitution. This was because there was no reason to construe 'otherwise provided' as 'importing a more stringent test [for when inconsistency will arise] than the terms of s 109 of the *Constitution*, within their respective spheres of application' ([43]). Rather, equivalence between the 2 tests for contrariety between Commonwealth and State laws would maximise the 'coherence of the body of law applicable in federal jurisdiction' ([43]).

It followed from this analysis that, even if the State presumption were a law of the kind that might be applied by s 79 of the Judiciary Act, the Family Law Act would have 'otherwise provided' within the meaning of s 79 so as to prevent the State presumption being 'picked up' and applied in this case ([48]). This was for the same reasons that the Family Law Act was inconsistent with the State presumption for the purposes of s 109 of the Constitution ([51]).

The Commonwealth's legal team

AGS (Andrew Buckland, Simon Thornton and Emily Kerr from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor-General, Dr Stephen Donaghue QC, and Brendan Lim as counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA//2019/21.html

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High Court rejects challenge to Australian Marriage Law Postal Survey

On 7 September 2017 the High Court unanimously rejected 2 urgent legal challenges to the conduct and funding of the Australian Marriage Law Postal Survey (the Postal Survey).

The Postal Survey was a voluntary survey of all Australians on the Commonwealth Electoral Roll on the question: 'Should the law be changed to allow same-sex couples to marry?'

The High Court upheld the constitutional validity of s 10 of the *Appropriation Act (No 1) 2017–2018* (Cth) (the Appropriation Act). Section 10 contains a longstanding feature of Appropriation Bills known as 'the Advance to the Finance Minister' (previously known as 'the Advance to the Treasurer'). The High Court also made various rulings on the correct construction and operation of s 10.

Wilkie v Commonwealth
Australian Marriage Equality Ltd v Cormann
High Court of Australia, 28 September 2017
[2017] HCA 40; (2017) 263 CLR 487; 91 ALJR 1035

Background

On 9 August 2017 the Treasurer issued a direction to the Australian Statistician (the ABS Direction) under s 9 of the *Census and Statistics Act 1905* (Cth) (the Statistics Act). The ABS Direction required the Australian Statistician to collect 'statistical information' from all Australians on the Commonwealth Electoral Roll on their views as to whether or not the law should be changed to allow same-sex couples to marry. The ABS Direction was framed in such a way that it was optional, not compulsory, for the people surveyed to express a view on the question.

The means chosen for collecting this statistical information was a postal survey. The survey came to be known as 'the Australian Marriage Law Postal Survey'. The Australian Bureau of Statistics (ABS), with assistance from the Australian Electoral Commission (AEC), was to mail out a survey form together with instructions and a reply-paid envelope to every person aged 18 years and older on the Commonwealth Electoral Roll as at 24 August 2017. The survey form was to ask the question: 'Should the law be changed to allow same-sex couples to marry?'

The Finance Minister made a determination under s 10 of the Appropriation Act to provide additional funding ($122 million) to the ABS to conduct the Postal Survey (Finance Minister's Determination).

On 10 August 2017, 2 challenges were brought to the conduct and funding of the Postal Survey. Both proceedings were heard together on an expedited basis. The first challenge was brought by 3 plaintiffs: Andrew Wilkie MP; PFLAG Brisbane Inc (an incorporated association which advocated on issues of human rights and equality in law for gay and lesbian people), and an elector who lives in a same sex-relationship and who is a long-term advocate for 'rainbow families' (the Wilkie proceeding). The second challenge was brought by Australian Marriage Equality Ltd and Greens Senator Janet Rice (the AME proceeding).

The plaintiffs variously challenged:

- the constitutional validity of s 10 of the Appropriation Act – the mechanism which was being used to provide funding for the Postal Survey
- the lawfulness of any expenditure of the $122 million provided by the Finance Minister's Determination
- the validity of both the ABS Determination and the Finance Minister's Determination on the basis that each was, on administrative law grounds, ultra vires the relevant statute under which each was made.

The defendants were, variously, the Commonwealth, the Finance Minister, the Treasurer, the Australian Statistician and the Australian Electoral Commissioner (the latter two entered submitting appearances). The Attorney-General of the Commonwealth intervened in the AME proceeding.

The High Court's decision

Standing

In both the Wilkie and the AME proceedings the Commonwealth parties argued that the plaintiffs lacked standing to seek any of the relief that they claimed. The Court declined to rule on this argument.

The Court said that '[n]o doubt because of the speed with which the proceedings came to be heard' none of the various issues that went to the standing (or lack thereof) of the plaintiffs 'was adequately explored in argument … the inadequacy of the argument on standing made it inappropriate in the circumstances to address standing' ([56], [58]).

Constitutional validity of the Advance to the Finance Minister

The Consolidated Revenue Fund (CRF) is established by s 81 of the Constitution. All moneys that the Commonwealth receives must be paid into it. Section 83 of the Constitution says that the Commonwealth may withdraw moneys from the CRF only if an Act of the Parliament authorises an appropriation. Such appropriations are found in (amongst other statutes) Appropriation Acts, which Parliament enacts every year.

By s 12 of the Appropriation Act, 'The Consolidated Revenue Fund is appropriated as necessary for the purposes of this Act'. Relevant purposes were set out in (inter alia) ss 7 and 8. Those sections said that various amounts specified in Sch 1 to the Act 'may be applied' for various kinds of governmental expenditures described there (and in other parts of the Act). As recorded in s 6 of the Act, '[t]he total of the items specified in Schedule 1 is $88,751,598,000'.

Additional to that $88.75 billion is a figure of '$295 million' mentioned in s 10(3). To understand the relevance of this additional amount, it is necessary to refer to s 10 as a whole. Most of the litigation in both proceedings centred on s 10:

10 Advance to the Finance Minister

(1) This section applies if the Finance Minister is satisfied that there is an urgent need for expenditure, in the current year, that is not provided for, or is insufficiently provided for, in Schedule 1:

...

(b) because the expenditure was unforeseen until after the last day on which it was practicable to provide for it in the Bill for this Act before that Bill was introduced into the House of Representatives.

(2) This Act has effect as if Schedule 1 were amended, in accordance with a determination of the Finance Minister, to make provision for so much (if any) of the expenditure as the Finance Minister determines.

(3) The total of the amounts determined under subsection (2) cannot be more than $295 million.

It is a well-established rule that 'there cannot be appropriations in blank, appropriations for no designated purpose, merely authorizing expenditure with no reference to purpose' (*Attorney-General (Victoria) v Commonwealth* (1945) 71 CLR 237 at 253 (Latham CJ)). Rather, '[a] n appropriation must always be for a purpose identified by Parliament, albeit that '[i]it is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified' ([71]).

'It is a well-established rule that "there cannot be appropriations in blank, appropriations for no designated purpose, merely authorizing expenditure with no reference to purpose" (*Attorney-General (Victoria) v Commonwealth* (1945) 71 CLR 237 at 253 (Latham CJ))'

The Wilkie proceeding plaintiffs argued that s 10 of Appropriation Act was invalid because it violated this rule. They argued that s 10 purported to confer power on the Finance Minister to unilaterally alter the Appropriation Act so as to supplement 'by executive fiat' the amount appropriated by Parliament in Sch 1. The Wilkie proceeding plaintiffs argued that, by enacting s 10, Parliament 'transgressed that constitutional limitation, abdicated its legislative responsibility and impermissibly delegated its power of appropriation to the Finance Minister' ([72]).

The Court concluded, first, that the applicants' argument was founded on a 'fundamental misconstruction' ([86]). Neither s 10 nor the making of a determination under it brings about any appropriation from the CRF. It is a different provision, s 12, that actually appropriates money. That includes appropriating money for the purposes of s 10. Section 10 itself appropriates nothing. The Court described the operation of s 12 as follows ([88]–[89]):

> Section 12 operated on and from the commencement of *Appropriation Act No 1 2017–2018* as an immediate appropriation of money from the Consolidated Revenue Fund for the totality of the purposes of the Act. Section 12 so operated as an immediate appropriation of the amount of $295 million specified in s 10(3) in the same way as it operated as an immediate appropriation of the amount of $88,751,598,000 noted in s 6 to be the total of the items specified in Sched 1 ...
>
> The power of the Finance Minister to make a determination under s 10(2) of *Appropriation Act No 1 2017–2018* is not a power to supplement the total amount that has otherwise been appropriated by Parliament. The power is rather a power to allocated the whole or some part of the amount of $295 million that is already appropriated by s 12 operating on s 10(3).

Secondly, addressing the '[p]assing scepticism' ([91]) that has from time to time been expressed as to how the Advance to the Finance Minister could be reconciled with the constitutional requirement for an appropriation to be for a legislatively determined purpose, the Court said that 'the degree of specificity of purpose of an appropriation is for Parliament to determine' ([91]). The 'constitutional requirement for Parliament to determine the purpose of an appropriation cannot be so constraining of legislative options as to ignore "practical necessity"' ([92]). So, the Court concluded, to appropriate by s 12 of the Appropriation Act the amount specified in s 10(3) is to appropriate that amount for a purpose which Parliament has lawfully determined may be carried out ([94]).

'[The] constitutional requirement for Parliament to determine the purpose of an appropriation cannot be so constraining of legislative options as to ignore "practical necessity". '

Expenditure for the 'ordinary annual services of Government'

The long title of the Appropriation Act is 'An Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government, and for related purposes'. The phrase 'ordinary annual services of the Government' comes from ss 53 and 54 of the Constitution. Section 54 provides that '[t]he proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation'.

It has long been recognised that ([63]):

> Each of ss 53, 54 and 56 of the Constitution is a 'procedural provision governing the intra-mural activities of the Parliament' in respect of which 'this Court does not interfere'. A failure to comply with any one or more of them 'is not contemporaneously justiciable and does not give rise to invalidity of the resulting Act when it has been passed by the two House of Parliament and has received the royal assent'.

The AME proceeding plaintiffs argued that the use of the phrase 'ordinary annual services of the Government' in the long title of the Appropriation Act changed this. It had the effect of imposing a limitation on the power to spend money made available under s 10. The AME proceeding plaintiffs said that funding for the Postal Survey provided for by s 10 could not be characterised as funding for the ordinary annual services of the Government.

The Court rejected the premise of the argument ([125]):

> Language drawn from ss 53 and 54 of the Constitution in the long title of an Appropriation Act cannot sensibly be interpreted as operating to convert the non-justiciable constitutional conception of the ordinary annual services of the Government into some justiciable but undefined statutory conception of the ordinary annual services of the Government.

The statutory description in the long title of the Appropriation Act does no more than signify the agreement of the House of Representatives and the Senate that the Appropriation Act is for the ordinary annual services of the Government. The statutory language has no justiciable content ([125]).

The Court seemed to accept that, in principle, parliamentary practice may be relevant to the construction of an Appropriation Act. For example, if parliamentary practice showed that an Appropriation Act for the ordinary annual services of the Government is never intended to appropriate money for a new policy, the Court seemed to accept that the Act would be construed accordingly ([126]). However, no such parliamentary practice was shown to currently exist ([127]–[128]). The Court noted that the inferences sought to be drawn from correspondence passing between ministers and Senate officers

on this subject would provide an insufficient foundation for drawing a statutory implication which would confine the operation of s 10 to expenditure that a court might characterise as expenditure other than on new policies ([127]–[128]).

Statutory construction of s 10 of the Appropriation Act

The plaintiffs also argued that, by operation of the ordinary rules of administrative law, the Finance Minister's Determination was invalid because it failed to satisfy the preconditions in s 10(1). Of particular significance were the preconditions that the Finance Minister be 'satisfied that there is an urgent need for expenditure' – a need that was 'was unforeseen until after the last day on which it was practicable to provide for it in the Bill for this Act before that Bill was introduced into the House of Representatives'. In dealing with this argument the Court had to expound upon the proper construction of s 10.

The Finance Minister's satisfaction

The casting of the statutory precondition by reference to the Finance Minister's 'satisfaction' invokes an 'established drafting technique' ([98]). The Court relied significantly on extrinsic material that illuminated the drafting history of s 10: advice of the Attorney-General's Department provided in 1979 and further in 1988 ([104]). These advices indicated that the statutory criteria for the enlivening of s 10 ('urgent' and 'unforeseen' need) were intended to be criteria whose existence must be established not objectively but, rather, by reference to the subjective satisfaction of the Finance Minister (albeit a subjective satisfaction that had to be properly formed according to the rules of administrative law – for example, reasonably – and by reference to relevant criteria, a correct understanding of the statute and so on).

'The Court relied significantly on extrinsic material that illuminated the drafting history of s 10: advice of the Attorney-General's Department provided in 1979 and further in 1988.'

The meaning of 'need'

In addition to having a reasonable satisfaction made on a correct understanding of the law, the Finance Minister must also be satisfied that there is a 'need' for expenditure in the current fiscal year that is not provided for or is insufficiently provided for in Sch 1 of the Act. The Court rejected the plaintiffs' argument that the need must arise from some source external to Government. The nature of Government expenditure is incompatible with importing such a limitation: 'Even where expenditure might be responsive to some external circumstance, the incurrence of that expenditure will be the result of an internal decision in which options, consequences and competing priorities will be weighed' ([112]).

The meaning of 'urgent'

Urgency in this case is in the context of 'the ordinary sequence of annual Appropriation Acts' – that is, in a fiscal year ([113]). The Court framed the statutory test as follows ([113]):

> [T]he question for the Finance Minister to weigh is why the expenditure that is needed in the current fiscal year and that is not provided for, or is insufficiently provided for, in the relevant Schedule to Appropriation Act No 1 cannot await inclusion in Appropriation Act No 3, or (if the time for inclusion of the expenditure within Appropriation Act No 3 has already passed) why it might not be included in an Appropriation Act No 5.

The meaning of 'unforeseen'

The test to be applied here is whether the expenditure remained unforeseen until after the last day on which it was practicable to provide for it in the Bill for the Appropriation Act. Whether some other expenditure directed to achieving the same or a similar result could have been foreseen by the executive government or whether the actual payments to be made might have been foreseeable other than by the executive government is not the correct question ([120]).

Validity of the Finance Minister's Determination

The plaintiffs submitted that the Finance Minister erred in law by conflating the statutory question of his satisfaction of the urgency of the expenditure with the separate question of his satisfaction as to the expenditure being unforeseen. The Court referred to the fact that an affidavit sworn by the Finance Minister that was in evidence, unchallenged by the plaintiffs, made clear that he had considered separately the questions of whether the expenditure was urgent and unforeseen ([132]). That affidavit 'displaced' any question about the soundness of the reasoning of the Finance Minister that might otherwise have arisen from the Explanatory Statement that accompanied the Finance Minister's Determination.

The Court rejected further challenges to the Finance Minister's reasoning as to why he was satisfied the expenditure was unforeseen. The Court held that the Minister correctly identified that the expenditure was unforeseen on the last day on which the Bill containing the Schedule could include the expenditure (5 May 2017) and that it was not unreasonable for the Finance Minister to conclude it was not possible for any minister to foresee the conduct of a postal survey becoming Government policy as at 5 May 2017 ([137]).

Validity of the ABS Direction

The Court rejected the Wilkie proceeding plaintiffs' submission that the ABS Direction exceeded the power of the Treasurer under s 9(1)(b) of the Statistics Act. It was argued that the information directed to be collected did not fit the statutory description of 'statistical information'.

This argument, which had 2 strands, was given short shrift by the Court ([142]):

> One strand of the argument sought to draw a dichotomy between a 'vote' or 'plebiscite', on the one hand, and the collection of 'statistical information', on the other. The dichotomy is false. The only legally relevant question is whether the Statistics Direction directed the collection of 'statistical information'. What it directed might well also be described as a 'vote' or a 'plebiscite'. That, or any other, alternative characterisation is irrelevant to its validity'.

The second strand was to the effect that the term 'statistical information' in the Statistics Act, properly construed, excluded information about personal opinion or belief. This argument was untenable. Under it '[t]he Court, apparently, was to ignore the fact that the ABS had in practice collected a wide range of data concerning opinions and beliefs in the administration of the Statistics Act since at least the 1960s' ([145]). The true position was that 'information about personal opinion or belief, including information as to the proportion of persons holding a particular opinion or belief, is and always has been "statistical information"' ([146]).

The plaintiffs put an additional argument – that the information to be collected was not 'in relation to' any of the matters prescribed by regulations made under the Statistics Act as matters in relation to which the Minister may direct the Australian Statistician to collect 'statistical information'. The Court held that the information to be collected

'was plainly "in relation to" each of the subject-matters referred to in the items in the table in s 13 of the Statistics Regulation as "marriages", "Law" and "the social … characteristics of the population"' ([147]).

The authority of the AEC

The plaintiffs in the Wilkie proceeding also argued that s 7A of the *Commonwealth Electoral Act 1918* (Cth) (the Electoral Act), in empowering the AEC to make 'arrangements for the supply of goods or services', confers a 'power' on the AEC which is incapable of being exercised outside the 'functions' of the AEC identified in s 7 of the Electoral Act. Those functions, it was said, do not extend to allowing the AEC to have a role in a postal survey. The Court rejected this, noting that making and honouring arrangements under s 7A is itself one of the functions of the AEC in s 7(1)(a) of the Electoral Act ([150]).

Following the decision

The survey proceeded, and 12,727,920 people participated in it. On 15 November 2017 the Australian Statistician announced that, in response to the question 'Should the law be changed to allow same-sex couples to marry?', 61.6% of respondents said 'yes' and 38.4% of respondents said 'no'. *The Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), which legalised same-sex marriage, came into effect in December 2017.

The Commonwealth's legal team

AGS (Gavin Loughton, Niamh Lenagh-Maguire and Liam Boyle of the Constitutional Litigation Unit) acted for the Commonwealth, the Finance Minister and the Treasurer in the Wilkie proceeding and (with Selena Bateman and Andrew Buckland) for the Finance Minister and the Attorney-General intervening in the AME proceeding. The Solicitor-General, Stephen Donaghue QC, Michael O'Meara, Brendan Lim and Anna Lehane of AGS were counsel for the defendants and the Attorney-General.

The text of the decision is available at:

http://austlii.edu.au/au/cases/cth/HCA/2017/40.html

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State tribunals cannot determine federal matters

The High Court has unanimously held that a State tribunal that is not a 'court of a State' within the meaning of Ch III of the Constitution cannot exercise judicial power in any of the matters dealt with in ss 75 and 76 of the Constitution; instead, such matters can only be conclusively determined by courts.

As a result, the High Court unanimously dismissed these appeals from the New South Wales Court of Appeal and held that certain provisions of the *Civil and Administrative Tribunal Act 2013* (NSW) (CAT Act) were invalid to the extent that they purported to confer jurisdiction upon the New South Wales (NSW) Civil and Administrative Tribunal (NCAT) in relation to matters between residents of different States (s 75(iv)). A majority of the Court (Kiefel CJ and Bell, Keane and Gageler JJ) did so on the basis that, for any of the matters listed in ss 75 and 76 of the Constitution, Ch III of the Constitution, by implication, prevents a State from conferring jurisdiction on a State tribunal that is not a 'court of the State'.

Burns v Corbett; Burns v Gaynor; Attorney-General for NSW v Burns; Attorney-General for NSW v Burns; State of NSW v Burns
High Court of Australia, 18 April 2018
[2018] HCA 15; (2018) 92 ALJR 423; 353 ALR 386

Background

Mr Burns, a resident of NSW, brought complaints in NCAT and its predecessor the Administrative Decisions Tribunal (ADT). The complaints were against residents of Queensland (Mr Gaynor) and Victoria (Ms Corbett) and alleged that each had engaged in homosexual vilification contrary to the *Anti-Discrimination Act 1977* (NSW) (AD Act). It was common ground that NCAT would exercise judicial power in resolving the complaints and the proceedings thus came within the subject matter of s 75(iv) of the Constitution – namely, 'matters ... between residents of different States'. It was also accepted that NCAT was not a 'court of a State' within the meaning of Ch III of the Constitution.

The NSW Court of Appeal had held that NCAT did not have jurisdiction to hear and determine the complaints. The NSW Attorney-General and Mr Burns appealed this decision to the High Court. The Commonwealth Attorney-General was a respondent to the appeals, having intervened in the NSW Court of Appeal.

In the High Court, consistent with the Commonwealth's longstanding position, the Commonwealth Attorney-General argued that NCAT did not have jurisdiction either because:

- for any of the matters identified in ss 75 and 76 of the Constitution, Ch III of the Constitution, by implication, prevents a State from conferring judicial power on a State tribunal that is not a 'court of the State' (the Ch III implication)
- alternatively, by investing State courts with federal jurisdiction in ss 75 and 76 matters, s 39 of the *Judiciary Act 1903* (Cth), in combination with s 109 of the Constitution, renders inoperative State laws investing jurisdiction in those same matters in State *tribunals*.

Constitutional provisions

Chapter III of the Constitution deals with the federal judicature. It relevantly:

- vests the judicial power of the Commonwealth in the High Court, federal courts and 'such other courts as [the Commonwealth Parliament] invests with federal jurisdiction' (s 71)
- empowers the Parliament to '[invest] any court of a State with federal jurisdiction' in any or all of the 9 subject matters set out in ss 75 and 76 of the Constitution (s 77(iii))
- empowers the Parliament to make the jurisdiction of federal courts in any of those 9 subject matters 'exclusive of that which belongs to or is invested in the courts of the States' (s 77(ii))
- confers jurisdiction on the High Court to hear appeals from any 'court exercising federal jurisdiction' (subject to exceptions prescribed by Parliament) (s 73(ii)).

The subject matters (or heads) of federal jurisdiction set out in ss 75 and 76 of the Constitution include matters in which the Commonwealth is a party (s 75(iii)) and matters between residents of different States (s 75(iv)). Shortly after federation, the Commonwealth Parliament exercised its powers under s 77 of the Constitution to exclude the State jurisdiction of, and to generally confer federal jurisdiction on, 'the several Courts of the States' in all such matters (ss 38 and 39 of the *Judiciary Act 1903*).

The issue in this appeal was whether, within this framework, a State body that was not a court could exercise *State* jurisdiction (and thus State judicial power) to determine a matter within a head of federal jurisdiction.

The High Court's decision

The High Court delivered 5 separate judgments: a joint judgment of Kiefel CJ and Bell and Keane JJ (the plurality); and separate judgments of Gageler J, Nettle J, Gordon J and Edelman J.

The plurality and Gageler J – accepting the implication in Ch III of the Constitution

The plurality accepted the Ch III implication, stating ([2]):

> Considerations of constitutional text, structure and purpose compel the conclusion that a State law that purports to confer jurisdiction with respect to any of the matters listed in ss 75 and 76 of the Constitution on a tribunal that is not one of the courts of the States is inconsistent with Ch III of the Constitution, and is, therefore, invalid.

Their Honours held that the provisions of Ch III 'exhaustively identify the possibilities for the authoritative adjudication of matters listed in ss 75 and 76' ([3]). As the provisions of Ch III do not contemplate the adjudication of the matters identified in ss 75 and 76 by an organ of State government that is not a 'court of a State', the adjudication of those matters by such a body is implicitly proscribed by Ch III ([3]). In reaching this conclusion the plurality drew on the approach of the High Court to the interpretation of Ch III in the seminal case of *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (*Boilermakers*), whereby 'the statement of what may be done is taken to deny that it may be done otherwise' ([45]). Thus, just as *Boilermakers*

established that it was implicit in Ch III that the Commonwealth could only confer Commonwealth judicial power on Ch III courts, it followed from the same interpretative approach that Ch III also impliedly denies the possibility that 'any matter referred to in ss 75 and 76 might be adjudicated by an organ of government, federal or State, other than a court referred to in Ch III' ([45]). In short, 'Ch III recognises no other governmental institution [other than a court] as having the potential to exercise adjudicative authority over the matters listed in ss 75 and 76' ([45]). And because s 73 guarantees an appeal to the High Court from any court exercising federal jurisdiction, the Ch III implication 'ensures that adjudication in respect of all such matters [listed in ss 75 and 76] occurs consistently and coherently throughout the federation' ([49]; see also [53]).

In finding the Ch III implication existed, the plurality rejected arguments based on the existence of State tribunals exercising judicial power at or around federation, including in matters between residents of different States or colonies. Those arguments 'failed to recognise the historical context, and the associated purpose, of Ch III' in entrusting *courts* to determine disputes between residents of different States ([56]). Further, the existence of such bodies 'cannot be decisive of the true operation of Ch III' ([63]). Their Honours noted that the now well-established *Boilermakers* implication makes the distinction between courts and tribunals 'of vital importance' for the purposes of Ch III ([63]).

'... the now well-established *Boilermakers* implication makes the distinction between courts and tribunals "of vital importance" for the purposes of Ch III.'

Because the plurality found the Ch III implication existed, it was not necessary to consider the s 109 argument in dismissing the appeals ([2]–[5]).

Gageler J's approach

Justice Gageler also accepted that the drawing of the Ch III implication was 'warranted as a structural implication from Ch III' ([68]). The implication was needed to 'ensure the effective exercise of the legislative powers conferred on the Commonwealth Parliament by s 77(ii) and (iii) of the Constitution' to produce the result that the exercise of judicial power with respect to the subject matter listed in ss 75 and 76 ([68], [96]–[97]):

- occurs only under the authority of Commonwealth law
- occurs only in a body that meets the 'constitutionally mandated' minimum characteristics of independence and impartiality required of a Ch III 'court'
- gives rise to a judgment or order that is appealable directly to the High Court in accordance with s 73(ii) of the Constitution.

Critically, Gageler J held that neither s 77(ii) nor s 77(iii) 'permit[ted] the Commonwealth Parliament to exclude the adjudicatory authority of State tribunals that are not State courts' ([76]–[79]). Thus, absent the Ch III implication, a State Parliament could 'circumvent' the Commonwealth's power to exclude the State jurisdiction of a State court to decide a matter within a head of federal jurisdiction by conferring that same jurisdiction on a State tribunal instead ([99]).

In reaching this conclusion, Gageler J placed significant weight on the importance of s 73(ii) to the constitutional structure of Ch III ([97]–[100]). For his Honour, the appeal mechanism under s 73(ii) provides an appeal 'on all questions of fact and law arising in a matter within federal jurisdiction' ([98]). This allows the High Court, in its appellate jurisdiction, to do 'complete justice' in determining a matter under appeal ([98]). This 'automatic constitutional consequence', his Honour reasoned, would be 'undermined to a significant extent were a State Parliament able to confer State jurisdiction with

respect to a matter identified in ss 75 or 76 on a State tribunal that is not a State court' ([99]). The State tribunal would not need to have the 'constitutionally mandated' minimum characteristics of independence and impartiality required of a Ch III court and would not need to be subject to the 'constitutional consequence' of a s 73 appeal to the High Court.

In accepting the Ch III implication, his Honour recognised that history is important to constitutional interpretation ([107]) but held that the issue in this case could not be resolved by consideration of historical detail of State practices around federation ([108]). His Honour emphasised that 'on federation, everything adjusted' ([112]). The fact that a particular adjustment (in this case, the Ch III implication) was not immediately understood and implemented by these historical State bodies does not mean that it is not constitutionally warranted ([112]).

As already noted, a critical step in Gageler J's reasoning was that the Commonwealth lacked legislative power to exclude the State jurisdiction of State tribunals in all ss 75 and 76 matters. On this basis he also rejected the s 109 argument ([92]–[93]).

Minority approach: Nettle, Gordon and Edelman JJ rejecting the Ch III implication but accepting s 39(2) of the Judiciary Act rendered the State law inoperative

Justices Nettle, Gordon and Edelman all separately rejected the Commonwealth's Ch III implication argument (Nettle J at [137], Gordon J at [176], Edelman J at [205]). Their Honours all held that the text and structure of the Constitution (including, importantly, the terms of s 77(ii)), without the enactment of Commonwealth legislation, could not impliedly exclude the State jurisdiction of State courts in all ss 75 and 76 matters (Nettle J at [137], Gordon J at [176]–[179], Edelman J at [218]).

For these judges, the historical practices of State bodies around federation posed an obstacle to accepting that the Ch III implication existed (Nettle J at [134], Gordon J at [185]–[187]). This obstacle was particularly significant for Edelman J (see [225]–[237]).

Both Nettle and Gordon JJ accepted the Commonwealth's s 109 argument (thus largely endorsing the reasoning of the NSW Court of Appeal) and found that s 39(2) of the Judiciary Act, by operation of s 109 of the Constitution, renders inoperative State laws which confer jurisdiction on State tribunals in ss 75 and 76 subject matters (Nettle J at [146], Gordon J at [192]–[193]). Nettle J held that this operation of s 39(2) was supported by an implied area of Commonwealth legislative power under s 77(iii) ([141]). Gordon J held that this operation was supported by either s 77(ii) and (iii) or s 51(xxxix) ([195]–[196]).

Justice Edelman found that ss 38 and 39 of the Judiciary Act operate to exclude State laws from conferring jurisdiction on State tribunals in all of the matters in ss 75 and 76 of the Constitution (including s 75(iv)) ([256]–[257], [259]) and were supported by s 77(ii) of the Constitution. His Honour held that the invalidity 'in the sense of the inoperability' of these State laws could also be seen 'as arising directly from the exclusionary effect required by s 77(ii)' of the Constitution ([254]).

The Commonwealth's legal team

AGS (Andrew Buckland, Simon Thornton, and Selena Bateman from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor-General, Dr Stephen Donaghue QC, Craig Lenehan and Julia Freidgeim as counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2018/15.html

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NT WHS legislation not inconsistent with Commonwealth civil aviation law

By a majority of 6:1, the High Court has held that ss 19 and 32 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) (NT WHS Act) are not inconsistent with Commonwealth civil aviation statutes.

Work Health Authority v Outback Ballooning Pty Ltd
High Court of Australia, 6 February 2019
[2019] HCA 2; (2019) 93 ALJR 212

Background

In 2013, a passenger embarking on a hot air balloon operated by Outback Ballooning Pty Ltd (Outback) had her scarf caught in the inflation fan of the balloon. She died. The Northern Territory Work Health Authority (the WHA) (the appellant) filed a criminal complaint against Outback. The complaint alleged that Outback had failed to comply with the duty imposed by s 19(2) of the NT WHS Act. Section 19(2) requires that a person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of persons 'is not put at risk from work carried out as part of the conduct of the business or undertaking'. The effect of s 32 of the NT WHS Act is to render a failure to comply with s 19(2) a criminal offence in certain circumstances.

Constitutional issues

Outback's argument before the High Court was that Commonwealth civil aviation statutes – comprising the *Air Navigation Act 1920* (Cth), the *Civil Aviation Act 1988* (Cth) (CA Act), the *Civil Aviation Regulations 1988* (Cth) and some Civil Aviation Orders (together, the Civil Aviation Law) – are inconsistent the NT WHS Act to the extent that the latter applies to workplaces involving aircraft. The result was said to be that the NT WHS Act is, by operation of s 109 of the Constitution, invalid in its application to workplaces involving aircraft. Therefore (it was argued), Outback Ballooning could not be prosecuted under the NT WHS Act for the accident.

The Attorneys-General for the Commonwealth, Queensland, Tasmania, Victoria and Western Australia intervened in the case in support of the WHA.

The High Court's decision

Chief Justice Kiefel, Bell, Keane, Nettle and Gordon JJ (the plurality) delivered a joint judgment, holding ss 19 and 32 of the NT WHS Act are not inconsistent with the Civil Aviation Law. In a separate judgment, Gageler J reached the same conclusion but for different reasons.

Justice Edelman dissented, holding that ss 19 and 32 of the NT WHS Act are inconsistent with the Civil Aviation Law.

The approach to determining s 109 inconsistency: 'direct' vs 'indirect' inconsistency and the importance of finding the legislature's intention

The plurality endorsed the well-known distinction between 'direct' and 'indirect' inconsistency between State and Commonwealth laws:

a. 'Direct' inconsistency may arise where a State law would alter, impair or detract from the operation of the Commonwealth law ([32]).

b. 'Indirect' inconsistency may arise where a law of the Commonwealth is to be read as expressing an intention to say completely, exhaustively or exclusively what shall be the law governing the particular conduct or matter to which its attention is directed ([33]).

The plurality said that '[w]here an indirect inconsistency is said to arise, the primary focus will be on the Commonwealth law in order to determine whether it is intended to be exhaustive with respect to an identified subject matter' ([34]). Such an intention might possibly be inferred from 'the detailed nature of the scheme'. In any event, '[a]ny provision which throws light on the intention to make exhaustive or exclusive provision on a subject is to be considered', as is any provision suggestive of a contrary intention ([35]).

Justice Gageler

Justice Gageler described the distinction between 'direct' and 'indirect' inconsistency as 'conceptually problematic but stubbornly persistent' ([67]). He preferred (at [71]) the 'more complete explanation' offered by Aickin J in *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 280:

> The two different aspects of inconsistency [ie direct and indirect inconsistency] are no more than a reflection of different ways in which the Parliament may manifest its intention that the federal law, whether wide or narrow in its operation, should be the exclusive regulation of the relevant conduct. Whether it be right or not to say that there are two kinds of inconsistency, the central question is the intention of a particular federal law.

To this end, Gageler J sought to rehabilitate the centrality of legislative intention. In his view, '[g]roups acting deliberatively according to established procedures can meaningfully be seen to have intentions, distinct from the subjective intentions of their constituent individuals' ([73]). The responsibility of a court 'is to adopt an authoritative construction of legislated text which accords with the imputed intention of the enacting legislature' ([77]).

Justice Edelman

Justice Edelman accepted that the concepts of 'direct' and 'indirect' inconsistency have a long-established usage in both case law and legislation. Thus, while the distinction 'can mislead', he would not abolish it. Rather, he would accept that both concepts 'involve the State or Territory law altering, impairing or detracting from the Commonwealth law'; they 'are simply attempts to describe different ways that this can occur' ([105]).

Whether there was s 109 inconsistency in this case

Before the High Court, Outback alleged an indirect inconsistency between the Civil Aviation Law and the NT WHS law. Six members of the Court disagreed.

The plurality

The plurality proceeded on the basis of Outback's description of the subject matter of the Civil Aviation Law: 'the prescription and enforcement of the standards of safety in the conduct of air navigation or air operations' ([8] and [36]).

Their Honours rejected the proposition that the Civil Aviation Law deals completely, exhaustively or exclusively with that 'very broad' subject matter. The plurality said that 'it could hardly be said that it [the CA Act] purports to lay down an entire legislative framework covering all aspects of the safety of persons who might be affected by operations associated with air-craft, including on-ground operations' ([38]). Instead, their Honours considered that the CA Act was intended to be 'supplementary to or cumulative upon' State and Territory law ([39]).

In so holding, the plurality referred to a number of aspects of the regime which pointed against it being exclusive, including:

- the existence of other Commonwealth laws that apply to aviation security ([41]–[42])
- that the provisions of the CA Act that Outback principally relied on to argue for the exclusivity of the Civil Aviation Law imposed only general duties. Those provisions did not, in their terms, purport to deal specifically with the particular activities that were the subject of the present prosecution ([47])
- statements of intention that standards and directions given under the Act are not to be taken as inconsistent with Territory law ([48])
- statements in explanatory material suggesting the provisions were intended to operate within a framework of other laws ([56]).

Justice Gageler

For Gageler J, the comprehensive nature of the *Civil Aviation Regulations 1988* confirmed the ambition of the CA Act to provide a single regulatory framework for the prescription and enforcement of standards ([80]–[81]). However, his Honour considered that the terms of s 28BE of the CA Act gave rise to a carve-out from the otherwise exhaustive operation of the Civil Aviation Law. (Another way of putting it might have been to say that s 28BE gave rise to a carve-out from the 'field' otherwise covered by the CA Act.) This carve-out pertains to the subject matter of s 28BE of the CA Act: 'the general requirement to exercise reasonable care and diligence in the operation of an aircraft' ([84]). Section 28BE(5) said that s 28BE 'does not affect any duty imposed by, or under, any other law of the Commonwealth, or of a State or territory, or under the common law'. Therefore, the CA Act could not be regarded as exhaustive on that subject.

The distinction erected by his Honour appears to be between 'precise' standards (eg a rule that an aircraft must not fly lower than a specific altitude) and broad and relatively non-specific duties on the other (eg a duty to take reasonable care). His Honour considered that the Civil Aviation Law is intended to be exhaustive as to the former ([82]) but not as to the latter.

Accordingly, his Honour held that the broad and general duty in s 19 of the NT WHS Act could coexist with the specific prescriptions of the Civil Aviation Law.

Justice Edelman

Justice Edelman held that:

1. The CA Act is exhaustive as to the prescription and enforcement of standards of safety in civil aviation.
2. The NT WHS Act deals with that the same subject matter when applied to businesses involved in air navigation.

His Honour was therefore of the view that there is a s 109 inconsistency between them.

Justice Edelman agreed with Gageler J that the subject matter of the Civil Aviation Law is the prescription and enforcement of standards of safety in the conduct of civil air navigation in, to or from Australia ([110]). However, unlike the plurality and Gageler J, Edelman J considered that on this subject matter the Civil Aviation Law was exclusive and ousted the operation of ss 19 and 32 of the NT WHA Act in relation to that subject matter. (This was notwithstanding s 28BE(5) of the CA Act: see [137] and [140]).

In reaching his conclusion, his Honour placed significant weight on the historical emphasis that international and domestic civil aviation law has placed on the need for 'uniformity' in air navigation standards ([113]–[121]) and the good practical reasons why uniformity is desirable. Justice Edelman also considered the text of the Civil Aviation Law in detail and came to the view that it prescribes a regime for safety of air navigation that requires 'an exclusive and unitary, uniform approach because every person involved in an air operation must be able to identify the set of rules governing the safety of that operation, and must be able to identify the person with whose directions he or she is required to comply' ([123]).

His Honour then turned to the question of whether there are any relevant subject matters that do not fall within the exclusive coverage of standards of safety in air navigation and determined that:

1. Commonwealth legislation on work health and safety should be read down as not extending to matters directly involving standards of safety in air navigation ([148]).
2. The general law duty of care and torts generally do not fall within the coverage of standards of safety in air navigation. His Honour considered that the CA Act regime, as it is concerned with safety, 'has a different purpose and regulates a different subject matter from one that is concerned with the violation of individual rights' (ie tort law) ([151]).
3. The general criminal law and air security do not fall within the coverage of standards of safety in air navigation ([153]–[154]).

Having identified the subject matter of the CA Act and its exclusivity, his Honour turned to construing the NT WHS Act. His Honour accepted that there would be areas within that subject matter which would not intrude into the subject matter of the safety of air navigation. However, where the business relevant to the NT WHS Act involves air navigation, Edelman J held there is an inconsistency ([165]).

The Commonwealth's legal team

AGS (Gavin Loughton, Danielle Gatehouse and Lara Strelnikow from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor-General, Dr Stephen Donaghue QC, Zelie Heger and Thomas Wood as counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2019/2.html

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Australian Electoral Commission validly authorised to publish 'two-candidate-preferred' results before close of all polls

In 2 judgments (Gageler J writing separately), the High Court unanimously held that the *Commonwealth Electoral Act 1918* (Cth) (Electoral Act) authorises the publication of the identity of the candidates selected for the indicative 'two-candidate-preferred count' (TCP count) and the progressive results of that count (collectively, TCP information) before polls have closed in all Divisions across Australia. The plaintiffs' failure to establish a sufficient factual foundation for their constitutional challenge to the statutory authorisation to publish TCP information prior to the close of all polls meant that the constitutional issue was unanimously held not to properly arise.

Palmer v Australian Electoral Commission
High Court of Australia, 14 August 2019
[2019] HCA 24; (2019) 93 ALJR 947

Background

Two-candidate-preferred count

The AEC conducts the TCP count as part of its scrutiny of votes in a House of Representatives election, pursuant to the requirements of s 274(2A) of the Electoral Act. Prior to polling day, the AEC selects 2 candidates (the TCP candidates) for each Division who, in the opinion of the relevant Australian Electoral Officer (AEO), are most likely to be elected in that seat. On election night, after polls have closed and following the first preference count in each Division, the AEC conducts the TCP count for that Division. Essentially, the TCP count involves notionally allocating the ballots of all other candidates to the TCP candidate for whom a higher preference has been expressed. This gives an indication of which of the 2 TCP candidates is more likely to win in the Division.

The AEC has a clearly established practice for the publication of TCP information. Once the polls in a Division have closed at 6 pm local time on election night, the AEC makes public the identity of the 2 TCP candidates selected for that Division ([18], [20]) and, via various means, publishes the progressive results of the Division's TCP count as soon as they become available ([19]). Because of the different time zones across Australia, the effect of the AEC's practice is that the TCP information for Divisions on Australian Eastern Standard Time (AEST) becomes publicly available while the polls are still open in electorates in other time zones (including in Western Australia, South Australia and the Northern Territory).

Plaintiffs' arguments

The plaintiffs in this proceeding, Clive Palmer and 3 candidates nominated by the United Australia Party (UAP) for the House of Representatives in the 2019 federal election, challenged the time at which the AEC publishes the TCP information. The basis for the plaintiffs' challenge to publication of the TCP information before polls closed in all parts of Australia was that:

- such publication was not authorised by the Electoral Act, including because publication created the appearance that the AEC was not impartial or was favouring one or more of the selected TCP candidates ([3]) (the statutory argument)
- even if purportedly authorised by statute, publishing the TCP information while polls remained open in any part of Australia would 'impermissibly distort the voting system' in a manner that compromised the mandate of direct and popular choice in ss 7 and 24 of the Constitution ([3]) (the constitutional argument).

Critically, the plaintiffs did not produce any evidence that quantified the effect (if any) that publishing TCP information when polls were still open in some Divisions would have on the electoral choices of voters who were yet to vote in those Divisions. Instead the plaintiffs relied on 3 academic articles about voter choice from the United States, France and Denmark, submitting that these articles supported a proposition that voters who were yet to cast their vote 'may' be influenced by the release of election results elsewhere.

The Commonwealth Attorney-General intervened in the proceeding and made written and oral submissions. The defendants (the AEC, the Electoral Commissioner and the AEO for each State, the Northern Territory and the Australian Capital Territory) filed submitting appearances ([4]). After the hearing on 6 and 7 May 2019, the High Court unanimously dismissed the plaintiffs' application but reserved its reasons.

The High Court's decision

The High Court delivered 2 separate sets of reasons. Chief Justice Kiefel and Bell, Keane, Nettle, Gordon and Edelman JJ delivered joint reasons, and Gageler J provided separate reasons dealing with the construction of the AEC's power under s 7(3) of the Electoral Act to do 'all things necessary for or in connection with the performance of its functions'.

The plaintiffs failed to establish a factual foundation for their case

For all of the justices, the critical defect in the plaintiffs' case was the lack of a sufficient factual foundation for both their statutory and constitutional arguments ([30], [36], [68]).

The joint judgment identified 3 factual contentions which their Honours said underpinned the plaintiffs' arguments and found that there was a lack of evidentiary support for any of them (see also Gageler J at [67]). Their Honours held that:

- There were no facts supporting a finding that the voting system was 'distorted' in any relevant way by the AEC publishing the TCP information before polls had closed throughout Australia ([36]). The academic articles relied on by the plaintiffs did not demonstrate any relevant effect on voter choice: they were not about the Australian voting system of compulsory preferential voting and did not address the effect of publishing information comparable to TCP information ([32]).
- There was no factual foundation for the contention that the AEC's selection of TCP candidates was inaccurate or misleading. The AEC's selection of TCP candidates was generally accurate; and if, on election night, it appeared that one or both of the

TCP candidates should not have been selected, the AEC's practice was to 'mask' the selection and results so they were not visible to the public ([39]).

- Publishing the TCP information did not constitute the AEC giving its 'imprimatur' to any particular candidate or outcome. As a matter of statutory construction, the TCP count is a prediction after the close of polls: the TCP candidates remain secret until polls are closed, and progressive results are published based on votes cast and counted. Publication does not constitute any expression of opinion by the AEC about the desirability of the results published or any opinion favouring one candidate over another ([40]).

Section 7(3) authorises the AEC's practice in publishing TCP information

All members of the Court held that, pursuant to s 7(3) of the Electoral Act read with the functions set out in s 7(1), the AEC had power to publish TCP information before the close of polls nationally ([43], [59]). In doing so, they rejected the Commonwealth's alternative argument that the provisions which require the AEC to conduct the TCP count – s 274(2A)–(2C) – also implicitly authorise the publication of the TCP information ([43], [59]). Under s 7(1) of the Electoral Act, the AEC's functions include functions that are 'permitted or required' by the Electoral Act (s 7(1)(a)), 'promoting public awareness of election and ballot matters' (s 7(1)(c)) and 'publishing material on matters that relate to [the AEC's] functions' (s 7(1)(f)).

In reaching this conclusion, the joint judgment held, consistently with the statutory framework and legislative history ([48]), that it was open to the AEC to decide that publishing the TCP information as soon as polls closed in a Division was 'necessary and convenient' to be done for or in connection with its functions ([47]). Their Honours found that, once the AEC has the power, 'the issue of how it is preferable for that power to be exercised is not a matter for the Court' ([50]). Questions as to the limits of the AEC's powers in this regard 'do not arise in this case' ([50]).

Furthermore, in light of the plaintiffs' failure to establish that the AEC's publication of TCP information gave rise to an appearance of partiality or conveyed an 'imprimatur', the joint judgment did not find it necessary to consider whether conduct that was or appeared partial would have fallen outside the scope of the power in s 7(3) ([42], [51]).

By contrast, although Gageler J also found that s 7(3) authorised the AEC to publish TCP information before the close of polls nationally ([57], [68]), his Honour considered whether conduct that was, or appeared, partial would be outside the scope of s 7(3). His Honour stated that something could not be 'necessary or convenient' to be done for or in connection with the AEC's functions if that thing departed from the scheme of the Electoral Act ([64]–[65]) and said that conduct which favoured (or gave the appearance of favouring) a particular candidate or party would depart from the Act's scheme. It was fundamental to the scheme of the Electoral Act, inherent in the composition of the AEC and implicit in the nature of the AEC's functions that the AEC be, and appear to be, apolitical or non-partisan ([66]).

Constitutional challenge did not properly arise on the facts

Neither the joint judgment nor Gageler J considered whether the AEC's publication of TCP information would 'impermissibly distort the voting system' in a manner that would compromise the mandate in ss 7 and 24 of the Constitution that senators and members of the House of Representatives be 'directly chosen by the people'. The joint judgment (with Gageler J agreeing at [57]) said that the lack of any factual basis was sufficient, in itself, to reject the plaintiffs' constitutional argument ([52], [55]). The joint judgment noted, in particular, that the lack of evidence that the AEC was giving

its 'imprimatur' or support to TCP candidates meant that the question of 'whether it would be constitutionally problematic for a government agency to endorse or support particular candidates for election' did not arise ([55]).

The Commonwealth's legal team

AGS (Simon Thornton, Tasha McNee, Andrew Buckland and Andrew Chapman from the Office of General Counsel, and Paul Vermeesch and Megan Driscoll from AGS Dispute Resolution) acted for the Commonwealth Attorney-General and the AEC, with the Solicitor-General, Dr Stephen Donaghue QC, Gim del Villar and Sarah Zeleznikow as counsel.

The text of the decision is available at:

http://austlii.edu.au/au/cases/cth/HCA/2019/24.html

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NSW Court of Appeal finds that NCAT is not a 'court of a State'

The New South Wales Court of Appeal (NSWCoA) has held that the NSW Civil and Administrative Tribunal (NCAT) is not a 'court of a State' within the meaning of Ch III of the Constitution but that it exercises judicial power when making termination orders under s 87 of the *Residential Tenancies Act 2010* (NSW) (RT Act). It followed that NCAT did not have jurisdiction to hear and determine the proceedings under appeal – namely, a matter between residents of different States (within the meaning of s 75(iv) of the Constitution) – because it had already been established that only a 'court' can exercise judicial power in matters within ss 75 and 76 of the Constitution.

Attorney-General for New South Wales v Gatsby
Court of Appeal of NSW
[2018] NSWCA 254; (2018) 99 NSWLR 1; 340 FLR 171

Background

In 2015, 2 separate proceedings under the RT Act were commenced in NCAT between residents of different States. One proceeding (the Gatsby proceeding) involved an application for an order terminating a residential tenancy agreement (under s 87 of the RT Act); the other proceeding (the Johnson proceeding) involved an application for orders for various forms of compensation under the RT Act. In both proceedings, the unsuccessful party appealed to the Appeal Panel of NCAT. A question was then raised whether NCAT had jurisdiction to hear and determine the proceedings because they were between residents of different States (the subject matter of s 75(iv) of the Constitution).

The proceedings in NCAT were initially stood over pending the resolution of the NSWCoA's decision in *Burns v Corbet*t [2017] NSWCA 3. That case had proceeded on the agreed basis that NCAT was not a 'court of a State', and the NSWCoA had held that only a 'court of a State' could exercise judicial power to determine matters falling within ss 75 and 76 of the Constitution, including matters 'between residents of different States' (s 75(iv)). (This decision was affirmed subsequently by the High Court in *Burns v Corbett* [2018] HCA 15 but on different grounds. See above at p 28.)

After the NSWCoA's decision in *Burns v Corbett*, the Appeal Panel found that NCAT was validly exercising judicial power when making the orders under the RT Act, because it was a 'court of a State' for Ch III purposes. The Appeal Panel therefore determined that NCAT had jurisdiction in both proceedings.

The NSW Attorney-General (who was joined as a party in NCAT) appealed this decision to the NSWCoA. The Attorney-General of the Commonwealth then intervened in the appeal. The issues determined on appeal were whether the Court had jurisdiction under s 83(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) (CAT Act) to determine the appeals; whether NCAT was exercising judicial power when terminating a tenancy agreement under s 87 of the RT Act; and whether NCAT is a 'court of a State' for Ch III purposes.

The Court of Appeal's decision

(1) NCAT exercised judicial power when deciding whether to terminate residential tenancy agreements under s 87 of the RT Act

The first constitutional issue was whether NCAT was exercising judicial power in making an order under s 87 of the RT Act terminating a residential tenancy agreement under the RT Act ([128]).

The Court analysed the section as conferring power on NCAT to determine, first, whether a contract (the residential tenancy agreement) existed; secondly, whether that contract was breached; and, thirdly, whether the breach was sufficient in the circumstances to justify the termination of the agreement, taking into account a range of factors. Such a power has been traditionally thought to be a judicial power ([126]; see also [134] as to the width of the discretion). Also important was the fact that NCAT had power to enforce its own orders under s 121 of the RT Act ([127]) and that a conclusion that the power conferred by s 87 is judicial was consistent with previous authority ([129]–[136]).

The Court therefore concluded that, when exercising powers under s 87 of the RT Act, NCAT was exercising judicial power ([128] (Bathurst CJ); [197] (Beazley P); [198]–[200] (McColl JA); [279] (Leeming JA)). This reasoning aligned closely with the Commonwealth's submissions on this issue.

(2) NCAT is not a 'court of a State' for Ch III purposes

The Court unanimously held that, while NCAT had many features of a 'court' and exercised judicial power in some cases (including in these proceedings), NCAT was not a 'court of a State' within the meaning of Ch III of the Constitution ([184]–[192] (Bathurst CJ); [197] (Beazley P); [198], [201]–[205] (McColl JA); [223]–[228] (Basten JA); [290] (Leeming JA).

> '... while NCAT had many features of a 'court' and exercised judicial power in some cases (including in these proceedings), NCAT was not a 'court of a State' within the meaning of Ch III of the Constitution ...'

Bathurst CJ identified 2 different approaches put by the parties as to the appropriate methodology to be applied to determine the question of whether NCAT is a 'court of a State'. The first approach was to determine whether NCAT had the 'indispensable' features of a 'court'. The alternative approach was to construe the legislation establishing NCAT to determine whether the State legislature intended to create the body as a 'court'.

His Honour considered that the same result followed on either approach ([173]) and set out a number of factors which, while not necessarily individually decisive, when taken in combination led to the 'clear conclusion' that NCAT is not a 'court' ([184]. Those were, in ascending order, that ([186]–[188]):

- NCAT is not designated as a 'court of record'
- NCAT is not composed 'predominantly of judges', as it included a considerable number of non-lawyers and part-time appointments
- NCAT's members do not have security of tenure and are subject to the possibility of removal at the executive's discretion, and there is a question as to the impartiality of its 'general members' appointed under s 13(6) of the CAT Act.

President Beazley agreed with Bathurst CJ ([197]), as did McColl JA, who added that the issue of 'greatest significance' was that NCAT did not satisfy the minimum requirements of independence and impartiality ([202]).

Justice Basten similarly held that, to determine whether a body is a 'court', one must 'consider the structure, membership and functions of the body, as defined by State law'. His Honour further noted that the title of the body is relevant but not necessarily decisive; and, here, the fact that NCAT is titled as a 'tribunal' signals that the New South Wales Parliament intended to establish a body without some characteristics associated with courts ([223]–[225]; see also [227]). As to the members of NCAT, their tenure, terms of appointment and requisite qualifications counted against NCAT being a 'court' ([226]) (as these factors 'significantly entrench' the degree of independence of the body from the executive). And, as to NCAT's functions, while these include some traditionally exercised by courts, it was relevant that NCAT also took over the functions of a multitude of bodies not described as courts.

In contrast, Leeming JA focused on the following features of the CAT Act that clearly indicated the State's legislative intention not to establish NCAT as a 'court'.

First, it was established that the Administrative Decisions Tribunal of NSW (ADT), the precursor to NCAT, was not a 'court' for Ch III. The fact that the ADT's jurisdiction had been given to NCAT, that former members of the ADT became members of NCAT, and the absence of anything in the CAT Act to suggest that NCAT was to be a 'court of a State' pointed towards a legislative intention that NCAT was similarly intended not to be established as a 'court' ([291]–[292]).

Secondly, following the decision of the NSWCoA in *Burns v Corbett*, the New South Wales Parliament enacted Pt 3A of the CAT Act. The effect of Pt 3A was to confer jurisdiction on the New South Wales District and Local Court to decide disputes between residents of different States that would previously have (purportedly) been within NCAT's jurisdiction. Justice Leeming considered that this was the 'clearest legislative statement' that NCAT is 'not a court for the purposes of s 77(iii) as the premise of Pt 3A is that NCAT lacks authority to determine diversity proceedings' ([299]).

Unlike the other member of the Court, Leeming JA did not place much weight on considerations of independence and impartiality. His Honour noted that the case law relating to independence and impartiality was developed in the context of challenges to State legislation conferring incompatible functions on bodies which were unquestionably courts of a State (*Kable* challenges). These principles did not necessarily answer the anterior question whether a body is a 'court of a State', because it is clear as a matter of principle that a State can choose to create a procedurally fair, independent and impartial *tribunal* to exercise judicial power or to create a *court* to do the same thing (there being no strict separation of judicial power at the State level). Justice Leeming thus held that the substantial error in the Appeal Panel's reasoning was that it had approached the question of whether NCAT was a 'court' by relying on these indicia, formulated in the context of *Kable* challenges, when they 'fall well short' of resolving the issue of whether a State body is a 'court' or a tribunal for Ch III purposes ([301]).

(3) It was unnecessary to decide whether the Queensland Court of Appeal in *Owen v Menzies* was plainly wrong

In *Owen v Menzies* (2012) 293 ALJR 327 the Queensland Court of Appeal held that the Queensland Civil and Administrative Tribunal (QCAT) was a 'court of a State' for Ch III purposes. The NSWCoA held that that decision was distinguishable because QCAT, unlike NCAT, was expressly designated as a 'court of record' ([191] (Bathurst CJ)). Accordingly, it was not necessary for the NSWCoA to decide whether its decision in this case conflicted with the decision in *Owen v Menzies*.

(4) Basten J's proposed alternative approach – NCAT had jurisdiction because there was no 'matter' before it

Justice Basten considered that, subject to certain procedural steps being taken, it would have been open to the Court to find that NCAT had jurisdiction to make an order under s 87 of the RT Act on the basis of a new argument not advanced by any party ([228]–[275]; cf [194]–[195] (Bathurst CJ); [307] (Leeming JA)). That argument appeared to involve the following propositions:

- While it is established that a 'matter' in Ch III of the Constitution means the 'subject matter for determination in a legal proceeding', that is to be understood as a proceeding in a court and not in a tribunal ([233], [239])
- because the rights created by the RT Act are not enforceable in a court, a dispute about those rights is not a 'matter' within the meaning of Ch III ([246]–[248], [250])
- Ch III of the Constitution does not affect the jurisdiction of State tribunals to determine a dispute that is not a 'matter' ([239], [246])
- Therefore, NCAT had jurisdiction to determine the dispute ([250]).

Justice Basten held that this argument was not precluded by the High Court's decision in *Burns v Corbett* ([261]–[274]). Although the High Court had accepted as common ground that the NCAT proceedings that gave rise to the appeals in that case involved a 'matter' within s 75(iv), as this was not in dispute between the parties the High Court may have accepted this assumption without authoritatively deciding it ([263]; [271]).

However, accepting that this was a minority position, Basten JA ultimately agreed with the orders disposing of the appeal ([277]).

The Commonwealth's legal team

AGS (Andrew Buckland, Simon Thornton and Selena Bateman from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor-General, Dr Stephen Donaghue QC, Craig Lenehan and Talia Epstein as counsel.

The text of the decision is available at:

http://austlii.edu.au/au/cases/nsw/NSWCA/2018/254.html

DECISIONS IN BRIEF

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Commonwealth power not limited by foreign law

The High Court unanimously held that the Commonwealth's legislative and executive powers to authorise and take part in an activity in another country are not affected by the lawfulness of the activity under the domestic law of that country. Accordingly, the validity, under Australian law, of the Commonwealth's regional processing and resettlement arrangements in the Independent State of Papua New Guinea (PNG) was not affected by the decision of the Supreme Court of PNG in *Namah v Pato* (2016) SC1497 (*Namah*).

Plaintiff S195/2016 v Minister for Immigration and Border Protection
High Court of Australia, 17 August 2017
[2017] HCA 31; (2017) 261 CLR 622; 91 ALJR 857; 346 ALR 181

Background

After entering the migration zone at Christmas Island, the plaintiff was taken to PNG by Commonwealth officers pursuant to provisions of the *Migration Act 1953*. Once in PNG he became subject to a requirement under PNG law to reside at the Manus Regional Processing Centre (Manus RPC). The Supreme Court of PNG subsequently held in *Namah* that the treatment of people at the Manus RPC contravened provisions of the PNG Constitution and was unsupported by PNG law.

Following that decision the plaintiff commenced this proceeding in the original jurisdiction of the High Court to challenge various Commonwealth actions regarding regional processing and resettlement in PNG. Those actions included:

- entering into a 'Regional Resettlement Arrangement', memorandum of understanding (MOU) and administrative arrangements with PNG under which certain persons would be taken to and accepted by PNG
- contracting with the third defendant, Broadspectrum (Australia) Pty Ltd, to provide relevant services at the Manus RPC
- designating PNG as a regional processing country for the purposes of the Migration Act
- issuing the direction that allowed the plaintiff's transfer to PNG and effecting the actual transfer of the plaintiff to PNG
- more broadly, any action regarding the arrangements in PNG that was undertaken under s 198AD of the Migration Act, and
- any future Commonwealth action to assist in his detention or removal from PNG.

The Commonwealth's actions were undertaken pursuant to either, or both, the Commonwealth's non-statutory executive power conferred by s 61 of the Constitution and the specific statutory powers and duties conferred by ss 198AB(1), 198AD and 198AHA of the Migration Act ([14]–[16]).

The High Court's decision

The High Court observed that a Commonwealth officer's failure to comply with the domestic law of a foreign country may have consequences for that officer under that domestic law and for Australia under international law. There may also be consequences for that Commonwealth officer under Australian law that applies extraterritorially. The Court held, however, that the legislative and executive powers of the Commonwealth are not constitutionally limited by any requirement to comply with international law or the domestic laws of a foreign country. Unless there is an express or implied limitation to that effect imposed by a relevant Commonwealth law, compliance or noncompliance with the domestic law of a foreign country 'has no bearing' on the statutory authority or executive capacity of the Commonwealth or its officers ([20], emphasis added).

'... the legislative and executive powers of the Commonwealth are not constitutionally limited by any requirement to comply with international law or the domestic laws of a foreign country.'

The High Court also dismissed the plaintiff's further argument concerning s 198AHA of the Migration Act. That section applies where the Commonwealth enters into an 'arrangement' with a person or body the regional processing functions of a country (s 198AHA(1)). Where the section applies, it confers capacity and authority on the Commonwealth to do various things in relation to the regional processing functions of that country. The plaintiff argued that neither the Regional Resettlement Arrangement nor the MOU with PNG was an 'arrangement' within the meaning of s 198AHA because PNG did not have lawful authority or capacity (as a matter of PNG law) to enter it – that being said to be the effect of *Namah*.

Given that the Supreme Court of PNG did not hold that PNG's entry into the Regional Processing Arrangement was unlawful, the High Court considered the plaintiff's argument misconceived ([25]). In any event, the definition of an 'arrangement' in s 198AHA specifically encompasses relations that are not legally binding. Even if *Namah* had determined that the arrangements were unlawful, that determination would have no impact on Commonwealth acts undertaken under s 198AHA ([21], [26]–[28]).

The Commonwealth's legal team

AGS (Andrew Buckland and Nerissa Schwarz from the Constitutional Litigation Unit and Andras Markus and Dale Watson from AGS Dispute Resolution) acted for the Commonwealth defendants, with the Solicitor-General, Dr Stephen Donaghue QC, Geoffrey Kennett SC, Anna Mitchelmore and Perry Herzfeld as counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2017/31.html

DECISIONS IN BRIEF

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Mandatory visa cancellation not an exercise of judicial power

The High Court unanimously dismissed the plaintiff's application to quash a decision by a delegate of the Minister for Immigration and Border Protection acting under s 501(3A) of the *Migration Act 1958* (Cth) to cancel the plaintiff's visa, and a decision not to revoke this cancellation decision. The Court held that s 501(3A) does not confer judicial power on the Minister contrary to Ch III of the Constitution.

Falzon v Minister for Immigration and Border Protection
High Court of Australia, 7 February 2018
[2018] HCA 2; (2018) 92 ALJR 201; 351 ALR 61

Background

The plaintiff, a Maltese citizen, arrived in Australia as a child and did not obtain Australian citizenship at any time during his 61 years in Australia. Until 10 March 2016 the plaintiff held an Absorbed Person Visa and a Class BF Transitional (Permanent) Visa, and he had legal status as a lawful non-citizen (s 13(1) of the Migration Act). In 2008, the plaintiff was convicted of a drug trafficking offence and sentenced to 11 years imprisonment with a non-parole period of 8 years. He had previous convictions for drug-related and other offences.

Shortly before the plaintiff was released on parole, a delegate of the Minister cancelled the plaintiff's Absorbed Person Visa under s 501(3A) of the Migration Act. The cancellation decision had the effect that the Minister was taken to also have decided to cancel the plaintiff's other visa (s 501F(3)). Upon his release on parole the plaintiff was then taken into immigration detention under s 189 of the Migration Act.

After unsuccessfully applying to have the cancellation decision revoked, the plaintiff commenced this proceeding in the High Court seeking orders quashing both the cancellation and non-revocation decisions, an order of mandamus requiring his release from immigration detention and a declaration that s 501(3A) is invalid.

Constitutional issue

The central issue for the Court was whether s 501(3A) confers judicial power on the Minister contrary to Ch III of the Constitution. Relevantly, s 501(3A) requires the Minister to cancel the visa of a person who does not pass the character test because of a substantial criminal record and who is serving a full-time custodial sentence.

The plaintiff argued that s 501(3A) conferred judicial power on the Minister in 2 ways:

(1) In its legal operation and practical effect, the provision resulted in or caused his detention for a punitive purpose.

(2) The power under s 501(3A) otherwise took on a judicial character as a result of, among other things, the nature of the criteria which enlivened the duty to exercise it.

The High Court's decision

In 3 separate judgments, the Court held that s 501(3A)

- does not authorise or require detention ([56], [63] (Kiefel CJ and Bell, Keane and Edelman JJ – the plurality); [69], [83] (Gageler and Gordon JJ); [92]–[93] (Nettle J)) and
- does not otherwise confer judicial power on the Minister ([47] (the plurality); [69], [83], [88]–[89] (Gageler and Gordon JJ); [96] (Nettle J)).

The plurality

The plurality observed that the mandatory nature of the visa cancellation under s 501(3A), which operates by reference to certain criminal offending, did not make the power 'punitive in nature or purpose' and therefore judicial ([45]). Rather, the provision constituted a 'legislative judgment' that a class of persons identified by the features of offending and imprisonment should not remain in Australia ([45]; see also [52]). As the plurality stated, 'the deportation of aliens does not constitute punishment' ([47]). Thus, although s 501(3A) required the plaintiff's visa to be cancelled on the grounds of his previous criminal offending, it did not involve the imposition of punishment for an offence and did not involve an exercise of judicial power ([47]). Section 501(3A) provided the basis for the change in the plaintiff's legal status from lawful non-citizen to unlawful non-citizen ([56]). It is this change in status that makes a person liable to detention under s 189 of the Migration Act ([56]). (Similarly, s 501CA of the Migration Act, which provides a process for review of whether a cancellation decision under s 501(3A) should be revoked, does not itself authorise or require detention – s 196 deals with the duration of detention in those circumstances ([57]).)

'... the mandatory nature of the visa cancellation under s 501(3A), which operates by reference to certain criminal offending, did not make the power 'punitive in nature or purpose' and therefore judicial.'

The plurality also rejected the plaintiff's submission that there is a constitutionally guaranteed freedom from executive detention and that restrictions of this alleged freedom must be proportionate ([25]). Their Honours stated that, as Ch III contains 'an absolute prohibition on laws which involve the exercise of the judicial power of the Commonwealth', questions of proportionality 'cannot arise under Ch III' ([32]).

Gageler and Gordon JJ's judgment

Justices Gageler and Gordon dismissed the application on the basis that the plaintiff's contentions were 'untenable' ([69]). This was because the limits on the executive detention of non-citizens are concerned 'only with laws that require or authorise detention of non-citizens' and s 501(3A) did neither ([69], [87]). Their Honours considered the legal effect and practical operation of s 501(3A) in light of the statutory scheme. They observed that the Migration Act provides for the mandatory detention

and removal of unlawful non-citizens in Divs 7 and 8 of Pt 2 ([69], [76], [84]) and that the plaintiff did not challenge these provisions ([69]). They concluded that the power under s 501(3A) is 'administrative in character' and does not involve the 'exclusively judicial function of determining or punishing criminal guilt' ([88]). Furthermore, the fact that avenues for review of a purported decision under s 501(3A) are limited, that rules of natural justice did not apply and that the Minister had a discretion rather than a duty to revoke a decision to cancel a visa did not demonstrate, either separately or together, that the cancellation decision involved an exercise of judicial power ([90]).

Nettle J's judgment

Justice Nettle agreed with the judgment of Gageler and Gordon JJ ([92]) but also addressed the proportionality argument dealt with by the plurality. Noting that there was no constitutionally guaranteed freedom from executive detention so as to require that provisions dealing with the detention and deportation of non-citizens 'must be justified as appropriate and adapted, or proportionate to a non-punitive end', his Honour concluded that there was no role for proportionality analysis in this context ([95]).

The Commonwealth's legal team

AGS (Simon Thornton and Timothy McGregor from the Constitutional Litigation Unit, and Hervee Dejean and Andras Markus from AGS Dispute Resolution) acted for the Commonwealth Attorney-General and the Minister for Immigration and Border Protection, with the Solicitor-General, Dr Stephen Donaghue QC, Anna Mitchelmore SC and Christopher Tran as counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2018/2.html

DECISIONS IN BRIEF

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Parliamentary joint committee has power to direct witnesses to attend hearing

In determining a summons for interlocutory relief, which in substance sought an injunction to restrain or control the exercise of its powers by the Joint Parliamentary Committee on Corporations and Financial Services, Gordon J of the High Court has upheld the power of a parliamentary joint committee to direct witnesses to attend a committee hearing.

Alford & Atkinson v Parliamentary Joint Committee on Corporations and Financial Services
High Court of Australia, 22 November 2018
[2018] HCA 57; (2018) 92 ALJR 1084

Background

The Parliamentary Joint Committee on Corporations and Financial Services is a joint committee of the Houses of the Commonwealth Parliament. In an inquiry into the operation and effectiveness of the Franchising Code of Conduct, the Committee directed the plaintiffs to attend as witnesses before it. The plaintiffs did not wish to attend, so they challenged the power of the Committee to direct their attendance. They also sought an interlocutory order to stay the Committee's direction that required their attendance.

On 22 November 2018, Gordon J dismissed the plaintiffs' interlocutory application with costs. The plaintiffs appeared before the Committee on 27 November 2018 and agreed to discontinue the substantive application on 10 December 2018.

The High Court's decision

Justice Gordon held that no interlocutory relief was warranted because there was no serious question to be tried, and the balance of convenience did not favour granting the relief sought ([5]–[7]). In doing so, Gordon J dismissed each of the plaintiffs' arguments in support of their substantive application, while indicating that this analysis 'should not be construed as acceptance that all of the issues sought to be raised by the plaintiffs were justiciable' ([30]).

Source of power

First, Gordon J held that the Committee has power to direct the plaintiffs' attendance under s 242 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) and relevant parliamentary resolutions ([11]–[14], [35]). Furthermore, Gordon J held that, should it be necessary to supplement the power conferred by the resolutions, a committee of both Houses of the Commonwealth Parliament is a 'committee of each

House' within the meaning of s 49 of the Constitution ([31]–[32]) and that s 49 therefore provides an additional source of power to issue directions to compel witnesses to attend ([15]–[16]).

No basis to find exercise of power invalid

Justice Gordon dismissed the plaintiffs' arguments that, if the Committee otherwise has power, it is nevertheless constrained by the separation of powers under the Constitution ([44]). The directions requiring the plaintiffs to attend did not involve an exercise of judicial power – the Committee does not make any legally binding or final determinations of guilt or innocence ([45]). Furthermore, s 49 of the Constitution provides the Committee with the 'ancient powers, privileges and immunities of the Houses of Parliament' – that is, the coercive authority to summon witnesses and require the production of documents under 'pain or punishment for contempt' ([45]–[47]).

Justice Gordon also rejected arguments based on:

- the principle of legality, finding that it is 'unclear what right the plaintiffs allege is being abrogated' and that, where Parliament has made provision to deal with the protection of witnesses, the principle 'arguably has no work to do' ([48]–[51])
- the implied freedom of political communication, on the basis that the constitutional framework giving rise to the implication includes s 49 of the Constitution ([54]–[55]).

Finally, her Honour concluded that, even if the issues raised were justiciable, they were ill-defined and hypothetical ([30], [57]). In light of this, the plaintiffs had failed to identify any reason why the Court should review the exercise of the Committee's power or any basis for the Court to find the exercise of that power invalid ([56]).

The Commonwealth's legal team

AGS (Simon Thornton, Vanessa Austen and Emily Kerr from the Constitutional Litigation Unit) acted for the Attorney-General, with Stephen Free SC and Zelie Heger as counsel. AGS (Jamie Watts and Jane Lye from AGS Dispute Resolution) acted for the Committee, with Gim del Villar as counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA//2018/57.html

DECISIONS IN BRIEF

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High Court dismisses challenge to parole legislation

The High Court unanimously dismissed a challenge to ad hominem parole legislation and in doing so refrained from deciding an argument which, if successful, would not have affected the plaintiff.

Knight v Victoria
High Court of Australia, 17 August 2017
[2017] HCA 29; (2017) 261 CLR 306; 91 ALJR 824; 345 ALR 560

Background

The plaintiff, Mr Julian Knight, was sentenced in 1988 by the Supreme Court of Victoria to life imprisonment for each of 7 counts of murder and to 10 years imprisonment for each of 46 counts of attempted murder. Under s 17 of the *Penalties and Sentences Act 1985* (Vic), the Court also fixed a minimum term of 27 years during which he was not eligible to apply for parole.

Shortly before he became eligible to apply for parole, the Victorian Parliament amended the parole regime as it applied specifically to Mr Knight by enacting the *Corrections Amendment (Parole) Act 2014* (Vic). This Act inserted new s 74AA into the *Corrections Act 1986* (Vic). The effect of s 74AA is to prevent the Adult Parole Board from ordering Mr Knight's release on parole unless stringent additional criteria are satisfied, including that he be in imminent danger of dying or seriously incapacitated and as a result no longer have the physical ability to harm any person.

Mr Knight challenged the validity of s 74AA on the ground that it substantially impaired the institutional integrity of the Court so as to be incompatible with its role as a repository of federal jurisdiction under Ch III of the Constitution. He argued that:

(1) Section 74AA impermissibly interfered with his initial sentence by replacing the minimum term – a judicial judgment – with a legislative judgment.

(2) Because Victorian judges may be appointed as members of the Adult Parole Board, s 74AA enlists serving judges in a function that is repugnant or incompatible with the exercise of federal jurisdiction.

The High Court's decision

The High Court unanimously held that s 74AA of the Corrections Act did not interfere with the sentences the Supreme Court imposed ([6]): s 74AA could not be distinguished from a similar provision that the High Court previously upheld in *Crump v NSW* (2012) 247 CLR 1 ([25]), there was nothing in s 74AA that contradicted the minimum term, and s 74AA did not did not replace a judicial judgment with a legislative judgment ([29]). Whether or not Mr Knight would be released on parole at the expiration of the

minimum term set by the Victorian Supreme Court was held to be 'outside the scope of the [court's] exercise of judicial power' in imposing the sentences ([28]).

In relation to the second argument, the division of the Adult Parole Board which had been considering Mr Knight's application did not include any members who were currently serving as judges. There was no statutory requirement that it do so. Consequently, the Court held it was unnecessary and inappropriate to determine whether s 74AA would be invalid where the function conferred under that provision might be exercised by a division of the Adult Parole Board that included a serving judge ([6], [37]). This was because, even if it would be in valid in that circumstance, the provision could be read down in accordance with s 6 of the *Interpretation of Legislation Act 1984* (Vic) (the Interpretation Act) so as to have a valid application where a division of the Adult Parole Board did not include a current judge ([36]). As a result, it was 'unnecessary and inappropriate to determine', in this case, whether s 7AA would be invalid in that circumstance ([37]).

In reaching this conclusion the Court held that, like s 15A of the *Acts Interpretation Act 1901* (Cth) (which it mirrored), s 6 of the Interpretation Act would not apply to a provision of another Act where it was displaced by a contrary intention in that Act. A contrary intention would be found where it was evident from the Act that the provision should be wholly invalid if it could not apply to all of the persons, subject matters or circumstances to which it could otherwise have applied on its terms ([35], citing *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502). The Court considered the Corrections Act to manifest no such intention. There was no indication in the Act that the Adult Parole Board should be wholly incapable of performing a function in which a current judge could not participate ([36]).

'There was no indication in the Act that the Adult Parole Board should be wholly incapable of performing a function in which a current judge could not participate.'

The Commonwealth's legal team

AGS (Andrew Buckland, Danielle Gatehouse and Emily Kerr from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General, with the Solicitor-General, Stephen Donaghue QC and Gim del Villar as counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2017/29.html

DECISIONS IN BRIEF

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Plaintiff's conduct rendered it unnecessary for High Court to determine lawfulness of detention

On 13 February 2019, the High Court unanimously held that it was unnecessary to answer the primary questions of law in the special case in proceedings commenced in the Court's original jurisdiction, including as to whether the plaintiff's detention is unlawful on the basis that it is not authorised by ss 189 and 196 of the *Migration Act 1958* (Cth) (the Migration Act).

Plaintiff M47/2018 v Minister for Home Affairs
High Court of Australia, 12 June 2019
[2019] HCA 17; (2019) 93 ALJR 732; 367 ALR 71

Background

The plaintiff arrived in Australia by aeroplane at Melbourne Airport in 2010 without a visa. On entering the migration zone, he became an 'unlawful non-citizen' within s 14 of the Migration Act. The Migration Act relevantly requires that an unlawful non-citizen in the migration zone be detained in immigration detention until they are removed from Australia, deported or granted a visa (ss 189 and 196) ([1]). The plaintiff has been held in immigration detention since his arrival in Australia in 2010 and has exhausted his rights under Australian law to seek a visa authorising his entry ([2]).

The plaintiff commenced proceedings in the original jurisdiction of the High Court seeking a writ of habeas corpus or mandamus requiring his release from custody ([3]). He also sought a declaration that his detention is unlawful on the ground that it is not authorised by ss 189 and 196 of the Migration Act. This was said to be for 2 reasons ([4]):

- First, as a matter of construction, the provisions have ceased to authorise his detention because his removal is not reasonably practicable at all, or in the reasonably foreseeable future.
- Secondly, if the provisions do purport to authorise his detention in those circumstances, they are invalid in their application to him because his continued detention is not sufficiently connected to a constitutionally permissible purpose of executive detention.

The factual premise of both grounds is that 'the inability of the defendants to establish the plaintiff's identity at any time in the future [is] such that there is "currently no practical possibility" of [the plaintiff's] removal from Australia to any other country' ([43]; see also [11]).

The parties agreed a special case, stating questions of law for the opinion of the Full Court and setting out the facts said to be necessary to enable the Full Court to answer those questions. The special case did not contain an agreed fact to the effect that there is

currently no prospect that the plaintiff will be able to be removed from Australia in the reasonably foreseeable future ([9], [44]).

Given the absence of agreement on the factual premise for the plaintiff's arguments, the plaintiff sought to have the Court draw one or more of the following 4 inferences of fact from the special case ([10], [45]):

1) There is no real prospect or likelihood that the plaintiff will be removed from Australia potentially in his lifetime or, alternatively, during his natural life.
2) There is no real prospect or likelihood that the plaintiff will be removed from Australia within the reasonably foreseeable future.
3) The plaintiff's removal from Australia is not practically attainable.
4) The defendants are not presently able to effect the plaintiff's removal within a reasonable period.

The High Court's decision

In 2 separate judgments (Kiefel CJ and Keane, Nettle and Edelman JJ; and Bell, Gageler and Gordon JJ), the High Court unanimously held that 'none of the inferences may be drawn from the facts agreed, and the documents referred to, in the special case' ([12]; see also [49]). In both judgments this conclusion stemmed from the inconsistent nature of the plaintiff's statements regarding his identity (see [41]–[42] and [48]–[49]).

Kiefel CJ and Keane, Nettle and Edelman JJ (the plurality): plaintiff should not be permitted to take advantage of his failure to cooperate

After recounting the plaintiff's factual circumstances, including the different accounts he has given regarding his identity ([18]–[29]), the plurality concluded that 'he has adopted a posture that involves, at best, non-cooperation and, at worst, deliberate obfuscation and falsehood' ([30]). They stated that 'the plaintiff seeks to take advantage of difficulties to which he has contributed to contend that enquiries as to his identity and country of origin have no prospect of success' ([32]) and rejected this attempt 'to turn his falsehoods to his advantage … in accordance with the general disinclination of the courts to allow a party to take advantage of his or her own wrongful conduct' ([34]). Finally, they concluded ([35]):

> That the plaintiff has chosen to adopt a course of non-cooperation involving the deployment of falsehoods also tends to suggest that he may be seeking to hide something which he fears might be discovered if he cooperates with the Department.

The plurality also rejected the plaintiff's contention that the defendants bear the onus in relation to establishing his identity and demonstrating that there is a prospect of removal within a reasonable time ([37]–[40]) and noted that the Department of Home Affairs continued to pursue the possibility of removing the plaintiff from Australia ([36]). In circumstances where the plaintiff had not cooperated, the plurality held that it could not be concluded that 'the pursuit is futile' and accepted that 'the options for the plaintiff's removal have not yet been exhausted' ([36]).

Bell, Gageler and Gordon JJ: assessment of prospects of independently verifying plaintiff's identity not possible in the absence of cooperation

While agreeing with the reasons of the plurality as to the basis for the conclusion that 'the plaintiff has deliberately failed to assist the defendants in their attempts to establish his true identity' ([47]), Bell, Gageler and Gordon JJ focused on the likelihood of the availability of evidence capable of independently verifying any account the plaintiff might now give of his identity and nationality ([48]–[49]). They concluded that, absent

the plaintiff's cooperation, it cannot be known whether evidence might be available to establish the plaintiff's identity and permit an assessment as to the likelihood of the plaintiff's removal ([49]). Accordingly, they held that the inferences on which the plaintiff relied were not open ([49]).

The Commonwealth's legal team

AGS (Simon Thornton and Selena Bateman from the Constitutional Litigation Unit and Andras Markus and Ashlee Briffa from AGS Dispute Resolution) acted for the Commonwealth and the Minister for Home Affairs, with the Solicitor-General, Dr Stephen Donaghue QC, Perry Herzfeld and Zelie Heger as counsel.

The text of the decision is available at:

https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA//2019/17.html

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Referral of proceedings for inquiry and report held valid by the Federal Court

CPB Contractors Pty Ltd v Celsus Pty Ltd (No 2)
Federal Court of Australia, 6 December 2018
[2018] FCA 2112; (2018) 364 ALR 129; 133 ACSR 106

On 6 December 2018, the Federal Court (Lee J) upheld the validity of provisions empowering the Court to refer proceedings to a referee for inquiry and report, holding that s 54A of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) was not contrary to Ch III of the Constitution. That section empowers the Court to refer proceedings to a referee for inquiry and report and to adopt, reject or otherwise deal with the referee's report as it thinks fit.

Justice Lee held that s 54A did not invalidly confer the judicial power of the Commonwealth on referees. Relevantly, a referee is not a delegate of the Court ([60]) and, because a referee's report has no effect unless and until adopted by the Court ([55]), referees do not conclusively quell controversies between parties by making binding determinations of their rights and liabilities. As such, the inquiry and report procedure lacked 'the most basic characteristic of the exercise of judicial power' ([59]).

His Honour also rejected an argument that, in adopting a report, the Court would be acting inconsistently with the requirements of Ch III of the Constitution. Specifically, the respondents sought to argue that the established principles governing the exercise of the Court's discretion to adopt a report impermissibly reduced the judiciary's role in fact-finding to one of uncritically accepting the referee's conclusions ([68]). Justice Lee rejected the argument, stating that there was no constitutionally entrenched requirement that judges subjectively consider all evidentiary material or hear argument on every relevant issue ([70]). There was nothing objectionable about the fact that the Court would be disposed to accept a referee's findings of fact unless it reached a particular level of satisfaction that it should not do so ([71], [74]), including by reference to what evidence was before a referee on an inquiry ([73]).

The Commonwealth's legal team

AGS (Andrew Buckland, Emily Kerr and Shona Moyse from the Constitutional Litigation unit) acted for the Commonwealth, with Stephen Free SC and Patrick Knowles as counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2018/2112.html

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'The Commonwealth' in s 52(i) can include a general law corporation

Construction Industry Training Board v Transfield Services (Australia) Pty Ltd
Supreme Court of South Australia, (Full Court), 17 August 2017
[2017] SASCFC 103; (2017) 128 SASR 475; 323 FLR 166

On 17 August 2017, the Full Court of the Supreme Court of South Australia held that the Australian Rail Track Corporation (ARTC), a company incorporated under the *Corporations Act 2001* (Cth) and wholly owned by the Commonwealth, is 'the Commonwealth' for the purposes of s 52(i) of the Constitution (Kourakis CJ [1]; Stanley J [121]; Nicholson J agreeing [122]). Accordingly, land held by the ARTC as part of an interstate rail network constituted a place acquired by the Commonwealth for public purposes within the meaning of s 52(i) of the Constitution, and construction activity on that land was not subject to a State tax.

'... the fact that the ARTC is a company incorporated under the general corporations law did not prevent it from being "the Commonwealth". Instead the Full Court looked to various indicia to determine whether "the Commonwealth is, or is not, operating through the corporation".'

The Court held that the expression 'the Commonwealth' has the same meaning in s 52(i) as it does in s 114 of the Constitution ([102]; see also [19] referring to s 75 of the Constitution). Thus, references to the 'Commonwealth' should not be narrowly construed ([86]). Whether an entity falls within this description turns on the 'purpose for which the entity was formed' and 'whether the entity exhibits features such that the Commonwealth can be said to be operating in a particular field through the ... entity' ([100]). In separate concurring reasons, Kourakis CJ identified the critical question as being the extent to which the executive government 'can directly or indirectly control the exercise of proprietary rights, powers and interests over and in the place', including 'the right to use ... the place' and to 'dispose of the property' ([25]).

Importantly, the Court held that the fact that the ARTC is a company incorporated under the general corporations law did not prevent it from being 'the Commonwealth' ([107]). Instead the Full Court looked to various indicia to determine whether 'the Commonwealth is, or is not, operating through the corporation' ([109]).

One of the most significant factors was whether the Commonwealth executive exercised ultimate control over the activities and functions of the corporation ([109]–[110]). In relation to a company incorporated at general law, such control could be discerned by looking to both the articles of association and the broader governance

framework applicable to government-owned entities under Commonwealth law ([111], [113]–[117]).

The Court considered the extent of Commonwealth executive control over the appointment, removal and remuneration of the ARTC's directors and chief executive officer; the ARTC's corporate plan; payment of dividends; the auditing of the ARTC's accounts; and the Minister's power to give a general policy direction to the ARTC ([117]). Given the extent of ultimate control, the absence of 'day to day operational control' over the ARTC's business was not determinative ([118]). Rather, the powers of ultimate control over the ARTC indicated that it was 'the emanation by which the Commonwealth discharges the public purpose of providing rail infrastructure' ([117]) and its rail network land 'a place acquired by the Commonwealth for public purposes within the meaning of s 52(i) of the *Constitution*' ([121]).

The Commonwealth's legal team

AGS (David Lewis and Emily Kerr from the Office of General Counsel) acted for the Commonwealth Attorney-General, with Chris Horan QC and Danielle Tucker as counsel.

The text of the decision is available at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASCFC/2017/103.html

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