

HIGH COURT OF AUSTRALIA

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

JOHN HOLLAND PTY LTD (ACN 004 282 268)

APPLICANT

AND

INSPECTOR NATHAN HAMILTON & ANOR

RESPONDENTS

John Holland Pty Ltd v Inspector Nathan Hamilton
[2009] HCA 46
13 October 2009
S121/2009 & S122/2009

ORDER

Matter No S121 of 2009

- 1. Pursuant to s 40(1) of the Judiciary Act 1903 (Cth), remove part of the cause now pending in the Industrial Court of New South Wales in proceeding No IRC 1989 of 2007, being that part of the proceeding by which John Holland Pty Ltd sought the declarations numbered 1, 2 and 4, and consequential relief, in its Notice of Motion filed in the Industrial Court of New South Wales on 13 October 2008.*
- 2. Declare that the charge made by Inspector Nathan Hamilton referred to in the order of the Industrial Court of New South Wales made on 26 October 2007 is not by reason of the Occupational Health and Safety Act 1991 (Cth) and s 109 of the Constitution rendered invalid, null or void, and that it is not beyond the jurisdiction of the Industrial Court of New South Wales to hear and determine proceedings upon that charge.*
- 3. The applicant, John Holland Pty Ltd, pay the costs of and incidental to the removal application.*

Matter No S122 of 2009

- 1. Pursuant to s 40(1) of the Judiciary Act 1903 (Cth), remove part of the cause now pending in the Industrial Court of New South Wales in proceeding No IRC 1990 of 2007, being that part of the proceeding by which John Holland Pty Ltd sought the declarations numbered 1, 2 and 4,*

and consequential relief, in its Notice of Motion filed in the Industrial Court of New South Wales on 13 October 2008.

2. *Declare that the charge made by Inspector Nathan Hamilton referred to in the order of the Industrial Court of New South Wales made on 26 October 2007 is not by reason of the Occupational Health and Safety Act 1991 (Cth) and s 109 of the Constitution rendered invalid, null or void, and that it is not beyond the jurisdiction of the Industrial Court of New South Wales to hear and determine proceedings upon that charge.*
3. *The applicant, John Holland Pty Ltd, pay the costs of and incidental to the removal application.*

Representation

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

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

Interveners

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

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))

P J Hanks QC with F I Gordon intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

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

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

CATCHWORDS

John Holland Pty Ltd v Inspector Nathan Hamilton

Constitutional law (Cth) – Inconsistency between Commonwealth and State laws – *Occupational Health and Safety Act 1991* (Cth) ("OHS Act") – *Occupational Health and Safety Act 2000* (NSW) ("State Act") – Provisions of State Act empowered inspectors to bring proceedings for an offence against State Act – Applicant charged with offences under State Act – OHS Act relevantly applies to employers that are "non-Commonwealth licensees" – Applicant became non-Commonwealth licensee after alleged offences committed but prior to charges being laid – Whether while applicant remains a non-Commonwealth licensee for purposes of OHS Act it is liable for conviction under State Act for offences allegedly committed before applicant 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*.

Constitution, s 109.

Occupational Health and Safety Act 1991 (Cth), ss 3, 4, 5(1).

Occupational Health and Safety Act 2000 (NSW), ss 8, 107.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND
BELL JJ. These are two applications for removal into this Court pursuant to
s 40(1) of the *Judiciary Act* 1903 (Cth) of part of causes now pending in the
Industrial Court of New South Wales. The applicant seeks removal of so much
of the pending causes as are applications upon motions by the applicant in which
it seeks declarations that charges against it of offences under the *Occupational
Health and Safety Act* 2000 (NSW) ("the NSW Act") are "invalid and null and
void" and the Industrial Court is without jurisdiction to hear and determine
proceedings upon those charges.

2 The alleged offences against the NSW Act were committed by the
applicant in New South Wales from about 27 October 2005 up to and including
2 November 2005. The offences are contraventions of s 8(1) and s 8(2) of the
NSW Act. Section 8(1) imposes a duty upon an employer to ensure the health,
safety and welfare at work of all employees. Section 8(2) requires an employer
to ensure that persons other than its employees are not exposed to risks to their
health and safety arising from the conduct of its undertaking while they are at its
place of work.

3 There is a general limitation of two years for the institution of proceedings
for an offence (s 107(1)). The proceedings in the Industrial Court were
commenced upon application by the first respondent in this Court, an inspector
appointed under the NSW Act, on 26 October 2007, that is to say just inside the
two year period.

4 During the supervening period, the applicant had become a
"non-Commonwealth licensee" within the meaning of s 5 of the *Occupational
Health and Safety Act* 1991 (Cth) ("the OHS Act"), and the applicant relies upon
the federal law, especially s 4, and s 109 of the Constitution for the relief it seeks
in this Court.

5 The applicant is the same corporation as the plaintiff in Matter M16 of
2009. A Justice of this Court ordered that the case stated in that proceeding and
these applications for removal be listed together for hearing by the Full Court.

6 The case stated concerns the law of Victoria, not New South Wales. The
terms of the State statutes are not uniform, but the issues that are presented for
this Court are relevantly identical. The reasoning which supports an adverse
outcome for the plaintiff on the case stated leads to the same outcome in the other

French CJ
Gummow J
Hayne J
Heydon J
Crennan J
Kiefel J
Bell J

2.

proceeding. The reasons given on the case stated should be read with what is said here.

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Order 1 sought in each application for removal into this Court should be made. On each of the removed motions the Court should declare that the charges made on 26 October 2007 are not by reason of the operation of the OHS Act and s 109 of the Constitution rendered invalid, null or void and that it is not beyond the jurisdiction of the Industrial Court of New South Wales to hear and determine proceedings upon those charges. The applicant should pay the costs of the removal applications.