

The Federal Court on Constitutional Law: The 2001 Term

Introduction

For the Federal Court 2001 was also not a watershed year – but like 1998 it was a year in which the Court attracted considerable public attention. Curiously at first instance it was again North J, the “judge from central casting” as he has been described in the press, who as duty judge was put in the difficult position of having to hear and determine a complex and controversial matter of high public interest in circumstances of urgency and in which his every word was bound to receive the most careful scrutiny and analysis. In 1998 North J dealt with the high profile Patrick’s wharf dispute and in 2001 it was what came to be known as the Tampa crisis. I will talk of that a little more in a moment, because, although the press reports rather obscured the fact, it was at the heart a constitutional case arising under Chapter II of the Constitution.

Not surprisingly, however, Chapter III of the Constitution attracted much more of the Court’s attention over 2001 as a whole. I propose in this presentation to look principally at matters under Chapter III which came before the Full Court in 2001. However, I will conclude with consideration of *MIMA v Vadarlis*, the Tampa case.

Chapter III

The Full Court in two appeals gave consideration to whether legislative provisions were invalid as attempts to confer administrative functions (ie non judicial power) on the Federal Court. The appeals were:

Yanner v Minister, Aboriginal & Torres Strait Islander Affairs [2001] FCA 36

Cabal v United Mexican States [2001] FCA 427

The same issue had been considered by the Full Court late in the previous year in *King v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union*

[2000] FCA 1900, a reservation of a question by a judge for consideration by the Full Court.

Perhaps it is significant to note that in two out of these three cases the constitutional issue was identified by the Court rather than the parties. Indeed in *Yanner* no contradictor to invalidity has as yet been identified – a matter which appears to have influenced the High Court when it granted special leave to appeal against the majority decision of the Full Federal Court which found the relevant legislative provision unconstitutional and therefore invalid.

The provision under consideration in *Yanner* was s 31 of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). After providing that a person is not qualified to be appointed as a Commission if he or she has been convicted of certain offences against a Commonwealth, State or Territory law, the section provides for certain exceptions. One exception is that:

“... the Federal Court of Australia, on application by the person, declares that in spite of the person’s conviction, he or she ought not to be disqualified from being appointed as a Commissioner.”

The majority of the Full Court, (Drummond and Kiefel JJ) and the judge at first instance (Dowsett J) considered it of importance that the Act failed to provide any appropriate and objective criteria by which the Court could determine whether the conviction and sentence should operate to disqualify the person, leaving the Court with no assistance in exercising a very broad discretion. The majority noted that the discretion was one which touched on political matters as the Commission is, in effect, a department of government. Sackville J, in dissent in the Full Court, took a different view. He did not think that it was beyond the familiar role that courts perform to make a judgment as to whether a particular applicant, despite his or her conviction, could safely be entrusted to discharge the functions of a Commissioner.

In issue in *Cabal* was whether the *Extradition Act 1988* (Cth) was unconstitutional as conferring on the Federal Court an administrative rather than a judicial function. The argument advanced in support of invalidity was that as the initial hearing before a magistrate was administrative in character, the rehearing by way of review before the

Court was necessarily also administrative in character. The Full Court (Hill, Weinberg and Dowsett JJ) in a joint judgment rejected the argument referring to, amongst other authorities, *The Queen v Davison* (1954) 90 CLR 353.

The Court, constituted by Sackville J, heard and determined in *Australian Communications Authority v Viper Communications Pty Ltd* [2001] FCA 637 the reverse issue. That is, whether s 128 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) was invalid as an attempt to require bodies described by the Act as “eligible carriage service providers” to join the Telecommunications Industry Ombudsman Scheme, being a scheme to confer the judicial power of the Commonwealth on the Telecommunications Industry Ombudsman. His Honour concluded that the Ombudsman does not exercise judicial power noting first, that decisions of the Ombudsman are not automatically enforceable and can only be enforced by proceedings taken in a court. Secondly, His Honour concluded that the Ombudsman was not required to determine complaints by a process of applying principles of law to the facts as found; rather the Ombudsman was free to create norms to resolve a particular dispute or a class of disputes.

Another Full Court decision touching on Chapter III was *Ly v Jenkins* [2001] FCA 1640 where the Court rejected, as not open before the Federal Court, the argument that s 132(6A) of the *Copyright Act 1968* (Cth) is invalid as not providing, in respect of an offence to be tried summarily, for a trial by jury as allegedly required by s 80 of the Constitution.

Chapter I

To illustrate that the Federal Court did not wholly fail to consider Chapter I of the Constitution I refer to *Quickenden v Commission O'Connor of the Australian Industrial Relations Commission* [2001] FCA 303. In this case, Dr Quickenden, an academic employed by the University of Western Australia, challenged the validity of a certified agreement made under the *Workplace Relations Act 1996* (Cth) between the University and the National Tertiary Education Industry Union, of which he was not a member. He also challenged the validity of the provision of the *Workplace Relations Act* under which the agreement was certified. The issues involved included

the scope of the power of the Commonwealth to make laws with respect to trading and financial corporation (Constitution s 51(xx)), whether the relevant provisions of the *Workplace Relations Act* are laws with respect to such corporations and whether the University is a trading or financial corporation to which those laws apply. A separate question also arose as to whether the certified agreement, by its effect on Dr Quickenden's pre-existing common law contractor rights, amounts to an acquisition of property required to be on just terms (Constitution s 51(xxxi)).

In summary, Dr Quickenden was unsuccessful on all issues both before Lee J at first instance and before the Full Court constituted by Black CJ, French and Carr JJ.

Chapter II

I return to look more carefully at *MIMA v Vadarlis*.

On 11 September 2001, Justice North made orders directing the Commonwealth to release people who had been rescued from a sinking vessel by the Norwegian ship the MV Tampa on 26 August. In effecting the rescue the MV Tampa had acted on a request of the Australian Government. On 3 September those people had been transferred to HMAS Manoora, then in Australian waters off Christmas Island. His Honour's orders directed that the persons be brought ashore to a place on the Australian mainland.

Justice North's order was by way of *habeas corpus* and was granted on the basis that the Commonwealth had, without lawful authority, detained the people rescued by the MV Tampa. The orders were made on the application of the VCCL and by a Victorian Solicitor, Mr Eric Vadarlis.

The Commonwealth appealed against the decisions of North J. An application for an urgent hearing was granted on 12 September (Wed) and the appeal was heard the next day (Thurs). The Full Court made orders on 17 September 2001 (Mon).

By a majority comprised of Justices Beaumont and French, the Court allowed the appeals and set aside the orders made by Justice North. The majority concluded that

the Commonwealth was acting within its executive power under s 61 of the Constitution in the steps that it took to prevent the landing on Australian soil of the persons rescued by the MV Tampa. The majority also concluded that those persons were not detained by the Commonwealth, nor was their freedom restricted by anything done by the Commonwealth. The Chief Justice dissented on both issues.

The judgment of the majority is, in effect, that of French J with whom Beaumont J agreed. Anyone interested in a more detailed recitation of the background facts to the case will find such a recitation in the reasons for judgment of French J.

The key constitutional issue before the Court, both at first instance and on appeal, was whether the executive power of the Commonwealth authorised and supported the expulsion of those persons rescued by the MV Tampa and their detention for that purpose.

French J noted at [176] that:

“Section 61 is the primary source of executive power. Its content extends to the execution and maintenance of the Constitution and the laws of the Commonwealth. It is also limited by those terms in so far as it will not authorise the Commonwealth to act inconsistently with the distribution of powers and the limits on power for which the Constitution provides. Nor will it authorise the Commonwealth to act otherwise than according to the laws of the Commonwealth. Other provisions of the Constitution vesting powers in the Governor-General may be seen as distinct sources of executive power on their specific topics and as giving content to the power conferred by s 61.”

His Honour noted that the use of the term “prerogative” to describe a power derived from s 61 of the Constitution may properly acknowledge its historical antecedents but does not adequately illuminate its constitutional origin. He cited *Davis v The Commonwealth* (1988) 166 CLR 79 at 93 and Gummow J in *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 369. French J pointed out that the executive power conferred by s 61 of the Constitution is a power conferred as part of a negotiated federal compact expressed in a written Constitution distributing powers between the three arms of government reflected in Chapters I, II and III of the Constitution and, as to legislative powers, between the polities that comprise the

federation. The power, His Honour pointed out, is subject, not only to the limitations as to subject matter that flow directly from the Constitution but also to the laws of the Commonwealth made under the Constitution. His Honour took the view that there is no place for any doctrine that a law made on a particular subject matter is presumed to displace or regulate the operation of the executive power in respect of that subject matter. The operation of the law upon the power is a matter of construction governed by the terms of the relevant statute but informed by a requirement for a clear intention to displace the power [184]. His Honour cited *Barton v Commonwealth* (1974) 131 CLR 477 for the proposition that the greater the significance of a particular executive power to national sovereignty, the less likely it is that, absent clear words or inescapable implication, the parliament would have intended to extinguish the power.

His Honour observed at [192] that:

“Australia's status as a sovereign nation is reflected in its power to determine who may come into its territory and who may not and who shall be admitted into the Australian community and who shall not”

He concluded at [193]:

“... the executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion. This does not involve any conclusion about whether the Executive would, in the absence of statutory authority, have a power to expel non-citizens other than as an incident of the power to exclude.”

His Honour rejected the contention that the *Migration Act* covers the field of unlawful entry into Australia in a way which manifests an intention to displace any executive power in relation to the same subject matter. He pointed out that the test was whether the Act evinces a clear and unambiguous intention to deprive the Executive of the power to prevent entry into Australian territorial waters of a vessel carrying non-citizens apparently intending to land on Australian territory and the power to prevent such a vessel from proceeding further towards Australian territory and to prevent non-citizens on it from landing upon Australian territory. His Honour concluded at [202] that the *Migration Act*, by its creation of facultative provisions, which may yield a like result to the exercise of executive power, in this particular application of it cannot be

taken as intending to deprive the Executive of the power to do that which it had done. The Migration Act, his Honour found, conferred power. It did not evince an intention to take power away.

The Chief Justice, in dissent, concluded at [26] that the preponderance of opinion by text writers supports the view that, by the end of the nineteenth century, in English jurisprudence, the power to exclude aliens in times of peace was not considered to be part of the prerogative. He rejected the proposition that there is a broad prerogative power to expel or detain in times of peace citing *Lim v Minister for Immigration* (1992) 176 CLR 1 at 19.

As to s 61 of the Constitution, the Chief Justice said:

“If it be accepted that the asserted executive power to exclude aliens in time of peace is at best doubtful at common law, the question arises whether s 61 of the Constitution provides some larger source of such a power. It would be a very strange circumstance if the at best doubtful and historically long-unused power to exclude or expel should emerge in a strong modern form from s 61 of the Constitution by virtue of general conceptions of ‘the national interest’. This is all the more so when according to English constitutional theory new prerogative powers cannot be created”

The Chief Justice adopted a different test from French J for the determination of whether the executive power of the Crown derived from s 61 of the Constitution had been displaced by statute. The Chief Justice adopted a simple covering the field test holding at [37] that the prerogative will be held to be displaced when a statute covers the subject matter. After a careful analysis of the *Migration Act*, including the amendments introduced by the *Border Protection Legislation Amendment Act 1999* (Cth), the Chief Justice concluded that the *Migration Act* provides a comprehensive regime for the control of Australia’s borders and the patrol of territorial waters in the circumstances such as those that the rescued people were in at the relevant time and that it was a regime which could have applied to the rescued people. The Chief Justice noted that:

“It would be a strange intention to impute to the Parliament that a parallel system of unregulated executive discretion should be available, or not available, according to whether an officer for the purposes of s 189(2)

happened to be on board, for example, a Commonwealth vessel tasked for border protection.”

He concluded that the Parliament intended that in the field of exclusion, entry and expulsion of aliens, the Migration Act should operate to the exclusion of any executive power derived otherwise than from powers conferred by Parliament.

The Chief Justice would also not have disturbed the finding of North J that the persons rescued by the MV Tampa were detained by the appellants and that their detention was not authorised by law.

Mr Vadarlis, but not VCCL, sought special leave to appeal to the High Court from the decision of the Full Court of the Federal Court. Special leave was refused by Gaudron, Gummow and Hayne JJ on the ground that the essential claim made before the Federal Court that the persons rescued by the MV Tampa were detained aboard the MV Tampa could no longer be made. All of them were now either in Nauru or New Zealand and detained, if at all, outside of Australia and in circumstances not ventilated before the Federal Court. The Court indicated, however, that the question of executive and prerogative power examined in the Full Court is an important constitution question and might, in an appropriate case, attract the grant of special leave.

I feel that I should not conclude without noting, for completeness, that yet again in 2001, there were litigants who brought before the Federal Court constitutional contentions of the widest potential significance. It was argued in one case, for example, that part of the Melbourne suburb of Kew has seceded from the Commonwealth so as to render persons who live there beyond the reach of the Australian Competition and Consumer Commission, that no Governor-General of Australia has ever been validly appointed, and that all members of the Commonwealth Parliament, all Federal Ministers of State and all Federal judges are invalidly appointed. If you are interested in investigating the merits of these arguments, I commend to you the decision of Goldberg J in *ACCC v Purple Harmony Plates Pty Ltd* [2001] FCA 1062.