

Public Law Section

Monitor's Report by Gabi Crafti



1. *Recent cases / practice notes*

1.1 Constitutional law

Wurridjal v Commonwealth [2009] HCA 2 (2 February 2009)

Case summary by Kris Walker (who appeared for the plaintiffs with Ron Merkel QC, Richard Niall and Albert Dinelli)

1. This case concerned the validity of one aspect of the Commonwealth's Northern Territory intervention: the taking by the Commonwealth of a five year lease over certain property within Aboriginal communities in the NT. The Plaintiffs claimed that the taking of a lease by the Commonwealth over certain land (the **Maningrida Land**) constituted an acquisition of property other than on just terms and thus was invalid pursuant to s 51(xxxi) of the Constitution.
2. Two forms of property were in issue in the proceeding:
 - an estate in land held by the Arnhem Land Aboriginal Land Trust (the **Land Trust**) pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the **Land Rights Act**) and described in that Act as an estate in fee simple; and
 - interests of traditional owners in the Maningrida Land granted by s 71 of the *Land Rights Act* to use the land in accordance with tradition (the **s 71 rights**).

The Legislation

3. The legislation challenged was the *Northern Territory National Emergency Response Act 2007* (Cth) (the **NER Act**) and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) (the **FaCSIA Act**) (collectively, **the Acts**). The Acts were enacted pursuant to s 122 of the Constitution (the territories power), although they were arguably also supported by the races power (s 51xxvi) and/or the external affairs power (s 51(xxix)).

4. The key provision in issue was s 31 of the NER Act, which provided for the creation of a statutory lease over the Maningrida Land (the **five year lease**).
5. Section 60(2) of the NER Act required the payment of reasonable compensation if the NER Act resulted in an acquisition of property to which s 51(xxxi) applied. The current state of authority was that s 51(xxxi) had no application to legislation enacted under the territories power (s 122 of the Constitution)—*Teori Tau v Commonwealth* (1969) 119 CLR 564. Thus unless the legislation was enacted under some other head of power, or unless *Teori Tau* was overruled, the Act did not require reasonable compensation to be paid in relation to the Maningrida Land. In an earlier case, *Newcrest Mining, Gaudron, Gummow and Kirby JJ* had indicated that they were prepared to overrule *Teori Tau*. This case presented an opportunity for this issue finally to be determined by the High Court.
6. Further, the reasonable compensation requirement was qualified by certain other provisions of the Act that required that any compensation take into account any improvements to the land, whether by the Commonwealth or any other person and whether before or after the acquisition.

The Issues

7. The case raised the following issues for decision:
 - whether *Teori Tau* should be overruled so that s 51(xxxi) would apply to any acquisition of property pursuant to legislation enacted under the territories power;
 - whether the Trust's fee simple and the s 71 rights were "property" within the meaning of s 51(xxxi);
 - whether the five year lease effected an "acquisition" of property within the meaning of s 51(xxxi); and
 - whether s 60(2) of the NER Act provided "just terms" for any acquisition of property, as required by s 51(xxxi).

The Judgments

8. The Court delivered 6 separate judgements, each with somewhat disparate reasoning. In summary:
 - Four judges (French CJ, Gummow and Hayne JJ, and Kirby J) held that *Teori Tau* should be overruled. Thus the power of the Commonwealth Parliament to make laws for the government of any Territory pursuant to s 122 of the Constitution is subject to the limitation imposed by s 51(xxxi) of the Constitution that laws for the acquisition of property from any person for any purpose in respect of which the Parliament has power to make laws must be on just terms

Heydon J, Crennan J and Kiefel J each found this issue unnecessary to decide.

- Five judges (French CJ, Gummow and Hayne JJ, Kirby J and Kiefel J) held that the statutory fee simple estate held by the Land Trust was a form of property protected by s 51(xxxi). They rejected the Commonwealth's contention the Land Trust's title was inherently subject to statutory adjustment, and that the Acts were simply such an adjustment to which no requirement of just terms attached. This was consistent with the Court's decision in *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099.

Crennan J concluded that, although the statutory fee simple was property protected by s 51(xxxi) in some (perhaps most) contexts, it was a form of property that was subject to statutory adjustments of a certain kind (see further 8c, below).

Heydon J found this issue unnecessary to decide.

- Five judges (French CJ, Gummow and Hayne JJ, Kirby J and Kiefel J) held that the taking of a lease by the Commonwealth over the Land Trust's fee simple land constituted an acquisition of property within the meaning of s 51(xxxi).

Crennan J dissented on this issue: she concluded that the Trust's fee simple estate was inherently subject to statutory adjustment of the kind effected by the imposition of the five year lease in the particular circumstances that justified the NT intervention. Thus the imposition of the five year lease was considered a permissible, temporary "adjustment" of the Trust's possession and control of the Maningrida Land. The intervention was not "directed to benefiting the Commonwealth or to acquiring property for the Commonwealth ... nor to depriving traditional Aboriginal owners of any prior rights or interests". Rather, the purpose of the legislation was regarded as beneficial to the traditional owners. Thus the challenged provisions fell outside the scope of s 51(xxxi).

Five judges (French CJ, Gummow & Hayne JJ, Crennan J and Kiefel J) held that the s 71 rights were not extinguished or fettered by the imposition of the five year lease; those rights continued and were not subject to termination by the Commonwealth pursuant to the NER Act. Thus the s 71 rights were not acquired by the imposition of the five year lease.

Kirby J considered the question whether the Plaintiff's traditional interests in land, including the s 71 rights, had been acquired to be arguable and thus a demurrer was not an apt procedure to resolve the issue.

Heydon J found it unnecessary to consider whether there had been any acquisition of property to which s 51(xxxi) applied.

- Five judges (French CJ, Gummow and Hayne JJ, Heydon J and Kiefel J) held that s 60(2) of the NER Act provided for just terms and hence the legislation was not invalid.

Kirby J (dissenting on this issue) concluded that it was reasonably arguable that s 60(2) did not provide for just terms, thus a demurrer was not an apt procedure to resolve the issue.

Crennan J found this issue unnecessary to decide.

9. Thus although the Commonwealth's demurrer to the Statement of Claim was ultimately upheld, the consequences for the Plaintiffs (and for the Land Trust, which was joined as a respondent) were positive, in that:
 - the Land Trust property acquired by the Commonwealth was subject to the protection of s 51(xxxi) so that just terms are payable for the acquisition of that property; and
 - the s 71 rights of the traditional owners continued and were not affected by the five year lease (and hence were not acquired and no just terms were required to be paid).
10. More generally, the Court has by majority confirmed that the legislative power of the Commonwealth pursuant to s 122 of the Constitution is qualified by the guarantee of just terms on s 51(xxxi) of the Constitution.

Wong v Commonwealth of Australia; Selim v Lele [2009] HCA 3
(2 February 2009)

Constitutional law; s 51(xxiiiA); provision of medical and dental services (but not so as to authorise any form of civil conscription)

The appellants, general medical practitioners, were both found to have engaged in "inappropriate practice" under s 82 of the *Health Insurance Act 1973* (Cth)(the **Act**). They sought a declaration from the High Court that ss 10, 20, 20A and Pt VAA of the Act amounted to "civil conscription" within the meaning of s 51xxiiiA of the Constitution and were outside the legislative powers of the Commonwealth and invalid.

Sections 10, 20 and 20A of the Act deal with entitlement to Medicare benefits, payment to the persons incurring the medical expenses in respect of the professional service and assignment of Medicare benefits to the relevant practitioner. Part VAA of the Act (ss 80 - 106ZR) is headed "The Professional Services Review Scheme" and deals with "inappropriate practice".

Section 51(xxiiiA) of the Constitution reads: "the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances".

The appellants submitted that ss 10, 20 and 20A compelled practitioners to participate in Medicare which amounted to civil conscription. They also submitted that the requirement under Pt VAA for medical practitioners not to engage in "inappropriate practice" was an impermissible intervention in the professional delivery of clinical medical services and care and offended the prohibition against civil conscription.

The appeals were dismissed (6:1). The Court relied heavily on extrinsic and historical materials in interpreting s 51(xxiiiA).

French CJ and Gummow J held that the legislative history and genesis of s 51(xxiiiA) supported a construction of the phrase “(but no so as to authorise any form of civil conscription)” which treated “civil conscription” as involving some form of compulsion or coercion, in a legal or practical sense, to carry out work or provide services for the Commonwealth, a statutory body or a third party at the Commonwealth’s direction. Their Honours held that Pt VAA of the Act was not a law which authorised a form of civil conscription. Similarly, they held that ss 10, 20 and 20A did not amount to practical compulsion to perform a professional service.

Kirby J held that the regulation imposed on the appellants by the Act, in the provisions impugned by them, were no more than measures proportionate to ensure the lawfulness and integrity of the provision of “medical and dental services” in a manner conforming to the Constitution. They did not constitute a form of “civil conscription” and were therefore valid.

Heydon, Crennan and Kiefel JJ held that ss 10, 20 and 20A did not compel, legally or practically, a medical practitioner perform any service, whether on behalf of the Commonwealth or at all. Pt VAA compelled practitioners to abide by a particular standard of professional behaviour in connection with rendering or initiating services. This did not prevent a practitioner from choosing whether or not to practise. It was not a form of civil conscription.

Heydon J, in dissent, held that whilst ss 10, 20 and 20A did not constitute civil conscription, aspects of Pt VAA did and were therefore invalid.

K-Generation Pty Limited v Liquor Licensing Court [2009] HCA 4
(2 February 2009)

Constitutional law; judicial power; Ch III; vesting of federal jurisdiction in State courts

K-Generation Pty Ltd applied to the South Australian Liquor and Gambling Commissioner (the **LGC**) under the *Liquor Licensing Act 1997* (SA) (the **Act**) for an entertainment venue licence. The Commissioner for Police for South Australia (the **CPSA**) intervened so as to introduce evidence and making representations on whether it would be contrary to the public interest if the individuals involved with K-Generation (Krasnov and Tay) were approved as fit and proper persons. The CPSA had classified certain information as “criminal intelligence” pursuant to s 28A of the Act and he had that information tendered to the LGC. In reliance upon that section, the information was not disclosed to K-Generation, Krasnov, Tay or their representatives. The LGC, acting upon the information, refused the application on the ground that it would be contrary to the public interest.

K-Generation sought review of the LGC’s decision in the Licensing Court of South Australia. The parties invited the Court to determine whether, on the criminal intelligence information alone, the decision of the LGC would be upheld. The Court considered the criminal intelligence information and on upheld the decision of the LGC. K-Generation applied for judicial review and declarations in the Supreme Court of South Australia. The proceeding was ultimately heard by a Full Court which by a majority refused the application.

Special leave was granted to appeal from the decision of the Full Court of the SA Supreme Court.

The sole ground of appeal was that the Full Court erred in law in finding s 28A to be valid notwithstanding that it required the Licensing Court to hear and determine a review without disclosing to K-Generation information classified as “criminal intelligence”, which had been relied upon by the LGC in refusing the application for the licence.

In substance, the appellants argued that s 28A conferred a function upon the Licensing Court and upon the Supreme Court incompatible with their status as courts of a State in which federal jurisdiction could be invested under s 77(iii) of the Constitution.

The Court dismissed the appeal with costs.

French CJ said that s 28A infringed upon the open justice principle that is an essential part of the functioning of courts in Australia. It infringed upon procedural fairness in that it authorised and effectively required the Licensing Court and the Supreme Court to consider, without disclosing to the party to whom it relates, criminal intelligence information tendered by the Commissioner of Police. Nonetheless, his Honour held that s 28A:

- did not confer on the Licensing Court or the Supreme Court functions which were incompatible with their institutional integrity as courts of the States or with their constitutional roles as repositories of federal jurisdiction;
- left it to the Courts to determine whether information classified as criminal intelligence answered that description;
- left it to the Courts to decide what steps might be necessary to preserve the confidentiality of such material;
- enabled the Courts to disclose the material to legal representatives of the party affected pursuant to confidentiality undertakings or the like;
- left it open to the Courts to decide whether to accept or reject such material and to decide what if any weigh should be placed upon it.

Accordingly, French CJ held that s 28A was not constitutionally invalid.

Similarly, Gummow, Hayne, Heydon, Crennan and Kiefel JJ held that the Licensing Court was not directed as to which particular steps may be taken, nor was it denied the assistance of submissions by the legal representatives of parties other than the Police Commissioner as to what those steps should be. The Licensing Court was not bound to accept in its terms the “criminal intelligence” upon which the Police Commissioner relied. The Court itself could question the evidence in closed session. The section did not operate to deny the Licensing Court the constitutional character of an independent and impartial tribunal.

Kirby J held that s 28A intentionally diminished the role of a court to decide claims to privilege with respect to “criminal intelligence”. However, it did not involve the State Parliament or Police Commissioner impermissibly “instructing” a court on a particular case. It did not prevent a court from

performing traditional judicial functions. It did not diminish the integrity and independence of a court in a constitutionally impermissible way.

1.2 Administrative law

Fisse v Secretary, Department of the Treasury [2008] FCAFC 188
(11 December 2008) (Stone, Buchanan and Flick JJ)

Administrative law; freedom of information; Cabinet documents; document prepared for purpose of submission to Cabinet; public interest; no question of law

In 2003, the Dawson Committee reported to the Federal Government on the competition provisions of the *Trade Practices Act 1974* (Cth). The committee recommended that criminal sanctions be introduced for serious cartel conduct subject to the resolution of some issues. On 15 April 2003, Cabinet agreed that a working group would consider those issues. By an exchange of correspondence in July and September 2003, the Prime Minister and the Treasurer agreed that the working party would report to the Treasurer by the end of 2003 and that the Treasurer would bring “the issue” before Cabinet early in 2004. The working party submitted its report in April 2004. The report included an executive summary. The executive summary was attached to a Cabinet submission that was presented to Cabinet for its considerations on 21 June 2004.

The Administrative Appeals Tribunal (the ***Tribunal***) refused Mr Fisse’s request under the *Freedom of Information Act 1982* (Cth) (the ***FOI Act***) for access to the report, including the executive summary. It found that:

- the executive summary had been prepared for the purpose of submission for consideration by the Cabinet and was therefore exempt from disclosure under s 34(1)(a) of the FOI Act; and
- the entirety of the working party report was exempt under s 36 of the FOI Act as disclosure would be contrary to the public interest.

Mr Fisse appealed to the Full Court of the Federal Court pursuant to the *Administrative Appeals Tribunal Act 1975* (Cth). Section 44(1) of that Act confines appeals to the Federal Court from the Tribunal to “a question of law”.

The Full Court held that the Tribunal’s findings were findings of fact that were open to it on the evidence. Accordingly, there was no question of law for the Court to review.

In respect of the first finding, regarding the purpose of the executive summary, Buchanan and Flick JJ expressed reservations about the sufficiency of parts of the evidence that had been before the Tribunal but acknowledged that that was not a question of law. At [46], Buchanan J reiterated the well-established principle that want of logic is not synonymous with error of law.

As to the second finding, the Court held that the Tribunal had properly weighed up the relevant competing considerations but had found that the public interest in preserving the confidentiality of Cabinet submissions and deliberations outweighed the other considerations. This was a course that was open to the Tribunal and that was not reviewable by the Court.

2. *Upcoming event - Constitutional Law Conference and Dinner*

Speakers include: Justice Michelle Gordon; Pamela Tate SC, Solicitor-General for Victoria; Stephen Gageler SC, Commonwealth Solicitor-General; Mark Dreyfus QC, Commonwealth MP.

Date and time: Friday 20 February 2009, 8.30am – 5.00pm and dinner

Venue: Australian National Maritime Museum, Darling Harbour, Sydney