SHORT PARTICULARS OF CASES

MAY 2016

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DAY v AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF SOUTH AUSTRALIA & ANOR (S77/2016);
MADDEN & ORS v AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF TASMANIA & ORS (S109/2016)

Dates proceedings commenced: 22 March 2016 and 14 April 2016

Date referred to Full Court: 15 April 2016

On 22 March 2016 certain amendments ("the Amendments") to the *Commonwealth Electoral Act* 1918 (Cth) ("the CEA") were effected by the *Commonwealth Electoral Amendment Act* 2016 (Cth) ("the Amendment Act").

The Amendments include changes to the ballot paper used in each State or Territory in the election of Senators ("the Ballot Paper") and the way in which electors are required to mark the Ballot Paper when they vote. The prescribed form for the Ballot Paper is Form E in Schedule 1 to the CEA.

Following the Amendments, the Ballot Paper will continue to contain a line that separates the names of political parties and groups of candidates, printed at the top of the sheet, from the names of all individual candidates, printed below the line.

Prior to the Amendments, voters were required to mark the Ballot Paper in one of two ways. The first was to choose only one political party or group above the line by writing a "1" (a tick or a cross also being acceptable) against their choice. The alternative was to number sequentially every name below the line, indicating the voter's preference for the individual candidates.

Following the amendment of both Form E and s 239 of the CEA the two options, as to be printed on the instructions on the Ballot Paper, will be as follows. The first is to number at least six of the political parties or groups above the line in the order of the voter's choice. The alternative is to number individual candidates below the line in accordance with the voter's choice, by numbering as few as 12 names (instead of all of them). In relation to the first option, s 269 of the CEA provides that a ballot paper will not be informal if fewer than six of the parties or groups are numbered, including if only one party or group is marked with a "1" (or a tick or a cross).

Prior to the Amendments, a vote for a party or group above the line on the Ballot Paper could lead to a distribution of preferences by that party or group in a manner as described in a poster or a pamphlet displayed at the place of voting. Section 272 of the CEA now provides however that a vote above the line for a party or group is taken to be a vote for the candidates of that party or group as if the voter had numbered his or her preferences in the order in which the candidates' names are listed below the line.

On 22 March 2016 Mr Robert Day, a Senator for South Australia, filed an application for an order to show cause with this Court, seeking declarations that:

- the CEA (as amended) ss 4(1), 239, 269, 272 and Form E in Part 1 of Schedule 1 are invalid; and

- the Amendment Act Schedule 1, Parts 1 (items 1 to 42A) and 3 (items 89 and 92 to 94) are invalid.

Mr Day seeks relief including an order restraining the defendants (being the Commonwealth and the Australian Electoral Officer for South Australia) from issuing ballot papers for the next Senate election in the form of Form E as it stands following the Amendments.

An application for an order to show cause was also filed by Mr Peter Madden and six others. Each of those plaintiffs is an elector enrolled to vote in the election of Senators for a State or Territory of Australia. The grounds of their application and the relief sought in it are substantially identical to those contained in Mr Day's application. The defendants are the Commonwealth and the Australian Electoral Officer of each State and Territory other than South Australia.

A Notice of a Constitutional Matter has been filed in each proceeding. At the time of writing, no Attorney-General had given notice of intending to intervene in the proceedings.

On 15 April 2016 Chief Justice French referred both applications to the Full Court for hearing. The Chief Justice also ordered that the submissions filed in respect of the *Day* proceeding stand as submissions filed for the purposes of the *Madden & Ors* proceeding.

The grounds on which the plaintiffs claim relief include:

- Contrary to Commonwealth Constitution s 9 and the constitutional guarantee of representative government Form E in the challenged provisions prescribes more than one method of choosing of Senators uniform for all the States, more particularly an optional first past the post / preferential party list method above the line and a part compulsory preferential candidate list method below the line.

- Contrary to Constitution s 7 and the constitutional guarantee of representative government the challenged provisions authorise voting on Form E and under s 239(2) CEA as amended for "*the party or group for whom the person votes as his or her first preference, and the numbers 2, 3, 4, 5 and 6 being given to other parties or groups so as to indicate the order of the person's preference for them*" and not for a Senator directly chosen by the people of the State or Territory voting as one electorate.

- Contrary to Constitution s 7 and the constitutional guarantee of representative government items 89 and 92 to 94 of Part 3 of Schedule 1 to the Amendment Act provide for the use of party logos limited to two in Form E above the line thereby disadvantaging and/or discriminating against independent candidates and minor parties and disenfranchising voters for independents and minor parties.

HALL v HALL (A7/2016)

Court appealed from: Full Court of the Family Court of Australia

Date of judgment: 7 August 2015

Date special leave granted: 12 February 2016

The appellant wife and respondent husband were married in 2001 and separated in September 2013. On 23 October 2013, the wife filed proceedings in the Family Court seeking orders for property settlement and for spousal maintenance in the sum of $20,000 per month. On 10 December 2013, Dawe J made orders which included an order that the husband pay spousal maintenance to the wife of $10,833 per month, pending final determination of the maintenance and property settlement proceedings. The husband applied to have that order set aside. His application was dismissed by Dawe J on 17 June 2014.

The husband appealed to the Full Family Court (Thackray, Strickland and Eldridge JJ). The Court found that Dawe J had failed to consider, and indeed make any finding as to, whether there was sufficient new evidence before her to discharge the interim spousal maintenance order. The Court was particularly concerned about her Honour's failure to take into account evidence that the wife's late father's will specified that she should receive from a family company an annual payment of $150,000 from the date of his death until she received payment of an amount of $16.5 million from that company. The Court found there were clear indications or inferences to be made from the evidence before her Honour that the wife's brothers (including the executor of the will), who controlled the family company, would carry out their father's wish in this regard.

The Court concluded that the consequence must be that her Honour's dismissal of the husband's application, to the extent that it sought a discharge of the interim spousal maintenance order, warranted appellate interference. They noted that pursuant to s 83(1)(c) of the *Family Law Act* 1975 (Cth), a spousal maintenance order may be discharged "if there is any just cause for so doing". The issue for consideration was whether there was evidence before the Court that demonstrated that the wife was able to support herself adequately.

The Court held that the inference from the evidence relating to the father's will was that, if she requested it, the wife would receive that benefit. The evidence from which that inference could be made was evidence that the wife had a good relationship with her brothers; that it was a wish expressed in the will of their late father; and the brothers had, in the past, provided the wife with late models of luxury motor vehicles. In these circumstances, the Court was prepared to set aside the relevant part of the order made by Dawe J and discharge the order for spousal maintenance made on 10 December 2013.

The grounds of appeal include:

- The Court erred as a matter of law in setting aside paragraph 6 of the orders made in exercise of her discretion by the primary judge on 17 June 2014, being an order dismissing the application of the respondent to discharge an order of 10 December 2013 for interim spousal maintenance :

(1) on the ground that the primary judge had failed to consider the husband's application for discharge of the interim spousal maintenance order;

(2) on a ground which was not raised by the respondent either on appeal or at first instance, namely, that the appellant was able to support herself adequately because she was able to request the V Group to make a voluntary annual payment to her of $150,000.

CROWN MELBOURNE LTD v COSMOPOLITAN HOTEL (VIC) PTY LTD & ANOR (M253/2015)

Court appealed from: Court of Appeal, Supreme Court of Victoria [2014] VSCA 353

Date of judgment: 22 December 2014

Date special leave granted: 11 December 2015

The appellant ('Crown') operates the Melbourne Casino and Entertainment Complex. Between 1997 and 2005 the respondents ('the tenants') operated two restaurants at the Complex. Crown wanted the tenants to undertake significant refurbishment of the two premises, and to rent them for a period of five years. The tenants sought a longer period of tenancy in light of the substantial financial outlay in refurbishing the premises. Following lengthy negotiations the tenants signed leases which set the length of each lease at five years.

After the expiration of the leases, Crown did not renew and the tenants vacated the premises. The tenants sued Crown in the Victorian Civil and Administrative Tribunal ('VCAT') over the non-renewal of the leases, alleging that Crown had told them that, if they entered into the leases and completely refurbished the restaurants at their expense, they would be 'looked after at renewal time'. VCAT held that Crown had breached a collateral contract with the tenants. Crown sought leave of the Supreme Court of Victoria to appeal that decision. Justice Hargrave granted leave, and allowed the appeal, on the basis of his finding that the statements made by Crown were representational and not promissory.

The tenants' appeal to the Court of Appeal (Warren CJ, Whelan and Santamaria JJA) was upheld despite the Court's finding that the trial judge was correct to find that the statement was not promissory. The Court found that Crown was estopped from denying the existence of a collateral contract.

Whelan JA (with whom Santamaria JA agreed) identified the relevant principles as follows: (a) a representation which is too uncertain to constitute a contractual obligation may found a proprietary or promissory estoppel; (b) it is essential to show that the statement was of such a nature that it would have misled any reasonable man and that the person to whom the statement was made was in fact misled by it; (c) if there is a 'grey area' in what is represented or promised, but it was reasonable for the representee to interpret it as extending at least to the lower limit of that 'grey area' and to act in reliance on it as so understood, the Court should regard the representation or promise as sufficiently certain up to this lower limit; (d) particular care needs to be taken to ensure that business people pursuing their commercial interests, who are fully aware of what is contractually agreed and what is not, do not have judges' views of what is required by good conscience imposed upon their negotiated bargains; and (e) where a representation is made and relied upon so that it is unconscionable for the representor to resile, *prima facie* equity will give relief which compels the representor to perform or make good what was represented, but this *prima facie* position is subject to the qualification that it is also necessary to do justice to the representor and to third parties who might be affected.

Their Honours noted that neither VCAT nor the trial judge had addressed estoppel on the basis of the factual findings which VCAT had made but by reference to the 'lower limit' of what was meant by 'looking after' the tenants at renewal. A claim couched in those terms was within the case that was pleaded

and put at VCAT but had never been adjudicated upon. As no submissions had been heard upon the claim formulated in that way, their Honours ordered that the matter be remitted to VCAT for determination of what equitable relief, if any, should be granted in respect of the tenants' estoppel claim.

The grounds of appeal include:

The Victorian Court of appeal erred in finding that:

- A promissory estoppel can be made out merely by proving the making of and resiling from an ambiguous representation, without the need to prove the way in which the representation was understood by the representee, whether that understanding was reasonable and whether that understanding was relied upon;
- The statement that the respondents would be 'looked after' at the time for renewing their leases was sufficiently clear and unequivocal to found a promissory estoppel, though not the promissory estoppel pleaded by the respondents;
- Treating the promissory estoppel as operating at an undefined and undetermined 'lower limit' of what was meant by 'looking after' the tenants at renewal.

The respondents have filed a cross-appeal, the grounds of which include:

- The Court of Appeal erred in holding that the appellant stated and identified as the subject matter of its appeal from the Tribunal to the Supreme Court any question or questions of law pursuant to s148 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic).

MILLER v THE QUEEN (A28/2015)

Court appealed from: Court of Criminal Appeal, Supreme Court of South Australia [2015] SASCFC 53

Date of judgment: 28 April 2015

Date special leave granted: 13 November 2015

The appellant was found guilty by unanimous jury verdict of the murder of Clifford Hall. The incident the subject of the charge occurred at about 11.00 pm on 12 December 2012 at Grant Street, Elizabeth Park. Mr Hall was assaulted near his home by a group of men including the appellant and the co-accused Joshua Betts, Johnas Presley, and Wayne Smith. A number of weapons were used in the assault, including a baseball bat, a shovel and a bottle. Mr Hall was stabbed with a knife to his back, penetrating his chest cavity, lung and heart. It was not disputed at trial that this wound, which was fatal, was inflicted by Betts. The prosecution case was that the appellant, Betts, Presley and Smith were part of a joint enterprise that had as its object, or within its contemplation, an attack on Mr Hall with weapons accompanied by an intention to cause grievous bodily harm. At trial, counsel for the appellant conceded during his closing address that the appellant was present at the time of the confrontation. His contention was that the evidence led by the prosecution did not establish that he was physically involved in the confrontation or that he was a party to any relevant joint enterprise.

A breath test performed on the appellant three hours after the assault produced a reading of 0.167 mg of alcohol per litre of blood, and a blood sample taken the following morning showed the presence of diazepam, nordiazepam, cannabis and carboxy THC. A pharmacologist (Dr Majumder) gave evidence that the appellant's level of intoxication at the time of the offending would have significantly impaired his decision making and his ability to foresee the consequence of certain decisions.

In his appeal to the Court of Criminal Appeal (Gray, Sulan and Blue JJ) the appellant submitted that the trial judge had erred in leaving extended joint criminal enterprise as a basis for liability for murder in the circumstances of the case against him because it caused confusion and obfuscated the real issues at trial. He also submitted that the judge erred in failing to leave an alternative verdict of manslaughter by excessive self-defence, and further that the verdict was unreasonable or could not be supported having regard to the evidence. None of these submissions was successful. In its judgment rejecting the appeal, the Court did not refer to the evidence relating to the appellant's level of intoxication and its effects.

The grounds of appeal include:

- The court below ought to have found, on the basis of the evidence of Dr Majumder, that the applicant's consciousness was or would have been impaired, by his intoxication and drug use, to such an extent that there was a reasonable doubt about whether the applicant could contemplate or foresee the consequences of his or another's actions.

The appellant has filed a summons seeking leave to amend his grounds of appeal to add the following grounds:

- The directions given by the learned trial judge to the jury on the question of extended joint criminal enterprise were incorrect in law;
- Further or alternatively, the trial judge applied the principle concerning joint criminal enterprise laid down by the High Court in *McAuliffe v The Queen* (1995) 183 CLR 108, which principle is now considered incorrect in English law.

The applications for special leave to appeal by two of the co-accused, Presley and Smith were, on 12 February 2016, referred to the Full Court to be argued as on an appeal and are listed for hearing together with this appeal.

SMITH v THE QUEEN (A22/2015)

Court appealed from:	Court of Criminal Appeal, Supreme Court of South Australia [2015] SASCFC 53
Date of judgment:	28 April 2015
Date matter referred to Full Court:	12 February 2016

The applicant was found guilty by unanimous jury verdict of the murder of Clifford Hall. The incident the subject of the charge occurred at about 11.00 pm on 12 December 2012 at Grant Street, Elizabeth Park. Mr Hall was assaulted near his home by a group of men including the applicant, and the co-accused Joshua Betts, Everard Miller and Johnas Presley. A number of weapons were used in the assault, including a baseball bat, a shovel and a bottle. Mr Hall was stabbed with a knife to his back, penetrating his chest cavity, lung and heart. It was not disputed at trial that this wound, which was fatal, was inflicted by Betts. The prosecution case was that the applicant, Betts, Miller and Presley were part of a joint enterprise that had as its object, or within its contemplation, an attack on Mr Hall with weapons, accompanied by an intention to cause grievous bodily harm. It was alleged that the applicant hit Mr Hall with a shovel and a bottle. The prosecution contended that the applicant lied to the police about his whereabouts at the time of the incident, and this lie was capable of being used as an item of circumstantial evidence of his presence and participation in the attack. There was evidence that the applicant had been drinking throughout the day on which the murder took place, although a blood sample taken about 24 hours after the event showed a zero blood alcohol concentration.

In his appeal to the Court of Criminal Appeal (Gray, Sulan and Blue JJ) the applicant submitted, inter alia, that the verdicts were unreasonable or could not be supported having regard to the evidence. The Court concluded that there was sufficient evidence to leave it open to the jury to find that the applicant was present at the scene and participated in the attack with the necessary intent. In his application for special leave, the applicant contends that although the issue of intoxication was not specifically raised on appeal, the Court should have referred to the effect of the evidence of intoxication on the ability of the applicant to foresee the possibility that one of the co-offenders might unlawfully kill or inflict grievous bodily harm on the deceased with the requisite intent.

The proposed grounds of appeal include:

- The Full Court should have held that the convictions were unreasonable and not supported by the evidence because there existed a reasonable possibility on the evidence that the appellant's state of intoxication was such that his thought processes were impaired to the point where he was not able to foresee or predict the consequences of his own conduct or the conduct of others.

The applicant has filed a summons seeking leave to amend his proposed grounds of appeal to add the following ground of appeal:

- The appellant's trial miscarried as liability for murder was left for consideration by the jury on bases including the principle enunciated in

McAuliffe v The Queen (1995) 183 CLR 108, known as extended joint enterprise, upon which basis the appellant may have been convicted.

This application is listed together with the application by Presley, which is also referred, and the appeal by Miller.

PRESLEY v THE DIRECTOR OF PUBLIC PROSECUTIONS (A17/2015)

Court appealed from: Court of Criminal Appeal, Supreme Court of South Australia [2015] SASCFC 53

Date of judgment: 28 April 2015

Date matter referred to Full Court: 12 February 2016

The applicant was found guilty by unanimous jury verdict of the murder of Clifford Hall. The incident the subject of the charge occurred at about 11.00 pm on 12 December 2012 at Grant Street, Elizabeth Park. Mr Hall was assaulted near his home by a group of men including the applicant and the co-accused Joshua Betts, Everard Miller, and Wayne Smith. A number of weapons were used in the assault, including a baseball bat, a shovel and a bottle. Mr Hall was stabbed with a knife to his back, penetrating his chest cavity, lung and heart. It was not disputed at trial that this wound, which was fatal, was inflicted by Betts. The prosecution case was that the applicant, Betts, Miller and Smith were part of a joint enterprise that had as its object, or within its contemplation, an attack on Mr Hall with weapons accompanied by an intention to cause grievous bodily harm.

The applicant, when interviewed by police, admitted attending Grant Street armed with a baseball bat and in the company of at least Smith, whom he said was also armed. The prosecution case was that the applicant hit a friend of Mr Hall with the baseball bat – to which he pleaded guilty – and joined in the attack on Mr Hall, also hitting him with the bat.

In his appeal to the Court of Criminal Appeal (Gray, Sulan and Blue JJ), the applicant submitted that the trial judge had erred in his directions in his description of the elements of murder under the doctrine of extended joint enterprise. It was submitted that only a participant to a joint enterprise who actually foresees a murder as a possible incidental crime is liable for murder under extended joint enterprise and that the accused must have foresight of a possibility that the victim might be killed with murderous intent and not merely that the victim might sustain really serious harm. The Court rejected that argument, finding that the relevant foresight is of someone acting with the necessary intention for murder, namely, either an intent to kill or an intent to cause grievous bodily harm, citing the judgment of this Court in *McAuliffe v The Queen* (1995) 183 CLR 108.

The applicant further submitted that the directions given by the trial judge on intoxication were inadequate. He contended that directions were required to properly instruct the jury as to how their findings of fact on the evidence on intoxication affected ten matters concerning his awareness of those facts and his intention. Those matters included: his awareness of the scope of any joint enterprise; whether he was subjectively aware of the intentions of other participants; whether he turned his mind to possible consequences of participation; whether he was aware Betts was carrying a knife; his comprehension of or agreement to the level of violence; whether he intended that a person sustain grievous bodily harm; whether he was aware of a possibility that someone might be murdered; and whether he was aware of a possibility that someone might be killed in circumstances falling short of murder, that is, how intoxication could affect his liability for extended joint enterprise manslaughter. The Court noted that the judge gave general directions on the topic of

intoxication, and specific directions on that subject with respect to the applicant. Those directions addressed the relevance of intoxication with respect to murder, manslaughter, whether the applicant entered into the relevant joint enterprise and, where relevant, what he might have foreseen. The Court considered that the summing up of the trial judge with respect to intoxication and the applicant could not be fairly criticised. The jury was made well aware of the relevance of intoxication by general directions, and the facts concerning the applicant's possible intoxication and their relevance to the particular issues in the case put against the applicant were adequately addressed.

The proposed ground of appeal is:

- The court below ought to have found, on the evidence that the applicant's consciousness would have been impaired by intoxication to such an extent that there was a reasonable doubt about whether the applicant could foresee the possible consequences of another person's actions, or form the *mens rea* necessary for murder under the doctrine of joint enterprise or extended joint enterprise.

The applicant has filed a summons seeking leave to amend his proposed grounds of appeal to add the following further ground:

- The court below erred in finding that liability for murder under the common law doctrine of extended joint criminal enterprise requires foresight only of the possibility of someone acting with the necessary intent for murder, namely either an intent to kill or an intent to cause grievous bodily harm.

This application is listed together with the application by Smith, which is also referred, and the appeal by Miller.

MURPHY v ELECTORAL COMMISSIONER & ANOR (M247/2015)

Date Special Case referred to Full Court: 24 March 2016

The plaintiff is enrolled to vote for the Division of Wills in the State of Victoria and he intends to vote at the next federal election. He is challenging the constitutional validity of provisions of the *Commonwealth Electoral Act* 1918 (Cth) ('the Act') which suspend the processing of claims for enrolment and transfer of enrolment of persons otherwise eligible to enrol to vote in the period from seven days after the issue of the writs for the election until after polling day. The basis of the challenge is that the suspension period is incompatible with and contrary to ss 7 and 24 of the *Constitution* and the mandate, as explained by this Court in *Roach v Electoral Commissioner* (2007) 233 CLR 162 and in *Rowe v Electoral Commissioner* (2010) 243 CLR 1 that Senators and members of the House of Representatives be 'directly chosen by the people'. (In *Rowe* this Court held that the suspension period of zero days (for enrolments) and three days (for transfers) after the issue of the writs was invalid). The plaintiff estimates that approximately 130,000 eligible people were disenfranchised in the 2013 federal election as a result of the operation of the suspension period.

The plaintiff is seeking a declaration that sections 94A(4), 95(4), 96(4), 102(4), 193A(5), 103B(5) and 118(5) of the Act are invalid; and the issue of a writ of prohibition directed to the first defendant prohibiting him from giving effect to, or taking any steps in reliance upon, those sections.

On 24 March 2016 Nettle J referred the Special Case for consideration by the Full Court.

Notices of Constitutional Matter have been served. The Attorney-General for the State of South Australia has filed a Notice of Intervention.

The questions in the Special Case include:

Q2. Are any or all of sections 94A(4), 95(4), 96(4), 102(4), 103A(5), 103B(5) and 118(5) of the *Commonwealth Electoral Act* 1918 (Cth) contrary to ss 7 and 24 of the Constitution and therefore invalid?

Q3. If the answer to question 2 in relation to a section is yes, do sections 152(1)(a) and 155 of the Act have the same or substantially the same operation or effect as the impugned provisions or any of them and, if so, are sections 152(1)(a) and 155 invalid and of no effect?