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CRUMP v STATE OF NEW SOUTH WALES & ANOR (S165/2011)

Date special case filed: 30 November 2011

On 20 June 1974 Mr Kevin Crump and Mr Allan Baker were sentenced to life imprisonment for murdering Mr Ian Lamb and for conspiring to murder Mrs Virginia Morse. Justice Taylor recommended that Mr Crump and Mr Baker never be released. In doing so, his Honour took into account the circumstances of the rape and murder of Mrs Morse, which the convicted men carried out in Queensland after having abducted Mrs Morse from her home in New South Wales.

At the time of Mr Crump's sentencing, life imprisonment was the mandatory sentence for murder, but prisoners had an opportunity for a grant of a release on licence. In 1990, the *Crimes Act* 1900 (NSW) was amended such that life imprisonment was no longer mandatory for murder, but any sentence of life imprisonment was for the term of the person's natural life (with no opportunity for release on licence). Also in 1990, the *Sentencing Act* 1989 (NSW) was amended such that a person serving life imprisonment (who had served at least 8 years) could apply to the Supreme Court for the determination of a minimum term of imprisonment and an additional term during which they could be released on parole. On 10 December 1992 Justice Loveday declined an application made by Mr Crump for such a determination. His Honour held that it would be premature to set a shorter term, having regard to considerations of retribution, general deterrence, the protection of society and the stage of Mr Crump's rehabilitation.

On 30 May 1994 the Court of Criminal Appeal (Mahoney JA, Hunt CJ at CL and Allen J) unanimously dismissed Mr Crump's subsequent appeal. Mahoney JA & Allen J found that Justice Loveday had not erred in exercising his discretion to refuse Mr Crump's application. Hunt CJ at CL held that the reason for the application's refusal should have been that Mr Crump's crimes fell within the worst category of cases, for which the maximum penalty was appropriate.

Mr Crump then made a second application for determination of his sentence. On 24 April 1997 Justice McInerney sentenced Mr Crump (for the murder of Mr Lamb) to 30 years imprisonment with eligibility for release on parole from 13 November 2003 and an additional term of the term of his natural life. For the charge of conspiracy to murder Mrs Morse, his Honour imposed a sentence of 25 years imprisonment (the then maximum sentence for that crime). His Honour found that Mr Crump had been a model prisoner and that he had made every attempt to rehabilitate himself in the difficult environment of maximum security incarceration. His Honour also found however that Mr Crump still had a long way to go before he could be considered for release.

In 2001 s 154A was inserted into the *Crimes (Administration of Sentences) Act* 1999 (NSW) ("the Administration Act"). Under s 154A(3), the Parole Authority can direct the release of a prisoner who is the subject of a sentencing recommendation that he or she never be released. This however is only in circumstances where the prisoner now lacks the physical ability to harm any person (or is in imminent danger of dying) and poses no risk to the community. On 11 September 2003 the Parole Board determined that Mr Crump was not eligible for release due to s 154A.

On 10 May 2011 Mr Crump filed a Writ of Summons seeking, inter alia, a declaration that he be eligible to have an application determined by the Parole

Authority without having to show the factors required under s 154A(3) of the Administration Act.

On 23 November 2011 Mr Crump filed a Notice of a Constitutional Matter under s 78B of the *Judiciary Act* 1903 (Cth). The Attorneys-General for the Commonwealth, Victoria, Queensland, South Australia and Western Australia have all advised this Court that they will be intervening in this matter.

On 30 November 2011 the parties filed a Special Case for the opinion of the Full Court.

The questions stated for the opinion of the Full Court include:

- Is s 154A of the Administration Act, in its purported application to the plaintiff, invalid, in that it has the effect of varying or otherwise altering a judgment, decree, order or sentence of the Supreme Court of New South Wales in a "matter" within the meaning of s 73 of the Constitution?

THE HONOURABLE BRENDAN O'CONNOR COMMONWEALTH MINISTER FOR HOME AFFAIRS AND ORS v. ZENTAI AND ORS (P56/2011)

Court appealed from: Full Court of the Federal Court of Australia [2011] FCAFC 102

Date of Judgment: 16 August 2011

Date of grant of special leave 9 December 2011

Charles Zentai's extradition is sought by the Republic of Hungary in respect of alleged war crimes. On 20 August 2008 a Magistrate determined that Mr Zentai was eligible for extradition to Hungary and issued a warrant committing Mr Zentai to prison under s 19(9) of the *Extradition Act* 1988 (Cth) ("the Act"). On that day Mr Zentai was granted bail pending the determination of his application under s 21 of the Act for review of the Magistrate's determination under s 19 of the Act. On 31 March 2009 Gilmour J affirmed the Magistrate's determination and on 8 October 2009 the Full Court of the Federal Court dismissed an appeal from Gilmour J's decision. On 12 November 2009 the Minister made a determination under s 22 of the Act that Mr Zentai be extradited to Hungary and issued a warrant under s 23 of the Act requiring Mr Zentai to be released from prison into the custody of Australian police officers and then placed in the custody of Hungarian police officers for transport to Hungary.

On 4 December 2009 Mr Zentai commenced a proceeding seeking a review of the Minister's s 22 determination. On 16 December 2009 McKerracher J made orders admitting Mr Zentai to bail. On 2 July 2010 his Honour found that 'war crime' was not an 'extradition offence'. On that basis his Honour found that "it was not open to the Minister in the exercise of his s 22 discretion to surrender for extradition a person when the offence of which the person was 'suspected' (not charged) did not exist at the relevant time". On 10 December 2010 McKerracher J ordered that writs of certiorari issue to quash the s 22 determination and the s 23 warrant and that a writ of mandamus issue to the Minister directing him to determine that Mr Zentai not be surrendered to the Republic of Hungary in response to the extradition request and to order his release.

On 4 January 2011 the appellants filed a notice of appeal. On 16 August 2011 the Full Court of the Federal Court allowed the appeal in part. The majority found that as the offence of "war crime" did not exist in Hungarian law on 8 November 1944 (the date of the conduct alleged to have constituted the offence) it was not open to the Minister to reach the state of satisfaction referred to in s 22(3)(e)(iii) of the Act.

The grounds of appeal include:

- The majority of the Full Court erred in holding that the first appellant committed a jurisdictional error in determining on 12 November 2009 pursuant to s 22 of the Act that the first respondent is to be surrendered to the Republic of Hungary in relation to the offence of 'war crime'.

Particulars

- The majority of the Full Court erred in finding that extradition under the Treaty on Extradition between Australia and the Republic of Hungary ("the Treaty") and pursuant to the Act may take place only where the specific offence for which extradition is sought existed under Hungarian law at the time the acts or omissions constituting the offence occurred.

The first respondent has filed a Notice of Contention which contends that the decision of the Full Court should be affirmed on the following ground: "The Full Court erred in failing to hold that the First Appellant fell into jurisdictional error in failing to provide a statement of reasons explaining and justifying his decision of 12 November 2009."

On 19 January 2012 the first respondent issued a Notice of Constitutional Matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth). On 20 February 2012 the first respondent issued a further Notice of Constitutional Matter. The Attorney-General for South Australia is intervening pursuant to s 78A of the *Judiciary Act*. The Attorney-General's intervention is limited to the question raised in the Notice of Contention, namely whether the Minister is obliged to provide reasons to validly exercise his power under s 22 of the Act.

BOARD OF BENDIGO REGIONAL INSTITUTE OF TECHNICAL AND FURTHER EDUCATION v BARCLAY & ANOR (M128/2011)

Court appealed from: Full Court of the Federal Court of Australia [2011] FCAFC 14

Date of judgment: 9 February 2011

Date special leave granted: 2 September 2011

The first respondent (Barclay) is a senior teacher employed by the appellant (BRIT). He is also the Sub-Branch President at BRIT of the second respondent (AEU). Barclay forwarded an email to AEU members employed at BRIT, regarding an upcoming re-accreditation audit, in which he said he was aware of reports of serious misconduct by unnamed persons in BRIT. Before sending the email he did not advise any of his line managers of the details of the alleged misconduct. The email was passed on to senior managers and subsequently, the Chief Executive Officer of BRIT (the CEO). She wrote to Barclay, requiring him to show cause why he should not be disciplined for failing to report the misconduct alleged in his email to senior managers. Barclay was suspended on full pay, had his internet access suspended and was not required to attend BRIT during the suspension period.

The respondents commenced proceedings, contending that BRIT had contravened provisions of the *Fair Work Act* 2009 (Cth) (the Act), designed to protect the right of union officials and members, so that the action taken by the CEO constituted adverse action within the meaning of s 342 of the Act. BRIT conceded that Barclay's suspensions and preclusion from BRIT did constitute adverse action. However BRIT submitted that the decision to require Barclay to show cause was not adverse action within the meaning of the Act. The respondents submitted that the test of the reason why the relevant action was taken was objective and not subjective. Tracey J found that the adverse action was taken by the CEO because she considered that his conduct could be a breach of BRIT's code of conduct and his obligations as a BRIT employee and not because of his union activity.

The respondents appealed to the Full Court (Gray, Lander & Bromberg JJ) on a number of grounds. The majority (Gray & Bromberg JJ, Lander J dissenting) concluded that the reasons for the CEO's actions were founded upon the sending of the email, which was part of the exercise of Barclay's functions as an AEU officer. While there may have been a number of reasons for the CEO's actions, one of the factors was Barclay's union activity and thus constituted adverse action within the meaning of the Act. The majority held that on the facts the objective factors outweighed the subjective evidence. Lander J considered that a person's reasons for taking action can only be ascertained subjectively. He agreed with the reasoning and conclusions of the trial judge.

The grounds of appeal include:

- The majority [of the Full Federal Court] erred in law in concluding that a decision maker , who establishes by evidence at trial that they took adverse action for an innocent and non-proscribed reason, does not establish a good defence under the general protection provisions in Part 3-1 of the *Fair Work Act* 2009 (Cth);

- The majority [of the Full Federal Court] erred in law in finding:
  (a) whether a general protections contravention has occurred is determined by ascertaining whether there is a causal connection between the adverse action and the proscribed reason;
  (b) the requisite causal connection may be determined by an objective test;
  (c) an innocent state of mind of the decision-maker is not determinative as to whether there is a requisite causal connection.

The Minister for Tertiary Education, Skills, Jobs and Workplace Relations is intervening in this appeal, pursuant to s 569 of the *Fair Work Act* 2009 (Cth).

FORREST v. AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION AND ANOR (P44/2011)
FORTESCUE METALS GROUP LTD v. AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION AND ANOR (P45/2011)

Court appealed from: Full Court of the Federal Court of Australia [2011] FCAFC 19

Date of judgment: 18 February 2011

Date of grant of special leave: 29 September 2011

Andrew Forrest was the chairman and CEO of Fortescue Metals Group ("FMG"). In 2004, FMG entered into "framework agreements" with three Chinese companies for a mining project in the Pilbara Region. In August and November 2004, FMG provided information to the Australian Securities Exchange ("ASX") about the projects, relevantly stating that the parties had executed binding agreements to build, finance and transfer the infrastructure for the project. In 2006, ASIC commenced proceedings against FMG and Forrest, alleging that FMG breached s 1041H of the *Corporations Act* 2001 (Cth) ("the Act") or s 52 of the *Trade Practices Act* 1974 (Cth) by engaging in misleading or deceptive conduct by falsely representing that the framework agreements were binding. FMG was alleged to have breached its continuing disclosure obligations under s 674(2) of the Act. That provision required FMG to notify the ASX of information that was not generally available and that was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the entity's securities. Forrest was also alleged to have breached his duties as a director under s 180 of the Act.

Justice Gilmour dismissed ASIC's proceedings. In relation to the alleged breach of s 674, his Honour noted that the information ASIC contended ought to have been disclosed comprised an assertion as to the meaning and legal effect of the framework agreements. That assertion was necessarily the product of a judgment or opinion and there was no evidence that FMG or Forrest ever held the opinions postulated by ASIC. There were reasonable grounds for FMG and Forrest to have held the view that the framework agreements were binding as claimed. Those views were based on legal advice and were honestly and reasonably held. In relation to the alleged breach of s 1041H of the Act, Gilmour J found that the relevant disclosures did not amount to misleading and deceptive conduct. ASIC's case against Forrest under s 180 of the Act was contingent upon FMG's breach of ss 674(2) and 1041H and, accordingly, failed.

ASIC's appeal was allowed by the Full Court (Keane CJ, Emmett and Finkelstein JJ). Keane CJ gave the principal judgment of the Court. His Honour noted that, in relation to s 1041H of the Act and s 52 of the *Trade Practices Act*, the issue was what ordinary and reasonable members of the investing public would have understood from the various announcements. It was the effect of the statements on the persons to whom they were published rather than the mental state of the publisher which determined whether the statement was misleading or deceptive.

In relation to Forrest, his known participation in the events leading to FMG's breach of s 1041H of the Act established that he was involved in its contraventions for the purposes of the Act. He was also a person involved in FMG's contravention of s 674 pursuant to s 674(2A). He failed to discharge the onus of showing that he

took all reasonable steps to ensure that the agreements were, in law, binding agreements to the effect represented by FMG and he was unable to rely on the defence under s 674(2B) of the Act. Further, he was unable to avail himself of the business judgment rule under s 180(2) of the Act. The decision not to make an accurate disclosure about the terms of a major contract could not be described as an exercise of business judgment.

The grounds of appeal include:

P44/2011 (Forrest)

- The Full Court erred in holding that the second respondent contravened ss 674(2) and 1041H of the Act and the appellant contravened ss 180(1) and 674(2A) of the Act in making announcements that the framework agreements were binding agreements under which the Chinese entities had agreed to build, finance and transfer the infrastructure for the Project and, in particular, that the financing risk for the Project had been agreed to be taken by the Chinese entities.

P45/2011 (FMG)

- The Full Court erred in holding that the appellant contravened ss 674(2) and 1041H of the Act in making announcements that the framework agreements were binding agreements under which the Chinese entities had agreed to build, finance and transfer the infrastructure for the Project and, in particular, that the financing risk for the Project had been agreed to be taken by the Chinese entities.

The first respondent cross-appeals, in each appeal, subject to the grant of special leave, from paragraph 2.1 of the judgment of the Full Court of the Federal Court of Australia given on 18 February 2011, as varied by orders made on 20 May 2011. The grounds of cross-appeal are materially identical for each appeal and include:

P44/2011 (Forrest)

- The Full Court should have held that the appellant contravened s 674(2A), by reason of his knowing involvement in [the] contraventions of s 674(2A) by the second respondent.

P45/2011 (FMG)

- Applying the test of "likely influence" for the purposes of s 677 of the Act as explained by the Full Court at para 188 of its reasons, and leaving aside the effect of any public announcement by the appellant concerning the framework agreements, the Full Court should have held that the appellant contravened s 674(2) of the Act, by reason that the appellant failed to notify the ASX, in accordance with the ASX Listing Rules, of the material terms or effect of each of the framework agreements immediately after the appellant and the board of the relevant Chinese counterparty approved each framework agreement.

The first respondent has also filed a notice of contention in identical terms in each appeal. The first respondent contends that the judgment of the Full Court should be affirmed on the following ground: "If and insofar as the Full Court failed to find that there was no reasonable basis for [Forrest and FMG] to believe that their public announcements accurately described the terms or legal effect of the framework agreements, the Full Court ought to have so found (although the first respondent contends that the Full Court did so find)."