XYZ v Commonwealth (2006) 80 ALJR 1036

The issue raised in this case was whether a law which applies to conduct outside Australia by Australian citizens or residents is within the legislative competence of the Australian Parliament because it is a law for the peace, order and good government of Australia with respect to external affairs.

Section 50BA and s50BC of the *Crimes Act 1914* (Cth) make it an offence for an Australian citizen or a resident, while outside Australia to engage in sexual intercourse with a person under 16 or to commit an act of indecency on a person under 16.

The plaintiff was due to stand trial in the County Court of Victoria on charges under the legislation alleging sexual activity with children in Thailand that had occurred in 2001. Before being arraigned the plaintiff instituted proceedings in the original jurisdiction of the High Court seeking a declaration that ss50BA and 50BC of the *Crimes Act 1914* were not valid laws of the Commonwealth. Under s18 of the *Judiciary Act 1903* a justice stated a case to the full court.

By majority, the High Court found that both sections of the Crimes Act were valid.

The chief justice was of the view that the Australian legislature had the right to regulate the conduct outside Australia of Australian citizens or residents. In this regard he saw the fact that the Australian legislature had confined the relevant Crimes Act provisions to the conduct of Australian citizens and residents as a desire on the part of the Australian Parliament to conform to international expectations and not an attempt to invade the domestic concerns of the country where the alleged conduct occurred. On that point the chief justice referred to Professor Brownlie's comments in *Principles of Public International Law:*

> Extra-territorial acts can only lawfully be the object of jurisdiction if certain general principles are observed:
>
> i. that there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction;
>
> ii. that the principles of non-intervention in the domestic or territorial jurisdiction of other states should be observed;
>
> iii. that the principle based on elements of accommodation, mutuality, and proportionality should be applied. Thus nationals resident abroad should not be constrained to violate the law of the place of residence.

The chief justice also referred to the plaintiff's argument that the external affairs power only allowed parliament to make laws with respect to relations between Australia and other countries. Finding for the plaintiff would require the High Court to depart from the decision in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501. Such a course was never going to be followed. The chief justice said on that point:

> *Polyukhovich* held that the external affairs power covers, but is not limited to, the matter of Australia's relations with other countries. It also includes a power to make laws with respect to places, persons, matters or things outside the geographical limits of, that is, external to, Australia. That conclusion represents the current doctrine of the Court on the external affairs power, and should be maintained because it is correct.

In a joint judgment Gummow, Hayne and Crennan JJ were of the view that the Commonwealth correctly submitted that legislative enactments such as ss50BA and s50BC of the *Crimes Act 1914* proscribing activities of the type alleged in this case are supported by the external affairs power.

Kirby J was also part of the majority who found the laws were valid. His Honour considered the arguments by the plaintiff relating to *Polyukhovich* at some length. One of these was that in *Polyukhovich* for the first time a majority of the High Court had endorsed the geographical externality principle and it had been accepted without criticism in other cases. The submission to the court in *XYZ* was described by his Honour in these terms:

> Now, so it was suggested, was the time to pause and reconsider the 'modern doctrine' with the benefit of critical analysis, which the court needed in order to sharpen its federal jurisprudence and to correct a dangerous wrong turning.

The invitation was not accepted by the court.

By Keith Chapple SC

Litigation funding

Campbell's Cash & Carry v Fostif (2006) 229 ALR 58

The High Court's decision in *Campbell's Cash & Carry v Fostif* (Fostif) has made the position of a litigation funder at least a little clearer. It has made some kinds of representative proceedings in the Supreme Court a little less clear.

Litigation funding and abuse of process

Firmstone & Feil (Firmstones) attempted to arrange and fund representative proceedings on behalf of several thousand tobacco retailers who appeared to have a claim against tobacco wholesalers. The claim was for money had and received for a licence fee that was later held unconstitutional.

The defendants argued that this was an abuse of process. They complained that Firmstones:

- sought out potential plaintiffs;
- insisted on a high level of control over the proceedings; and
- hoped and expected to make a substantial profit from the litigation (being one third of any amount recovered on the principal claims plus any costs award).

Gummow, Hayne and Crennan JJ disagreed, albeit *obiter*: 'none of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process.' Gleeson CJ agreed with their Honours, and Kirby J published separate reasons coming to the same conclusion. (Gleeson CJ and Kirby J were in the minority on the outcome of the case.)

Their Honours did not say that litigation funding poses no risk to the court's process. Rather, in their view, any risks are adequately addressed through the court's general control over its process and

through the ethical regulation of the legal profession. Special dangers posed by class actions or the way in which settlements are procured should be dealt with in the rules that govern those matters. They do not justify a general rule of public policy that saves the other party from answering the claim.

The court was not dealing with the question of whether a funding agreement is unenforceable for maintenance or champerty. Section 6 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) expressly preserves the rules relating to when contracts are treated as against public policy or illegal. That is a matter between the funder and the funded party. It is not a ground to stay proceedings. The effect of their Honours' comments on the enforceability of litigation funding agreements is a question for the future.

Callinan and Heydon JJ were firmly of the view that there was an abuse of process. Since the majority on the disposition of the case was Gummow, Hayne, Callinan, Heydon and Crennan JJ, the 'majority' comments on abuse of process have no precedential value. However, they have the support of five out of the seven justices. They are likely to be relied on by litigants and are likely to be regarded as persuasive.

Numerous persons having the same interest

The holding which disposed of the appeal was that Pt 8 r 13(1) of the Supreme Court Rules was not engaged. That sub-rule permits representative actions on behalf of 'numerous persons [having] the same interest in [the] proceedings'. Part 7 r 4 of the UCPR and O 7 r 13 of the Federal Court Rules use the same words. (The Federal Court also has separate and detailed provision for large-scale representative proceedings in Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (FCA).) The words can be traced back to Chancery practice before the *Judicature Act 1873* (UK).

In *Fostif,* a summons was filed on behalf of a lead plaintiff, purportedly representing other relevant (unidentified) plaintiffs. The summons only sought remedies for the lead plaintiff. According to the majority, this meant other potential plaintiffs had no 'interest in [the] proceedings', as required by the sub-rule.

The position was different in an earlier case considering Pt 8 r 13(1), *Carnie v Esanda Finance Corporation* (1995) 182 CLR 398 *(Carnie)*. *Carnie* involved loan arrangements said to be unlawful. Representative proceedings were commenced against lenders on behalf of all relevant debtors. The High Court held that Pt 8 r 13 was engaged. Crucially, the lead plaintiff sought not only a money sum, but also a declaration that no represented debtor was obliged to pay for charges of a particular kind. All potential plaintiffs had an interest in that declaration.

In Callinan and Heydon JJ's view, seeking a declaration could not have saved the summons in *Fostif*. The action was only for a money sum, and a declaration would have been surplusage. Moreover, each plaintiff's right to be paid depended on the particular arrangements between that plaintiff and the wholesaler. Until that right was alleged, a declaration would go beyond the pleadings.

The availability of a declaration in *Carnie* was, in a sense, fortuitous. A declaration in favour of all plaintiffs would be surplusage, or would depend on the particular facts of each plaintiff's case, in many potential representative proceedings.

The rules now appear to fall between two stools. If the view is taken that class actions should be available before the class of potential plaintiffs has been exhaustively identified, then the rules ought to provide for it, as does Pt IVA of the FCA. It is difficult to see the reason for an additional hurdle that the lead plaintiff be able to shape its claim to include a remedy on behalf of all potential plaintiffs. If, on the other hand, such actions are felt to be so dangerous that they cannot be controlled by judicial supervision, or by a more detailed regime in the rules of court, then there is no reason to permit them simply because a such a remedy can be devised. There is something to be said for revisiting the form of the rules.

Discovery as to potential plaintiffs

A third issue, which arose in the courts below, is the availability of discovery to identify potential plaintiffs. Einstein J at first instance and Mason P, Sheller and Hodgson JJA in the Court of Appeal would have permitted it if the claims proceeded.

Discovery must be necessary before it is ordered. Special considerations presumably apply to discovery sought for the benefit of unknown plaintiffs. It remains for future litigation or legislation to give further guidance on when it will be available and how it should be controlled.

By James Emmett

Freedom of information

McKinnon v Secretary, Department of Treasury (2006) 229 ALR 187

The appellant, Michael McKinnon, is the freedom of information editor of *The Australian*. In 2002 McKinnon made two applications to the Treasury Department under the *Freedom of Information Act 1982* (Cth) ('FOI Act') seeking access to documents relating to bracket creep and the level of fraud associated with the First Home Buyers Scheme. The department denied access to a number of documents on the basis that they were exempt documents under s36(1) of the FOI Act. A document is exempt from disclosure under s36 if two conditions are satisfied. First, the document must be an internal working document according to the objective criteria in s36(1)(a).