SHORT PARTICULARS OF CASES
APPEALS

NOVEMBER 2015

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ATTWELLS & ANOR v JACKSON LALIC LAWYERS PTY LIMITED (S161/2015)

Court appealed from: Supreme Court of New South Wales, Court of Appeal [2014] NSWCA 335

Date of judgment: 1 October 2014

Special leave granted: 7 August 2015

Jackson Lalic Lawyers Pty Limited ("Jackson Lalic") appealed against a decision of Justice Harrison in proceedings known as "the negligence proceedings". In those proceedings his Honour had relevantly declined to answer, by way of a separate question, whether the advocates' immunity from suit ("the Immunity") was a complete answer to Mr Gregory Attwells' and Mr Noel Attwells' ("the Attwells") claim of negligence against Jackson Lalic.

The negligence proceedings arose out of allegedly negligent advice given by Jackson Lalic to their client, the Attwells, in proceedings known as "the guarantee proceedings". This was in circumstances whereby a guarantee was sought to be enforced against the Attwells. That advice led to the settlement of the guarantee proceedings by way of consent order.

At the hearing of the separate question, a statement of agreed facts which clearly defined the allegedly negligent breach of duty to the Attwells (in the guarantee proceedings), was before Justice Harrison.

On 1 October 2014 the Court of Appeal (Bathurst CJ, Meagher and Ward JJA), unanimously upheld Jackson Lalic's appeal. Their Honours held that Justice Harrison had erred in declining to answer the separate question. They found that in circumstances whereby the alleged breach was clearly defined and agreed upon, it was appropriate for Justice Harrison to answer it.

The Court of Appeal also held that the advice given by Jackson Lalic fell within the scope of the Immunity because it led to the guarantee proceedings being settled. It was therefore intimately connected to them.

On 19 October 2015 the Law Society of New South Wales filed a summons, seeking leave to be heard as *amicus curiae* in this appeal.

The grounds of appeal include:

- The Court of Appeal fell into error in that it held that the Immunity applied in the context of negligently advised and/or effected settlement, and/or an outcome not the result of a judicial determination on the merits.

- The Court of Appeal fell into error in that it applied the wrong test for the boundaries of the Immunity or in the alternative, misapplied the "intimate connection" test for the Immunity.

FAIR WORK OMBUDSMAN v QUEST SOUTH PERTH HOLDINGS PTY LTD & ORS (P38/2015)

Court appealed from: Full Court of the Federal Court of Australia
[2015] FCAFC 37

Date of judgment: 17 March 2015

Special leave granted: 14 August 2015

This application concerns the proper construction of s 357(1) of the *Fair Work Act* 2009 (Cth) ('the Act') which provides: '*A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor*.'

The appellant claimed that the first respondent ('Quest'), an operator of a business providing serviced apartments, contravened s 357(1) by making representations to two housekeepers employed by it to the effect that they would not be (and later that they were not) its employees, but independent contractors performing work at its premises. The housekeepers were first employed by Quest in 2007. In October 2009, Quest entered into an agreement with the second respondent ('Contracting Solutions') by the terms of which Quest engaged Contracting Solutions to provide "the administrational management of contractors". The object of the exercise was to have the existing housekeepers of Quest continue to perform the same work for Quest as they were then performing, but as independent contractors under Contracting Solutions' system and not as employees. A number of representations were made to the employees urging them to sign up to the new system and stressing the asserted benefits of "converting" to being independent contractors.

The primary judge (McKerracher J) dismissed the claims against Quest and Contracting Solutions pursuant to s 357 in relation to the representations made to the housekeepers.

On appeal to the Full Federal Court (North, Barker and Bromberg JJ) the appellant contended that an actionable representation was not confined by s 357(1) to a mischaracterisation of the contract between the employer and employee, but included a representation that the employee was an independent contractor, including an independent contractor whose contract was with a third party, when in fact that person was the employee of the representor.

The Court rejected that argument, finding that the subject matter, to which an actionable representation under s 357(1) must be directed, is the nature of the contract between the representee (the employee) and the representor (the employer). This construction was based upon the text of the provision and a consideration of the legislative history and relevant extrinsic material, including explanatory memoranda and regulation impact statements of predecessor legislation.

While acknowledging that it could be argued that this construction failed to achieve the beneficial purposes of Division 6 of the Act, the Court stated that there were two answers to that argument. First, at least in relation to situations

where an employer seeks to convert its employee or former employee into an independent contractor (including through triangular contracting), another provision (s 359 of the Act) could provide relief. A second and complete answer was that whilst a Court's approach to construction should strive to give effect to the evident purpose of the legislation, it must nevertheless arrive at a construction consistent with the terms of the legislation. The Court did not accept that the construction for which the appellant contended was consistent with the terms of s 357(1).

In this matter the 1st respondent has not participated in the appeal. The 3rd respondent has filed a submitting appearance.

The ground of appeal is:

- The Judges of the Full Court of the Federal Court erred at law in finding that a misrepresentation by an employer to a person who is, in truth, its employee that the person is performing work as an independent contractor under a contract for services:
  (a) is only actionable under s 357(1) of the *Fair Work Act* 2009 (Cth) if the sham contract for services is made directly between the employer and the employee; and
  (b) is not actionable under s 357(1) of the *Fair Work Act* 2009 (Cth) if a third party is interposed into the sham independent contractor arrangements (such as when the employee provides services through his or her own company or, as in this case, the services are provided via a labour hire company).

FERNANDO (BY HIS TUTOR LEY) v COMMONWEALTH OF AUSTRALIA & ANOR (P37/2015)

Court appealed from: Full Court of the Federal Court of Australia [2014] FCAFC 181

Date of judgment: 22 December 2014

Special leave granted: 14 August 2015

The appellant is a Sri Lankan citizen who was granted a permanent residency visa in 1995. In July 1998, he was convicted of three counts of sexual penetration without consent, and was sentenced to eight years' imprisonment. In 2001, the Minister cancelled the appellant's visa under s 501(2) of the *Migration Act* 1958 (Cth) ("the Act"). The appellant brought a successful application for judicial review of that decision in the Federal Court. The Minister then decided to reinitiate the cancellation process and the Acting Minister cancelled the appellant's visa on 3 October 2003. When the appellant was released on parole on 5 October 2003, he was immediately taken into immigration detention.

On 2 October 2003, the appellant had brought an application for judicial review in respect of the Acting Minister's decision to cancel his visa. Following the Federal Court decision in *Sales v Minister for Immigration and Multicultural Affairs* [2006] FCA 1807, the Department conducted a review of cases which might, in effect, be similar to *Sales*. The appellant's case was identified as one such case and he was released from detention on 18 January 2007. On 24 January 2007, orders were made by consent in the proceedings then on foot, quashing the cancellation of the appellant's visa. He had spent 1,203 days in immigration detention. The appellant then brought a claim for damages against the respondents relying on various causes of action, including the tort of false imprisonment. The primary judge (Siopis J) found that he had been falsely imprisoned for one day and awarded him the amount of $3,000 in damages. His Honour found that the appellant's detention had been lawful on and from the second day. (In a separate judgment Siopis J awarded the appellant $25,000 by way of exemplary damages against the 1st respondent).

The respondents appealed to the Full Federal Court, and the appellant cross-appealed. The appeal was dismissed, but the appellant's cross-appeal against the primary judge's holding that he had not been falsely imprisoned on and from the second day of his detention was successful and the issue of damages was remitted to the primary judge. After the Full Court had made its orders, but before the primary judge had considered the issue of damages on the remitter, two United Kingdom decisions (*Kambadzi v Secretary of State for the Home Department* [2011] 1 WLR 1299 and *Regina (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245) were handed down. These decisions provided the basis for a new issue: whether the appellant should be awarded no more than nominal damages in respect of his false imprisonment because he could and would have been lawfully detained in any event.

On the remitter, the primary judge ordered that the respondents pay the appellant nominal damages in the amount of $1.00. The primary judge found the provisions of the Act rendered the appellant's detention following the cancellation of his visa inevitable or virtually inevitable. His Honour said that it followed by reference to the application of ordinary compensatory principles in tort that the

appellant did not suffer any loss by reason of his unlawful detention for 1,203 days which warranted an award of substantial damages. (The primary judge ordered that the 1st respondent pay the appellant $25,000 in exemplary damages).

The appellant appealed and the 1st respondent cross-appealed. In the Full Federal Court (Besanko, Barker and Robertson JJ), one of the main issues was whether the primary judge had erred in awarding nominal damages only. The respondents submitted that, even though the appellant had been unlawfully detained for 1,203 days, he could, and would, have been lawfully detained in any event, and it followed that he was not entitled to compensatory damages. This was because, having regard to the cancellation of his visa by the Acting Minister, an officer could, and would, have formed the reasonable suspicion referred to in s 189(1) of the Act. The appellant would then have been kept in immigration detention under s 196(1) of the Act, and the fact that he was challenging the decision to cancel his visa on the ground that it was unlawful, would not have affected the statutory requirement in s 196 of the Act to keep him in immigration detention.

The Court found that contention was correct. It was consistent with the principle identified in *Lumba* and subsequent cases in the United Kingdom. This was not a new principle: it was a basic principle relevant to the award of compensatory damages under Australian common law as much as the common law of the United Kingdom. Unless there was reason to think that the principle had been excluded by the particular statutory context, then it should be applied. No statutory provisions suggesting the exclusion of the principle were identified in this case. The Full Court dismissed the appellant's appeal and allowed the cross-appeal quashing the order for payment of $25,000 by way of exemplary damages.

The ground of appeal is:

- In dismissing the appellant's appeal, and allowing the respondent's cross-appeal, the Full Court erred when it upheld the finding of the primary judge that the appellant was entitled to only nominal damages for the 1,203 days on which he had been unlawfully detained.

PLAINTIFF M64/2015 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION (M64/2015)

Date Special Case referred to Full Court: 27 August 2015

The plaintiff was born in 1994 in Jaghori, Afghanistan. He and his family fled to Iran in 2003 following the disappearance of his father. In 2010, the plaintiff was arrested in Iran as an undocumented immigrant and was deported to Afghanistan. He subsequently fled Afghanistan and arrived in Australia on 29 May 2010. He was granted a protection visa on 18 August 2011. His family remained in Iran. On 5 December 2011, his mother and three brothers ('the visa applicants') lodged an application for Class XB visas as members of the immediate family of the plaintiff. As a "split family" application, the visa applicants were not required to establish that they were subject to substantial discrimination amounting to a gross violation of human rights in their home country. Further, the application attracted a "concession" under which it would have been treated as meeting the "compelling reasons" criterion in clause 202.222 of Schedule 2 to the *Migration Regulations* 1994 (Cth) ('the Regulations') on the basis of the strength of the visa applicants' family connection with Australia.

On 12 December 2013, when the visa application had been pending for more than two years, the Minister made a decision to remove the prevailing concession for visa applications proposed by unaccompanied minors who held protection visas, and to adjust the policy in relation to "processing priorities" for visa applications in the Special Humanitarian Programme ('SHP'). These changes came into effect on 22 March 2014. On 16 September 2014, the Delegate refused the visa application on the grounds that the application did not satisfy sub-clause 202.222(2) of the Regulations. Although the delegate accepted that the visa applicants were subject to a significant degree of discrimination in their home country, that they had strong links to Australia, and that there was no other suitable country available for resettlement, he also relevantly found:

- "Australia does not have the capacity to resettle all applicants who apply for a humanitarian visa at this time";
- " ... the limited number of visas available and the high demand for them mean that only a small proportion of applicants can be successful"; and
- "As we can accept only a small number of applicants, the government has set priorities within the SHP. Only the highest priority applications will be successful because there are not enough visas available. Australia does not have the capacity to provide for permanent settlement of all close family proposed applicants at this time ".

The plaintiff submits that the Delegate made a jurisdictional error in connection with the application of the Government's administrative policy in relation to priorities within the SHP. In particular, the plaintiff contends: (a) the Delegate misconstrued clause 202.222(2)(d) of Schedule 2 to the *Regulations*; (b) the Delegate took into account irrelevant considerations (the number of "places" available in the SHP, or the "priorities" set by the Government within the SHP); (c) the Government's policy in relation to "processing priorities" is inconsistent with the *Migration Act 1958* and the Regulations; and (d) the Government's policy in relation to "processing priorities" was rigidly or inflexibly applied by the Delegate.

The Minister submits that the central issue in this case is whether the legislative framework that governs Australia's offshore humanitarian program permits the

Minister to promulgate policies for the purposes of guiding individual delegates as to the Minister's intentions concerning the overall size of the humanitarian program, and priorities within it. The Minister submits that there is nothing unlawful about the Minister making, and delegates giving effect to, policies of that kind. Such policies are necessary in order to produce consistency in the implementation of the broadly expressed statutory criteria.

The questions reserved by the Special Case signed by the parties include:

- Did the delegate:
  - (a) construe clause 202.222(2)(d) of Schedule 2 to the *Migration Regulations* 1994 (Cth) as requiring or permitting him to consider the capacity of Australia to resettle all applicants who apply for a humanitarian visa ;
  - (b) fail to construe clause 202.222(2)(d) as requiring him to consider the capacity of the Australian community to provide for the permanent settlement of each of the visa applicants, or persons such as each of the visa applicants, having regard to their individual circumstances; or
  - (c) fail to construe clause 202.222(2)(d) as requiring him to assess whether or not there were compelling reasons for giving special consideration to grant permanent visas to the visa applicants in the circumstances of the particular case, having regard to all of the matters in 202.222(2)(a) to (d) both individually and cumulatively?
- If so, did the delegate thereby make a jurisdictional error?

TABCORP HOLDINGS LIMITED v STATE OF VICTORIA (M81/2015)

Court appealed from: Supreme Court of Victoria, Court of Appeal [2014] VSCA 312

Date of judgment: 4 December 2014

Special leave granted: 15 May 2015

Following the float of the Totalisator Agency Board in Victoria in 1994, the *Gaming and Betting Act* 1994 (Vic) provided for the grant to the appellant ("Tabcorp") of an 18-year gaming and waging licence. Section 21(1) of the Act provided for a terminal payment to be made to Tabcorp, in the following terms: "on the grant of new licences … the person who was the holder of the licence last in force … is entitled to be paid an amount equal to the licence value of the former licences or the premium paid by the new licensee, whichever is the lesser". In 2003, Parliament consolidated the State's gaming legislation into the *Gambling Regulation Act* 2003 and s 21(1) was maintained in the same terms in the new s 4.3.12(1). A new "wagering and betting licence" was created under Chapter 4, Part 3A and a new provision, s 4.3.4A(1) was inserted into Part 3 of Chapter 4 which provided that "this Part applies only with respect to the wagering licence and gaming licence that were issued on 15 August 1994 and does not authorise the grant of any further wagering licence or gaming licence".

In amendments in 2009, the effective monopoly of Tabcorp was ended and the Act provided for venues to own and operate gaming machines through "gaming machine entitlements" ("GMEs"). In August 2012, the gaming licences held by Tabcorp expired. Tabcorp issued proceedings in the Supreme Court of Victoria, claiming an entitlement to the terminal payment provided for in s 4.3.12 of the 2003 Act. The issue was whether the allotment of the GMEs amounted to the 'grant of new licences' within the meaning of s 4.3.12. This turned largely on whether the expression '[o]n the grant of new licences' in s 4.3.12(1) meant new licences issued under Part 3 of Chapter 4 of the Act, as the respondent ("the State") contended, or had a broader generic meaning of a licence or other entitlement which authorised gaming in Victoria, as Tabcorp contended.

The trial judge (Hargrave J) concluded that 'new licences' in s 4.3.12 had the specific meaning for which the State contended and, therefore, that the issue of GMEs, although authorising the carrying on of gaming operations, did not amount to the grant of new licences within the meaning of the section.

Tabcorp's appeal to the Court of Appeal (Nettle, Osborn and Whelan JJA) was unsuccessful. The Court noted that s 4.3.4A provided that Part 3 of Chapter 4 applied only with respect to the wagering and gaming licences that were issued to Tabcorp on 15 August 1994 and did not authorise the grant of any further wagering licence or gaming licence. After considering ss 4.3.4A, 4.3.5, 4.3.8, 4.3.9(1) and 4.3.9(2), the Court concluded the only way of reconciling s 4.3.4A and s 4.3.12 was to read s 4.3.12 as providing in effect that, if new licences could still be and were granted under s 4.3.8, the person holding the former licences would be entitled to be paid the terminal payment. To give it the broader generic meaning for which Tabcorp contended would require a significant departure from the plain and ordinary meaning of the words of s 4.3.12 in the context in which it appeared and thus in effect run counter to what the Court perceived to be the

statutory purpose of Part 3 of Chapter 4 of the 2003 Act. This statutory purpose was to preclude the occurrence of the circumstance which could entitle Tabcorp to the specified payment whilst preserving the continued existence of the statutory entitlement. The Court found that Parliament determined not to alter the right to payment in s 4.3.12, and indeed expressly preserved it. But at the same time Parliament determined to deprive that right of any practical content by providing that the pre-condition to the payment could not occur.

The grounds of appeal include:

- The Court of Appeal ought to have held that the words "new licences" in s 4.3.12(1) of the *Gambling Regulation Act* 2003 (Vic) had their ordinary meaning, so that the phrase "on the grant of new licences" in that section referred to the grant of fresh licences which authorised the conduct of wagering and gaming businesses of the same nature as the businesses conducted under the wagering and gaming licence.

The respondent has filed a Notice of Contention which contends that even if the term "new licences" in s 4.3.12(1) had the generic meaning for which the appellant contends, none of (a) the gaming machine entitlements issued to licensed venue operators under Part 4A of Chapter 3 of the Act; (b) the wagering and betting licence granted to Tabcorp Wagering (Vic) Pty Ltd under Part 3A of Chapter 4 of the Act: or (c) the keno licence granted to Tabcorp Investments No 5 Pty Ltd under Chapter 6A of the Act, constituted "new licences" within that generic meaning.

STATE OF VICTORIA v TATTS GROUP LIMITED (M83/2014)

Court appealed from: Supreme Court of Victoria (Court of Appeal)
[2014] VSCA 311

Date of judgment: 4 December 2014

Special leave granted: 15 May 2015

In 1995, the appellant ("the State") entered into an agreement with the respondent ("Tatts") to ensure that Tatts and Tabcorp Holdings Limited ("Tabcorp") would operate on an equal footing in the gambling market. Clause 7 of the agreement provided that a terminal payment would be made to Tatts "if the gaming operator's licence expires without a new gaming licence having issued to Tatts" unless no such licence was issued or such a licence was issued to Tatts. This was subsequently given legislative force. In 2003, Parliament consolidated the State's gaming legislation into the *Gambling Regulation Act* 2003 and the terminal payment continued under that Act (s 3.4.33). In amendments in 2009, the effective monopoly of Tatts / Tabcorp was ended and the Act provided for venues to own and operate gaming machines through "gaming machine entitlements" ("GMEs"). Tatts did not apply for any GMEs. In August 2012, the gaming licences held by Tatts and Tabcorp expired. No terminal payment was paid to Tatts.

Tatts issued proceedings in the Supreme Court of Victoria for damages for, inter alia, breach of the 1995 agreement. The trial judge (Hargrave J) found that the issue of the GMEs constituted the issue of a "new gaming operator's licence" and awarded Tatts damages of $450 million plus interest.

In its appeal to the Court of Appeal the State contended that the phrase 'a new gaming operator's licence' in cl 7 of the 1995 Agreement had a specific limited meaning: a 'gaming operator's licence' issued under the 1991 Act or a gaming operator's licence issued under Division 3 of Part 4 of Chapter 3 of the 2003 Act. The Court rejected that contention and found that the phrase had the broad generic meaning that Tatts contended: 'any licence or authority of substantially the same kind as Tatts' existing gaming operator's licence'. Their conclusion was based on a number of considerations, including the natural meaning of the words.

The Court (Nettle, Osborn and Whelan JJA) noted that cl 7 contemplated that Tatts would receive compensation for the 'investment in infrastructure lost' and that the right to compensation was prima facie the value of the licence, but was conditional upon the grant of a new licence to a third party and limited by the amount of the licence fee paid by that third party. There was nothing in this fundamental scheme to suggest that 'a new gaming operator's licence' must be granted under the 1991 Act.

Also, the context in which the agreement was made supported the view that the purpose of cl 7 was to provide compensation for the loss of the gaming business upon the expiry of the existing licence whilst ensuring that compensation was limited by reference to the premium received by the government (if any) for any new licence authorising the continuation of the gaming previously conducted by Tatts. This contextual material supported the same conclusion as the structure of cl 7 itself, namely, that there was nothing in this fundamental scheme to support

the conclusion that 'a new gaming operator's licence' must be granted under the 1991 Act.

The Court further found that there was no good commercial reason advanced by the State to justify the Court giving the specific meaning to the phrase. Accepting the specific meaning would make commercial nonsense of the State's promise to make the terminal payment in return for Tatts' agreement to pay the substantial fees stipulated in clause 3 of the 1995 Agreement and 'as compensation for the investment in infrastructure lost'. Such a construction of the phrase would lead to an unjust result and should be rejected where a reasonable competing construction, which produced a commercial result consistent with the purpose or object of the 1995 Agreement, was available.

The grounds of appeal include:

- The Court of Appeal erred in finding that the phrase "new gaming operator's licence" in cl 7 of the 1995 Agreement meant not a new gaming operator's licence issued under the *Gaming Machine Control Act* 1991 (Vic) (as it might be amended re-enacted or replaced from time to time) but any statutory authority whose effect was to confer on the holder substantially the same rights as were conferred on the respondent by its gaming operator's licence at the time of its expiration.

The respondent has filed a Notice of Contention which contends, inter alia, that the Court of Appeal erred in the construction of s 3.4.33(1) of the *Gambling Regulation Act* 2003 (Vic) by holding that the words "gaming operator's licence" in s 3.4.33(1)(b) referred only to a licence granted under Division 3 of Part 4 of Chapter 3 of the Act.

WEI v MINISTER FOR IMMIGRATION AND BORDER PROTECTION (S9/2015)

Date proceedings commenced: 8 January 2015

Date referred to Full Court: 15 June 2015

Mr Wei Wei is a Chinese national who completed his secondary schooling in Australia in 2011, after arriving on a student visa in 2008. In March 2012 Mr Wei was granted a fresh student visa, after he had enrolled in a "Foundation Program" at Macquarie University ("the University"). While holding that visa, Mr Wei enrolled in a further Foundation Program that commenced in June 2013. At the request of Mr Wei, the University issued a "Letter of Enrolment" to him on 23 December 2013 in relation to that course. Mr Wei successfully completed the course in June 2014.

The University, however, failed to record Mr Wei's enrolment in an electronic database known as the Provider Registration and International Student Management System ("PRISMS"). PRISMS is used by the Department of Immigration and Border Protection ("the Department") as a tool in the monitoring of compliance with s 19 of the *Education Services for Overseas Students Act* 2000 (Cth) ("the ESOS Act"), which requires education providers to provide the Department with certain information on relevant students. The Department also uses PRISMS to monitor students' compliance with their visa conditions.

On 20 March 2014 a delegate of the Minister for Immigration and Border Protection ("the Minister") cancelled Mr Wei's second visa ("the Decision"). This was on the basis that Mr Wei had breached a condition of that visa by (apparently) not being enrolled in a registered course.

The Minister's Department had sent a letter to Mr Wei in February 2014 notifying him that the Department would consider cancelling his visa and inviting him to respond. That letter however was returned to the Department "unclaimed". A letter sent by the Department in March 2014 notifying Mr Wei of the Decision was also returned "unclaimed". Mr Wei only became aware of the Decision in October 2014. The University did not record requisite information in PRISMS about Mr Wei and his course until November 2014.

Mr Wei commenced proceedings in this Court by application for an order to show cause, seeking to quash the Decision. On 15 June 2015 Justice Gageler referred Mr Wei's application to a Full Court for further hearing.

The ground on which Mr Wei claims relief is:

- The Decision was affected by a breach of natural justice or a constructive failure to exercise jurisdiction, because Mr Wei's education provider failed to comply with ss 19(1)(a) and 19(1)(b) of the ESOS Act with the consequences that:
  a) Information that was required to be before the delegate when he made the Decision was not actually (but was constructively) before him; and
  b) The statutory scheme, by which education providers provide information to the Minister so that consideration can be given as to whether to *inter alia* cancel a student visa (ss 19(1)(a) and 19(1)(b) of the ESOS Act read with s 116(1)(b) of the *Migration Act* 1958 (Cth)) was undermined.