

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

ANDREW CHARLES THEOPHANOUS

PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA

DEFENDANT

Theophanous v Commonwealth of Australia
[2006] HCA 18
11 May 2006
M22/2005

ORDER

The questions set out in the Amended Case Stated are answered as follows:

- (1) Q. *Is Pt 2 of the Crimes (Superannuation Benefits) Act 1989 invalid in so far as it purports to authorise the making by the appropriate court of a superannuation order under s 19 of the Act on the ground that Pt 2 purports to confer federal jurisdiction on State and Territory Courts that is contrary to Chapter III of the Constitution?*
- A. *Unnecessary to answer.*
- (2) Q. *Is Pt 2 of the Crimes (Superannuation Benefits) Act 1989 invalid in so far as it purports to authorise the making by the appropriate court of a superannuation order under s 19 of the Act on the ground that Pt 2 is a law with respect to the acquisition of property otherwise than on just terms?*

- A. *Pt 2 in its application to the pending application for a superannuation order against the plaintiff is a valid law of the Commonwealth.*
- (3) Q. *Who should pay the costs of the Stated Case and of the hearing of the Stated Case before the Full High Court?*
- A. *The plaintiff.*

Representation:

G R Kennett with R M Niall for the plaintiff (instructed by Zindilis Barristers & Solicitors)

D M J Bennett QC, Solicitor-General of the Commonwealth with C J Horan for the defendant (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Theophanous v Commonwealth of Australia

Constitutional Law (Cth) – Acquisition of property – Plaintiff formerly a member of the House of Representatives of the Parliament of the Commonwealth – Plaintiff entitled to a retirement allowance in accordance with s 18 of the *Parliamentary Contributory Superannuation Act* 1948 (Cth) ("Superannuation Act") – Plaintiff convicted after trial on indictment of offences answering the description of "corruption offence" within s 2(1) of the *Crimes (Superannuation Benefits) Act* 1989 (Cth) ("CSB Act") – Commonwealth Director of Public Prosecutions applied to the County Court of Victoria for a superannuation order in respect of the plaintiff pursuant to s 17 of the CSB Act – Effect of superannuation order would include cessation of all rights of and benefits payable to or in respect of the plaintiff under the Superannuation Act – Whether Pt 2 of the CSB Act invalid as providing for the acquisition of property otherwise than on just terms – Whether the acquisition effected by Pt 2 of the CSB Act of a kind with which "just terms" is an inconsistent or incongruous notion – Whether the operation of Pt 2 of the CSB Act reasonably incidental to the exercise of a head of power other than s 51(xxxi) – Whether the operation of Pt 2 of the CSB Act a reasonably proportional consequence of breach of the law in question.

Words and phrases – "acquisition of property", "just terms".

Constitution, ss 48, 51(xxxi), 51(xxxvi).

Crimes (Superannuation Benefits) Act 1989 (Cth), ss 2(1), 7, 16, 17, 19, 21.

Parliamentary Contributory Superannuation Act 1948 (Cth), ss 4B, 4C, 18, 19.

1 GLEESON CJ. The plaintiff, who for more than 20 years had been a member of the House of Representatives, ceased to be a member in November 2001. He was entitled to a retirement allowance under the provisions of the *Parliamentary Contributory Superannuation Act* 1948 (Cth) ("the Superannuation Act"). His wife also had certain contingent rights under the Superannuation Act in the event of his death, provided that the plaintiff was then still entitled to an allowance. Details of the entitlements of the plaintiff and his wife appear from the reasons of Gummow, Kirby, Hayne, Heydon and Crennan JJ ("the joint reasons"), and it is unnecessary to repeat them.

2 During his term as a member of the House of Representatives, the plaintiff held certain positions concerned with immigration. On 22 May 2002, following a trial in the County Court of Victoria, the plaintiff was convicted of three offences against the *Crimes Act* 1914 (Cth). One offence was of defrauding the Commonwealth by making false representations in relation to an immigration matter. Another was, in effect, of taking an unlawful inducement. The third was, in effect, of soliciting an unlawful inducement. A conviction for a fourth offence was set aside on appeal. It has been accepted for purposes of argument in this Court that the three offences of which the plaintiff was convicted involved an abuse of his office.

3 In 1989, the Parliament enacted the *Crimes (Superannuation Benefits) Act* 1989 (Cth) ("the CSB Act"). In its long title, it is described as an Act relating to certain superannuation benefits paid or payable to or in respect of certain persons convicted of corruption offences. A "corruption offence" is defined to include an offence by a person who was an employee at the time when it was committed, being an offence whose commission involved an abuse by the person of his or her office as such an employee (s 2). "Employee" means, relevantly, a person employed by the Commonwealth. A member of the Parliament is to be taken, for the purposes of the CSB Act, to be employed by the Commonwealth (s 7). Section 16 of the CSB Act provides that, where a person who is or was an employee is convicted of an offence, and the Minister is of the opinion that the offence is a corruption offence, the Minister may authorise the Director of Public Prosecutions to apply to the appropriate court for a superannuation order. In making such an order the court must calculate the value of the employer contributions and benefits related to those contributions (s 19). When a superannuation order is made, all rights to such future benefits cease, and benefits already received are to be repaid to the Commonwealth (ss 19 and 21).

4 These proceedings challenge the validity of the provisions of the CSB Act relating to superannuation orders. An application for such an order in relation to the plaintiff (which, if successful, will also have consequences for his wife) has been made, but has not yet been heard or determined. There is now only one ground of challenge to the validity of the legislation. It appears from the form of the second question in the Stated Case:

- "2. Is Pt 2 of the [CSB Act] invalid in so far as it purports to authorise the making by the appropriate court of a superannuation order under s 19 of the [CSB] Act on the ground that Pt 2 is a law with respect to the acquisition of property otherwise than on just terms?"

There is also a question as to who should pay the costs.

5 Section 51(xxxi) of the Constitution empowers the Parliament, subject to the Constitution, to make laws for the peace, order, and good government of the Commonwealth with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. The qualification to the power, contained in the reference to just terms, protects rights of private property. Whatever arguments there may be about the extent of that protection in various circumstances, the existence of the protection has been recognized as an "implied guarantee", with significant consequences for an understanding of the relationship between par (xxxi) and the rest of s 51¹. If par (xxxi) were intended to be no more than an express conferral of a power of acquisition that would otherwise be implicit in other paragraphs of s 51, then that would not explain the presence of the qualification. It is an important limitation on power.

6 The Commonwealth contends that the constitutional concept of acquisition of property on just terms for any purpose in respect of which the Parliament has power to make laws has nothing to do with the CSB Act, and that s 51(xxxi) is irrelevant to the validity of that legislation. In order to explain that proposition, which should be accepted, it is necessary to examine the legislative power which supports the Superannuation Act and the CSB Act. For obvious reasons, the plaintiff does not question the validity of the Superannuation Act, but it is necessary to consider the foundation on which it rests in order to put the CSB Act into its appropriate constitutional context.

7 Section 51(xxxvi) of the Constitution, considered in the light of s 48, empowers the Parliament to legislate for the payment of allowances, including retirement allowances, to members of the House of Representatives. Such allowances, including future allowances, constitute remuneration². Although opinions may differ about the reasonableness of various forms and levels of remuneration, it is now generally accepted that parliamentarians should commit themselves to their duties on a substantially full-time basis, and that the corollary is that they should be remunerated (or, as the Americans would say, compensated) for doing so. If it were otherwise, political activity would be the

1 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 189.

2 *cf Austin v Commonwealth* (2003) 215 CLR 185 at 219 [28].

3.

preserve of the independently wealthy, or parliamentarians would need financial support and assistance of a potentially unhealthy kind. Providing schemes of retirement allowances in the nature of superannuation or pension benefits, whether such schemes are contributory (as in the case of parliamentarians) or non-contributory (as in the case of judges), and whether entitlements may be commuted (as in the case of parliamentarians) or may not be commuted (as in the case of judges), is a well recognized form of remuneration of public office holders. Subject to the Constitution, it is for Parliament to decide the form and incidents of such schemes. Legislation may create rights, the statutory modification or extinguishment of which could effect an acquisition of property³. Whether or not s 51(xxxi) has potential application to such modification or extinguishment may depend upon the legislative context in which such modification or extinguishment occurs. If Parliament legislated to modify or take away accrued entitlements simply for the purpose of saving money, or because it was decided as a matter of policy that they were too generous, then the case may fall within s 51(xxxi). It is unnecessary to decide that question. As at present advised, I would not accept that statutory superannuation or pension benefits are inherently defeasible and that, on that account alone, their modification or withdrawal could never constitute an acquisition of property.

8

The source of the power to enact the CSB Act is the same as the source of the power which sustains the Superannuation Act. Parliament may legislate for the remuneration of members of the House of Representatives, and such remuneration may include retirement allowances in the nature of superannuation benefits. It is ultimately for Parliament to decide the amount, nature and incidents of such remuneration. When Parliament decided, as it did in 1989, that, in the interests of integrity in public life, abuse of office manifested in conviction of a corruption offence should expose a member, or former member, to loss of future retirement allowances, and liability to repay benefits already received, to the extent to which they reflected government contributions, then it was placing a perfectly understandable qualification upon the entitlements created by the Superannuation Act.

9

In *Burton v Honan*⁴, Dixon CJ responded to an argument that legislation providing for the forfeiture of property under the *Customs Act* 1901 (Cth), especially when the property belonged to an innocent person, went beyond what was reasonably incidental to the trade and commerce, and the taxation, powers (an argument that might now be expressed by asserting that the legislation was "disproportionate") as follows⁵:

3 *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 17 [17].

4 (1952) 86 CLR 169.

5 (1952) 86 CLR 169 at 178-179.

4.

"On one side it is pointed out that injustice may occur to individuals who are innocent, and that they may be involved in the loss of property for which they can only have a recompense by recourse to the person who has sold it, who may, of course, not be able to restore the purchase money. On the other side it is pointed out that in the history of English and Australian Customs legislation forfeiture provisions are common, drastic and far-reaching, and that they have been considered a necessary measure to vindicate the right of the Crown and to ensure the strict and complete observance of the Customs laws, which are notoriously difficult of complete enforcement in the absence of strong provisions supporting their administration. These matters of incidental powers are largely questions of degree, but in considering them we must not lose sight of the fact that once the subject matter is fairly within the province of the Federal legislature the justice and wisdom of the provisions which it makes in the exercise of its powers over the subject matter are matters entirely for the Legislature and not for the Judiciary."

10 We are not here concerned with the incidental power, but it may also be said that abuse of office by engaging in corruption is so destructive of the quality of public life that strong sanctions should be applied in cases where it is detected. A decision by Parliament that, if a member engages in corrupt abuse of office, that member should be exposed to the loss or forfeiture (by court process) of certain benefits provided as remuneration for the honest discharge of the duties of office, is well within the scope of the power under which Parliament provides remuneration for members. The obvious purpose of the qualification is to maintain high standards of probity in the conduct of public affairs. Nothing could be more central to good government.

11 Viewed in this light, the CSB Act has nothing to do with the acquisition of property on just terms for a purpose in respect of which the Parliament has power to make laws. To say that s 51(xxxi) is irrelevant to such a law is correct, but it is to state a conclusion rather than a reason for the conclusion. Similarly, to observe that a requirement of just terms in such a context is incongruous is fair comment, but it is an observation about a step in a process of constitutional interpretation.

12 In *Burton v Honan*, Dixon CJ dealt with an argument that, from the point of view of an innocent owner of forfeited goods, there was an acquisition of property, and a failure to provide just terms, because the owner was not given a right to contest the forfeiture. He said⁶:

6 (1952) 86 CLR 169 at 180-181.

5.

"The short answer to this contention is that the whole matter lies outside the power given by s 51(xxxi). It is not an acquisition of property for any purpose in respect of which Parliament has power to make laws. It is nothing but forfeiture imposed on all persons in derogation of any rights such persons might otherwise have in relation to the goods, a forfeiture imposed as part of the incidental power for the purpose of vindicating the Customs laws. It has no more to do with the acquisition of property for a purpose in respect of which the Parliament has power to make laws within s 51(xxxi) than has the imposition of taxation itself, or the forfeiture of goods in the hands of the actual offender."

13 In *Re Director of Public Prosecutions; Ex parte Lawler*⁷, Brennan J said:

"A law which imposes a penalty or sanction for breach of a provision prescribing a rule of conduct and which, apart from its imposition of the penalty or sanction, is a law with respect to a head of power other than s 51(xxxi) cannot be classified as a law with respect to the acquisition of property within s 51(xxxi). To place it within the s 51(xxxi) category would be to annihilate the penalty or sanction and thus to weaken, if not destroy, the normative effect of the prescription of the rule of conduct."

14 A law which qualifies parliamentarians' rights to remuneration, by way of a sanction for corrupt abuse of office, is within the power to grant remuneration; a power given by s 51(xxxvi). It would weaken or destroy the sanction, and the normative effect of the principle of probity which the sanction is intended to vindicate, to place the law within s 51(xxxi).

15 I agree with the answers proposed in the joint reasons.

7 (1994) 179 CLR 270 at 278.

Gummow J
Kirby J
Hayne J
Heydon J
Crennan J

6.

- 16 GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ. The plaintiff was a member of the House of Representatives from 18 October 1980 until 9 November 2001. He served as a Parliamentary Secretary and as Chairperson of the Joint Parliamentary Standing Committee on Migration Regulations⁸. Thereafter, on 22 May 2002, after a jury trial in the County Court of Victoria, the plaintiff was convicted on four counts, being counts 2, 3, 5 and 6 of the indictment.

The convictions of the plaintiff

- 17 The relevant counts were as follows:

Count 2: That between 4 July 1998 and 22 February 1999 at Melbourne the plaintiff, contrary to s 86⁹ of the *Crimes Act* 1914 (Cth) ("the Crimes Act") conspired with Peter Yau, Frank Cheung and Chen Qing to defraud the Commonwealth contrary to s 29D of the Crimes Act.

Count 3: That between 1 December 1998 and 8 February 1999 at Melbourne the plaintiff, contrary to s 29D of the Crimes Act, defrauded the Commonwealth by falsely representing to officers of the Department of Immigration and Multicultural Affairs "that the relationship between Li Hon Cheung (aka John Jang) and his wife was ongoing".

Count 5: That on or about 4 February 1999 at Broadmeadows in Victoria the plaintiff, contrary to s 73A(1) of the Crimes Act, being a member of a House of the Parliament did receive for himself \$2,000 on an understanding that the exercise by him of his duty or authority as such a member would in any manner be influenced or affected.

Count 6: That on or about 25 January 1999 at Broadmeadows the plaintiff, contrary to s 73A(1) of the Crimes Act, being a member of a House of the Parliament did agree to ask for property for himself on an understanding that the exercise by him of his duty or authority as such a member would in any manner be influenced or affected.

8 See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 117, 194.

9 Section 86 was repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act* 2001 (Cth) ("the 2001 Act").

7.

18 The effect of s 86(1) and (2) was that if a person conspired with another to commit an offence against s 29D the conspiracy was punishable by a fine not exceeding 2,000 penalty units, or imprisonment for a period not exceeding 20 years, or both¹⁰.

19 Section 29D of the Crimes Act¹¹ provided:

"A person who defrauds the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence.

Penalty: 1,000 penalty units or imprisonment for 10 years, or both."

Section 73A(1) of the same statute¹² stated:

"A member of either House of Parliament who asks for or receives or obtains, or offers or agrees to ask for or receive or obtain, any property or benefit of any kind for himself or any other person, on an understanding that the exercise by him of his duty or authority as such a member will, in any manner, be influenced or affected, is guilty of an offence.

Penalty: Imprisonment for 2 years."

20 On 11 June 2002, the plaintiff was sentenced in respect of count 3 to three years' imprisonment and in respect of each of counts 5 and 6 to one year's imprisonment. In respect of count 2, he was sentenced to imprisonment for five years. Had the plaintiff been convicted and been under sentence or been subject to be sentenced for any of these offences whilst a member of the House of Representatives, he would, by force of s 44(ii) of the Constitution, have been incapable of further sitting as a member. If he had ceased to be a member he would have been incapable, whilst under sentence or subject to be sentenced, of being chosen as such a member, again by force of s 44(ii)¹³.

10 Section 86(2) was repealed by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act* 2000 (Cth) ("the 2000 Act") in advance of the repeal of the whole section by the 2001 Act.

11 Since repealed by the 2000 Act.

12 Also repealed by the 2000 Act.

13 Section 44 provides:

Gummow J
Kirby J
Hayne J
Heydon J
Crennan J

8.

21 On 20 June 2003, the Court of Appeal of the Supreme Court of Victoria allowed in part an appeal by the plaintiff, set aside his conviction relating to count 2 and ordered a retrial on that count. At the time of the proceeding in this Court, that retrial had not occurred.

22 On 27 August 2004, the Minister for Justice and Customs, who is the Minister for the purposes of s 16 of the *Crimes (Superannuation Benefits) Act* 1989 (Cth) ("the CSB Act") authorised the Director of Public Prosecutions ("the DPP") to apply to the County Court for a "superannuation order" in respect of the plaintiff. The DPP then on 9 December 2004 applied to the County Court under s 17 of the CSB Act for that superannuation order. The application is to be heard by the County Court on a date to be fixed.

The action in this Court

23 In the meantime, the plaintiff commenced an action in this Court against the Commonwealth, and a Justice stated the present case for the consideration of a Full Court. Two questions of substance were reserved but only one of them was pressed before the Full Court. The effect of this is to ask whether the provisions of Pt 2 of the CSB Act are invalid in so far as they would authorise the making by the County Court of the superannuation order sought against the plaintiff. The plaintiff's contention is that the relevant provisions are invalid as providing for the acquisition of property otherwise than on just terms within the operation of s 51(xxxi) of the Constitution. Section 51(xxxi) states that the Parliament may make laws with respect to:

"the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

"Any person who:

...

(ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; ...

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."

The plaintiff's superannuation benefits

24 Something more should be said of the financial position of the plaintiff. As and from 10 November 2001, the day after he ceased to be a member of the House of Representatives, the plaintiff has been entitled to a retirement allowance in accordance with s 18 of the *Parliamentary Contributory Superannuation Act* 1948 (Cth) ("the Superannuation Act"). The Superannuation Act was passed with the short title "*Parliamentary Retiring Allowances Act* 1948". The present short title was introduced in 1978¹⁴. In the second reading speech on the Bill, delivered by the Prime Minister on 1 December 1948, he said¹⁵:

"In its general purpose the scheme aims to meet the situation, long recognized by members of all parties, that men or women who serve in parliament often sacrifice opportunities to provide against the day when their parliamentary careers come to an end. It has frequently happened that members who have made great contributions to the work of the Parliament have, upon retirement, faced a condition of hardship."

25 On 8 September 1996, the plaintiff married Kathryn Eriksson and they remain married. In the event of his death and his wife surviving him, she would be entitled to benefits in accordance with s 19 of the Superannuation Act but subject to any operation of the CSB Act.

26 On or about 17 November 2001, the plaintiff elected to convert 50 per cent of his retirement allowance to a lump sum payment, in accordance with s 18B of the Superannuation Act. By reason of that election, there was paid to the plaintiff the sum of \$367,763.37 on or about 20 November 2001.

27 Since 10 November 2001, the plaintiff has been entitled to and in receipt of a retirement allowance by way of a fortnightly payment under the Superannuation Act. That payment as at 1 December 2004 was in the sum of \$1,575.32 per fortnight gross of taxation.

14 By s 3 of the *Parliamentary Contributory Superannuation Amendment Act* 1978 (Cth).

15 Australia, House of Representatives, *Parliamentary Debates* (Hansard) at 3738.

Gummow J
Kirby J
Hayne J
Heydon J
Crennan J

10.

28 In addition to challenging the application to his circumstances of the CSB Act, the plaintiff asserts the invalidity of any operation of the legislation upon the presently contingent interest of his wife. She is not a party to the action but has had notice of it.

29 Something more should now be said respecting the Superannuation Act, and then of the CSB Act.

The Superannuation Act

30 Section 18(1) states that, subject to the statute, a "member" who ceases to be entitled to a "parliamentary allowance" is to be entitled to benefits in accordance with s 18. A "member" is defined in s 4(1) as a member of either the Senate or House of Representatives. The term "parliamentary allowance" is defined in the same provision as meaning allowances under various provisions made by the *Parliamentary Allowances Act 1920* (Cth), the *Parliamentary Allowances Act 1952* (Cth) and the *Remuneration and Allowances Act 1990* (Cth).

31 Section 48 of the Constitution states:

"Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat."

32 Section 51(xxxvi) empowers the Parliament, subject to the Constitution, to make laws with respect to "[m]atters in respect of which this Constitution makes provision until the Parliament otherwise provides".

33 Quick and Garran said of the provision made in s 48 of the Constitution¹⁶:

"Payment of members of Parliament is not a modern political innovation. It was known and practised in the early history of parliamentary representation in England¹⁷. It was adopted in the Federal

16 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 499.

17 See Hearn, *The Government of England: Its Structure and Its Development*, 2nd ed (1886) at 526.

11.

Constitution of the United States¹⁸. It has been the subject of prolonged controversy in British colonies during the last forty years, and it is now generally regarded as an essential condition of democratic government, especially in young communities. It is in force in most of the responsible government colonies, although in several instances it was not carried without bitter opposition and memorable contests."

34 The principal reasons for the adoption of the provisions made by the United States Constitution were treated by Story¹⁹ as the public advantage in commanding the services of those "who, though favored by nature, might not be favored by fortune". Story added²⁰:

"It could hardly be expected that such men would make the necessary sacrifices in order to gratify their ambition for a public station; and if they did, there was a corresponding danger that they might be compelled by their necessities, or tempted by their wants, to yield up their independence, and perhaps their integrity, to the allurements of the corrupt or the opulent."

35 The above statement by Quick and Garran respecting parliamentary representatives in England requires qualification. Provisions dating from mediaeval times for the maintenance by constituencies of their members of the House of Commons during the time of Parliament fell into desuetude²¹; the last known recipient appears to have been Andrew Marvell, as member for Hull in the first Restoration Parliament²². A nineteenth century movement for payment

18 Art 1 s 6. [This provides: "The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States." Amendment XXVII, ratified in 1992, states: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect until an election of Representatives shall have intervened."]

19 *Commentaries on the Constitution of the United States*, 5th ed (1891), vol 1, §854.

20 *Commentaries on the Constitution of the United States*, 5th ed (1891), vol 1, §854.

21 Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd ed (2004) at 24.

22 Story, *Commentaries on the Constitution of the United States*, 5th ed (1891), vol 1, §852.

Gummow J
Kirby J
Hayne J
Heydon J
Crennan J

12.

for members out of public funds²³ led to a resolution of the House in 1895 in favour of payment of a reasonable allowance²⁴; the present system follows that of the appropriation by the *Appropriation Act* 1911 (UK)²⁵. Provision for recovery of expenses incurred by peers in attending the House of Lords was not made until 1957²⁶.

36 The inclusion in the Constitution of s 48 was not attended by controversy; the reason was to be found in the already established position in the legislatures of the Australian colonies. Harrison Moore wrote²⁷:

"In all the States, members of the Lower House are paid a salary, 'allowances' or 're-imbursement of expenses' varying from £100 to £300 per annum with railway passes and other privileges. In South Australia and Tasmania the members of the Legislative Council are also paid, and in all the States they have the same privileges of travelling as members of the Assembly. It was therefore of course that provision should be made for

23 This had been opposed by John Stuart Mill (*Considerations on Representative Government*, 2nd ed (1861) at 216-217) as follows:

"If, as in some of our colonies, there are scarcely any fit persons who can afford to attend to an unpaid occupation, the payment should be an indemnity for loss of time or money, not a salary. The greater latitude of choice which a salary would give, is an illusory advantage. No remuneration which any one would think of attaching to the post would attract to it those who were seriously engaged in other lucrative professions, with a prospect of succeeding in them. The business of a member of parliament would therefore become an occupation in itself; carried on, like other professions, with a view chiefly to its pecuniary returns, and under the demoralizing influences of an occupation essentially precarious."

24 Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd ed (2004) at 24.

25 Sched (B), Pt 7, Civil Services – Class II. See *Griffith & Ryle on Parliament*, 2nd ed (2003), §2-089.

26 *Griffith & Ryle on Parliament*, 2nd ed (2003), §12-056. *The Appellate Jurisdiction Act* 1876 (UK), 39 & 40 Vict c 59, had established the office of Lord of Appeal in Ordinary as a salaried position (s 6).

27 *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 137-138.

the payment of members of the Federal Parliament, and there was no reason for distinguishing between Senators and members of the House of Representatives."

37 Without an amendment to the Constitution, the Parliament might change the provision made in s 48 with respect to the allowance of £400 a year. That has come to pass with the legislation dealing with parliamentary allowances to which reference has been made. The same head of legislative power also supports the Superannuation Act in its application to the plaintiff and his wife. There is no suggestion to the contrary²⁸.

38 The Superannuation Act makes provision in s 19 for the payments of benefits to spouses of persons who die when entitled to a retiring allowance, whether or not the retiring allowance is immediately payable. For this purpose, the phrase "spouse who survives a deceased person" is the subject of a detailed definition in s 4C which in turn requires consideration of the definition of "marital relationship" spelled out in s 4B. It is unnecessary for the purposes of this case to say any more of these provisions save that the plaintiff's wife, were she to survive him, would fall within them.

39 We turn to the CSB Act.

The CSB Act

40 The CSB Act commenced on 21 December 1989 during the currency of the service of the plaintiff as a member of the House of Representatives. It will be recalled that he had become a member on 18 October 1980.

41 Part 2 of the CSB Act (ss 15-23) is headed "SUPERANNUATION ORDERS". Reference has been made already to s 16 and the text should be set out in full:

"Where:

28 In their application to persons other than Senators and members of the House of Representatives, the Superannuation Act and the CSB Act may be supported by other heads of power. In dealing with provisions of the *Australian Federal Police Act* 1979 (Cth) resembling Pt 2 of the CSB Act, Doyle CJ referred to the support provided by s 61 and s 51(xxxix) of the Constitution: *Director of Public Prosecutions (Cth) v Pirone* (1997) 68 SASR 106 at 115.

Gummow J
Kirby J
Hayne J
Heydon J
Crennan J

14.

- (a) a person who is or was (whether before, on or after the commencing day) an *employee* is convicted of an *offence*; and
- (b) the Minister is of the opinion that the offence is a *corruption offence*;

the Minister may, by notice in writing, authorise the DPP to apply to the *appropriate court* for a superannuation order in respect of the person." (emphasis added)

Each of the expressions indicated in s 16 is defined elsewhere in the statute. The term "employee" has the meaning given in s 7. This contains a widely drawn definition which includes a range of persons, including those who are employed by the Commonwealth or by a Commonwealth authority²⁹, under contract of service or apprenticeship. However, what is critical for the present case is that specific provision is made including as an employee a person who is "a member of the Parliament".

42 The term "offence" is identified in s 2(1) in terms applicable to offences against ss 29D and 73A(1) of the Crimes Act (and the previous s 86), these being offences against a law of the Commonwealth punishable by imprisonment for a term longer than 12 months.

43 The definition in s 2(1) of the expression "corruption offence" is built upon the definition of "offence"; the offence must be one by a person who was an employee at the time, and:

- "(a) whose commission involved an abuse by the person of his or her office as such an employee; or
- (b) that, having regard to the powers and duties of such an employee, was committed for a purpose that involved corruption; or
- (c) that was committed for the purpose of perverting, or attempting to pervert, the course of justice".

The offences under ss 73A(1), 86 and 29D of the Crimes Act with which this case is concerned answer the description of either or both par (a) and par (b) of

29 The term "Commonwealth authority" itself is given a detailed definition in s 2(1), but for present purposes this need not be further noticed.

15.

the definition of "corruption offence". The plaintiff did not submit to the contrary. Accordingly, no question arises concerning the construction of par (c) of the definition or its validity; nor do comparable questions arise from the inclusion in the definition of "offence" itself of offences against State and Territory law as well as against a law of the Commonwealth³⁰.

44 The County Court is an "appropriate court" in the present case, within the definition of the term in s 2(1) because it was the court of the State before which the plaintiff was convicted.

45 Section 17 required the DPP in the present circumstances to make the application to the County Court. When authorised under s 16, the DPP "must make that application". Section 19(1) would oblige the County Court, if satisfied that the offences to which the application related were corruption offences, by order to make certain declarations. These declarations would establish first that the plaintiff was convicted of the corruption offences and secondly that Pt 2 of the CSB Act applied "in relation to the rights of, and benefits paid or payable to or in respect of, [the plaintiff] under any superannuation scheme".

46 The term "superannuation scheme" is defined in s 2(1) as including that established under the Superannuation Act; the definition applies to a superannuation scheme under which employer contributions or benefits are paid or payable by the Commonwealth to or in respect of the plaintiff.

47 If a court made a superannuation order in respect of the plaintiff then there would follow the consequences spelled out respectively in pars (a), (b) and (c) of s 21(1). First, as to par (a):

"all rights of, and benefits payable to or in respect of, the person or a dependant of the person (being rights or benefits arising out of the person's membership of any superannuation scheme) cease, or cease to be payable, on the day on which the order takes effect, and the person ceases to be a member of the scheme on that day".

30 The definition in s 2(1) of "offence" states that it means:

- "(a) a common law offence; or
- (b) an offence against a law of the Commonwealth or of a State or Territory, being an offence punishable by imprisonment for life or for a term longer than 12 months".

Gummow J
Kirby J
Hayne J
Heydon J
Crennan J

16.

48 Secondly, on the day the court made the superannuation order, there
would cease to be vested in the plaintiff the benefit or a benefit attributable to
employer contributions as identified in s 19(3).

49 Thirdly, the Commonwealth would not be liable to pay any employer
contribution or benefit in respect of the plaintiff on or after the day the
superannuation order was made.

50 Further, the court would be required to specify in its order and in
accordance with the formula in s 19(4) the amount of benefits which have been
paid which reflected the employer contributions plus interest and the amount so
worked out would be payable as a debt due to the Commonwealth (s 21(2)).

51 Finally, s 21(5) makes provision which would entitle a person such as the
plaintiff to payment of an amount respecting employee contributions as
determined in accordance with the formula set out in that sub-section.

52 The convictions of the plaintiff of the corruption offences in question thus
had various adverse consequences for him. First, he was subject to the sentences
to which reference has been made. Secondly, Pt 2 of the CSB Act applied to the
plaintiff because he had been a member of the Parliament who, whilst a member,
committed corruption offences which either or both involved an abuse of his
office, and were committed for a purpose that involved corruption, having regard
to the powers and duties of his office. Those events rendered him susceptible to
the taking of steps under ss 16 and 17 which, if the County Court makes a
superannuation order, would have the consequences provided in s 21. These
include the cessation of all rights and benefits payable to or in respect of the
plaintiff. The prospective or contingent benefits of his wife under the
Superannuation Act are dependent upon her status under that Act as a spouse
surviving the plaintiff and are thus rights "in respect of" the plaintiff within the
meaning of s 21(1) of the CSB Act. These also would cease by virtue of the
operation of par (a) of s 21(1).

53 It is in this setting that the plaintiff asserts the invalidity of the provisions
which would empower the County Court to make the superannuation order.

54 Reference should be made finally to Pt 3 of the CSB Act (ss 24-39). This
is headed "RESTRAINING ORDERS". No issue is raised in the case stated
respecting the validity of these provisions. However, the facts disclose that on
7 June 2002, and on the application of the DPP, the County Court made an order
restraining the disposition, without the prior written consent of the DPP or further
order, of the plaintiff's interest in two parcels of land in Victoria. That order has

been extended until 2 December 2006. The power of the DPP to seek such an order in respect of the plaintiff was conditioned upon the plaintiff's conviction of an offence (s 24) and the County Court was required to be satisfied that the offence concerned was a corruption offence (s 25).

Section 51(xxxi) of the Constitution

55 The issues that arise in determining the success of the case for invalidity of Pt 2 in its application to the plaintiff are to be considered with several settled propositions respecting s 51(xxxi) of the Constitution in mind. First, as Deane and Gaudron JJ observed in *Re Director of Public Prosecutions; Ex parte Lawler*³¹:

"It has long been established that, to the extent that s 51(xxxi) confers legislative power, it also abstracts power with respect to the acquisition of property from the other paragraphs of s 51. It is also well established that the power conferred by s 51(xxxi) is only validly exercised if the law in question provides just terms." (footnotes omitted)

56 Secondly, their Honours also remarked in that case³²:

"[T]he power conferred by s 51(xxxi) is one with respect to 'acquisition of property on just terms'. That phrase must be read in its entirety and, when so read, it indicates that s 51(xxxi) applies only to acquisitions of a kind that permit of just terms. It is not concerned with laws in connexion with which 'just terms' is an inconsistent or incongruous notion. Thus, it is not concerned with a law imposing a fine or penalty, including by way of forfeiture, or a law effecting or authorizing seizure of the property of enemy aliens or the condemnation of prize. *Laws of that kind* do not involve acquisitions that permit of just terms and, thus, they are not laws with respect to 'acquisition of property', as that expression is used in s 51(xxxi)." (emphasis added)

57 The notion of incongruity appears first to have been emphasised by Gibbs J in *Trade Practices Commission v Tooth & Co Ltd*³³. His Honour's

31 (1994) 179 CLR 270 at 283.

32 (1994) 179 CLR 270 at 285.

33 (1979) 142 CLR 397 at 408.

Gummow J
Kirby J
Hayne J
Heydon J
Crennan J

18.

remarks were approved in the joint judgment of the whole Court in *R v Smithers; Ex parte McMillan*³⁴. In *McMillan*, their Honours said³⁵:

"It has never been considered that a civil action for penalties involves an acquisition of property by the Commonwealth, let alone an acquisition of property otherwise than on just terms. Just as the imposition of a penalty or fine by way of punishment for a criminal offence involves no acquisition of property, so also with the imposition of a civil liability for pecuniary penalties".

58 On the other hand, what may be described as a penalty or forfeiture may be an incident of a head of legislative power other than s 51(xxxi). In *Lawler*³⁶, Dawson J, with other members of this Court, concluded that the forfeiture of the vessel with which that case was concerned was authorised by the *Fisheries Management Act 1991* (Cth) as an incident of the legislative power conferred by s 51(x) to make laws with respect to "fisheries in Australian waters beyond territorial limits". His Honour then immediately continued³⁷:

"Confiscation of property connected with the commission of crimes was long part of the common law and had its origin in the doctrines of attainder and deodand. Property could be forfeited even if its owner was not involved in the crime. Forfeiture at common law was abolished in England in 1870 and thereafter in this country, but statutory powers of forfeiture have remained in certain areas and, indeed, have been introduced in some new areas." (footnotes omitted)

As an instance of a new area, Dawson J referred to the *Crimes (Confiscation of Profits) Act 1986* (Vic).

59 Other fields of law, outside criminal law, had also dealt with the notions of penalty and forfeiture. The privileges against exposure to penalties and forfeitures are a well-developed instance of this. In *Rich v Australian Securities*

34 (1982) 152 CLR 477 at 488.

35 (1982) 152 CLR 477 at 487.

36 (1994) 179 CLR 270 at 289.

37 (1994) 179 CLR 270 at 289.

*and Investments Commission*³⁸, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ accepted the proposition that:

"for the Commission to seek an order disqualifying a person from acting in the management of a corporation on the ground that the person has contravened the law is to seek a penalty or forfeiture. The order is sought by a regulatory authority; its grant would be founded on demonstration of a contravention of the law; it is an order which leads to the vacation of existing offices in a corporation and imposition of a continuing disability for the duration of the order."

60 Section 51(xxxi) of the Constitution is not to be given a pedantic or narrow construction³⁹. The taking of property under a federal law is not removed from "acquisition" merely because of the statutory description given to the action. It may be complained that the boundary marked to the "just terms" requirement of s 51(xxxi) by reference to its application being "inconsistent" or "incongruous" states a criterion that may require difficult questions of judgment. But to mark the boundary to the application of the "just terms" requirement in this way is grounded in the realisation that to characterise certain exactions of government (such as levying of taxation, imposition of fines, exaction of penalties or forfeitures, or enforcement of a statutory lien) as an acquisition of property would be incompatible with the very nature of the exaction. Such exactions are, and long before the Commonwealth were, regular features of the law in England, the Australian colonies and now of the Commonwealth. It cannot therefore have been the purpose of s 51(xxxi) to apply to such exactions an obligation to provide "just terms". There may, in some cases, be room for difference about the characterisation of the exaction and the application of considerations of inconsistency or incongruity. The present is not such a borderline case.

61 With these considerations in mind, it is convenient to return first to the reliance by the plaintiff upon s 51(xxxi) of the Constitution. It is unnecessary for the present case to determine any classification for other legal purposes which Pt 2 of the CSB Act might have in its application to the plaintiff. Further, references to penalties and forfeitures in authorities such as *Lawler* were made,

38 (2004) 220 CLR 129 at 144 [29].

39 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202; *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133 at 180 [98].

Gummow J
Kirby J
Hayne J
Heydon J
Crennan J

20.

as the passage from the judgment of Deane and Gaudron JJ⁴⁰ set out earlier in these reasons indicates, as illustrative of the kind of laws which involve acquisitions which do not permit of just terms.

62 The operation of Pt 2 of the CSB Act in respect of the benefits and interests of the plaintiff and his wife, vested or contingent, manifests one of the adverse consequences of his conviction for corruption offences. The corruption offences in question were committed whilst the plaintiff was a member of the House of Representatives. They involved abuse of that position and were committed for a corrupt purpose.

63 The provision of benefits to legislators, whether by salary, allowance or retirement benefit, has long been regarded as made to lessen the risk of and temptation to corruption and abuse of office. Legislation such as Pt 2 of the CSB Act, in its application to the situation of the plaintiff, vindicates the public interest in denying to those who succumbed to that temptation the benefits provided to encourage probity in legislators. To require the provision of "just terms" in such circumstances would indeed, in the sense of the authorities, be incongruous.

64 For these reasons, s 51(xxxi) has no operation with respect to the application of Pt 2 of the CSB Act to the plaintiff.

65 The plaintiff's wife can stand in no better position than the plaintiff. The Commonwealth submitted that, notwithstanding the broad meaning of the term "property" in s 51(xxxi), it was debatable whether the plaintiff's wife had any sufficient interest under the Superannuation Act. The Solicitor-General emphasised that under the terms of that legislation she would have no present entitlement unless she survived her husband and the matrimonial relationship endured to his death.

66 It is unnecessary to determine that issue. It is sufficient to determine the position of the plaintiff's wife by reference to the requirement of the Superannuation Act that not only must she survive him, but he must, at the time of his death, be entitled to a retiring allowance⁴¹. If the superannuation order presently sought against the plaintiff be made, then the plaintiff's wife can never become entitled to any benefits under the Superannuation Act.

40 (1994) 179 CLR 270 at 285.

41 Superannuation Act, s 19(1)(a), s 19(2), definition of "deceased person" in s 4C(1).

67 It is also unnecessary to consider statements in the authorities upon which the Commonwealth relied for an alternative submission. This was that, while not all rights created by or under statute were "inherently defeasible" and thus outside the operation of s 51(xxxi), the entitlements under the Superannuation Act were of this character.

Other head of power?

68 The question then becomes whether, in its application to the plaintiff (and thus to his wife), Pt 2 of the CSB Act is reasonably incidental to the exercise of another head of legislative power. Reference has been made earlier in these reasons to the support for the Superannuation Act provided by s 48 and s 51(xxxvi) of the Constitution. The enjoyment of benefits provided thereunder by reason of membership of the House of Representatives or the Senate may be brought to an end as a further operation of the legislative power which supported their creation⁴². Particularly is this so where the occasion for that determination, convictions for corruption and abuse of power while a member, is expressive of the same public interest in the avoidance of such delinquent exercise of the authority of high public office as sustained the law for the initial provision of those benefits.

69 There was reference in argument to statements by McHugh J in *Lawler*⁴³ which suggest that a "forfeiture" must be both reasonably incidental to the exercise of a head of power other than s 51(xxxi) and be a reasonably proportional consequence of a breach of the law in question. The plaintiff submitted that that reasonable proportionality was absent in the operation of the CSB Act.

70 Several points are to be made here. First, in *Lawler*, Toohey J reserved the applicability in this field of a notion of reasonable proportionality⁴⁴; Dawson J disagreed with the whole notion⁴⁵. Secondly, subsequent authority, in

⁴² cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 79 ALJR 1309 at 1317 [28]; 218 ALR 483 at 494.

⁴³ (1994) 179 CLR 270 at 292-293, 294.

⁴⁴ (1994) 179 CLR 270 at 291.

⁴⁵ (1994) 179 CLR 270 at 290-291.

Gummow J
Kirby J
Hayne J
Heydon J
Crennan J

22.

particular *Leask v The Commonwealth*⁴⁶, denies the application of a concept of "proportionality" to non-purposive heads of legislative power. In *Leask*, McHugh J⁴⁷, together with Brennan CJ, Dawson J and Gummow J⁴⁸, expressed that conclusion.

71 Thirdly, in *Lawler*, McHugh J, in supporting the unanimous decision of the Court, referred to the well-established use of forfeiture of property, even in the hands of an innocent owner, as a means of obtaining compliance with the law⁴⁹. The operation of Pt 2 of the CSB Act, as already explained, is not, in the constitutional sense, a disproportionate consequence of the convictions of the plaintiff. The Part is therefore within the legislative powers of the Parliament and is constitutionally valid.

Orders

72 It is unnecessary to answer question 1 of the questions reserved. Question 2 should be answered: "Part 2 in its application to the pending application for a superannuation order against the plaintiff is a valid law of the Commonwealth." Question 3 should be answered: "The plaintiff."

46 (1996) 187 CLR 579.

47 (1996) 187 CLR 579 at 616-617.

48 (1996) 187 CLR 579 at 593-595, 602-603, 624. See also the judgment of Doyle CJ in *Director of Public Prosecutions (Cth) v Pirone* (1997) 68 SASR 106 at 115.

49 (1994) 179 CLR 270 at 294.