

**SHORT PARTICULARS OF CASES**  
**APPEALS**

**BRISBANE**  
**JULY 2016**

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## **LYONS v STATE OF QUEENSLAND (B16/2016)**

Court appealed from: Court of Appeal of the Supreme Court of Queensland  
[2015] QCA 159

Date of judgment: 28 August 2015

Special leave granted: 11 March 2016

Ms Gaye Lyons is profoundly deaf. Although she can lip-read, the primary and most reliable method of communication for her is Australian Sign Language (“Auslan”).

When Ms Lyons was summonsed for jury service, she informed the Deputy Registrar of Ipswich Courthouse that she would require two Auslan interpreters. The Deputy Registrar then decided to exclude Ms Lyons as a potential juror (“the Exclusion”). This was on two bases: (1) there was no provision in the *Jury Act* 1995 (Qld) (“the Jury Act”) for an interpreter to take an oath of secrecy; and (2) it was not possible to have a person in the jury room during the jury’s deliberations other than the jurors and a bailiff. Upon a request by Ms Lyons for a further explanation, the Deputy Registrar informed Ms Lyons that she had been excluded by reason of s 4(3)(l) of the Jury Act, which provides that persons not eligible for jury service include “a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror”.

Ms Lyons then filed a complaint with the Queensland Civil and Administrative Tribunal (“QCAT”), claiming that the Exclusion constituted both direct and indirect discrimination under ss 10 and 11 respectively of the *Anti-Discrimination Act* 1991 (Qld) (“the AD Act”). That complaint was dismissed, upon a Member of QCAT finding that the Exclusion was based on the problems posed by an interpreter being present in the jury room, not on the fact that Ms Lyons required an interpreter due to her disability.

An appeal by Ms Lyons was dismissed by QCAT’s Appeal Tribunal, on the basis that the Deputy Registrar’s approach was supported by a judgment of the Supreme Court of Queensland (*Re: the Jury Act 1995 and an application by the Sheriff of Queensland* [2014] QSC 113). In that judgment, Justice Douglas held that a deaf juror was ineligible for jury service by virtue of s 4(3)(l) of the Jury Act, as no legislative provision facilitated the use of an Auslan interpreter to assist a juror in jury room discussions. The Appeal Tribunal nevertheless proceeded to address Ms Lyons’ grounds of appeal based on the reasons of the Member (who had not applied the Supreme Court judgment).

Ms Lyons applied for leave to appeal.

The Court of Appeal (Holmes & Gotterson JJA, Mullins J) unanimously dismissed Ms Lyons’ application. Their Honours held, in respect of indirect discrimination under s 11 of the AD Act, that the Appeal Tribunal had not erred by agreeing with the Member’s finding that the Exclusion had not involved the imposition of a condition on Ms Lyons that she communicate by conventional speech. In respect of direct discrimination, the Court of Appeal held that the Appeal Tribunal had not misapprehended the test, under s 10(4) of the AD Act, involving “a substantial reason” for the Deputy Registrar’s treatment of Ms Lyons. This was because the Member had found that Ms Lyons’ deafness was not a reason for the Exclusion at

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all. The Court of Appeal also held that the Member, in applying s 10(5) of the AD Act, had appropriately considered as a notional comparator a hypothetical person who required the assistance of a non-juror in the jury room rather than a hypothetical person who required no such assistance. Their Honours found that on the present state of the legislation “it is difficult to see how jury members could discuss the case in the presence of an interpreter without breaking their oath”.

The grounds of appeal include:

- The Court of Appeal erred in finding that there was no unlawful indirect discrimination because it misconstrued s 11 of the AD Act by finding that the Respondent had not imposed a term on Ms Lyons to the effect that she be able to communicate by means of conventional speech in its refusal to allow her to participate in the jury selection process.
- The Court of Appeal erred in finding that there was no unlawful direct discrimination pursuant to s 10 of the AD Act by:
  - a) failing to find that Ms Lyons’ impairment was the reason or a substantial reason within the meaning of s 10(4) of the AD Act for the Deputy Registrar’s decision to exclude Ms Lyons from the jury selection process;
  - b) misconstruing s 10(5) of the AD Act in finding that Ms Lyons’ requirement for the special service of an Auslan interpreter was to be taken into account by imbuing the notional comparator as a person who required an additional person in the jury room; and
  - c) by reason of the misconstruction of s 10(5) as set out in b), finding that the Respondent did not treat Ms Lyons less favourably than another person is or would be treated in circumstances that are the same or not materially different.

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**THE QUEEN v BADEN-CLAY (B33/2016)**

Court appealed from: Court of Appeal of the Supreme Court of Queensland  
[2015] QCA 265

Date of judgment: 8 December 2015

Special leave granted: 12 May 2016

On the morning of 20 April 2012 Mrs Allison Baden-Clay was reported missing by her husband, Mr Gerard Baden-Clay. Mr Baden-Clay told police that he had last seen his wife the previous night, when she was watching television when he went to bed. Mr Baden-Clay said that his wife had apparently gone for an early-morning walk but had not returned. Ten days later Mrs Baden-Clay's body was found by a creek under a bridge, 13 kilometres from her home. A likely cause of her death was unable to be determined by autopsy.

Mr Baden-Clay was charged with having murdered his wife. The Crown case against him was that he had killed Mrs Baden-Clay on the night of 19-20 April 2012, after a build-up both of financial pressure from his business and of emotional pressure due to an extra-marital affair he was having. Evidence in the trial included that Mr Baden-Clay had told police that the affair had ended in 2011 whereas his mistress testified that the affair was continuing in April 2012. The mistress had also become upset with Mr Baden-Clay on 19 April 2012 when he told her that Allison was to attend a seminar the following day, which she too would be attending. Mr Baden-Clay told police that he had slept soundly through the night of 19-20 April 2012, though testing of his mobile phone indicated that it had been placed on a charger next to his bed at 1:48am on 20 April. Expert evidence was given in relation to small cuts and abrasions that were on Mr Baden-Clay's cheeks, which he said were caused by his having shaved hurriedly on the morning of 20 April. The expert evidence was to the effect that one set of abrasions was likely caused by fingernails, not by a razor.

The jury found Mr Baden-Clay guilty of his wife's murder, whereupon Justice Byrne sentenced him to imprisonment for life. Mr Baden-Clay appealed against his conviction.

The Court of Appeal (Holmes CJ, Fraser & Gotterson JJA) unanimously allowed the appeal and substituted a verdict of manslaughter for the jury's verdict. (Resentencing has been postponed pending the outcome of the appeal to this Court.) Their Honours held it was open to the jury to conclude that Mrs Baden-Clay had died as a result of an injury suffered during a violent altercation with her husband and that he had then dumped her body in the creek where it was found. The Court of Appeal held however that even if Mr Baden-Clay had lied about various matters and had disposed of his wife's body, those factors did not enable a jury to infer that he had an intent to kill Mrs Baden-Clay or to cause her grievous bodily harm. Their Honours found that Mr Baden-Clay's post-offence conduct was neutral on the issue of his intent, due in part to an absence of evidence of any motive to kill his wife. A reasonable hypothesis for Mr Baden-Clay's post-offence conduct was that he had panicked upon realising he had accidentally killed Mrs Baden-Clay.

The grounds of appeal are:

- The Court of Appeal erred:
  - a) in concluding that the evidence of the respondent's lies, disguising his wounds and his disposal of his wife's body was "intractably neutral" on the issue of intent and that the jury could not properly have been satisfied beyond reasonable doubt that the element of intent to kill or do grievous bodily harm had been proved without first considering the significance of that evidence in the context of the other evidence in the case; and
  - b) in concluding that there was no evidence of relevant motive; and
  - c) in concluding that a hypothesis consistent with innocence, which had not been raised as an issue at the trial and which was inconsistent with the respondent's case, was nevertheless a hypothesis which the jury were not entitled to reject.

**AUSTRALIAN COMPETITION & CONSUMER COMMISSION v FLIGHT CENTRE TRAVEL GROUP LIMITED (B15/2016)**

Court appealed from: Full Court of the Federal Court of Australia  
[2015] FCAFC 104

Date of judgment: 31 July 2015

Special leave granted: 11 March 2016

The respondent (“Flight Centre”) operates a travel agency business involving the sale of international passenger air travel services to customers. Flight Centre provides information and books flights with various airlines, obtaining income from commission it earns on each fare paid by a customer. Many airlines, including Singapore Airlines, Malaysia Airlines and Emirates (the latter three together, “the Airlines”) sell flights directly to customers in addition to accepting bookings and payments from travel agencies such as Flight Centre.

In the relevant period, between 2005 and 2009, Flight Centre became concerned over the sale of flights by the Airlines directly to customers at prices lower than the prices at which Flight Centre needed to sell in order to receive commission. Flight Centre corresponded with each of the Airlines, complaining of their undercutting of prices and addressing various considerations including margins and a potential reduction in future sales by Flight Centre.

The appellant (“the ACCC”) commenced proceedings against Flight Centre, alleging that its dealings with the Airlines concerning prices and margins amounted to inducements to make arrangements that would lessen competition in a market, in contravention of s 45(2)(a)(ii) of the *Trade Practices Act 1974* (Cth) (“the TPA”). A necessary element of the ACCC’s case was that Flight Centre provided services in competition with each of the Airlines within the meaning of s 45A of the TPA.

Justice Logan held that Flight Centre had contravened s 45(2)(a)(ii) of the TPA and ordered it to pay a pecuniary penalty of \$11 million to the Commonwealth. His Honour found that Flight Centre was a competitor of the Airlines, each of which it had attempted to induce to enter into an agreement which would control the prices that they each charged for airfares. Justice Logan held that this had occurred in a single market of distribution and booking services for international air travel.

The Full Court of the Federal Court (Allsop CJ, Davies & Wigney JJ) unanimously allowed Flight Centre’s appeal. Their Honours held that Justice Logan had erred in identifying the relevant market. It was artificial to characterise, without supporting evidence, an airline’s selling of flights directly to customers as involving the provision of a distribution service by the airline to itself. It was also artificial to consider booking services as constituting a separate supply. The Full Court found that booking services were an inseparable part of the supply of international air travel, falling within the agency agreement between Flight Centre and the Airlines. Their Honours held that the market in which Flight Centre’s conduct occurred was the market for the supply of international air travel, in which Flight Centre acted as agent for the Airlines rather than in competition with them.

The grounds of appeal include:

- The Full Court, having accepted that Flight Centre and the Airlines operated independent businesses and engaged in rivalry or competition for the sale to consumers of international passenger air travel services, erred in finding that:
  - a) there was no separate market for the supply of booking services and/or distribution services in which Flight Centre and the Airlines were in competition for the purposes of s 45A of the TPA; and
  - b) the agency relationship between Flight Centre and each of the Airlines precluded them from being in competition with each other in a market for the supply of booking services and/or distribution services for the purposes of s 45A of the TPA.