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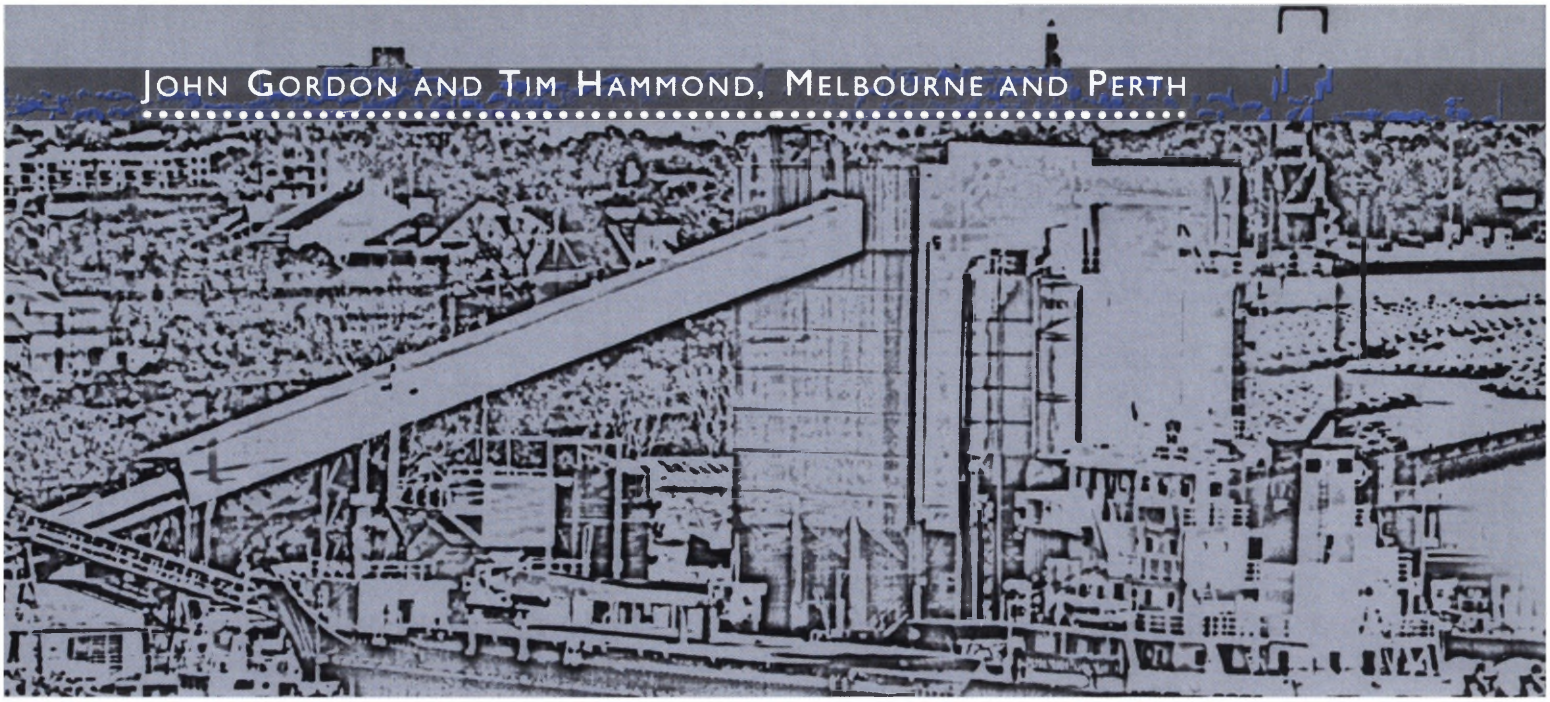

It's the Constitution, it's the vibe:

Smith v ANL in the High Court

In 1994 the High Court ruled that the *Commonwealth Employees Compensation and Rehabilitation Act 1988* (Cth) was invalid to the extent it acquired a common law right to claim damages without providing just terms.[1] In *Stephen Paul Smith v ANL Limited*[2] the High Court has revisited the issue of the acquisition of common law rights and again decided that, in some cases, such acquisition is unconstitutional. The Court ruled that section 54 of the *Seafarers Rehabilitation and Compensation Act 1992* (Cth), which acts as a bar to common law damages, was invalid by offending Section 51 (xxxi) of the Constitution. The law had the effect of acquiring Mr. Smith's property on other than just terms.

The facts

In December 1988 it is alleged that whilst in the course of his employment as a merchant seaman, Mr. Smith was required to perform tasks which brought about a claim in negligence against his employer, then named the Australian National Line Ltd ("ANL").

Mr Smith, as a merchant seaman, would spend months at a time at sea, working on various vessels. In early December 1988 he obtained employment on board the "Australian Prospector". As the ship was approaching the Port of Sakai in Japan, Mr Smith was required, in rolling seas and without assistance, to urgently rig and shackle a heavy pilot ladder. The next day he was directed to pull an electrical generator across the deck of the ship. The generator weighed approximately 300 kg. ▶

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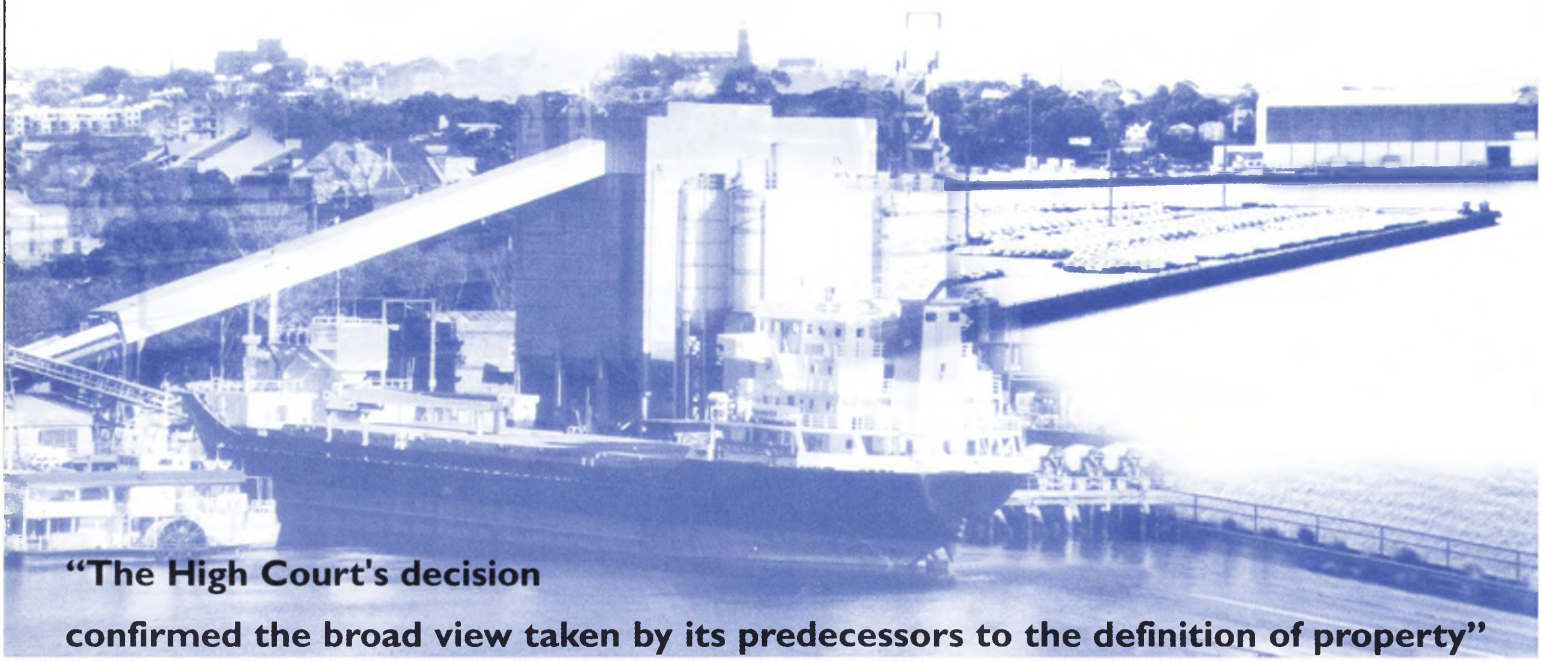

"The High Court's decision confirmed the broad view taken by its predecessors to the definition of property"

As a consequence of performing these duties, Mr Smith suffered serious and extensive back injuries, which required a spinal fusion, and he was permanently incapacitated for work.

At the time of the accident, Mr. Smith was entitled to compensation pursuant to the *Seaman's Compensation Act* 1911 (Cth) ("the SCA"), which allowed compensation pursuant to a statutory scheme, but also provided for an injured seaman to bring a claim for damages.[3]

On 24 December 1992 the SCA was repealed and replaced by the *Seafarer's Rehabilitation and Compensation Act* 1992 (Cth) ("the SRC"). The SRC was strikingly similar to the *Commonwealth Employees Rehabilitation and Compensation Act* (Cth) 1988[4] ("the CERCA"). Both Acts served to create a statutory framework which severely restricted an injured worker from bringing any claim in damages against their employer, regardless of the extent of negligence.

Of particular importance to Mr. Smith's claim was s 54 of the SRC. S 54 reads:

> *Subject to Section 55, a person does not have a right to bring an action or other proceedings against his or her employer or an employee of the employer in respect of:*
>
> *(a) An injury sustained by an employee in the course of his or her employment, being an injury in which the employer would, apart from this subsection, be liable (either vicariously or otherwise) for damages....*

Such provision was almost identical to s 44 of the CERCA.

Section 54 did not come into effect until 23 December 1993 by virtue of *the Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendment) Act* 1992 (Cth) ("the transitional provisions").

Section 13 of that Act stated:

> *Despite Section 54 of the (SRC), an employee has the right to bring within six months after the commencing day, an action or other proceeding against his or her employer, or an employee of the employer, in respect of:*
>
> *(a) an injury sustained before the commencing day by the employee in the course of his or her employment, being an injury in respect of which the employer would, apart from this subsection, be liable (whether vicariously or otherwise) for damages...*

The practical effect of the above provision was to allow an 'extension of time' within which to bring a claim for damages for a further six months after the commencement day (which was, for the purpose of s 54, 23 June 1993).[5]

The litigation history - from writ to the High Court:

Mr. Smith lodged a writ in November 1994 in the District Court of WA, suing his maritime employer for breaches of contract and of tortious and statutory duties of care, for the injuries he sustained in December 1988.[6] Predictably, ANL sought to have the statement of claim struck out based upon, *inter alia*,[7] the new law barring a claim for damages by virtue of s54.

This application came before Ipp J. of the Supreme Court of Western Australia,[8] as a stated case by way of preliminary questions. Ipp J. found for the defendant, ruling that s54 was constitutionally valid.

The decision was then appealed to the Full Court of the Supreme of Western Australia[9]. In a majority decision the Full Court, comprising Kennedy and Templeman JJ. (Pidgeon J. dissenting), held that Section 54 together with Section 13 of the transitional provisions was constitutionally valid and did not violate Section 51 (xxxi) of the Constitution.

The majority held that Section 13 of the transitional provisions and s54 of SRC did not extinguish a right of action, rather that it modified the right by virtue of effectively providing a shorter limitation provision. As a consequence, it did not bear the same fundamental character of acquisition as was found by the High Court in *Georgiadis*.[10]

In his dissenting judgement, Pidgeon J. found that there was no distinction between Mr. Smith's plight and the circumstances in *Georgiadis*:

> *It (the Act) operated once and for all as a final measure terminating the causes of action concerned and is not a measure of prescribing the time in which proceedings were to be commenced...the effect of the transitional Act is merely to postpone the extinguishment of the right to bring the action and in that sense, to postpone the acquisition. There has nevertheless still been an acquisition.*[11]

Mr. Smith appealed the decision and on 29 October, 1999

special leave was granted for the Applicant to appeal to the High Court on the constitutional issue as to whether s 54 of the SRC in this instance was valid.

The High Court decision

The High Court appeal was argued on 22 and 23 May, 2000. It was argued on behalf of ANL and the Commonwealth[12] that the present case was materially different from *Georgiadis* in that the transitional provisions provided a qualified right to removal and that the legislation did not acquire a right of action but rather "diminished its value by requiring that it be exercised, if it would be exercised at all, within six months."[13]

On 16 November, 2000 the High Court handed down a majority decision in which it allowed the appeal and found that s54 of the SRC Act was invalid in its application to the causes of action pleaded by the Plaintiff.

Gleeson CJ did not consider the effect of the Act to be materially different to that considered in *Georgiadis*.[14] The only other question was whether the six-month period satisfied the requirement for just terms.[15] The Chief Justice found that it had not been shown that what was gained by the appellant was full compensation for what was lost, even taking the six month period into account.[16]

Justices Gaudron and Gummow held:

> *It is to stretch beyond its legal endurance the concept of 'just terms' to have regard to what, in general, would have been the position of employees if Section 54 had not been enacted and to treat Section 13 as a true attempt to provide a fair and just standard of compensating employees or rehabilitating their former position...The period of grace specified in s 13 was too short and its operation from one employee to the next too capricious to meet the constitutional requirement of just terms.*[17]

Their Honours went on to say, "the 1992 legislation provides nothing which can fairly be described as compensation with respect to the choses in action which had accrued before the new scheme commenced and the substance or reality of proprietorship in that which was acquired."[18]

Kirby J. isolated the issues as follows:

1. *Were the appellant's choses in action against the respondent 'property' within the meaning of [Section 51(xxxi) of the Constitution]?*
2. *If so, has such 'property' been 'acquired' within the meaning of that paragraph?*
3. *If 'property' has been 'acquired' is the impugned legislation properly characterised as being 'with respect to the acquisition of property' within the paragraph?*
4. *If so, did the impugned legislation provide for the 'acquisition' of 'property' otherwise than on 'just terms' as compliance with Section 51 (xxxi) of the Constitution obliges?*[19]

Kirby J. found that the appellant was successful in answering each of the above questions in the affirmative.

Callinan J. compared the substance of the Appellant's right before and after the enactment came into power. Accordingly, Callinan J held "the defect here is that the legislation makes no provision for just terms, that is to say the payment and assessment of compensation in an appropriate way, the proper basis for the calculation which may itself be a matter upon which minds might well differ."[20]

The dissenting judgment of Hayne J., (with whom McHugh J. agreed) was based upon a view that "there is not that legal or practical compulsion which is necessary to amount to 'acquisition' of the property."[21]

The High Court found, therefore, that the Commonwealth had enacted a law for the acquisition of property which had the effect of acquiring a proprietary right, namely Mr. Smith's common law chose in action, without providing just terms. On 16 November 2000, after 6 years of litigation on preliminary issues, Mr. Smith finally won back his right to pursue his common law claim. *The West Australian* newspaper compared the seaman's struggle, and his reliance on s 51(xxxi) of the Constitution, to that of the family depicted in the Australian movie "The Castle".

Wider ramifications and consequences of the decision

Other than the considerable personal consequences for Mr. Smith and other seamen whose rights were similarly abrogated, what are the wider consequences of the High Court's decision?

1. Section 51(xxxi) – "property"

The High Court's decision confirmed the broad view taken by its predecessors to the definition of property in section 51(xxxi). This is reassuring for those concerned with the utility ▶

of that placitum as a brake on executive power as exercised through parliamentary lawmaking.

In particular, it reaffirmed such a role for this constitutional provision in protecting individual workers whose employment is governed by Federal legislation, or at least in protecting their rights to damages if injured in such employment (whether or not employees of the Commonwealth) which had been earlier articulated in *Georgiadis*, and affirmed and extended in *Mewett, Rock* and *Brandon*.

2. Statutory schemes – just terms?

The statutory scheme that replaced a seaman's right to claim damages, under consideration in *Smith*, was not, at least by comparison with various state statutory schemes, an ungenerous one. Moreover, as Gleeson CJ observed, it did preserve for a short time a right to claim damages.

However, even these benefits, it was held, did not amount to "just terms". As Dixon J had observed in *Nelungaloo v Commonwealth* (1948) 75 CLR 495 at 571, "just terms" would require the expropriating authority" to place in the hands of the owner expropriated, the full money equivalent of the thing of which he [or she] has been deprived...it cannot be less than the money value to which he [or she] might have converted his [or her] property had the law not deprived him [or her] of it."

This line of authority, reaffirmed in *Smith*, implicitly condemns every state and territory compensation scheme which has replaced common law damages with benefits that are less than those damages, as "unjust".

That such unjust arrangements can be implemented with impunity points to the necessity for state Bills of Rights (notwithstanding recent self-serving political disparagement) which enshrine such principles as prohibition of state acquisition of property, other than on just terms.

Clearly, the states and territories stand condemned for acquiring the property of its citizens for less than its full value; less than justness would require.

3. The Federal Judicial Power

This implicit condemnation of the states is not without some practical significance.

In a paper delivered at the 2000 APLA Conference,[22] one of the present authors argued that, on the basis of the decision in *Kable v DPP (NSW)* (1995) 189 CLR 51, any state court invested with Federal jurisdiction may not exercise any state power or function repugnant to, or incompatible with, the Constitutionally-protected judicial power of the Commonwealth. The test of repugnance or incompatibility posited by McHugh J (at 124) was the perception of reasonable persons that the Court in exercising the state power was a party to, and responsible for, the implementation of a political decision by the state executive government and was thus an instrument of executive government policy.

It follows that the implementation of an "unjust" law ie. where just compensation is not made for expropriation of a

citizen's property, for political purposes (for to enhance the profit potential of one section of society at the expense of injured workers, especially where such political favour is based upon spurious or ill-founded bases, is manifestly political) is similarly repugnant or incompatible. Any state court vested with Federal Jurisdiction should not be a party to such a blatant instrument of executive government policy.

This argument gains strength from the decision in *Smith* as it reaffirms both the acquisition of property involved in the abolition (or further restriction) of common law rights, and the unjust nature of the "compensatory" statutory scheme, with or without a limited period to issue claims.

The state Courts' directed role in this political attack on the less empowered in society impairs "public confidence in the impartial administration of the judicial function of the court" (per McHugh J at 124).

The point remains to be argued.

4. International treaties

One other possibility raised in the earlier paper referred to above, was the use of international treaties, in particular, the *International Covenant on Civil and Political Rights*, adopted into Commonwealth law as the Second Schedule to the *Human Rights and Equal Opportunity Act* 1986 (Cth), to argue that the state laws abolishing common law negligence claims for workplace injury were in conflict with that Commonwealth law, and to the extent of such inconsistency, invalid as in breach of s.109 of the Constitution.

Attention was directed primarily to Article 14 of the ICCPR which entitles a person in "a suit at law...to a fair and public hearing by a competent, independent and impartial tribunal". Interpretation by the European Court of Human Rights of an equivalent provision of the European Covenant on Human Rights has determined that this provision guarantees a UK citizen the right to bring a claim for damages in negligence, subject to reasonable and legitimate limitations.[23]

Applying such an argument to Article 14 of the ICCPR with respect to a common law negligence claim for an industrial accident in Australia, one could expect to be met with the argument that the provision of a statutory scheme and a reasonable period for the bringing of such an action was a reasonable and legitimate limitation on the untrammeled right to bring a claim. The finding in *Smith* that the unilateral expropriation of a citizen's property by the state occurred on other than just terms, suggests such an argument is unlikely to succeed.

Furthermore, the inclination of the High Court to safeguard the liberty and property of Australian citizens, as exemplified by the maintenance of the broad definition of property articulated by the majority in *Smith* augurs well for a future invitation to the Court to find inconsistency between a state law acquiring property other than on just terms, and the guarantee in Commonwealth law to have one's rights to damages determined by a Court.

Conclusion

The best thing about this case is that it demonstrates the value of persistence through the system, as difficult and drawn out as it might sometimes prove to be. If the will is strong and the cause is just, justice can ultimately be achieved. The High Court's judgment in this case is "going straight to the pool room!"[24]

Footnotes:

1. *Georgiadis v Australia and Overseas Telecommunications Corporation* (1994) 179 CLR 297.
2. [2000] HCA 58 16 November 2000 P56/1999. Also reported in the *Australian Law Reports*, 176 ALR 449. Reference to *Smith v ANL* herein will be in accordance with the *Australian Law Reports*.
3. However, the Act required that any compensation paid pursuant to the SCA be deducted from any award of damages and repaid to the employer - SCA, Section 10A (1) and (3).
4. Now the *Safety Rehabilitation and Compensation Act* 1998 (Cth), the title was changed on 24 December 1992.
5. Section 2 (3) of the Transitional Provisions stated that Section 54 and 55 had effect as of six months after those sections received royal assent, that is 23 June 1993.
6. The claim was initially issued against ANL and against the Commonwealth. This was largely as a precautionary measure, in case the argument was pursued that the Commonwealth was the correct identity to sue, as opposed to the employer, either as a consequence of its statutory responsibility for ANL, or as a result of its having acquired the plaintiff's rights without just compensation. In any event, the Commonwealth Attorney-General intervened in the proceedings.
7. There was also a defence raised under s 47A of the WA Limitation Act protecting persons acting in the execution of a public duty, which succeeded at first instance, but did not survive in the Full Court.
8. *Stephen Paul Smith v Australian National Line and Ors*, Supreme Court of Western Australia, Unreported, Lib No. 960468.
9. *Stephen Paul Smith v Australian National Line*, (1988) 20 WAR 219.
10. Ibid. at 231.
11. Ibid. at 247.
12. The Commonwealth appeared as an intervener.
13. *Smith v ANL Limited* [2000] HCA 58, paragraph 5 (176 ALR 449 at 451).
14. Ibid at paragraph 8; ALR 452.
15. Ibid at paragraph 9; ALR 452.
16. Ibid at paragraph 10; ALR 452.
17. Ibid at paragraph 50; ALR 463.
18. Ibid at paragraph 54; ALR 463.
19. Ibid at paragraph 72; ALR 467-468.
20. Ibid at paragraph 198; ALR 499.
21. Ibid at paragraph 130; ALR 481.
22. J. Gordon: "Do Try this at Home; Fighting Back - Constitutional Issues and International Treaties in Saving Workplace Injury Rights".
23. Reference should be made to the APLA conference paper for a full discussion of the context of this determination and of the relevant decisions of the European Court.
24. The repository of all things special and wondrous in "The Castle".