SHORT PARTICULARS OF CASES
APPEALS

SITTINGS COMMENCING TUESDAY, 15 JUNE 2010

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AID/WATCH INCORPORATED v COMMISSIONER OF TAXATION (S82/2010)

Court appealed from: Full Court of the Federal Court of Australia [2009] FCAFC 128

Date of judgment: 23 September 2009

Date of grant of special leave: 12 March 2010

Aid/Watch Incorporated ("Aid/Watch") is a non-governmental organisation that was incorporated in 1993. From 14 July 2000 it was endorsed as an entity exempt from income tax pursuant to s 50-105 of the *Income Tax Assessment Act 1997* (Cth) ("the ITA"). From 1 July 2005 it was also endorsed as a charitable institution pursuant to s 123E(1) of the *Fringe Benefits Tax Assessment Act 1986* (Cth) and s 176-1(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth). On 2 October 2006 Aid/Watch was advised that these endorsements had been revoked. On 6 March 2007 its objection pursuant to Div 3 Pt IVC of the *Taxation Administration Act 1953* (Cth) was also disallowed by the Commissioner of Taxation ("the Commissioner").

Aid/Watch applied to the Administrative Appeals Tribunal for a review of the Commissioner's decision. Downes J found that Aid/Watch's primary activities were associated with the relief of poverty and the delivery of foreign aid. His Honour further found that its objectives were to monitor, research, campaign and undertake activities relating to aid and investment programs. His Honour also found that although Aid/Watch sought to influence government policy as to the nature and extent and means of delivery of overseas aid, it did not do so by activist approaches and confrontational methods. It did so by indirect action such as the publication of reports and assessments. He therefore concluded that Aid/Watch was a charitable institution for the purposes of s 50 of the ITA.

The Commissioner's appeal to the Full Federal Court (Kenny, Stone and Perram JJ) was successful. Their Honours held that Aid/Watch's attempt to influence the government (however indirectly) necessarily involved criticism of both government activities and policies. They found that this was a political activity. Therefore, while Aid/Watch's activities were directed towards purposes which would fall within at least one category of charitable purpose (the relief of poverty), its political activities meant that it could not be categorised as a charitable institution in the legal sense.

The grounds of appeal include:

- The Full Federal Court found that Aid/Watch's purposes should be characterised as charitable in the legal sense (as being for the relief of poverty and the advancement of education) unless disqualified because of their political nature. It erred in holding that the activities of Aid/Watch in monitoring, undertaking research and campaigning were political activities, that behind those activities was a political purpose, and therefore Aid/Watch was disqualified from being a charitable institution as its main purpose was political.

On 19 April 2010 the Respondent filed a notice of contention, the grounds of which are:

- The Full Federal Court erred in holding that Aid/Watch had a purpose or activity of the relief of poverty within the meaning of the first head in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583 ("Pemsel").

- The Full Federal Court erred in holding that Aid/Watch had a purpose or activity of the advancement of education within the meaning of the second head of Pemsel.

SPENCER v COMMONWEALTH OF AUSTRALIA (S87/2009)

Court appealed from: Full Federal Court of Australia
[2009] FCAFC 38

Date of judgment: 24 March 2009

Date of referral: 12 March 2010

Mr Peter Spencer owned a property at Shannons Flat, New South Wales known as "Saarahnlee". That property is currently subject to the *Native Vegetation Act 2003* (NSW), while it was previously subject to the *Native Vegetation Conservation Act 1997* (NSW). (These Acts are known collectively as "the State statutes" but individually as "the 1997 Vegetation Act" and "the 2003 Vegetation Act".)

The State statutes prohibit the clearing of native vegetation other than in specified circumstances. As a consequence, Mr Spencer claimed that they made Saarahnlee unsuitable for commercial farming. He also claimed that they effectively amounted to the acquisition or expropriation of his interests in Saarahnlee. Mr Spencer further submitted that the State statutes operated with the effect or authority of two Commonwealth laws, the *Natural Resources Management (Financial Assistance) Act 1992* (Cth) and the *Natural Heritage Trust of Australia Act 1997* (Cth). (These Acts are known collectively as "the Commonwealth statutes" and individually as "the Financial Assistance Act" and "the Natural Heritage Act"). Mr Spencer claimed, inter alia, that the Commonwealth statutes are laws with respect to the acquisition of property other than on "just terms" as required by s 51(xxxi) of the *Commonwealth Constitution* ("the Constitution"). They are therefore invalid.

On 26 August 2008 Justice Emmett dismissed Mr Spencer's matter. This was on the basis that he had failed to identify any relevant Commonwealth law with respect to the acquisition of property.

On 24 March 2009 the Full Federal Court (Black CJ, Jacobson & Jagot JJ) unanimously dismissed Mr Spencer's appeal. Their Honours found that he could not surmount the following fundamental problems with his claims:

(i) the authoritative statements of this Court in *Pye v Renshaw* [1951] HCA 8 concerning the operation of ss 51(xxxi) and 96 of the Constitution,

(ii) the decision of the New South Wales Court of Appeal in *Arnold v Minister Administering the Water Management Act 2000* (NSW); and

(iii) the consequences of Mr Spencer accepting the validity of the State statutes. This meant that even if the Commonwealth statutes and inter-governmental agreements were invalid, the 2003 Vegetation Act would remain in force and impose the same prohibitions and restrictions on his property.

The applicant has issued a Notice of Constitutional Matter pursuant to s 78B of the *Judiciary Act 1903* (Cth).

The respondent has filed a draft notice of contention the grounds of which include that an exercise of power by the Commonwealth to grant financial assistance under s 96 of the Constitution is not vitiated if exercised for the purpose of inducing a State to exercise its powers of acquisition on other than just terms.

The questions of law said to justify the grant of special leave to appeal include:

- Whether *Natural Resources Management (Financial Assistance) Act 1992* and *Natural Heritage Trust of Australia Act 1997* or provisions thereof are laws which by their terms, operation or effect may be characterised as laws with respect to the acquisition of property, within the meaning of the Constitution section 51 (xxxi)?

The Attorney-General of the Commonwealth and the Attorneys-General for the States of New South Wales, South Australia, Victoria and Western Australia have intervened. The New South Wales Farmer's Association has applied for leave to intervene, or alternatively to be heard as *amicus curiae*.

STATE OF SOUTH AUSTRALIA v TOTANI & ANOR (A1/2010)

Court appealed from:	Full Court Supreme Court of South Australia [2009] SASC 301
Date of judgment:	25 September 2009
Date special leave granted:	12 February 2010

In December 2008 the South Australian Police Commissioner (the Commissioner) applied to the Attorney-General for a declaration under Part 2 of the *Serious and Organised Crime (Control) Act* 2008 (SA) (the Act) regarding the Finks Motorcycle Club Inc operating in South Australia. Section 10(1) of the Act provides:

If....the Attorney-General is satisfied that
a) members of the organisation associate for the purposes of organising, planning, facilitating, supporting or encouraging ion serious criminal activity
b) the organisation represents a risk to public safety and order in this state
the Attorney-General may make a declaration under this section in respect of an organisation

On 14 May 2009 the Attorney-General made the declaration. On 25 May the Commissioner applied ex parte to the Magistrates Court for a control order against the second respondent under s 14(1) of the Act, which provides:

The Court, must, on application by the Commissioner, make a control order against a person (the defendant) if the Court is satisfied that the defendant is a member of a declared organisation.

The Magistrates Court granted the control order, which provided that the second respondent (Hudson) was prohibited from associating with other persons who are members of declared organisations and possessing a dangerous article or prohibited weapon. On 26 May the respondents began proceedings in the Supreme Court, contending that s 14(1) of the Act impaired the institutional integrity of the Magistrates Court of South Australia, relying on the constitutional doctrine in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. They sought a declaration that Parts 2 and 3 of the Act (or in the alternative s 14(1) of the Act) were invalid. [The Commissioner also applied for a control order against the first respondent (Totani), but that application was stayed pending the determination of the Supreme Court proceedings]. Bleby J reserved the following questions for the consideration of the Full Court:

1. Is s 10(1) of the Act a valid law of the State of South Australia?
2. Is the declaration by the Attorney-General void and of no effect?
3. Is s 14(1) of the Act a valid law of the State of South Australia?
4. Is the control order in respect of Hudson made on 25 May 2009 void and of no effect?

A majority of the Full Court held that s 14(1) offended the *Kable* doctrine and answered the questions reserved as follows:

1. Not necessary to answer.
2. Not necessary to answer.
3. No.

4. Yes.

Bleby J (with whom Kelly J agreed) held that although the jurisdiction of the Magistrates Court to hear and determine an application under s 14(1) may have limited scope, the matters to be proved in that Court and the manner in which inquiries under ss 14 and 18 are to be conducted, are not incompatible with the proper discharge of judicial responsibilities or with the Court's institutional integrity. However he then determined that the function of the Court on an application under s 14(1) could not be considered in isolation from the other essential features of the Act. Bleby J concluded that the functions conferred by the Act on the Magistrates Court and on the Attorney-General were integrated or grafted onto one another so that the institutional integrity of the Court was impermissibly comprised. He found that in effect the Court is required to act as an instrument of the Executive. White J (dissenting) disagreed as to the relevance of the role of the Attorney-General in the making of the declaration under s 10(1) of that Act, to the constitutional validity of the task required of the Magistrates Court. White J considered that the focus should be on the effect of the act on the character of the Magistrates Court and its ability to function independently and impartially. He concluded that here the Court was still required to exercise its own independent adjudicative role.

The grounds of appeal include:

- The Full Court erred in law in holding that s 14(1) of the *Serious and Organised Crime (Control) Act* 2008 (SA) was beyond the legislative power of the State of South Australia and invalid;

- The Full Court erred by misapplying the principle recognised in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51..

The appeal was heard in part on 20 and 21 April 2010, and then adjourned for further hearing on 17 and 18 June 2010.

The Attorney-General of the Commonwealth and the Attorneys-General of the States of New South Wales, Queensland, Victoria, Western Australia and of the Northern Territory have intervened.