The inconsistency issue

Garuda argued that ss 45 and 45A of the TPA, and certain parts of the *Air Navigation Act 1920* (Cth) were practically and operationally inconsistent. In particular, it was noted that s 13 of the Air Navigation Act permitted the Minister to suspend or cancel an international airline licence if the airline did not comply with the relevant air services agreement between Australia and Indonesia. This was said to be significant in Garuda's case, because the Air Services Agreement between Australia and Indonesia contained provisions requiring the fixing of 'tariffs'.

Gordon J (with whom the plurality and Nettle J agreed) found that the alleged inconsistency did not arise, because, the conduct that contravened the TPA involved understandings arrived at in Hong Kong and Indonesia containing provisions to charge specific fuel surcharges, not agreements or understandings to set tariffs by way of minima under the Australia-Indonesia ASA.[21]

ENDNOTES

1 *Australian Competition and Consumer Commission v Air New Zealand Limited* (2014) 319 ALR 388 at [323].
2 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [12].
3 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [14].
4 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [26].
5 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [27].
6 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [28].
7 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [31].
8 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [34].
9 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [35].
10 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [40].
11 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [59].
12 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [60].
13 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [83].
14 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [116].
15 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [121].
16 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [122].
17 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [53].
18 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [138].
19 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [140].
20 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [141].
21 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [174].

Revisiting Project Blue Sky

Kate Lindeman reports on *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30

In *Forrest & Forrest Pty Ltd v Wilson*, the High Court, by a majority of 4:1 (Nettle J dissenting), allowed an appeal concerning the effect of non-compliance with certain provisions of the *Mining Act 1978* (WA). The case contains the High Court's latest statement on the effect of the principle established by *Project Blue Sky*,[1] specifically considering how the doctrine operates in the context of statutory regimes conferring power on states to grant rights to exploit natural resources.

Facts and procedural history

In 2011, the second and fourth respondents lodged applications for mining leases. The Mining Act required the lodgement of mining operations statements and mineralisation reports within a prescribed period after lodging the applications, but none were lodged in time.[2]

The warden (the first respondent) nevertheless held that he had jurisdiction to hear the applications. He considered that failure to lodge the mineralisation reports on time was no more than an irregularity, which could be cured by subsequent lodgement, as well as by the wide discretion given to the minister to grant an application under the Mining Act notwithstanding non-compliance with provisions of the Act. The warden proceeded to recommend that the minister grant the applications for mining leases.

Forrest applied for judicial review of the warden's decision on a number of grounds, only one of which was relevant in the High Court; namely, that the warden made a jurisdictional error in holding that he had jurisdiction to hear the applications for the mining leases. Allanson J, at first instance, concluded that the warden's hearing of the applications did not amount to a jurisdictional error, and the Court of Appeal of the Supreme Court of Western Australia (McLure P, Newnes and Murphy JJA) upheld the decision, finding that only a failure to provide a mineralisation report at all would prevent the satisfaction of a condition precedent to the warden making a recommendation to the minister. Forrest appealed to the High Court.

High Court Appeal

The majority of the court (Kiefel CJ, Bell, Gageler and Keane JJ) allowed the appeal, holding that the relevant provisions of the Mining Act imposed essential preliminaries to the exercise of power by the minister to grant a mining lease.[3] This conclusion involved a consideration of the application of *Project Blue Sky* to a statutory regime conferring power to grant rights to exploit natural resources.

Project Blue Sky

In *Project Blue Sky*, a majority of the High Court held:[4]

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.'

In *Forrest*, the majority observed that the court in *Project Blue Sky* was strongly influenced by the fact that the conditions in question regulated the exercise of functions already conferred on the relevant agency, as well as by the circumstance that the provisions did not have a 'rule-like quality', that many of the relevant obligations were expressed in 'indeterminate language', and that 'public inconvenience would be a result of the invalidity of the Act'.[5] The majority in *Forrest* considered that the present case was readily distinguishable.

The majority pointed to the fact that, first, the express terms of the provisions in question and their structure as 'sequential steps in an integrated process leading to the possibility of the grant of a mining lease', revealed that the relevant sections imposed essential preliminaries to the exercise of the minister's power under the Act.[6] Secondly, the majority observed that any inconvenience suffered by treating the requirements of the Act as conditions precedent to the exercise of the minister's power would enure only to those with some responsibility for the non-observance, whereas the contrary view would disadvantage both the public interest and individuals who were within the protection of the Act. Finally, the majority emphasised that *Project Blue Sky* was not concerned with a statutory regime for granting rights to exploit the resources of a state.[7]

Interpretation of statutory regime conferring power to grant rights to exploit state resources

The majority referred to a line of authority[8] which establishes that where a statutory regime confers power on the executive government of a state to grant exclusive rights to exploit the resources of the state, the regime will, subject to provision to the contrary, be understood as mandating compliance with the requirements of the regime as essential to the making of a valid grant. This means that, in short, the statutory conditions regulating the making of a grant 'must be observed.'[9]

This line of authority was said to support parliamentary control of the disposition of lands held by the Crown in right of the state, and to recognise that the public interest is not well served by allowing non-compliance with a legislative regime to be over-

looked or excused by officers of the executive government charged with its administration. Importantly, the majority held that '[n]othing said in *Project Blue Sky* diminished the force of the authorities which support this approach.'[10]

Applying this line of authority to the relevant provisions of the Mining Act, the majority held that nothing in the language of the relevant provisions revealed any intention to depart from what the majority termed the 'settled approach' to the construction of such a legislative regime. The majority also observed that compliance with the regime in question served the public interest, including by improving efficiency, by ensuring owners and occupiers of land were not troubled unnecessarily or prematurely, by protecting the rights of objectors by ensuring that objectors have the benefit of the information contained in mineralisation reports when preparing their objections, and by protecting the interests of miners in competition for access to the state's resources.[11]

Accordingly, the majority held that the appeal should be allowed, and relief sought by Forrest granted.

Nettle J delivered a dissenting judgment. His Honour agreed with the majority that the Mining Act required that the respondents' applications for mining leases be accompanied by a mineralisation report at the time of lodgement. However, his Honour did not agree that a delay between the lodgement of an application and the lodgement of a mineralisation report vitiates the minister's power to grant a mining lease in response to the application.[12]

Implications

The decision in *Forrest* clarifies the operation of *Project Blue Sky* in the context of a statutory regime governing the grant of rights to exploit the mineral resources of a state. Specifically, the majority held that nothing in *Project Blue Sky* limits the long line of authority holding that such a statutory regime must be followed and observed, subject to provision to the contrary.

ENDNOTES

1 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355.
2 Sections 74, 74A and 75 of the *Mining Act 1978* (WA).
3 *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30 at [63].
4 *Project Blue Sky* at [91].
5 *Forrest & Forrest* at [62].
6 *Forrest & Forrest* at [63].
7 *Forrest & Forrest* at [63].
8 *Watson's Bay and South Shore Ferry Co Ltd v Whitfield* (1919) 27 CLR 268; *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520 at 533; *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 76; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 63-64; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 173; *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 at [167]-[168]. See also *New South Wales Aboriginal Land Council v Minister Administering Crown Lands Act* [2016] HCA 50; (2016) 91 ALJR 177 at [121].
9 *Forrest & Forrest* at [64].
10 *Forrest & Forrest* at [65].
11 *Forrest & Forrest* at [89].
12 *Forrest & Forrest* at [101].

The sufficiency of evidence to a finding of guilt beyond reasonable doubt

Alexander H Edwards reports on
GAX v The Queen [2017] HCA 25; (2017) 91 ALJR 698.

Overview

The High Court unanimously determined that the evidence as to a historical sexual offence was not capable of supporting the conviction.

Background

The appellant was charged with three counts of indecently dealing with a child, his daughter. He was acquitted on the first two counts, but convicted of the third. The particulars of the third offence were that on the relevant date, the appellant touched the complainant 'on or her near the vagina'.

The evidence relating to the third count came from three sources: the complainant; her sister, DML; and her mother, GJC. The complainant made a statement to police 10 years after the incident. The complainant's evidence in chief as to the events was vague and uncertain but she did say that her father's fingers were 'near my vagina'. The complainant conceded that her memory was unreliable and that this had been a problem for most of her life. GJC said she returned home from picking up dinner to find the appellant in bed with the complainant with the sheets pulled up. GJC said when she pulled back the covers she saw that the complainant's underpants were folded down about an inch. She yelled at the appellant and pulled him out of the bed. She made her statement to police about the incident three weeks before she commenced family law proceedings, seeking orders against the appellant. DML said that she had been out with her mother on the night in question, and had returned to see the appellant in bed with the complainant. DML recalled that the complainant got out of bed crying with her underpants pulled 'right down' and her nightie in disarray. The appellant gave evidence denying any occasion where he had been in bed with the complainant.

Court of Appeal decision

By majority, the Court of Appeal (Atkinson J, Morrison JA agreeing) found that there was a rational basis for the conviction on ground three. Atkinson J reviewed the evidence in support of count three in the course of considering the inconsistent verdicts ground of appeal. Her Honour found that the evidence of DML and GJC relevantly supported the complainant, and that the inconsistencies between those accounts were minor. McMurdo P, in dissent, would have allowed the appeal.

Appeal to the High Court

The first ground of appeal before the High Court was that the reasons given by Atkinson J failed to demonstrate that her Honour had conducted an independent assessment of the evidence. The second ground was that it was not open to the jury to conclude beyond reasonable doubt that the appellant was guilty of the charge in count three.

The sufficiency of the evidence

The High Court accepted that the evidence of the complaint allowed an inference that was capable in law of supporting the particulars of the charge upon which the appellant was convicted.[1] This limited evidence was, however, marked by serious inconsistency with the accounts of DML and GJC,[2] and by recollections that suggested reconstruction.[3] This latter aspect, in particular, could not be excluded beyond a reasonable doubt.[4] The court unanimously (Bell, Gageler, Nettle and Gordon JJ, Edelman J agreeing) upheld the second ground of appeal for those reasons, resulting in an acquittal.[5]

Independent assessment by appellate court

The majority (Bell, Gageler, Nettle and Gordon JJ) found force in the contention that the reasons of Atkinson J did not disclose her Honour's own assessment of the sufficiency and quality of the evidence as to the particularised touching,[6] but noted the controversy in that regard was somewhat arid in light of their view as to the second ground of the appeal.[7]

Justice Edelman, who joined in the reasons of the majority as to ground two,[8] would have rejected the ground relating to the failure of the court below to make an independent assessment of the evidence.[9] His Honour observed that 'Submissions provide context to the reasons given by a court' and that proper determination of the ground may have required reference to the submissions made before the Court of Appeal.[10]

ENDNOTES

1 At [25] and [28].
2 At [28].
3 At [29].
4 At [30].
5 At [32].
6 At [25].
7 At [3].
8 At [33].
9 At [35].
10 At [37] and [40].