DISCRIMINATION

Above the law

GABRIELLE APPLEBY evaluates *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania) and Rodney John Nichols* [2008] FCAFC 104[1]

On 13 June 2008, the Full Court of the Federal Court of Australia declared that the Commonwealth of Australia is not a 'person' to which the *Anti-Discrimination Act 1998* (Tas) applies. That is, Centrelink (a statutory agency of the Commonwealth) was not bound by s 16 of the *Anti-Discrimination Act* to act in a non-discriminatory manner towards Mr Nichols on the basis of his disability when serving him at a Centrelink Customer Service Centre in Tasmania. Mr Nichols had prostate cancer, but had been asked to wait in a queue with other patrons by staff at the service centre. The immediate effect of the decision — that the Commonwealth could be excused from complying with a law providing fundamental rights — is alarming. It appears to subvert the very notion of equal application of the law to citizens and the State, which underpins the principle of the rule of law.

The decision, however, requires more careful reading. It may be both more and less alarming in its detail.

First, nothing in the decision undermines the fact that Centrelink would still be bound to comply with s 24 of the *Disability Discrimination Act 1992* (Cth). The Commonwealth Act places similar obligations on Centrelink to act in a non-discriminatory fashion towards people like Mr Nichols, and subjects it to the federal jurisdiction of the Australian Human Rights Commission. This means that Mr Nichols *could* have brought an action in this forum. He chose to use the State forum instead. This choice appeared entirely legitimate. The history of anti-discrimination legislation in Australia shows the Commonwealth generally intends Commonwealth and State legislation to operate concurrently.[2] During the passage of amendments to the *Racial Discrimination Act 1975* (Cth) to make this clear, Dr AC Theophanus said:

> ... it is necessary for us to pass a further amendment to the Act in order to ensure that where there is harmony in principles between State and Commonwealth racial discrimination Acts *people can take action under both Acts. We must have a situation in which good and morally just State legislation in these matters is not destroyed or overridden.*[3]

Commonwealth policy on this point is reflected in s 13 of the *Disability Discrimination Act*.

The second issue, which requires more detailed consideration, is a potential *constitutional* limitation on state power. The two judges in the majority, Kenny and Weinberg JJ, based their decision on a statutory interpretation point rather than the constitutional issue. They found that the correct interpretation of the Tasmanian legislation was that there was no intention to bind the Commonwealth: that Centrelink was not a 'person' for the purposes of the Act. That reasoning, of itself, is not alarming. It leaves open the possibility that, should the Tasmanian Parliament state so expressly, it *could* bind the Commonwealth.

Justice Kenny, however, considered the constitutional issue: *had* the Tasmanian Parliament purported to bind the Commonwealth, *could* it do so? Or would that be inconsistent with an implication from Chapter III of the *Constitution*? Because of her decision on the statutory interpretation issue, Kenny J was not *required* to consider this point. Nonetheless, her decision is an important new precedent; indeed she felt compelled to consider the point chiefly because it raised matters of 'general significance'.

The lack of strict separation of powers at the State level has meant that, both historically (pre- and post-federation) and today, State courts and tribunals exercise both judicial and non-judicial power. Justice Kenny's decision throws doubt upon the constitutionality of tribunals exercising judicial functions.

Justice Kenny's final decision focussed upon two questions:

(1) whether the Tribunal is a 'court of the State' and therefore invested with federal jurisdiction over the Commonwealth;[4] and

(2) if the Tribunal is not a court of the State, but is nonetheless exercising judicial power (which must therefore be State judicial power), whether that power can be exercised over the Commonwealth.

In relation to the first question, Kenny J had to determine what a 'court of a State' was. This was no easy task, having been the subject of seemingly conflicting decisions of the Federal Court which held the Tasmanian Anti-Discrimination Tribunal was a 'court',[5] and the NSW Court of Appeal which held the NSW Administrative Decisions Tribunal was *not* a court.[6] Justice Kenny relied on the Chief Justice's decision in *Forge v Australian Securities and Investment Commission* that a court 'must satisfy minimum requirements of independence and impartiality'.[7] In holding that the Tribunal was not a court, the persuading factor for Kenny J was that there was no legislative or constitutional guarantee of tenure.

To the second question, Kenny J held that, due to an implication from s 75(iii), the Commonwealth cannot be subject to State jurisdiction.[8] That is, the only judicial power that can be exercised in relation to the Commonwealth is the judicial power of the

REFERENCES

1. I would like to disclose that I acted as instructing solicitor for Mr JD Merralls and Mr S Gates on behalf of the Attorney-General of Tasmania, intervening, during the hearing on this matter before the Full Court of the Federal Court on 20–21 November 2007 and 7 December 2007.

2. As demonstrated in the cases of *Viskauskas v Niland* (1983) 153 CLR 280 and *University of Wollongong v Metwally* (1984) 158 CLR 447.

3. Emphasis added.

4. Under the combined operation of ss 71 and 77(iii) of the *Constitution* and s 39 of the *Judiciary Act 1903* (Cth).

5. *Commonwealth v Wood* (2006) 148 FCR 276.

6. *Trust Company of Australia (trading as Stockland Property Management) v Skiwing Pty Ltd (trading as Café Tiffany's)* (2006) 66 NSWLR 77.

7. (2006) 228 CLR 45, 65–66 (Gleeson CJ).

8. Section 75(iii) invests original *federal* jurisdiction in the High Court in relation to matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.

Commonwealth. This would also be the case for the other matters listed in ss 75 and 76. Any matters which are the subject of federal jurisdiction by the operation of the *Constitution* can *not* be the subject of State judicial power. This would include, for example, matters between States or residents of different States, or matters arising under the Constitution or involving its interpretation.

The potential ramifications of the decision on the quite extensive tribunal systems in the States are as yet unknown. I offer a couple of hypothetical scenarios and comment on their impact on our system of governance.

The position could be left as it is currently. The Commonwealth has a decision (albeit of a single judge of the Federal Court) that it is not bound by State tribunals exercising State judicial power. The law really requires the consideration of the High Court to gain clarity on this point. During the course of the argument, the Full Court urged counsel for the Commonwealth to seek instructions to apply to remove the matter to the High Court for exactly this type of resolution. These instructions were not forthcoming and the Full Court, somewhat grudgingly, continued to hear the matter. Given the outcome of the case in favour of the Commonwealth, it is unlikely that Mr Nichols will appeal the decision; his condition is terminal and he has limited means.

Nonetheless, if Kenny J's position is confirmed, either in this case or in another vehicle, it will undermine both Commonwealth policy and the fundamental precepts of the rule of law. It creates an anomalous situation whereby the Commonwealth is not subjected to State law, despite its intention that it should apply, and that other citizens are subject to it. It places the Commonwealth in a privileged position: above the law. An implication in the *Constitution*, which is itself based upon the 'assumption' of the rule of law and which results in this type of outcome, seems incongruous.

A second option may be for the States to remove the contested jurisdiction from the tribunal systems to the courts, or make the tribunals courts of the State by increasing tenure and remuneration guarantees. While a more preferable course of action, this option is still less than ideal. Tribunals offer an efficient, cost effective and flexible forum in a wide range of matters, including anti-discrimination, to complement the more formal court system. The removal of this complementary system would be to the detriment of those seeking quick, efficient and effective redress.

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CONSUMER AFFAIRS

Privacy invasion under the guise of changes

NOAM SHIFRIN examines bid information in South Australia's property auctions

Imagine the following scenario. You are in the market to purchase a property. You have attended and unsuccessfully bid at a number of auctions and suddenly you receive a flood of direct-mail brochures and telemarketer calls for goods and services connected with your property hunt.

Implausible? Well, if you live in South Australia you are now one small step away from being subjected to just such a deluge. The State government has recently passed the *Statutes Amendment (Real Estate Industry Reform) Act 2007* (SA) ('the Act') requiring real estate agents to not only register every bidder at every auction[1] but also record the value of each bid.[2] The only protection from disclosure of that information to third parties, and therefore use for purposes other than those defined in the legislation, is the threat of a $10 000 fine for each breach.[3] You might think to yourself that that is sufficient protection but the legislation goes on to provide each real estate agent with a ridiculously easy-to-prove (and complete) defence to any prosecution brought for such a breach. All section 37B of the Act requires is for an agent to prove, on the balance of probabilities, the offence was not committed intentionally and didn't result from a failure to take reasonable care to avoid the commission of the offence.

Another concern is the period for which information must be retained. The legislation mandates a period of five years for which records must be kept but remains silent as to what is to be done after that time.[4] Should those records be destroyed? If so, what method of deletion would be acceptable in the case of electronic records? Theoretically a complete historical record of every single bid at every single auction may be kept in perpetuity. To be fair the scheme is in good company. Legislation passed by New South Wales,[5] Queensland,[6] and the Australian Capital Territory [7] require some form of bidding record to be kept for three, five and three years respectively.

Where South Australia differs from any other Australian jurisdiction is in the type of information to be recorded. NSW and the Australian Capital Territory require either the highest [8] (if passed in) or winning bid to be recorded.[9] Queensland makes no provision for the recording of any bids and instead simply

REFERENCES

1. *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 24K(1)(a) amended by *Statutes Amendment (Real Estate Industry Reform) Act 2007* (SA).
2. *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 24J(1)(h) amended by *Statutes Amendment (Real Estate Industry Reform) Act 2007* (SA).
3. *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 24J(3) amended by *Statutes Amendment (Real Estate Industry Reform) Act 2007* (SA).
4. *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 37A(1)(a) amended by *Statutes Amendment (Real Estate Industry Reform) Act 2007* (SA).
5. *Property, Stock and Business Agents Act 2002* (NSW) s 68(4).
6. Property Agents and Motor Dealers (Auctioneering Practice Code of Conduct) Regulation 2001 (Qld) reg 32(6).
7. *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 25(3).
8. *Property Stock and Business Agents Regulation 2003* (NSW) reg 15(1)(h); *Civil Law (Sale of Property) Regulation 2004* (ACT) reg 14(1)(h).
9. *Property, Stock and Business Agents Regulation 2003* (NSW) reg 15(1)(g); *Civil Law (Sale of Property) Regulation 2004* (ACT) reg 14(1)(g).
10. Queensland Department of Tourism, Fair Trading and Wine Industry Development, 'Outcomes of the review of the *Property Agents and Motor Dealers Act 2000*' (2004).