SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 21 JUNE 2011

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QUEANBEYAN CITY COUNCIL v. ACTEW CORPORATION LTD & ANOR
(C2/2011; C3/2011)

Court appealed from: Full Court of the Federal Court of Australia [2010] FCAFC 124

Date of judgment: 24 September 2010

Date special leave granted: 8 April 2011

From 1 January 2000 the Australian Capital Territory ("ACT"), pursuant to s78 of *the Water Resources Act* 1998 (ACT), imposed on the first respondent ("ACTEW") a water abstraction charge ("WAC") for water taken by ACTEW from the ACT for supply to its urban customers. ACTEW passed the WAC on to these customers, which included the appellant. The amount of the WAC was fixed pursuant to s 107 of the *Water Resources Act* 2007 (ACT) at 51c per kL.

From 1 January 2007 the ACT, pursuant to s8(1) of the *Utilities (Network Facility Tax) Act* 2006 (ACT), imposed on ACTEW a utilities (network facilities) tax ("UNFT") in respect of its water distribution network (and also for its gas, sewerage and telecommunications networks). The UNFT was imposed on ACTEW by reference to the length of its water distribution network which was situated on land not owned by ACTEW. The UNFT was passed on by ACTEW to its customers, which included the appellant.

The appellant brought proceedings claiming that the WAC and the UNFT were both a duty of excise and beyond the legislative competence of the ACT by reason of s 90 of the *Constitution*. ACTEW cross-claimed for recovery of unpaid amounts of UNFT. The trial judge (Buchanan J) held that the WAC was not a duty of excise because it was not a tax. His Honour held that the UNFT was a tax and was a duty of excise because it is a tax on a step in the sale or distribution of goods, and declared the UNFT Act invalid to the extent that it purports to impose a tax on the water network facility operated by ACTEW. His Honour dismissed ACTEW's cross-claim against the appellant in relation to unpaid amounts of UNFT.

The Full Court of the Federal Court (Keane CJ, Stone and Perram JJ) unanimously allowed the appeal in respect of the UNFT and held that the UNFT was not a duty of excise. Keane CJ, with whom Stone and Perram JJ agreed, held that the UNFT was not an impost on a step in the production or distribution of water, and that the trial judge, by ignoring the circumstance that the UNFT does not select the water network for special treatment, failed to appreciate the point that an indicator that the water in the network was a target of the UNFT was absent. In relation to the WAC, Keane CJ and Stone agreed, for different reasons, that the WAC was not a tax and therefore not a duty. Keane CJ held that the WAC was sufficiently akin to a profit a prendre or royalty that it could not be called a tax, and that it was a condition of appropriating a resource rather than a tax upon an activity. Stone J held that the WAC is not a mere licence, it is in substance and in form also a fee for the right to take water. Perram J would have remitted the issue of the WAC to the trial judge to determine whether the price charged by the ACT bears a discernible relationship to the value of the water (citing *Air Caledonie International v Commonwealth*), but for that valuation to remove from the analysis monopoly pricing (citing *Airservices Australia v Canadian Airlines International Ltd*). His Honour found that the trial judge had erred in rejecting the expert evidence on pricing, and that the question of whether the WAC was or was not a duty

or excise could only be determined once the valuation of water exercise had been undertaken.

A notice of constitutional matter has been filed in each appeal. The Attorneys-General for the Commonwealth and all States have filed submissions as interveners.

The grounds of appeal include:

- Whether the Full Court erred in failing to hold that the WAC was a duty of excise and invalid as contrary to s 90 of the Constitution;

- Whether the majority of the Full Court erred in failing to hold that the UNFT was a duty of excise and invalid as contrary to s 90 of the Constitution.

AB v. STATE OF WESTERN AUSTRALIA & ANOR (P15/2011)
AH v. STATE OF WESTERN AUSTRALIA & ANOR (P16/2011)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia [2010] WASCA 172

Date of judgment: 2 September 2010

Date special leave granted: 8 April 2011

Each appellant applied (in 14 November 2007 and 11 April 2008, respectively) to the second respondent, the Gender Reassignment Board of Western Australia ("the Board"), for the issue of certificate pursuant to s 15 of the *Gender Reassignment Act* 2000 (WA) ("the Act") recognising the reassignment of their gender from female to male. The Board refused both applications, concluding that neither appellant was able to satisfy the second limb of the requirement in s 15(1)(b)(ii) of the Act, which requires that the person "has the gender characteristics of a person of the gender to which the person has been reassigned". The Act in s 3 defines "gender characteristics" to mean "the physical characteristics by virtue of which a person is identified as male or female". Both appellants had undergone subcutaneous bilateral mastectomies and were receiving testosterone therapy. Both retained their female reproductive system but were rendered effectively infertile while they continued the testosterone therapy. The Board concluded that neither could be identified as male because the fact of having a female reproductive system was inconsistent with being male.

The State Administrative Tribunal ("the Tribunal") set aside these decisions. The Attorney-General intervened in those proceedings and the Board submitted to the Tribunal's jurisdiction. The Tribunal concluded that the presence of female reproductive organs alone, in circumstances in which there was no longer a capacity to bear children and no real prospect of that changing in the future, did not outweigh the other physical characteristics by virtue of which each appellant is identified as male.

The Court of Appeal by majority (Martin CJ and Pullin JA, Buss JA dissenting) allowed the appeals, set aside the Tribunal's decisions and ordered that the decision of the Board to refuse the applications for certificates be reinstated. Martin CJ and Pullin JA, in separate reasons, concluded that because the appellants possess none of the genital and reproductive physical characteristics of a male, and nearly all of the normal external characteristics and internal reproductive organs of a female, they would not be identified, according to accepted community standards and expectations, as members of the male gender. Buss JA in dissent held that "physical characteristics" (in the definition of "gender characteristics" and "reassignment procedure") are confined to external physical characteristics and do not include internal physical characteristics. His Honour observed that parliament could have, but did not, stipulate that permanent sterility/infertility was a requirement for reassignment, nor that phalloplasty (for female to male reassignment) was required, merely that the procedure "alter" the genitals.

The Australian Human Rights Commission has sought leave to intervene in the proceedings.

The grounds of appeal include:

- Whether the majority of the Court of Appeal erred in finding that the determination pursuant to s 15(1)(b)(ii) of the *Gender Reassignment Act* ("has the gender characteristics of a person of the gender to which the person has been reassigned") is made by reference to both external genitalia and internal reproductive organs;

- Whether the majority of the Court erred in failing to find that the appellants had sufficient of the gender characteristics of the male gender to satisfy s 15(1)(b)(ii) of the Act.

QUINN v. THE QUEEN (S143/2011), GREEN v. THE QUEEN (S146/2011)

Court appealed from: New South Wales Court of Criminal Appeal [2010] NSWCCA 313

Date of judgment: 17 December 2010

Date special leave granted: 8 April 2011

These appeals concern the parity of sentences imposed on co-offenders involved in a large scale cannabis plantation.

The appellant, Shane Quinn, and a number of others, including Brett Green, were involved in the cultivation of a large commercial quantity of cannabis plants valued at about $4 million.

Both appellants pleaded guilty on 20 July 2009 in the District Court of NSW to an offence of cultivation of not less than a commercial quantity of cannabis plants contrary to s 23(2)(a) of the *Drug Misuse and Trafficking Act* 1985 (NSW). The maximum penalty is 20 years imprisonment. Mr Quinn was held to have been a principal in the offence and on top of the hierarchy. Mr Green, together with 2 co-offenders, Kody Taylor and Garry Mason, was regarded as a 'partner' with Mr Green at a more senior level than either Mr Taylor or Mr Mason.

On 14 August 2009 the appellants were sentenced by Boulton ADCJ. The sentences imposed were as follows: Mr Green was sentenced to imprisonment for period of 4 years including a non-parole period of 2 years, both such periods commencing on 17 May 2009; Mr Quinn was sentenced to imprisonment for a period of 6 years including a non-parole period of 3 years, both such periods commencing on 30 April 2008.

In arriving at these sentences his Honour allowed each of the appellants a 20% discount for his plea. (Boulton ADCJ had earlier sentenced Mr Taylor to imprisonment for 3 years including a non-parole period of 18 months on a charge of knowingly take part in the supply of a commercial quantity of cannabis.)

The Crown appealed asserting that the sentences imposed on each of Mr Quinn and Mr Green were manifestly inadequate and that the discount of 20% for the utilitarian value of the plea was in all the circumstances excessive. The appellants raised the issue of parity with the sentence imposed on Mr Taylor.

The Court of Criminal Appeal constituted a bench of five Justices to hear the appeals. The appeals were allowed by majority (McClellan CJ at CL, Hulme and Latham JJ; Allsop P and McCallum J dissented). Both the majority and the minority found that the sentences were manifestly inadequate but reached different conclusions about the degree of the inadequacy. The Court quashed the sentences imposed on the appellants. Mr Green was sentenced to imprisonment for a non-parole period of 3 years commencing on 17 May 2009 together with a further term of 2 years commencing on 17 May 2012 and Mr Quinn was sentenced to imprisonment for a non-parole period of 5 years commencing on 30 April 2008 together with a further term of 3 years commencing on 30 April 2013.

The ground of appeal is effectively identical in each matter:

- The Court of Criminal Appeal erred in holding that it was appropriate to allow the Crown appeal regarding the appellant and to thereby create disparity between the appellant's new sentence and that imposed on another offender who had not been the subject of a Crown appeal.