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High Court upholds Training Guarantee Legislation

The *Training Guarantee Act 1990* (Cth) ("the Act") and the *Training Guarantee (Administration) Act 1990* (Cth) ("the Administration Act") are intended to increase and improve the quality of the employment related skills of the Australian workforce so that it works more productively, flexibly and safely, thereby increasing the efficiency and international effectiveness of Australian industry (the Administration Act, s.3(1)).

The Administration Act states (s.3(3)) that these objects are to be achieved, "by guaranteeing a minimum level of expenditure by employers in quality employment related training". In its recent decision in *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth of Australia* (1993) 112 ALR 87, the High Court explained that this guarantee is implemented by the

"...[definition of] a minimum amount that each employer is notionally required to expend in training its workforce. The Act and the Administration Act then impose on the employer a liability to pay to the Commonwealth the amount by which the employer's actual expenditure falls short of that minimum amount. The moneys received by the Commonwealth in discharge of that liability are designated for expenditure on workforce training purposes"*(p.2)*.

The Plaintiff, Northern Suburbs General Cemetery, had to pay a sum of $916 pursuant to the Training Guarantee Scheme (which is established by the Administration Act) and sought a declaration that the Acts exceeded the power of the Commonwealth and were therefore invalid. The Plaintiff said that the laws were not laws with respect to s.51(ii) of the Constitution and were not otherwise supported by any other head of power. The Plaintiff also said that the provisions of the Administration Act dealing with the Training Guarantee Fund (which deals with the collection and disbursement of sums paid and distributed in accordance with the Scheme - with the intent of achieving minimum levels of training) contravened s.81 of the Constitution (in relation to ss.32 and 33) as well as s.54 of the Constitution (in relation to s.34).

The Full Bench of the High Court was unanimous in holding against the Plaintiff's contentions. Mason CJ, Deane, Toohey and Gaudron JJ delivered a joint judgment. Brennan, Dawson and McHugh JJ each delivered separate judgments. Unless otherwise stated, reference is only made to the joint judgment.

Tax under s.51(ii) of the Constitution

The Act imposes a compulsory levy, exacted by the Commonwealth and enforceable by law, and s.34 of the Administration Act provides that sums collected are to be applied for certain enunciated public purposes *(p.5)*. The Justices referred to the decision of the High Court in *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462, where they said that it is enough to stamp an exaction of money with the character of a tax, "if those positive attributes are present in combination with the negative attribute identified by Latham CJ in *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263, - that the levy is not a payment for services rendered"*(p.5)*. They also said that this is not an exhaustive definition of a tax and there may be other characteristics pointing to it *not* being a tax. The Plaintiff contended that there were three characteristics of

the statutory scheme which supported the conclusion that the levy was not a tax, namely that the charge *was* a fee for service, that the legislative purpose of the Acts was not to raise revenue and, as its principal argument, that characterising the charge as a tax would carry the consequence that the legislation contravened s.81 of the Constitution.

The Justices held that the charge paid to the Commonwealth was not a fee for service because the Administration Act did not require the moneys collected to be spent on training programs in respect of those employers who had the obligation to pay the charge. There was not "a sufficient relationship" *(p.5)*.

In dismissing the argument that the charge was not a tax because revenue raising was not among its objects and that it was more correctly characterised as a penalty, the Justices said that revenue raising is a *secondary* object of the legislation- "in the same way as a protective customs duty is a tax - despite the fact that its primary object is the protection of a particular local manufacturing industry from overseas competition" *(p.8)*.

Consolidated Revenue Fund

Section 81 of the Constitution requires that all revenues or moneys raised or received by the Executive Government of the Commonwealth be paid into the Consolidated Revenue Fund (CRF). The Justices reviewed the constitutional and legislative history of the CRF (from its 17th Century English origins) and the means by which sums collected under the legislation are distributed pursuant to the *Audit Act* and concluded that those procedures effected a standing appropriation from the CRF. Section 81 does not regulate the way in which moneys are collected or distributed, nor the auditing of the public accounts - "These topics are left...for the Parliament to regulate. They are regulated by the *Audit Act 1901*. What s.81 is concerned to do is to identify the moneys which form the CRF and to prevent their application otherwise than in accordance with an appropriation by the Parliament for the purposes of the Commonwealth" (per Brennan J at p.21).

The Justices also held that it was not to be lightly presumed that the Parliament intended a contravention of s.81 and that in his Second Reading Speech to the House of Representatives, the Minister had clearly expressed an intention that the moneys required were intended to be such a standing appropriation from Consolidated Revenue *(p.17)*.

The "ordinary annual services of the Government"

The Plaintiff also argued that s.54 of the Constitution had not been complied with. That section provides that, "the proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation". The Justices held that as the appropriation for the purposes of the Training Guarantee Scheme is a *standing* appropriation, the Administration Act did not therefore appropriate money for the *ordinary annual services* of the Government and did not fail by reason of failure to comply with s.54 *(p.18-19)*.

Copyright

For an interesting overview of the role and function of Copyright Agency Limited (CAL) see (1993) no.149 *Australian Book Review* 27, where a Legal Officer of the Copyright Agency defends CAL in the light of recent criticism.

RETROSPECTIVE TEXTS ON ABN

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