AUSTRALIAN GOVERNMENT SOLICITOR

Litigation Notes

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Validity of Corporations Cross-Vesting Scheme

Although this case concerned the cross-vesting scheme in the Corporations Law, the decision on the constitutional principles involved is also relevant to the validity of the general cross-vesting scheme. As the High Court was evenly divided, the decision does not conclusively determine the validity of the cross-vesting schemes.

Gould v Brown,
High Court of Australia, 2 February 1998

The High Court was evenly divided (3-3) and, under s.23(2)(a) of the *Judiciary Act 1903*, the decision appealed from (which had upheld the validity of the cross-vesting scheme in the Corporations Law) was therefore affirmed. Chief Justice Brennan and Justices Toohey and Kirby dismissed the appeal from the decision of the Full Federal Court and Justices Gaudron, McHugh and Gummow would have allowed the appeal.

The Commonwealth Attorney-General appeared in the High Court on behalf of the Commonwealth to support the validity of the challenged provisions.

THE CROSS-VESTING SCHEMES

The general cross-vesting scheme established by the *Jurisdiction of Courts (Cross-vesting) Acts 1987* of the Commonwealth and each of the States commenced on 1 July 1988. The corporations cross-vesting scheme included as part of the Corporations Law (which commenced on 1 January 1991) operates in civil matters arising under that law to the exclusion of the general cross-vesting scheme. Its provisions essentially mirror the general scheme.

The purpose of the cross-vesting schemes is to avoid jurisdictional disputes arising in the Australian judicial system. Proceedings commenced in a court covered by the schemes cannot fail for want of jurisdiction, but proceedings commenced in an inappropriate court may be transferred to a more appropriate court.

In *Bankinvest AG v Seabrook* (1988) 90 ALR 407, 408 Street CJ described the operation of the general cross-vesting legislation:

> 'The cross-vesting legislation in effect brings together the eight State and Territory Supreme Courts, the Federal Court and the Family Court into an organisational relationship. Very broadly speaking, the legislation now operative throughout Australia achieves two objectives: first, it enables any one of these courts to exercise the jurisdiction of, and to apply the law that would be applied by, any one of the other nine; secondly, it enables any one of those courts in which proceedings are commenced to transfer them to any one of the other nine.
>
> The introduction of this scheme is a significant move towards providing throughout our nation the services of an integrated court system transcending the boundaries, both geographic and jurisdictional, that have in the past obstructed the courts in meeting the requirements of the Australian public.'

The structure of the two schemes may be illustrated by reference to the provisions of the corporations cross-vesting scheme the validity of which was challenged in the present case. Section 42(3) of the *Corporations (Name of State) Act 1990* enacted by

each State Parliament confers State jurisdiction on the Federal Court. Section 42(3) provides:

> 'Jurisdiction is conferred on the Federal Court with respect to civil matters arising under the *Corporations Law* of (the State).'

Section 56(2) of the *Corporations Act 1989* (Cth) consents to the reception of State jurisdiction by the Federal Court. Section 56 provides:

(1) Nothing in this or any other Act is intended to override or limit the operation of a provision of a law of a State or Territory relating to cross-vesting of jurisdiction with respect to matters arising under the Corporations Law of the State or Territory.

(2) The Federal Court, the Family Court or the Supreme Court of the Capital Territory may:

(a) exercise jurisdiction (whether original or appellate) conferred on that Court by a law of a State corresponding to this Division with respect to matters arising under the Corporations Law of a State; and

(b) hear and determine a proceeding transferred to that Court under such a provision.

BACKGROUND TO THE LITIGATION

In June 1996 the Full Federal Court delivered judgment in three matters in which the Court unanimously upheld the validity of laws giving effect to the general cross-vesting scheme and to the cross-vesting scheme in the Corporations Law. The decisions are reported as *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451, 137 ALR 447. In one of the matters (*Gould v Brown*, formerly *BP Australia Ltd v Amann Aviation Pty Ltd*), special leave to appeal to the High Court was sought and granted.

Amann Aviation Pty Limited ('Amann') was wound up by an order of the Federal Court made under the Corporations Law in the exercise of State jurisdiction cross-vested in the Federal Court. Under s.596A of the Corporations Law, the liquidator caused to be issued out of the Federal Court (also in the exercise of cross-vested State jurisdiction) a number of summonses to persons to attend before the Court to be examined about the affairs of Amann. The case involved a challenge to the jurisdiction of the Federal Court to make the winding up order, issue the summonses and conduct the examinations. The challenge to the Federal Court's jurisdiction was put on two grounds: first, that the powers purportedly exercised by the Federal Court are derived from a State law and State Parliaments cannot validly invest State jurisdiction in a federal court created under Chapter III of the Constitution; secondly, that the particular power to conduct examinations involves the invalid conferral of non-judicial power on the Federal Court contrary to the doctrine of the separation of powers.

THE HIGH COURT'S DECISION

Power to cross-vest jurisdiction

Brennan CJ and Toohey J, and Kirby J, upheld the validity of the cross-vesting provisions on the basis that:

(a) the legislative power of a State Parliament extends to conferring State jurisdiction on a court that is not a court created by that Parliament; and

(a) there is no limitation arising from Chapter III of the Constitution which prevents a State Parliament from vesting State jurisdiction in a federal court other than the High Court. Chapter III of the Constitution is exhaustive only of the kinds of *federal* jurisdiction that can be invested in a federal court and there is no negative implication that Chapter III precludes the conferral of non-federal jurisdiction.

However, a State could not legislate to confer powers on a federal court created by the Commonwealth Parliament which are incompatible with the separation of powers implied by Chapter III or which alter the essential character of a federal court. Therefore, a State Parliament could not validly confer non-judicial powers on a federal court.

The conclusion reached by Justices Gaudron, McHugh and Gummow was that Chapter III of the Constitution exhaustively states the jurisdiction that may be conferred on federal courts and this does

not include the conferral of State jurisdiction. Therefore, neither a State Parliament nor the Commonwealth Parliament can confer or consent to the conferral of State jurisdiction on a federal court.

Power of the Federal Court to order examinations

Brennan CJ and Toohey J, and Kirby J, decided that the powers to order and conduct examinations and issue summonses could validly be conferred on the Federal Court where they were exercised in the course and for the purposes of a winding up. When exercised for that purpose, the powers were incidental to the judicial power of winding up and have a judicial character. To the extent that the powers could be exercised otherwise than in the course and for the purposes of a winding up, they would not be judicial and could not validly be conferred on the Federal Court.

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Acquisition of Property

In this case the High Court allowed the Commonwealth's appeal by a 4-2 majority (Brennan CJ, Gaudron, McHugh and Gummow JJ; Toohey and Kirby JJ dissenting).

Commonwealth v WMC Resources Ltd,
High Court of Australia, 2 February 1998

Western Mining Corporation Ltd (now WMC Resources Ltd) commenced proceedings in the Federal Court seeking compensation from the Commonwealth after the area covered by a petroleum exploration permit in which WMC had a part interest was reduced by the *Petroleum (Australia-Indonesia Zone of Co-operation) (Consequential Provisions) Act 1990* ('the Consequential Provisions Act'). That Act and the *Petroleum (Australia-Indonesia Zone of Co-operation) Act 1990* give effect to the Zone of Co-operation Treaty between Australia and Indonesia and create a joint development regime in the 'Timor Gap'.

The central issue in the legal action brought by WMC against the Commonwealth was whether the Consequential Provisions Act, by abolishing part of the petroleum exploration permit, effected an 'acquisition of property' from WMC otherwise than on 'just terms' within the meaning of s.51(xxxi) of the Constitution. If it did, then the Commonwealth would be liable to pay compensation to WMC under s.24 of the Consequential Provisions Act. Section 24(2) of the Consequential Provisions Act provides that where the operation of that Act would result in the acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay compensation to that person.

In 1994 Ryan J of the Federal Court determined that WMC was entitled to compensation under s.24 for the reduction in the size of the area covered by the petroleum exploration permit. On 27 March 1996 the Full Court of the Federal Court (Black CJ and Beaumont J, Cooper J dissenting) dismissed an appeal by the Commonwealth against Ryan J's decision. The High Court granted the Commonwealth special leave to appeal.

The case raised several significant constitutional issues given that the key terms of s.24(2) of the Consequential Provisions Act correspond to those of s.51(xxxi) of the Constitution. Before the High Court the Commonwealth argued, among other things, that:

- the exploration permit was wholly a creature of statute and, as such, rights created by the permit were inherently susceptible to modification or diminution by a later Commonwealth Act;
- there was no 'acquisition' of WMC's property. There was merely an extinguishment or diminution of WMC's rights without the conferral of any correlative benefit on the Commonwealth or anyone else;

- the Consequential Provisions Act was not a law with respect to the acquisition of property. Rather, it was concerned with the adjustment of competing rights, claims and obligations between Australia and Indonesia and only incidentally affected property rights.

THE HIGH COURT'S DECISION

By a 4-2 majority the High Court held that the Commonwealth is not liable to pay compensation to WMC under s.24(2) of the Consequential Provisions Act. In doing so it held that the Commonwealth legislation did not involve the acquisition of property from WMC within the meaning of s.51(xxxi) of the Constitution.

Of the majority justices, Brennan CJ held that where a law of the Commonwealth creates or authorises the creation of a right, a statutory modification or extinguishment of that right effects its acquisition if, but only if, it modifies or extinguishes a reciprocal liability to which the party acquiring the right was subject. In the present case, no party was relieved of any liability as a result of WMC's rights in the exploration permit being modified. In particular, the Commonwealth was not relieved of any such liability.

Brennan CJ conceded that if the Commonwealth had proprietary rights in the continental shelf, it would be arguable that the extinguishing of a permit holder's proprietary rights relieved the Commonwealth of a reciprocal burden on its title to land and thus constituted an acquisition of property. However, this argument was not available in the present case as the Commonwealth has no property in the continental shelf at common law and has not purported to declare by statute its property in the continental shelf.

Gaudron J broadly agreed with Brennan CJ, holding that there had been no *acquisition* of property as the diminution of WMC's statutory rights did not confer any corresponding benefit on the Commonwealth or any other person.

McHugh J thought that as the rights of WMC in the permit were created by an enactment under s.51(xxix) (i.e. the *Petroleum (Submerged Lands) Act 1967*), those rights were always liable to be amended, revoked or extinguished by legislation enacted under that same power. In contrast to Brennan CJ and Gaudron J, McHugh J considered that where a right is purely the creation of Commonwealth law, the Commonwealth Parliament may extinguish that right without 'just terms' even if a consequence of the extinguishment is to vest some benefit in the Commonwealth or some other person.

Gummow J characterised the permit as a mere licence to do something which would otherwise be unlawful. He considered that a law which reduces the content of such licence rights does not involve the acquisition of anything proprietary in nature. Gummow J thought, in any event, that it was apparent from the terms of the legislation under which the relevant permit was granted that the permit was inherently susceptible to variation by amendments which might be made from time to time to the legislation.

IMPLICATIONS OF THE DECISION

The divergent views expressed by the majority justices limit the value of the decision as both a precedent and a guide to future Commonwealth action. However, the decision is significant in that a majority of the Court (McHugh J dissenting) rejected the view that a right which is wholly a creature of Commonwealth law is, in all cases, inherently susceptible to modification or diminution by a later Commonwealth Act. It follows that where a Commonwealth statute confers a right in the nature of 'property', the application of s.51(xxxi) will need to be considered in relation to any subsequent Commonwealth legislation which purports to modify or extinguish that right.

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Validity of Section 15X of the *Crimes Act 1914*

Section 15X was inserted in the *Crimes Act 1914* by the *Crimes Amendment (Controlled Operations) Act 1996*. In this matter the High Court by a 5-2 majority (Brennan CJ, Toohey, Gaudron, Gummow and Hayne JJ; McHugh and Kirby JJ dissenting) upheld the validity of s.15X. The Commonwealth Attorney-General had intervened to support the validity of the challenged provision.

Nicholas v R,
High Court of Australia, 2 February 1998

The accused was charged on counts which included alleged possession of prohibited imports contrary to s.233B of the *Customs Act 1901* and pleaded not guilty to the charges in the County Court of Victoria. The prohibited imports to which the s.233B offences allegedly related were heroin which had been imported into Australia as part of a 'controlled' importation by law enforcement officers in contravention of s.233B. The County Court granted an application by the accused that the trial on the s.233B counts be permanently stayed on the basis of the principles established by the High Court in *Ridgeway v R* (1995) 184 CLR 19.

In *Ridgeway*, a majority of the High Court recognised a judicial discretion in criminal proceedings to exclude evidence, on public policy grounds, where the commission of the alleged offence was procured by unlawful conduct on the part of law enforcement officers.

The rationale for this discretion is the public interest in ensuring that law enforcement officers act within the law and in preserving the integrity of the administration of criminal justice by the courts.

The *Crimes Amendment (Controlled Operations) Act 1996* inserted provisions in the *Crimes Act* which sought to overcome the decision in *Ridgeway*. The provisions apply to certain authorised 'controlled operations' by law enforcement officers to import narcotic goods. In relation to controlled operations commenced *after* the amendments came into effect, the provisions exempt from criminal liability for a narcotic goods offence a law enforcement officer who imports prohibited drugs as part of a controlled operation; the exemption from criminal liability removes the basis for the operation of the *Ridgeway* principle.

In relation to a controlled operation which was commenced *before* the amendments came into effect, the provisions direct a court, when deciding whether to admit evidence of the unlawful importation of narcotic goods for the purposes of the prosecution of certain alleged offences, to disregard the fact that a law enforcement officer committed an offence in importing the goods in the course of the controlled operation. The validity of the provisions dealing with controlled operations which were commenced before the amendments came into effect were challenged in this case.

In the present case, after the coming into effect of the amendments made by the *Crimes Amendment (Controlled Operations) Act*, the Director of Public Prosecutions applied to the County Court to vacate the order that had been made staying the trial. The application was removed into the High Court in order to determine the validity of the amendments dealing with controlled operations which were commenced before the amendments came into effect.

The accused argued that the challenged provisions were invalid as, contrary to the separation of powers required by Chapter III of the Constitution, they impermissibly interfere with the exercise of judicial power by directing the court as to the exercise of the *Ridgeway* discretion and also by directing the court in relation to the small number of individuals, including the accused, to whose trials the provisions would apply.

THE HIGH COURT'S DECISION

A majority of the High Court upheld the validity of s.15X of the *Crimes Act*, which was the relevant operative provision. In substance a majority held

that s.15X is a procedural law altering the laws of evidence to be applied in the relevant prosecutions and does not impermissibly interfere with the exercise of the *Ridgeway* discretion.

A majority of justices also held that s.15X does not seek to secure the conviction of particular persons for particular conduct on particular occasions; it is a law generally applicable to relevant prosecutions and it remains for the court to determine guilt or innocence. Gaudron J also held that equality before the law is an essential characteristic of the exercise of federal judicial power but that s.15X does not offend this requirement. Brennan CJ emphasised that *Ridgeway* involved the weighing of competing public policies and that Parliament is entitled to express its view as to where the balance of the public interest lies.

McHugh and Kirby JJ (in separate judgments) held that s.15X was invalid on the basis that, by interfering in the way it did with the exercise of the *Ridgeway* discretion, it interfered with the capacity of courts invested with federal jurisdiction to protect their integrity and maintain public confidence in the administration of justice.

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Liability of Statutory Authorities

The High Court refused to overrule *Nagle v Rottnest Island Authority* (1993) 177 CLR 423. Ultimately then, the case involves the application of settled principles to particular facts.

Romeo v Conservation Commission of the Northern Territory, High Court of Australia, 2 February 1998

The High Court dismissed Romeo's appeal by a 5-2 majority (Brennan CJ, Toohey, Gummow, Kirby and Hayne JJ; Gaudron and McHugh JJ dissenting). The Court upheld the Northern Territory Supreme Court's decision that the Conservation Commission of the Northern Territory (the Commission) had not breached its duty of care to Romeo.

BACKGROUND

In April 1987 Nadia Romeo, then 16, suffered serious injuries as a result of her fall from the top of Dripstone Cliffs onto Casuarina Beach near Darwin. The Commission is a public authority responsible for the management and control of that area. Ms Romeo sought damages against the Commission in the Northern Territory Supreme Court. Ms Romeo claimed that the Commission had breached its duty of care to her in not giving her warning of the presence of the Cliffs or erecting a barrier at their edge.

The top of the Dripstone Cliffs is used frequently by members of the public to view tropical sunsets. The trial judge, Angel J, observed that the Commission provided various facilities, including toilets and barbeques, at Dripstone Park some distance from the Cliffs. At the top of the Cliffs the Commission provided a car park, bordered by a low post and log fence, and maintained the grass and plants.

At about 11 pm on 24 April 1987 Ms Romeo joined friends in the carpark at the top of the Cliffs. Alcohol was consumed and Angel J found that Ms Romeo, an inexperienced drinker, was adversely affected by it. Ms Romeo and a friend were seen on the sea side of the log fence around midnight. Sometime later they fell from the Cliffs but it is unclear how this happened. Angel J concluded that Ms Romeo and her friend had, in the gloom and under the effects of alcohol, mistaken a worn patch in the grass leading to a gap in the vegetation at the Cliffs' edge as a path and had simply walked over the edge.

Angel J rejected Ms Romeo's claim for damages against the Commission, observing that the nature of the Cliffs and their dangers were self-evident. Ms Romeo's appeal to the Full Supreme Court was dismissed by all judges, and she appealed to the High Court.

THE HIGH COURT'S DECISION

A majority of the High Court dismissed Ms Romeo's appeal. A majority of the Court (Brennan CJ dissenting) also refused to overrule *Nagle v Rottnest Island Authority* (1993) 177 CLR 423.

In *Nagle* the plaintiff dived into a swimming area on Rottnest Island hitting his head on a submerged rock. The High Court held in *Nagle* that where a public authority, exercising statutory powers, encourages members of the public to engage in certain activities on areas under its control, it comes 'under a duty to take reasonable care to avoid injury to them and the discharge of that duty would naturally require that they be warned of foreseeable risks of injury associated with the activity so encouraged.'

In the present case, Toohey and Gummow JJ (in a joint judgment) and Kirby and Hayne JJ (in separate judgments) denied that the Commission had breached the duty of care it owed to Ms Romeo. Toohey and Gummow JJ held that the Commission was 'under a general duty of care to take reasonable steps to prevent persons entering the Reserve from suffering injury' but that such steps did not include fencing off an area where the danger was obvious.

Kirby J agreed that the Commission was not in breach of its duty of care to Ms Romeo as the danger of the Cliffs was obvious to any reasonable person. Hayne J considered that Ms Romeo's claim that the Commission had breached its duty to her by not fencing off the Cliffs 'attributes a false degree of precision to identification of the foreseeable risk; it attributes too high a probability to the occurrence of that risk and it fails to identify properly the response that would have had to be made to that risk to avoid it.'

In dismissing Ms Romeo's appeal, Brennan CJ said given that the powers exercised by the Commission are statutory, any duties it may have are also statutory. His Honour stated:

> [W]hen the sole basis of liability of a public authority is its statutory power of management and control of premises, its liability for injury suffered by a danger in the premises is not founded in the common law of negligence but in a breach of a statutory duty to exercise its power and to do so reasonably having regard to the purpose to be served by an exercise of the power.

The duty his Honour said 'is to exercise reasonable care to prevent injury from dangers arising from the structure or condition of the premises which are not apparent and are not to be avoided by the exercise of reasonable care on the part of the entrant.' However, his Honour's approach to determining the scope of the duty of the authority was not shared by the rest of the Court.

In separate judgments, Gaudron and McHugh JJ in applying *Nagle*, upheld Ms Romeo's appeal. The Commission had encouraged people to visit the Cliffs. It was foreseeable that some visitors would walk along the Cliffs' edge and that some would not take care for their own safety. Both Gaudron and McHugh JJ therefore found that the Commission was in breach of its duty of care in not providing adequate fencing along the top of the cliffs near the carpark.

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Omission by a Public Authority to Exercise Statutory Duties

A majority of the High Court has rejected the usefulness of the doctrine of general reliance in determining the negligence liability of public authorities. Further, given the doubts raised by the High Court in relation to the doctrine of proximity in *Hill v Van Erp* (1997) 142 ALR 687, serious questions arise as to what principles should be applied to determine liability in negligence.

Pyrenees Shire Council v Day;
Eskimo Amber Pty Ltd v Pyrenees Shire Council,
High Court of Australia, 23 January 1998

The High Court (comprising 5 Justices) unanimously dismissed the Pyrenees Shire Council's ('the Council') appeal against the Victorian Supreme Court's decision that the Council was liable in negligence to Mr and Mrs Day. Further, the High Court by a 3:2 majority (Brennan CJ; Gummow and Kirby JJ; Toohey and McHugh JJ dissenting) allowed the appeal of Eskimo Amber Pty Ltd (Eskimo Amber) and Mr and Mrs Stamatopoulos against the Victorian Supreme Court's decision that the Council was not liable to them.

BACKGROUND

On 9 August 1988 a fire broke out in premises in Neill Street, Beaufort, Victoria. The premises were owned by Mr and Mrs Nakos and were leased in 1988 by Mr and Mrs Tzavaras. The fire occurred as a consequence of a faulty chimney. An officer of the fire brigade advised the occupant of the premises not to use the fireplace until the chimney was repaired.

Several days later, Mr Walschots, a building and scaffolding inspector employed by the Council, inspected the chimney and advised the tenant, Mr Tzavaras, not to use the fireplace until the defect was repaired. Following his inspection, Mr Walschots wrote a letter stating that the fireplace should not be used until repaired and addressed it to Mr Tzavaras and to Mr Nakos at the Neill Street premises. While Mr Tzavaras received the letter, Mr Nakos did not, and the fireplace was not repaired. The Council did not follow up on the letter to ensure that the fireplace was fixed.

In January 1990 Mr and Mrs Tzavaras assigned their lease of the Neill Street premises to Eskimo Amber, the family company of Mr and Mrs Stamatopoulos. Mr Tzavaras told Mr Stamatopoulos that the fireplace was in use. Mr and Mrs Stamatopoulos conducted a business from, and lived in, the Neill Street premises.

In May 1990 another fire occurred in the defective fireplace at the Neill Street premises causing property damage to Eskimo Amber, Mr and Mrs Stamatopoulos, and to the occupiers of the neighbouring premises, Mr and Mrs Day.

Pursuant to the *Local Government Act 1958* (Vic), the Council may take action to prevent the risk of fire which may cause damage, including the issuing of notices requiring defective fireplaces to be remedied. It is an offence not to comply with a notice issued under the Act and the Council has the power to take necessary follow up action.

Mr and Mrs Day were successful in their Victorian County Court actions in negligence against both Mr Tzavaras and the Council. Eskimo Amber and the Stamatopouloses succeeded in negligence against Mr Tzavaras, but failed in their actions for negligence and breach of statutory duty against the Council.

The Council appealed to the Victorian Court of Appeal against the County Court's decision in relation to the Days. The Court applied the doctrine of 'general reliance' and the appeal was dismissed. The doctrine of general reliance, developed by Mason CJ in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, arises out of a plaintiff's dependence on a statutory authority to exercise its powers with due care where such powers are granted to minimise or prevent the risk of injury recognised by Parliament to be so great or complex that individuals cannot take adequate steps for their own protection. Eskimo Amber and the Stamatopouloses appealed to the Court of Appeal claiming that the Council was liable in negligence. The Court held that the Council did not owe a similar duty of care to Eskimo Amber and the Stamatopouloses and their appeal was dismissed.

THE HIGH COURT'S DECISION

A majority of the High Court (Brennan CJ and Gummow and Kirby JJ) allowed the appeal by Eskimo Amber and the Stamatopouloses. All five members of the Court held that the Council was

liable for the damage suffered by the Days. However, their Honours differed in their reasons.

In separate decisions, Toohey and McHugh JJ, relying on the doctrine of general reliance, found that the Council was liable to the Days. The Days relied on the Council to exercise its statutory powers to ensure that the defective fireplace, of which it had knowledge, would be repaired.

The Days had no knowledge of the defective fireplace, they could not inspect the premises, and any remedy they might have would be slow and costly. Toohey and McHugh JJ considered that Eskimo Amber and the Stamatopouloses were in a different position to the Days and could not rely on the doctrine of general reliance. Eskimo Amber and the Stamatopouloses were in a position to ascertain the faults in the fireplace if they chose to do so.

Brennan CJ, Gummow and Kirby JJ, in separate judgments, rejected the usefulness of the doctrine of general reliance. Brennan CJ stated that the basis for the Council's liability for the damage suffered is legislative intention. Further his Honour said:

> Where the power is a power to control "conduct or activities which may foreseeably give rise to a risk of harm to an individual" ... and the power is conferred for the purpose of avoiding such a risk, the awarding of compensation for loss caused by a failure to exercise the power when there is a duty to do so is in accordance with the policy of the statute.

The Council was under a public law duty to enforce the terms of Mr Walschots' letter; the risk of not doing so was extreme and there was no reason to justify the Council's not doing so. The Council was, therefore, liable to the Days, Eskimo Amber and the Stamatopouloses.

Gummow J considered that the touchstone of the Council's duty was its 'measure of control of the situation including its knowledge, not shared by Mr and Mrs Stamatopoulos or by the Days, that if the situation was not remedied, the possibility of fire was great and damage to the whole row of shops might ensure.'

Drawing on *Caparo Industries Plc v Dickman* [1990] 2 AC 605, Kirby J enunciated a three stage test to decide whether a duty of care exists. First, is it reasonably foreseeable that the conduct or omission would cause harm to the plaintiff or someone in the plaintiff's position; second, is there a relationship of 'proximity' or 'neighbourhood' between the wrong-doer and the plaintiff and, third, if so is it 'fair, just and reasonable' that the law should impose a duty on the wrong-doer? On these facts, Kirby J held the Council liable to the Days, Eskimo Amber and the Stamatopouloses.

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The Award of Costs in 'Public Interest' Litigation

Following this decision, exceptional or special circumstances relating to 'public interest' litigation may warrant departure from the general rule that the successful party will ordinarily expect to recover its proper costs.

Oshlack v Richmond River Council,
High Court of Australia, 25 February 1998

In this case the High Court by a 3:2 majority (Gaudron, Gummow and Kirby JJ; Brennan CJ and McHugh J dissenting) allowed an appeal by Mr Oshlack against a decision of the NSW Court of Appeal ordering that he pay the Richmond River Council's (the Council's) costs both in the litigation at first instance and in the appeal.

In the NSW Land and Environment Court, Mr Oshlack challenged the validity of a development consent granted by the Council in respect of the 'Iron Gates' residential subdivision at Evans Head. Stein J dismissed Mr Oshlack's challenge. The Council

sought costs but his Honour decided that special circumstances existed in the case justifying a departure from the usual order as to costs (i.e. that costs follow the event). He therefore made no order as to costs.

The special factors that Stein J took into account included the 'public interest' nature of the litigation, the relaxation of standing pursuant to section 123 of the *Environment Planning and Assessment Act 1979* (NSW) (the EPA Act) (to award costs may have the effect of denying Parliament's intention of relaxing the standing requirements), the fact that Mr Oshlack had nothing to gain personally from the litigation but rather sought to preserve the environment, considerable public opposition to the development and hence public interest in the outcome of the litigation, and that Mr Oshlack's challenge, although dismissed, was arguable.

The Court of Appeal, relying on the High Court's decision in *Latoudis v Casey* (1990) 170 CLR 534, upheld the Council's appeal and ordered that Oshlack pay its costs.

In their joint judgment in *Oshlack*, Gaudron and Gummow JJ, said that the Court of Appeal had regarded *Latoudis* 'as authority for the proposition that the award of costs to a successful party in civil litigation is made not to punish the unsuccessful party but to compensate the successful party against the expense to which that party has been put by reason of the legal proceedings.' In the present proceedings, Mr Oshlack's motive in bringing the litigation in the public interest was, therefore, irrelevant.

Mr Oshlack then appealed, on the issue of costs, to the High Court.

THE HIGH COURT'S DECISION

A majority of the High Court (Gaudron, Gummow and Kirby JJ) restored the decision of Stein J. Gaudron and Gummow JJ said section 69 of the *Land and Environment Court Act 1979* (NSW) ('the Court Act') confers upon the Court a discretion to award costs. That discretion is very wide but it must be 'exercised judicially, that is to say not arbitrarily, capriciously or so as to frustrate legislative intent.'

Their Honours denied that there was a rule that 'in the absence of disentitling conduct, a successful party is to be compensated by the unsuccessful party.' They did, however, accept the existence of a principle generally favouring the successful party, guiding (but not confining) the exercise of judicial discretion.

The result was that, while a successful party might ordinarily expect the exercise of judicial discretion in his or her favour in the absence of disentitling conduct, each case must be considered on its merits.

Disentitling conduct may include, for example, unnecessarily prolonging the litigation. Gaudron and Gummow JJ distinguished *Latoudis*, and decided that the facts Stein J took into account when exercising his discretion pursuant to section 69 of the Court Act, and in light of section 123 of the EPA Act, were not irrelevant. Indeed such factors were relevant to Stein J's exercise of his discretion.

In a separate judgment, Kirby J also restored the decision of Stein J. Kirby J stated that *Latoudis* did not forbid Stein J 'from giving weight to the public interest character of the proceedings.' Kirby J also observed:

> Given the statutory context and the clear purpose of Parliament to permit, and even encourage, individuals and groups to exercise functions in enforcement of environmental law before the Land and Environment Court, a rigid application of the compensatory principle in costs orders would be completely impermissible.

His Honour concluded that while the successful party will ordinarily expect to recover its proper costs, there may be exceptional or special circumstances that dictate otherwise. Public interest litigation may sometimes warrant departure from the general rule.

Brennan CJ and McHugh J dissented. Brennan CJ delivered a short judgment, following *Latoudis*, and generally agreeing with McHugh J. McHugh J stated firmly that 'the fact that the proceedings can be characterised as public interest litigation is irrelevant to the question whether the court should depart from the usual order that costs follow the event.'

IMPLICATIONS OF THE DECISION

Clients need to be aware that, while the successful party will ordinarily expect to recover its proper costs, there may be exceptional or special circumstances that dictate otherwise. Public interest litigation may sometimes warrant departure from the general rule.

The risk of not being able to recover costs in litigation, even when one is successful, will be especially great where it is open to the client simply to submit to the jurisdiction of the court, but the client elects to take an active part in the proceedings.

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The Meaning of Control

Following this decision the concept of 'control' and the phrase 'being in a position to control' at least in the context of broadcasting legislation will be given a far broader meaning based on commercial reality. Arrangements which previously would not have fallen foul of the limitations on control will no longer be allowed.

Canwest Global Communications Corporation v Australian Broadcasting Authority, Full Court of the Federal Court of Australia, 27 February 1998

In this case the Full Court of the Federal Court in a unanimous decision dismissed an appeal by CanWest against a decision of Hill J.

BACKGROUND

In 1997 the ABA conducted an investigation into whether the provisions in the *Broadcasting Services Act 1992* ('the BSA') dealing with ownership and control of commercial broadcasting licences were being complied with in relation to a number of commercial television broadcasting licences, which together made up the Ten Group licences. The ABA's report was issued in April 1997. The ABA found that CanWest, a Canadian corporation and therefore a foreign person for the purposes of the BSA, was in breach of subsections 57(1) and 57(3) of the BSA because CanWest was in a position to exercise control of the Ten Group licences and because CanWest, together with another foreign person, had company interests in the Ten Group licences which exceeded 20%.

CanWest was given six months to take action so that it was no longer in breach of the BSA. CanWest subsequently instituted proceedings against the ABA seeking judicial review of the ABA's Report and findings. Hill J dismissed the application at first instance. CanWest then appealed to the Full Court of the Federal Court.

THE FULL COURT'S DECISION

The central issue in dispute in the proceedings was the nature of the statutory concept of 'control' and the words 'in a position to exercise control'. It was contended on behalf of CanWest, in reliance upon the decision in *Equiticorp Industries Limited v ACI International Limited* (1986) 10 ACLR 568 and other revenue cases, that to be in a position to exercise control of a commercial broadcasting television licence there must be 'an enforceable and immediately exerciseable right to exercise control'.

The ABA, in determining that CanWest was in breach of the ownership and control provisions, had focused on the question of whether there is an immediate factual power to control. The ABA considered not only the legal arrangement between the parties, but also any commercial or other arrangements or understandings underlying those

agreements and looked at control arising as a result of, or by means of, trusts arrangements, agreements, understandings and practices whether or not having legal or equitable force and whether or not, based on legal on equitable rights.

Beaumont J, with whom Black CJ and Lockhart J agreed, held that the ABA correctly appreciated the nature of the legal question it was required to address in relation to the meaning of control and that there was no explicit or implicit requirement in the BSA that the relevant power be immediately exerciseable on legally enforceable grounds.

Equiticorp and the revenue cases relied upon by CanWest were distinguished on the basis that the legislative provisions in question had significant differences.

Beaumont J adopted the reasoning of Bowen CJ and Lockhart J in *Re Application of News Corp Limited* (1987) 15 FCR 227, in particular the *News Corp* approach that questions of control in the context of broadcasting legislation are to be determined by practical and commercial considerations rather than highly refined legalistic tests.

It was also contended on behalf of CanWest that the phrase 'in a position to control' must carry with it a connotation of an ability to direct or command, that is, there must be a right or power and one person must be able to require the other person to act against the latter's wishes. Beaumont J rejected this contention.

His Honour found that practical control, arising out of formal constraints, financial incentives and disincentives and other surrounding circumstances may constitute control without an express finding being made that the parties had reached a relevant understanding or a relevant practice existed.

Beaumont J also upheld the ABA's finding that the fact that various company directors would not breach their fiduciary duties to act in accordance with the instructions or wishes of CanWest did not negate the finding of control.

His Honour found that 'control' in circumstances falling within lawful limits is sufficient for the purposes of the BSA and it is not necessary to also find that control extended to unlawful conduct.

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