HIGH COURT OF AUSTRALIA

FRENCH CJ
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

JOHN HOLLAND PTY LTD (ACN 004 282 268) PLAINTIFF

AND

VICTORIAN WORKCOVER AUTHORITY DEFENDANT

John Holland Pty Ltd v Victorian Workcover Authority
[2009] HCA 45
13 October 2009
M16/2009

ORDER

Order that the questions reserved in the amended stated case dated 29 September 2009 be answered as follows:

***Question 1**:* *While the Plaintiff remains a "non-Commonwealth licensee" for the purposes of the [*Occupational Health and Safety Act *1991 (Cth) ("the Federal OHS Act")], is the Plaintiff liable to conviction for offences against s 21 and s 23 of the [*Occupational Health and Safety Act *2004 (Vic) ("the State OHS Act")] committed before the Plaintiff became a "non-Commonwealth licensee"?*

***Answer**:* *Yes.*

***Question 2**:* *If the answer to question 1 is "yes", while the Plaintiff remains a "non-Commonwealth licensee" for the purposes of the Federal OHS Act, are any (and if so which) of ss 7, 8 and/or 130 of the State OHS Act invalid within s 109 of the Commonwealth Constitution to the extent that any of those provisions purports to empower the Defendant to authorise an inspector to bring proceedings against the Plaintiff for offences against s 21 and s 23 of the State OHS Act allegedly committed before the Plaintiff became a "non-Commonwealth licensee"?*

***Answer**:* *No.*

Question 3: *If the answer to question 2 is "yes", is the consequence that:*

(a) *the Inspector could not procure the issuing, on or about 24 September 2008, of a charge and summons against the Plaintiff alleging the commission of offences against s 21 and s 23 of the State OHS Act at Morwell and other places in the State of Victoria in or about October 2006; and*

(b) *the proceeding brought against the Plaintiff by the Inspector on or about 24 September 2008, alleging the commission of offences against s 21 and s 23 of the State OHS Act at Morwell and other places in the State of Victoria in or about October 2006, is incompetent?*

Answer: *Does not arise.*

Question 4: *Who should pay the costs of the stated case?*

Answer: *The Plaintiff.*

Representation

D F Jackson QC with G J Hatcher SC and S P Donaghue for the plaintiff (instructed by Harris & Company)

P J Hanks QC with F I Gordon for the defendant (instructed by Corrs Chambers Westgarth Lawyers)

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with C P Young intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with J V Agius SC and A M Mitchelmore intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

M G Hinton QC, Solicitor-General for the State of South Australia with S A McDonald intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (SA))

J D McKenna SC with A M Pomerenke intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

CATCHWORDS

John Holland Pty Ltd v Victorian Workcover Authority

Constitutional law (Cth) – Inconsistency between Commonwealth and State laws – *Occupational Health and Safety Act* 1991 (Cth) ("OHS Act") – *Occupational Health and Safety Act* 2004 (Vic) ("State Act") – Provisions of State Act empowered inspectors to bring proceedings for an offence against State Act – Plaintiff charged with offences under State Act – OHS Act relevantly applies to employers that are "non-Commonwealth licensees" – Plaintiff became non-Commonwealth licensee after alleged offences committed but prior to charges being laid – Whether while plaintiff remains a non-Commonwealth licensee for purposes of OHS Act it is liable for conviction under State Act for offences allegedly committed before plaintiff became a non-Commonwealth licensee – Whether provisions of State Act authorising prosecution of such offences inconsistent with OHS Act and thereby invalid by operation of s 109 of the *Constitution*.

Words and phrases – "employer", "law", "non-Commonwealth licensee".

Constitution, s 109.
Occupational Health and Safety Act 1991 (Cth), ss 3, 4, 5(1).
Occupational Health and Safety Act 2004 (Vic), ss 7(1)(c), 21, 23, 130.
Safety, Rehabilitation and Compensation Act 1998 (Cth), Pt VIII.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ. Pursuant to s 18 of the *Judiciary Act* 1903 (Cth) a Justice of this Court has stated an amended case and reserved questions for consideration of the Full Court.

The OHS Act and the State Act

2 To understand the nature of the dispute it is convenient to begin with the *Occupational Health and Safety Act* 1991 (Cth) ("the OHS Act"). The objects of that statute include (s 3(a)):

> "to secure the health, safety and welfare at work of employees of the Commonwealth, of Commonwealth authorities and of non-Commonwealth licensees".

The term "non-Commonwealth licensee" is defined in s 5(1) so as to identify a body corporate for which there "*is in force*" a licence under another law of the Commonwealth, Pt VIII of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the SRC Act"). (emphasis added)

3 Part 2 of the OHS Act (ss 16-23A) makes detailed provision for the duties of "employers" relating to occupational health and safety. Schedule 2 Pt 1 provides for civil enforcement proceedings and Pt 2 creates various offences for contravention of the duties created by Pt 2 and lays out penalty provisions. The term "employer" means the Commonwealth, a Commonwealth authority or a non-Commonwealth licensee (s 5(1)).

4 Section 7(1)(c) of the relevant State statute, the *Occupational Health and Safety Act* 2004 (Vic) ("the State Act") confers upon the defendant ("the Authority") the function of monitoring and enforcing compliance with that statute. Section 21 creates offences which include the offences by an employer of failing in the duty to provide or maintain plant or systems of work that are, so far as is reasonably practicable, safe and without risks to health (s 21(2)(a)) and the duty to provide information, instruction, training or supervision to employees necessary to enable employees to perform their work in a way that is safe and without risks to health (s 21(2)(e)). Section 23(1) requires an employer to ensure, so far as is reasonably practicable, that third parties are not exposed to health and safety risks arising from the undertaking of the employer. Offences against ss 21 and 23 are indictable offences (s 21(4) and s 23(2) respectively).

Proceedings for an indictable offence may be commenced within two years after the offence is committed or the Authority becomes aware the offence was committed, or at any time with the written authorisation of the Director of Public Prosecutions (s 132).

The plaintiff, by prosecution commenced in a State court on 24 September 2008, was charged with offences against these provisions of s 21 and s 23, allegedly committed in the State of Victoria on or about October 2006. The informant was an inspector appointed by the Authority under Pt 9 (ss 95-126) of the State Act. An inspector was empowered by s 130 to bring proceedings for an offence against the State Act.

It is important to note the date of the alleged offences. In October 2006, the plaintiff was not a "non-Commonwealth licensee" and so had no duties imposed upon it under the OHS Act. There was then no licence in force under Pt VIII of the SRC Act to meet the definition of "non-Commonwealth licensee" in s 5(1) of the OHS Act. At that stage no question of the operation of s 109 of the Constitution could have arisen.

Indeed, the relevant licensing provisions under the federal law did not exist in October 2006. The provisions were added to the OHS Act by the *OHS and SRC Legislation Amendment Act* 2006 (Cth) ("the 2006 Act") and commenced on 14 March 2007.

The licence under Pt VIII of the SRC Act was granted on 13 December 2006 with a commencing date of 1 January 2007 ("the plaintiff's licence"). The plaintiff's licence has remained in force at all times since 1 January 2007. On the commencement of the 2006 Act on 14 March 2007 and by reason of the plaintiff's licence under Pt VIII of the SRC Act then being in force, the plaintiff became a "non-Commonwealth licensee" and an "employer" within the meaning of the definition of those terms in the OHS Act.

The stated case

On 19 February 2009 the plaintiff commenced the proceeding in this Court, invoking the original jurisdiction conferred by s 76(i) of the Constitution and s 30(a) of the *Judiciary Act* 1903 (Cth).

Question 1 of the questions stated for the consideration of the Full Court asks whether while the plaintiff remains a non-Commonwealth licensee for the

purposes of the OHS Act it is liable for conviction under s 21 and s 23 of the State Act for offences committed before the plaintiff became a "non-Commonwealth licensee". For the reasons which follow, this should be answered "yes".

12 Question 2 assumes an affirmative answer to Question 1 and then asks whether within the meaning of s 109 of the Constitution certain provisions of the State Act are invalid to the extent that they purport to empower the defendant to authorise the bringing of proceedings against the plaintiff for offences against the State Act allegedly committed before the plaintiff became a "non-Commonwealth licensee" under the OHS Act. This should be answered "No".

13 Question 3 assumes an affirmative answer to Question 2 and then asks whether the proceedings brought against the plaintiff alleging the commission of offences in or about October 2006 is incompetent. This question does not arise, given the negative answer to Question 2.

The issue

14 The plaintiff contends that its prosecution under the State Act, commenced after it became a "non-Commonwealth licensee" and an "employer" within the meaning of the OHS Act, is incompetent, and enlists the operation of s 109 of the Constitution to mandate that conclusion. Counsel for the plaintiff identified the underlying issue in the case as whether once his client became subject to the OHS Act it ceased to be liable to prosecution for offences allegedly previously committed against the State Act; what had taken place was itself unaffected by the federal law but the provisions of the State law which enabled a prosecution to be instituted were rendered inoperative.

15 The defendant attracted the support of interventions by the Attorneys-General of the Commonwealth, New South Wales, South Australia and Queensland.

16 The submissions of the defendant and the interveners are to the effect that upon its proper construction the OHS Act evinces an intention to exclude the operation of the State Act only to the extent to which the State Act would purport to impose rights and obligations in relation to occupational health and safety of those who were "employers" or "employees" at the time the relevant workplace conduct occurred. The result is said to be that: (a) the OHS Act applies to

conduct of the plaintiff occurring on and from the commencement of the 2006 Act, namely 14 March 2007, or on the commencement of a licence, whichever is the later; (b) the OHS Act does not speak to the continuing operation of the State Act upon the earlier alleged conduct; (c) s 4 of the OHS Act, upon which the plaintiff particularly relies, cannot operate of its own force to render inoperative any State law and, rather, indicates the particular field upon which the OHS Act makes exhaustive or exclusive provision, and (d) that field does not extend to the prosecution of offences under State law for acts or omissions alleged in a period before the plaintiff became a "non-Commonwealth licensee".

Section 4 of the OHS Act

17 Section 4 of the OHS Act has the chapeau "Act excludes some State and Territory laws". The text of the section is as follows:

> "*Exclusion of State and Territory laws*
>
> (1) Subject to subsection (2), this Act is intended to apply to the exclusion of any law of a State or Territory (other than a law prescribed under subsection (3)) to the extent that the law of the State or Territory relates to occupational health or safety and would otherwise apply in relation to employers, employees or the employment of employees.
>
> Note: For the meaning of ***employer*** and ***employee***, see section 5.
>
> *State or Territory laws not excluded from applying to situations not covered by this Act*
>
> (2) If, because of section 14 or 15, provisions of this Act do not apply in relation to a particular situation, subsection (1) is not intended to affect the application of State or Territory laws to that situation.
>
> *Allowing certain State or Territory laws to apply*
>
> (3) If a State or Territory law deals with a matter relating to occupational health or safety that is not dealt with by or under this Act, the regulations may prescribe the law as not being intended to be excluded by this Act.
>
> *Interpretation*

(4) In this section, a reference to laws of a State or Territory includes a reference to such laws as they have effect as applied provisions within the meaning of the *Commonwealth Places (Application of Laws) Act 1970*.

(5) In this section:

law includes a provision of a law (including, for example, a formula or a component of a formula)."

(original emphasis)

18 Section 4 of the OHS Act is drawn in a fashion which resembles the plan of s 16 of *Workplace Relations Act* 1996 (Cth). The validity of s 16 was attacked by Western Australia in *The Work Choices Case*[1] as a "bare attempt to limit or exclude State legislative power" without the Commonwealth itself enacting a law which would prevail to the extent of inconsistency by reason of s 109 of the Constitution. In response, the Commonwealth had declined to contend that a federal law might simply exclude State law in a field and make no provision on that subject. Rather, the Commonwealth successfully submitted that s 16 was to be supported as an indication of the relevant field the federal law was intended to cover to the exclusion of State law and that s 109 operated accordingly. The section did not purport to state, impermissibly, the result of the operation of s 109, or to displace or expand its operation[2].

Conclusions

19 In the present case there is no challenge to the validity of s 4. Rather, the dispute concerns its proper construction. Section 4 in terms is addressed to "the Act". To achieve the objectives stated in s 3, the statute operates prospectively upon those such as the plaintiff who answer the temporally expressed definition of "non-Commonwealth licensee" and thus the definition of "employer". It imposes the duties specified in Pt 2, with attendant enforcement provisions of Pt 5. The section then states an intention as to the scope of the application of the

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1 (2006) 229 CLR 1 at 164-169 [364]-[372]; [2006] HCA 52.

2 *Botany Municipal Council v Federal Airports Authority* (1992) 175 CLR 453 at 464-465; [1992] HCA 52.

Act with respect, relevantly, to State law. The section does not purport to do what it could not do, and to operate directly upon State law. That is left to the operation of s 109 of the Constitution.

20 The legislative power of the Parliament extends to the expression in a law of its intention to cover a particular field of activity or to refrain from doing so. Such a law assists in the resolution, as a matter of statutory construction, of the question of the existence of such an intention. In the light of a provision such as s 4 it is not necessary to undertake a detailed analysis of the remaining provisions of the Act in order to determine with precision the field which it is intended the law should cover. That is set out in the express statement of legislative intent. But such a statement is only a statement of intention which informs the construction of the Act as a whole. It must be an intention which the substantive provisions of the Act are capable of supporting. Absent that necessary qualification, the character of a bare statement of intention could approach that of a bare exclusion of State law.

21 As Mason J emphasised in *The Queen v Credit Tribunal; Ex parte General Motors Acceptance Corporation*[3] a law of the Commonwealth cannot operate of its own force to invalidate or render inoperative a State law. His Honour said[4]:

> "although a provision in a Commonwealth statute which attempts to deny operational validity to a State law cannot of its own force achieve that object, it may nevertheless validly evince an intention on the part of the statute to make exhaustive or exclusive provision on the subject with which it deals, thereby bringing s 109 into play. Equally a Commonwealth law may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals, thereby enabling State laws, not inconsistent with Commonwealth law, to have an operation. Here again the Commonwealth law does not of its own force give State law a valid operation. All that it does is to make it clear that the Commonwealth law is not intended to cover the field,

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3 (1977) 137 CLR 545 at 562; [1977] HCA 34.

4 (1977) 137 CLR 545 at 563.

thereby leaving room for the operation of such State laws as do not conflict with Commonwealth law."

22 In this case the substantive provisions of the Act support the statement of intention set out in s 4.

23 Section 4, in its application with respect to State law, discloses a limited intention of exclusion by the use of the phrase "to the extent that ...". The limitation has two limbs which "target" a limited class of State laws. First the State law must be one which relates to occupational health or safety and secondly it must be the case that the State law "would otherwise apply in relation to employers, employees, or the employment of employees". The essential difficulty with the plaintiff's case is that it responds to the first but not to the second limb.

24 The plaintiff was an "employer" within the meaning of s 4 when on 24 September 2008 it was charged under s 130 of the State Act with the offences against ss 21 and 23 allegedly committed before it acquired that status of "employer". Each of ss 21 and 23 is to be treated for the purposes of s 4 as a "law". This follows from s 4(5) which provides that in s 4, "law" includes a provision of a law. Can it be said within the meaning of s 4 that ss 21 and 23 of the State Act, the offence provisions, are laws of a State which "would otherwise apply" in relation to the plaintiff as an "employer"? The answer must be in the negative. Again, to the extent that s 130 provides for the prosecution of a corporation in respect of an offence allegedly committed before it became an "employer", it is not to that extent a State law applying in relation to an "employer".

25 The apparent purpose of s 4 is to relieve "employers" from the observance of the concurrent operation of multiple sets of legislatively imposed duties, whether imposed by State or Territorial law. That objective assumes the operation of the federal system for the securing of the health, safety and welfare of employees. It is not advanced by a construction of s 4 which would absolve those who become "employers" from liability to prosecution for offences against a State occupational health and safety law allegedly committed before that status was acquired.

26 Reference was made in submissions to sub-sections of s 4 following upon s 4(1).

27 The provisions of s 4(1) are subjected to s 4(2). This confirms that in certain circumstances, not presently relevant, where substantive provisions of the OHS Act do not apply, State and Territory laws are not intended to be excluded. This provision does not assist the plaintiff's case.

28 Nor does the presence of s 4(3). The sub-section confers a power to prescribe by regulation a State or Territory law as not intended to be excluded by the OHS Act. The power is exercisable where the State or Territory law "deals with a matter relating to occupational health or safety that is not dealt with by or under [the OHS Act]". The exercise of this power serves to limit in the cases where it is exercised what otherwise would be the scope of the phrase "to the extent that" in s 4(1). The particular law may answer both limbs of s 4(1), but be excluded by regulation from the intention to exclude. In the present case, s 4(1) has no relevant operation to provide the occasion for the exercise of power under s 4(3).

Orders

29 The questions should be answered:

(1) Yes.

(2) No.

(3) Does not arise.

(4) By the plaintiff.