AUSTRALIAN GOVERNMENT SOLICITOR

Litigation Notes

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Duty of Care in Providing Advice or Information

The High Court by a 4 to 3 majority affirmed the trial judge's finding that there was no duty of care owed in the giving of a particular costs estimate. The decision reaffirms the law of negligent misstatement as it has developed over the last 35 years or more, but demonstrates how delicately balanced the issues can be in applying these principles to operations of an organ of government. It shows that the High Court will carefully scrutinise the functions and practices of a statutory authority giving advice or information, the nature of the relationship between the authority and the recipient of the advice or information, and the extent of other professional assistance being rendered to the recipient, before determining whether a duty of care is owed in the giving of that advice or information. In practical terms, it highlights the care to be exercised in the giving of cost estimates, and the need for them to be accompanied by all relevant qualifications and disclaimers.

Tepko Pty Ltd and Others v Water Board

High Court of Australia, 5 April 2001
[2001] HCA 19; (2001) 178 ALR 634

Background

The three plaintiffs (and appellants to this appeal) were Tepko Pty Ltd ('Tepko'), another company and Mr Neal, who was one of three shareholders in Tepko and owner of the other company. The defendant, the Water Board ('the Board'), was the continuation of what was at the times material here, the Metropolitan Water, Sewerage and Drainage Board under the *Metropolitan Water, Sewerage and Drainage Act 1924* (NSW).

In the early to middle 1980s the plaintiffs were involved in a proposal to subdivide for residential development dairy farmland owned either by Tepko or Mr Neal which was located just beyond the outskirts of Sydney. At all material times, the plaintiffs, in pursuing the proposal, had the professional assistance of solicitors and town planning consultants.

The plaintiffs encountered repayment difficulties with a bank loan taken out, among other things, to finance the proposed subdivision. To help determine whether it would foreclose on its securities supporting the loan, the lending bank asked Mr Neal to obtain from the Board an estimate of the costs of making certain water connections to the proposed subdivision.

It was the practice of the Board to supply water to rural residential areas only if the necessary works were funded by the developer. This was not a statutory obligation. It was capable of modification by the Board, subject to the direction of the relevant Minister. The Board was not required to help developers with information. Further, it was the Board's policy not to provide such information. Notwithstanding this, Mr Neal caused the Board to depart from this policy here. However, in doing this, Mr Neal did not fully disclose to the Board the perilous financial situation facing the proposed subdivision, nor, more particularly, the bank's interest in the estimate, as lender.

The Board gave Mr Neal an estimate of 'in the order of $2.5 million' for the cost of making the necessary connections. (There were no express qualifications or disclaimers upon the giving of this figure.) On the strength of this pre-estimate, the bank foreclosed, because it appeared that the cost was too great for the plaintiffs to bear. However, only some three weeks afterwards, the Board revised the estimate down to $1.7 million.

The plaintiffs claimed that the foreclosure could have been averted, with them being able to have proceeded with the subdivision (other approvals for the subdivision appearing likely to have been forthcoming). The plaintiffs sought damages from the Board for the loss which they claimed to have suffered in consequence of the foreclosure, alleging negligent misstatement in the giving of the original estimate.

High Court's Decision

In the Supreme Court of New South Wales, the trial judge found that there was no duty of care owed by the Board to the plaintiffs. He said that it was 'wholly reasonable' for the Board to assume that the professionals advising Mr Neal would realise that the first figure supplied by the Board was no more than an 'order of cost estimate' which might come down after 'detailed investigation and design'. This decision was affirmed by a 2 to 1 majority in the Court of Appeal.

A further appeal by the plaintiffs to the High Court, sitting all seven of its members, was dismissed by a majority of one (McHugh, Kirby and Callinan JJ dissenting). In a joint judgment, Gleeson CJ, Gummow and Hayne JJ relied upon Barwick CJ's statement of principle in *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 about the circumstances in which the law will import a duty of care 'in utterance by way of information or advice'. Barwick CJ said (at p. 571) that 'the speaker must realize or the circumstances be such that he ought to have realized that the recipient intends to act upon the information or advice in respect of his property or of himself in connexion with some matter of business or serious consequence'.

This statement was endorsed by the High Court subsequently in *Shaddock & Associates Pty Ltd v Parramatta City Council* [No.1] (1981) 150 CLR 225 and *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340. Gleeson CJ, Gummow and Hayne JJ said that this statement 'emphasises the need for caution lest a duty of care be imposed upon a party who has no appreciation of, and could not be expected to appreciate, the implications of making an error'.

Gleeson CJ, Gummow and Hayne JJ endorsed the finding of the trial judge on this score that Mr Neal had failed sufficiently to inform the Board, prior to the giving of the original estimate, of his relationship with the bank (including the prospect of foreclosure) such that the Board did not have an adequate appreciation of the implications of making an error in the giving of an estimate.

Gleeson CJ, Gummow and Hayne JJ, in addition, identified five factors which they saw as militating against the importation of a duty:

- the Board was entitled to adhere to what it regarded as the established principle that a developer should fund the provision of water services unless the Board was obliged to do work by direction of the relevant Minister under the Board's governing legislation
- the Board was not obliged to give any estimate of costing
- in contrast to the position in *Shaddock v Parramatta City Council*, it was not the practice of the Board to answer inquiries to which it was not required to respond
- the Board had a statutory monopoly for the supply of water services

- its governing legislation denied to the Board and developers 'a freedom of contract in significant respects'.

Gleeson CJ, Gummow and Hayne JJ referred also to a second statement of Barwick CJ in *MLC v Evatt.* This was that 'the circumstances must be such that it is reasonable in all the circumstances for the recipient to seek, or to accept, and to rely upon the utterance of the speaker' (see also at p. 571). They said [para 49] that the circumstances here:

> 'were not such as to make it reasonable for Mr Neal to rely upon the "ball-park" figure to meet the Bank's demand for a costings estimate. The identity and relative position of the parties were such that the relationship between the Board and Mr Neal was one in which the Board plainly was a reluctant participant....In that difficult situation Mr Neal, at all material times, had access to expert advice, which he utilised. These circumstances and the provisional nature of the estimate...made it unreasonable to posit a duty upon the Board in respect of the use Mr Neal made of the estimate in his dealings with the Bank.'

Gaudron J, in a separate judgment, agreed. She indicated that while the Board was in a position of advantage to determine what work was required to provide water to the proposed subdivision, it was not 'the sole repository of expertise on costing'. The plaintiffs had their own experts and could have relied on those experts' knowledge as to likely cost, once the extent of the work was known. In addition, it should have been clear to the plaintiffs that the estimate was one which was subject to change. Further, the plaintiffs could not have reasonably relied on the estimate. She said [para 88]:

> 'The speculative nature of the venture and the uncertainty of the political and administrative processes which the appellants set in train serve to emphasise the unreasonableness of any reliance they may have placed on what was said or done by any participant in those processes.'

The minority viewpoint of the Court was contained in the joint judgment of Kirby and Callinan JJ, with which McHugh J agreed. The minority justices were influenced by the facts that the Board had a superior capacity to provide reliable advice, the information in question was of a business nature, and was of serious concern to the plaintiffs. They disagreed with the majority justices that precise knowledge of the parlous financial circumstances of the plaintiffs was necessary for any duty of care to exist. It was enough that the Board knew the plaintiffs' anxiety about their financial position, the importance of the proposed subdivision and its costs, and the certainty that the plaintiffs would use the Board's estimate for a business purpose.

They said that '[c]itizens are entitled to hold expectations of [a public authority such as the Board] of honesty, accuracy and care in the provision of estimates of the type offered to the [plaintiffs] for a serious business purpose.'

Text of the decision is available through Scaleplus at: http://scaleplus.law.gov.au/html/highcourt/0/2001/0/HC000200.htm

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High Court Constitutional Decisions in Brief

Durham Holdings Pty Ltd v NSW
15/2/01, [2001] HCA 7; (2000) 177 ALR 436

The High Court upheld the validity of the *Coal Acquisition Act 1981* (NSW) which compulsorily acquired the applicant's coal deposits in NSW without providing full compensation. The Court affirmed that the States can enact laws acquiring property without providing 'just terms' compensation (contrast s.51(xxxi) of the Constitution which restricts the Commonwealth to acquisitions on 'just terms').

http://scaleplus.law.gov.au/html/highcourt/0/2001/0/HC000080.htm

Smith v ANL Ltd
16/11/00, [2000] HCA 58; (2000) 176 ALR 449

The High Court decided that s.54 of the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) is invalid in its application to causes of action which accrued before the section commenced. Section 54 abolishes common law actions for injuries sustained by a seafarer in the course of employment and substitutes a statutory rehabilitation and compensation scheme. It is expressed to apply to injuries that occurred before or after the section commenced but not to an action instituted before then. Its operation was postponed for 6 months from its commencement.

The High Court concluded that s.54 acquired the appellant's property without providing the 'just terms' compensation required by s.51(xxxi) of the Constitution. The appellant was prevented from exercising his common law rights, and the employer received a corresponding benefit. The legislation did not provide full compensation for that acquisition. The Court did not regard its earlier decision in *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 on the equivalent provision in the *Safety, Rehabilitation and Compensation Act 1988* (s.44) as distinguishable. The judgment does not cast doubt on the validity of s.54 in its prospective operation of barring rights to bring an action for injuries which occurred after the section commenced.

http://scaleplus.law.gov.au/html/highcourt/0/2000/0/HC000590.htm

Crampton v The Queen
23/11/00, [2000] HCA 60; (2000) 176 ALR 369

The High Court decided that in its appellate jurisdiction (conferred by s.73 of the Constitution) it can determine an appeal on a point of law which was not raised in the courts below. However, the Court's power to decide an appeal on a ground raised for the first time before it should only be exercised in 'exceptional circumstances' or 'to cure a substantial and grave injustice'. The ruling does not cast doubt on the Court's decisions (*Eastman v The Queen* (2000) 172 ALR 39, *Mickelberg v The Queen* (1989) 167 CLR 259) that it cannot receive fresh evidence on appeal.

http://scaleplus.law.gov.au/html/highcourt/0/2000/0/HC000610.htm

Residual Assco Group Ltd v Spalvins
13/6/00, [2000] HCA 33; (2000) 172 ALR 366

Re Macks; Ex parte Saint
7/12/00, [2000] HCA 62; (2000) 176 ALR 545

In these cases the High Court has upheld the validity of the key elements of the *Federal Courts (State Jurisdiction) Act 1999* enacted by each State. The State Acts are important remedial laws enacted as a result of the Court's decision in *Re Wakim* (1999) 198 CLR 511. *Re Wakim* invalidated that part of the Commonwealth/State cross-vesting schemes which provided for federal courts to exercise jurisdiction in State matters (see *Litigation Notes* No. 4, 28 October 1999). This meant that orders made by federal courts in the exercise of State jurisdiction (including many orders made under the corporations cross-vesting scheme) could be challenged as having been made without jurisdiction.

In *Residual Assco* the High Court upheld the validity of that part of the State Acts which provides for State matters that have been commenced in but not yet decided by a federal court to be in effect 'transferred' to the relevant State Supreme Court, with steps taken in the federal court treated as having been taken in the State court.

http://scaleplus.law.gov.au/html/highcourt/0/2000/0/HC000340.htm

In *Re Macks* the High Court upheld the validity of the essential elements of the State Acts in their operation on State matters that have already been decided by a federal court. The State Acts seek to 'validate' retrospectively decisions of federal courts made in the exercise of State jurisdiction by providing that the rights and liabilities of the parties are to be the same as if the decisions had been valid decisions of the State Supreme Court. The High Court ruled that the State Acts validly created separate, enforceable rights and liabilities the content of which was defined by reference to the ineffective federal court decisions. There remain some unresolved issues, including the availability of rights to appeal against or seek variation of federal court orders made in the exercise of State jurisdiction.

http://scaleplus.law.gov.au/html/highcourt/0/2000/0/HC000630.htm

Australian Securities and Investments Commission v Edensor Nominees Pty Ltd 8/2/01, [2001] HCA 1; (2001) 177 ALR 329

The High Court upheld the jurisdiction and powers of federal and State courts in proceedings brought by ASIC to enforce the State Corporations Laws. The proceedings involved the exercise of federal jurisdiction, including because ASIC was a party.

http://scaleplus.law.gov.au/html/highcourt/0/2001/0/HC000020.htm

Cheng v The Queen 5/10/00, [2000] HCA 53; (2000) 175 ALR 338

This decision upheld the constitutional validity of a conviction and sentence for an offence under ss 233B(1)(d) and 235(2) of the *Customs Act 1901* concerning importation of narcotics. Section 233B creates the offences and s.235(2) prescribes ranges of penalties which vary according to factual issues such as the nature and quantity of narcotics imported. In *Kingswell v R* (1985) 159 CLR 264, the High Court said that the penalty imposed for an offence under these provisions is to be decided by the trial judge on the basis of the judge's determination of the specified factual issues, and that this did not contravene s.80 of the Constitution (which requires 'trial by jury' for Commonwealth offences that are tried on indictment). The Court held that s.80 does not restrict Parliament's power to define the elements of an offence; here, the aggravating circumstances relevant to penalty were not made elements of the offence. As the jury had determined whether an offence had been committed, s.80 was satisfied.

However, in *Kingswell* and a later case of *R v Meaton* (1986) 160 CLR 359 the High Court also adopted a rule of practice requiring that the circumstances of aggravation be alleged in the indictment. In *Cheng* by a 6–1 majority (Kirby J dissenting) the Court accepted that the conviction and sentence in that case met the requirements of s.80. McHugh and Callinan JJ said that *Kingswell* was correctly decided. In a joint judgment, Gleeson CJ, Gummow and Hayne JJ took the view that as the practice was followed and the applicant pleaded guilty without putting any aggravating circumstances in dispute, there was no occasion for a trial by jury and it was not an appropriate occasion to reopen *Kingswell*. Gaudron J disagreed with the majority in *Kingswell* as to the meaning and operation of s.80 but held that ss 233B and 235 were nevertheless valid.

http://scaleplus.law.gov.au/html/highcourt/0/2000/0/HC000540.htm

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Landlords' Duty of Care

At issue in this case was whether a landlord of residential property has a statutory or common law duty to inspect premises prior to leasing for latent defects and if necessary to engage experts for the task. The Court by majority (McHugh J dissenting) found that they did not.

Jones v Bartlett

High Court of Australia, 11 November 2000
[2000] HCA 56; (2000) 176 ALR 137

Background

In *Northern Sandblasting v Harris* (1997) 188 CLR 313 the High Court overruled the common law position established by the House of Lords in *Cavalier v Pope* [1906] AC 428 that a landlord had a limited immunity from liability in negligence to their tenants. However the seven judges of that Court failed to reach a common ratio as to the content of the duty of care owed by landlords to residential tenants and their invitees. In *Jones v Bartlett* the High Court addressed this issue.

The appellant was injured when he failed to observe an interior glass door and attempted to walk through it. The door was within residential premises leased by his parents from the respondents. The door had been constructed some time in the 1960s and being of 4mm thickness, did comply with relevant Australian Standards for glass at the time it was constructed.

However, by 1992 when the appellant's parents took out the lease on the premises, relevant Australian Standards for interior glass doors stipulated glass thickness of not less than 10mm, unless laminated or otherwise toughened. This standard, though, only applied to replacement of glass panels. It was common ground that prior to the accident the door was in a state of good repair and there was nothing that would alert the untrained eye as to the danger posed by the glass. It was also common ground that it was not the usual practice for experts to be engaged to inspect.

High Court's Decision

All members of the Court rejected arguments that liability could be imposed pursuant to implied contract or breach of the provisions of the *Residential Tenancies Act 1987* (WA) or *Occupiers' Liability Act 1985* (WA) .

Section 42(1) of the *Residential Tenancies Act 1987* requires property owners leasing premises to, *inter alia*:

- provide and maintain premises in a reasonable state of repair having regard to their age, character and prospective life; and
- comply with all building, health and safety laws in so far as they apply to the premises.

The Court found that there was no dangerous defect with the door such as to attract a breach of s.42 of the Act simply because it did not comply with the present day Australian Standard for glass. That standard only required safer glass upon replacement. The door was not in need of repair so there was no breach of the obligation to maintain a reasonable state of repair.

The Court also found that a case could not be brought against the landlord under sections 5 and/or 9 of the *Occupiers' Liability Act 1985* (WA) notwithstanding that the landlord, under the terms of the lease, retained control of the premises for the purpose of effecting repairs. All members of the Court considered that a landlord could not be considered an 'occupier' once a tenant had taken possession of the property.

The major thrust of the appellant's case was that there had been a breach of the common law duty of

care owed to him. The Court, by majority (McHugh J dissenting) disagreed and dismissed his appeal.

Of the Court members, the most lenient formulation of the standard of care required of residential landlords was that of Gleeson CJ and Gaudron J who were of the view that, there being nothing to alert or which should have alerted the landlord as to a latent danger, there was no duty, in the circumstances of this case, to replace glass which was not defective simply because there were newer, safer materials available. The duty extended only to put and keep premises in safe repair. In their view it did not extend to making premises as safe as reasonable care can make them.

The judgments of Gummow and Hayne JJ and the separate judgment of Kirby J resisted a call to impose a blanket liability upon landlords to inspect for latent defects and engage experts in this regard. Their Honours suggest that the Courts should be slow to impose a standard of care upon landlords greater than that presently fixed by the various state and territory legislatures.

In rejecting a strict liability approach to the steps required to identify a dangerous defect, they expressed the view that the standard of care will vary with the intended use of the premises but is confined to risks which a reasonable person in the position of a landlord knew or ought to have known of. In this case the danger was not readily detectable, the respondents had no knowledge of it, and were unaware of the new Australian Standard for glass and therefore 'ordinary reasonable human conduct' did not require them to take steps with a view to ascertaining the existence of the danger.

All members of the Court (save McHugh J in dissent) expressed the view that there is no requirement for a landlord of residential premises to routinely engage experts in fields such as electrical wiring, gas installation or glass fabrication where a risk of a defect could only be seen as a possibility.

Text of the decision is available through Scaleplus at: http://scaleplus.law.gov.au/html/highcourt/0/2000/0/HC000570.htm

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Vicarious Liability for Negligence

This case revisits the principles of vicarious liability applying to the use of motor vehicles and other craft. The High Court refused to extend vicarious liability to the owner of a light aircraft for the negligence of the aircraft's pilot (not the owner's employee) in circumstances where the owner did no more than give permission for the aircraft to be used by the pilot to take the plaintiff on a joy flight. The Court was concerned that a vicarious liability finding here would approximate too closely to strict liability.

Scott v Davis

High Court of Australia, 5 October 2000
[2000] HCA 52; (2000) 175 ALR 217

Background

The first plaintiff was at the time of the accident in 1990 an 11 year old child who had been accompanying his parents at a social gathering at the country property of the owner of several light aircraft which were kept at an airstrip on the property. During the gathering, the father of the plaintiff and the father of some other children in attendance inquired of the owner whether their

children could go for a joy flight in one of the aircraft. The owner agreed to this, and at his request, the owner's wife arranged for a pilot who was present at the airstrip to fly the joy flights. The pilot was not an employee of the owner, but was a licensed pilot and aircraft enthusiast. The pilot had been previously permitted by the owner to fly the aircraft in question after the owner (himself a licensed pilot) had flown with the pilot and assured himself that the pilot was capable of flying the aircraft.

During the joy flight in question, in which the first plaintiff was the pilot's only passenger, negligence by the pilot in effecting a turn caused the aircraft to crash killing the pilot and seriously injuring the first plaintiff. The second and third plaintiffs were the father and mother of the first plaintiff. The first plaintiff sued the owner for damages for personal injury. The second and third plaintiffs sued him for nervous shock damages, having seen their son dragged from the crashed aircraft. All claimed that the owner was vicariously liable for the pilot's negligence.

High Court's Decision

Argument in the High Court centred on its decision in *Soblusky v Egan* (1960) 103 CLR 215. In that case, the High Court held that a person who was the bailee of a motor vehicle was vicariously liable for the negligence of a person who he had allowed to drive the vehicle while he himself remained a passenger in it, being asleep when the driver's negligence caused an accident resulting, among other things, in injury to another passenger.

The plaintiffs in the present case relied upon this decision in support of their argument that, even if the pilot was not under the owner's control at the time of the negligence, he was using the aircraft at the owner's request and for the owner's purposes. Therefore, the owner should bear vicarious liability. Gleeson CJ said of this argument [at para 18]:

> 'I am unable to accept that there is a principle of such width. There are several objections to it. First, ... it has no adequate foundation in authority. Secondly, it is impossible to reconcile with the general rule that a person is not vicariously liable for the negligence of an independent contractor. An independent contractor may be using an article at another's request and for the other's purposes, but the other is not ordinarily responsible for the contractor's negligence. Thirdly, the criterion of application of the principle is ill-defined and likely to be capricious in its operation. There are many circumstances, in which the owner or bailee of a chattel may request or permit another person to use or operate it, which do not yield readily to classification according to whether a purpose of the owner or bailee is being served.'

Gummow, Hayne and Callinan JJ, in separate judgments, went further, each suggesting that the plaintiffs' claim was tantamount to imposing strict liability upon the owner. Also, Gummow J endorsed (see para [252]) the comment of the majority judges in the South Australian Full Court who had said that, because the flying of aircraft, in contrast to the driving of motor vehicles, was not something able to be done by the greater community with relatively little training, there was not the same pressing need to extend vicarious liability as there was in the case of motor vehicles. Hayne J said (see para [310]) that, as the setting in which cases like the present would arise were social and not commercial, there was unlikely to be any insurance cover – in contrast to the position of motor vehicles – protecting the person in the position of the owner here against any vicarious liability.

Gummow, Hayne and Callinan JJ, held that *Soblusky v Egan* should be confined to the vicarious liability of the owner of a motor vehicle. Gleeson CJ saw the facts in *Soblusky v Egan* as simply not assisting the plaintiffs because of several distinguishing circumstances from the present case. He said (see para [16]) that, at the time of the negligence in question, the owner was not in a position to assert a

power of control over the manner in which the pilot was flying the aircraft. The other majority judges also agreed with this (see Gummow J, at para [258]; Hayne J, at para [311]; and Callinan J, at paras [357] and [358]).

McHugh J, on the other hand, in dissent, was not inhibited by any comparison with strict liability. He said (see para [120]) that the cases dealing with vicarious liability in the driving of motor vehicles (including *Soblusky v Egan*) did not depart from the basic principles of vicarious liability in holding an owner liable where negligent driving has occurred in the course of performing a task or duty which the owner has asked the driver to perform as the owner's representative or delegate. He said (see para [121]) once it was accepted that the owner of a motor vehicle may be liable for the negligent conduct of a driver who is not an employee and whose conduct was neither authorised, instigated nor ratified, that principle must also apply to boats and aircraft.

Text of the decision is available through Scaleplus at: http://scaleplus.law.gov.au/html/highcourt/0/2000/0/HC000530.htm

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The Trade Practices Act and the Commonwealth

The Federal Court has decided that the Commonwealth is not subject to the Trade Practices Act 1974 in contracting out the running of detention centres.

Corrections Corporation of Australia Pty Ltd v Commonwealth of Australia

Federal Court of Australia, 14 September 2000
[2000] FCA 1280; (2000) ATPR 41–787

Background

The litigation arose out of a tender process in 1997 by the Department of Immigration and Ethnic Affairs ('DIMA') on behalf of the Commonwealth of Australia to contract out services provided at detention centres. The services had previously been provided by the Australian Protective Service ('APS'). The contract was awarded to Australasian Correctional Services Pty Ltd. The applicant, Corrections Corporation of Australia Pty Ltd ('CCA') was an unsuccessful tenderer and challenged the way in which the tender process was conducted. It alleged that there was a 'process contract' to follow the rules of the tender and that this contract was breached by the Commonwealth. CCA also raised section 52(1) of the *Trade Practices Act 1974* ('TPA') (relating to misleading or deceptive conduct) and alleged that the Commonwealth was subject to the TPA.

Section 2A of the TPA provides that the Commonwealth is bound by the Act insofar as the Commonwealth 'carries on a business'. CCA alleged that the Commonwealth carried on a business in two ways, firstly that through DIMA or APS, it carried on the business of providing immigration detention services. Secondly, that in calling for a tender, it carried on the business of conducting a tender.

The Commonwealth moved successfully to strike out the TPA claim on the ground that it disclosed no reasonable cause of action.

Federal Court's Decision

The matter was heard before Finkelstein J. The Judge considered the meaning of the word 'business'. He considered that it must be understood in the context in which it is used. The context was the TPA which relates to the conduct of trading corporations and financial corporations that compete in markets for the provision of goods and services. He considered that it was clear that the carrying on of a business will bring the Commonwealth within the TPA where the activities in question are a commercial enterprise or a 'going concern.' He added that the commercial enterprise need not be conducted for a profit (because of the definition of 'business' in section 4(1) of the TPA).

The Judge held that operating a detention centre is not a trading or commercial activity. He found that it is 'no different from a Government maintaining and operating a prison for convicted felons.'

As to the calling of tenders, the Judge found that it is difficult to see how the process of selecting a person to provide services to the Commonwealth can be seen as relating to a business.

Although not strictly speaking relevant to the decision, the Judge also made comments regarding circumstances where Departments provide 'services' to each other. He noted that the language of business is often used when this is done and profit and loss statements and the like produced. However, he added it would be a mistake to see such work as the production of services in anything other than a loose sense. The Judge held that this has in effect been recognised by section 2C(1)(c)(i) of the TPA which provides that where there is a transaction involving persons who are acting for the Crown in the same right, it does not amount to the carrying on of a business. Different considerations of course apply where the service is provided by a statutory authority to a Department.

Implications of the Decision

The Court has provided useful guidance on the meaning of the word 'business'. The Commonwealth will be seen to be carrying on a business where it is involved in a commercial enterprise or a 'going concern'. In other words, merely providing goods or services for which a charge is made may not be enough.

Again, the Court has made it clear that where the Commonwealth is carrying on a purely government function, it may not be carrying on a business. Many other examples of this can be found in government procurement or contracting out programs. It is also relevant that the Judge has noted that services provided between core government departments of the Commonwealth does not amount to the carrying on of a business.

It is important to remember that there remain many areas where the Commonwealth will be found by the Courts to be carrying on a business – an obvious situation arising where the Commonwealth is providing goods or services to the public for a fee as part of an enterprise.

Text of the decision is available through Scaleplus at: http://scaleplus.law.gov.au/html/feddec/0/20003/0/FD003310.htm

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Claims for Contribution and Indemnity under State Legislation

This decision resolves, in the negative, the question whether a third party notice is maintainable against the Commonwealth, a Commonwealth authority, a licensed corporation within the meaning of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('SRC Act') or a Commonwealth employee that seeks indemnity or contribution in respect of injury or damage suffered by an employee in the course of employment with the Commonwealth, the authority or licensed corporation. In the context of determining the exposure of the Commonwealth, and any of these other classes of person, to State or Territory tortfeasors contribution legislation, the decision also contains some important observations on the operation of ss 64 and 79 of the *Judiciary Act 1903*.

Austral Pacific Group Ltd (in liq) v Airservices Australia

High Court of Australia, 3 August 2000
[2000] HCA 39; (2000) 173 ALR 619

Background

An employee of the Civil Aviation Authority, an authority of the Commonwealth for the purposes of the SRC Act, suffered injury in 1994 when, in the course of his employment at Cairns Airport, he slipped from a step fitted to a fire truck. The employee sued the appellant, the supplier of the step appliance to the Authority, for damages in respect of the injury, alleging negligence in the defective state of the step appliance. (The liabilities of the Authority were later transferred to Airservices Australia ('AA')) The appellant issued a third party notice against AA seeking indemnity or contribution from it. AA claimed that, because s.44 of the SRC Act precluded any action against it by the employee, it was not within the meaning of the Queensland tortfeasors contribution legislation, the *Law Reform Act 1995*, a tortfeasor 'who is, or would if sued have been, liable in respect of the same damage'.

This claim failed at first instance, but was upheld by the Queensland Court of Appeal (see (1998) 157 ALR 125). The appellant was granted special leave to appeal to the High Court. The High Court, sitting with a bench of five justices, unanimously dismissed the appeal.

High Court's Decision

In summary, Gleeson CJ, Gummow and Hayne JJ, in a joint judgment, held that s.44 of the SRC Act operated to deny from the outset the existence of a cause of action in respect of an injury suffered by an employee in the course of his or her employment. Notwithstanding the limited right to damages in the circumstances covered by s.45, the effect of s.44 was not merely procedural, but substantive (see *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297). This meant that at no time was AA a tortfeasor who would, if sued by the plaintiff (ie. the employee), have been liable as a joint tortfeasor in respect of the same damage as the appellant. Therefore, a third party notice did not lie against AA. McHugh J and Callinan J, in separate judgments, decided to like effect.

The position taken by the High Court (and the Queensland Court of Appeal beneath) was in line with that which had been taken in similar fact situations by the New South Wales Court of Appeal in *Commonwealth v Flaviano* (1996) 40 NSWLR 199 and the South Australian Full Court in *Coomblas v Gee* (1998) 72 SASR 247.

All the judgments observed that State or Territory tortfeasors contribution legislation was made a 'surrogate Commonwealth law' by s.79 of the

Judiciary Act 1903 (neither the SRC Act nor any other Commonwealth Act 'otherwise providing' within the meaning of that section). Though it was not necessary to determine here, assuming that AA equated to the Commonwealth for the purposes of s.64 of the Judiciary Act (as did the Commonwealth Trading Bank in *Maguire v Simpson* (1977) 139 CLR 362), s.64 would apply the State or Territory tortfeasors contribution legislation to make AA liable to give an indemnity or make contribution where the requirements of that legislation were satisfied (which in the present case they were not).

McHugh J made some enlightening observations on the operation of s.64 of the Judiciary Act (see paragraph [56] in particular).

Text of the decision is available through Scaleplus at: http://scaleplus.law.gov.au/html/highcourt/0/2000/0/HC000400.htm

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