# HIGH COURT OF AUSTRALIA

CALLINAN J

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**Matter No B70/1999**

JOHN DOONEY — PLAINTIFF

AND

MORRIS JAMES CLIFFORD HENRY (also known as JIM HENRY) — DEFENDANT

**Matter No B71/1999**

JOHN DOONEY — PLAINTIFF

AND

STEPHEN CHAPMAN, Deputy Commissioner of Taxation — DEFENDANT

**Matter No B79/1999**

VINCENT MORGILLO — PLAINTIFF

AND

SPENCER ROSS DE VERE — DEFENDANT

**Matter No B80/1999**

VINCENT MORGILLO — PLAINTIFF

AND

STEPHEN CHAPMAN, Deputy Commissioner of Taxation & ANOR — DEFENDANTS

**Matter No B86/1999**

IVAN GORSHKOV — PLAINTIFF

AND

MARGARET MARY KEY — DEFENDANT

**Matter No B87/1999**

IVAN GORSHKOV — PLAINTIFF

AND

STEPHEN CHAPMAN,
Deputy Commissioner of Taxation — DEFENDANT

**Matter No B88/1999**

JEREMY DIVE — PLAINTIFF

AND

STEPHEN CHAPMAN,
Deputy Commissioner of Taxation — DEFENDANT

**Matter No B89/1999**

JEREMY DIVE — PLAINTIFF

AND

MARGARET MARY KEY — DEFENDANT

**Matter No B5/2000**

WILLIAM GAIR — PLAINTIFF

AND

STEPHEN CHAPMAN,
Deputy Commissioner of Taxation — DEFENDANT

**Matter No B7/2000**

MATTHEW MOELIKER PLAINTIFF

AND

MORRIS JAMES CLIFFORD HENRY DEFENDANT
(also known as JIM HENRY)

**Matter No B8/2000**

MATTHEW MOELIKER PLAINTIFF

AND

STEPHEN CHAPMAN DEFENDANT

*Dooney v Henry*
[2000] HCA 44
*24 August 2000*
B70/1999, B71/1999, B79/1999, B80/1999, B86/1999, B87/1999
B88/1999, B89/1999, B5/2000, B7/2000 and B8/2000

**ORDER**

*In each matter:*

*1. The action be permanently stayed.*

*2. The respondent plaintiff or plaintiffs pay the applicant defendant's costs of the action (including this application) on an indemnity basis.*

*3. In action B5 of 2000 I order that:*

*(i) each party file any further material intended to be relied upon before 25 September next;*

*(ii) that written submissions be filed by each party before 10 October next; and*

*(iii) that the applicant's summons be adjourned to a date to be fixed.*

**Representation:**

**Matter Nos B70/1999, B71/1999, B86/1999, B87/1999, B88/1999, B89/1999, B7/2000 and B8/2000**

D C Fitzgibbon for the plaintiff (instructed by Peter Brooke & Company)

J A Logan SC with C D Coulsen for the defendant (instructed by Australian Government Solicitor)

**Matter Nos B79/1999 and B5/2000**

D C Fitzgibbon for the plaintiff (instructed by Rea & Sockhill)

J A Logan SC with C D Coulsen for the defendant (instructed by Australian Government Solicitor)

**Matter No B80/1999**

D C Fitzgibbon for the plaintiff (instructed by Rea & Sockhill)

J A Logan SC with C D Coulsen for the first defendant (instructed by Australian Government Solicitor)

No appearance for the second defendant

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

1 CALLINAN J. In these matters, which I have heard together, the plaintiffs have delivered Statements of Claim which all seek substantially the same relief and raise the same points for decision. In every case a Reply has also been delivered, and these also raise similar issues for determination. The defendants, who are the applicants in these matters, take no point on the attempt to raise by way of Reply, rather than by Statement of Claim, further issues.

2 In every case, the defendant (the applicant) has issued a summons seeking orders substantially as follows:

> "1. the statement of claim be struck out on the ground that the Plaintiff has no standing to bring the action;
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> 2. in the alternative, the statement of claim be struck out on the ground that it does not disclose a reasonable cause of action;
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> 3. in the further alternative, the statement of claim be struck out on the basis that it is unnecessary or that it may tend to prejudice, embarrass or delay the fair trail [sic] of the action;
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> 4. the action be struck out on the basis that it is frivolous or vexatious;
>
> 5. alternatively, the action be dismissed or permanently stayed on the basis that the issues raised in the statement of claim are or could be raised in existing proceedings in another court …
>
> 6. alternatively, such further or other orders or directions in relation to the further conduct of this action, including an order that it be remitted to the Federal Court of Australia for hearing and determination;
>
> 7. the plaintiff pay the costs of and incidental to this application and, as the case may be the action, including, if the Court or Justice thinks fit, an order that those costs be paid as between solicitor and client."

3 It is convenient to start with, as an exemplar, the prayer for relief in the Statement of Claim of the plaintiff (the respondent) in *Vincent Morgillo v Spencer Ross De Vere*[1]. Six orders are sought:

> "1. That the Defendant be prohibited from acting for any person illegally delegated contrary to s 8(1) of the *Taxation Administration Act* 1953 and s 34AB(b) of the *Acts Interpretation Act* 1901 in the preparation, issuing, maintenance and prosecution of proceedings

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**1** B79 of 1999.

in any court for any reason or in the seeking of monies from any person, company or fund under the instructions of such illegally delegated persons.

2. That any Winding Up orders obtained by the presentation to any court by the Defendant acting as a person illegally claiming to be a delegate of Stephen Chapman or the Deputy Commissioner of Taxation or both be set aside.

3. In the event of a Winding up Order or Orders being set aside that an order for full restitution be made against the Defendant.

4. That costs be awarded on an indemnity basis against any person or persons acting under purported delegations contrary to law and against any person knowingly acting on behalf of such person or persons to the detriment of the Plaintiff.

5. A declaration that the [Australian Taxation Office] is a body without legal persona.

6. Damages to be assessed."

4 It is alleged in *Vincent Morgillo v Spencer Ross De Vere* that the plaintiff is a director of a company, Shercorp Pty Ltd[2], upon which a Deputy Commissioner of Taxation, Stephen Chapman, caused to be served a Statutory Notice of Demand said to be pursuant to s 459 of the Corporations Law. The demand was for income tax payable by the company. There could be no doubt that the tax in question was payable, because it was tax shown and accepted as being payable by the company in its annual income tax return. But in any event there is a self-assessment provision in s 166A of the *Income Tax Assessment Act* 1936 (Cth) ("the Act") which deems such a return to be an assessment. That section relevantly provides:

"**Deemed assessment**

**(1)** Where a taxpayer that is a relevant entity within the meaning of Division 1B of Part VI furnishes a return in respect of income of a year of income to which that Division applies:

(a) the Commissioner is taken to have made, on the day on which the return is furnished, an assessment of the relevant taxable income or net income, as the case may be, and of the

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**2** ACN 072 982 953.

> tax payable on that taxable income or net income, being those respective amounts as specified in the return …"

5 It is alleged in the Statement of Claim that the Statutory Notice of Demand was defective because it was not issued by the Deputy Commissioner personally, or, as I read the pleading, by a person under a lawful delegation to do so. Other allegations are made: that the debt referred to in the Notice was not the subject of any attempt to establish it in a court of law; and, that no Notice of Assessment as required by s 177 of the Act was issued.

6 There then follows an allegation, purportedly supported by a number of particulars, which need not be repeated, that the Australian Taxation Office is a body without a legal existence.

7 This last allegation, and the misconceived claim for relief in respect of it (prayer 5), can be immediately disposed of. The Australian Taxation Office is not a legal personality, the applicant does not contend that it is, and whether the Australian Taxation Office is, or is not a legal personality, is not a matter of the slightest relevance to any issue or efficacious remedy that might be available to the respondent.

8 Other of the allegations can be equally, quickly disposed of. Section 459E of the Corporations Law, the section which the respondent incorrectly identified as s 459, does not require that a Statutory Notice of Demand be supported by a judgment. It relevantly provides as follows:

> "**Creditor may serve statutory demand on company**
>
> (1) A person may serve on a company a demand relating to:
>
> (a) a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum; or
>
> (b) 2 or more debts that the company owes to the person, that are due and payable and whose amounts total at least the statutory minimum.
>
> (2) The demand:
>
> (a) if it relates to a single debt – must specify the debt and its amount; and
>
> (b) if it relates to 2 or more debts – must specify the total of the amounts of the debts; and

(c) must require the company to pay the amount of the debt, or the total of the amounts of the debts, or to secure or compound for that amount or total to the creditor's reasonable satisfaction, within 21 days after the demand is served on the company; and

(d) must be in writing; and

(e) must be in the prescribed form (if any); and

(f) must be signed by or on behalf of the creditor.

(3) Unless the debt, or each of the debts, is a judgment debt, the demand must be accompanied by an affidavit that:

(a) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and

(b) complies with the rules.

(4) A person may make a demand under this section relating to a debt even if the debt is owed to the person as assignee."

9 Neither does a Statutory Notice of Demand need in any way, as alleged by the respondent, to be preceded by any attempt to prove it in a court of law, and it is certainly not for a creditor, as the Commonwealth of Australia is, to go out to seek evidence of the insolvency of a company before serving a Statutory Notice of Demand, a matter which is also alleged in the respondent's pleading.

10 There are only two other matters outstanding on the Statement of Claim. The first is a contention that the foundation for any winding up proceedings is unsound because there has been an unlawful sub-delegation by a Deputy Commissioner of Taxation whose facsimile signature has been applied to the Statutory Notice of Demand. In *O'Reilly v State Bank of Victoria Commissioners*[3] Gibbs CJ said[4]:

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**3** (1983) 153 CLR 1 (Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ).

**4** (1983) 153 CLR 1 at 10-11.

"The question whether s 264[5] requires that the Commissioner (or his delegate) should personally sign the notice in writing is simply one of construction. In *In re Whitley Partners Ltd*[6], Bowen LJ said:

> 'In every case where an Act requires a signature it is a pure question of construction on the terms of the particular Act whether its words are satisfied by signature by an agent. In some cases on some Acts the Courts have come to the conclusion that personal signature was required. In other cases on other Acts they have held that signature by an agent was sufficient. The law on the subject is thus summed up by Blackburn J in *Reg v Justices of Kent*[7]: "No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require personal signature." Quain J then says, "We ought not to restrict the common law rule, qui facit per alium facit per se, unless the statute makes a personal signature indispensable."'

There can be no doubt that as a general proposition at common law a person sufficiently 'signs' a document if it is signed in his name and with his authority by somebody else, but if by statute a document has to be personally signed the duty of signing cannot be delegated to a third person: see *London County Council v Agricultural Food Products Ltd*[8]. Exactly the same principles apply when the power is given by statute to a

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**5** Section 264 then relevantly provided:

> "(1) The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connexion with any department of a Government or by any public authority –
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> (a) to furnish him with such information as he may require; and
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> (b) to attend and give evidence before him or before any officer authorized by him in that behalf concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto."

**6** (1886) 32 Ch D 337 at 340-341.

**7** (1873) LR 8 QB 305 at 307.

**8** [1955] 2 QB 218 at 223-224.

designated person to issue a notice. The notice may be given by the authorized agent of the designated person, whose act will be the act of the principal, unless the statute on its proper construction requires the notice to be issued only by the person who is designated."

11 Later his Honour added[9]:

"Section 264 confers on the Commissioner a power whose exercise will be likely adversely to affect rights of individuals. This is a reason for inclining in favour of the view that it must be exercised personally. On the other hand, that section, and a number of other sections of the Act, confer on the Commissioner powers which may be expected to be exercised in myriads of cases. Those other sections include ss 166-169, 170 and 174, which give power to make and amend assessments and to serve notice of assessments. Since there are literally millions of taxpayers (according to Year Book Australia 1982 at 577, there were over 5.6 million individual taxpayers in the year 1979-80) it would reduce the administration of the taxation laws to chaos if the powers conferred by those sections could be exercised only by the Commissioner or a Deputy Commissioner personally. It can not be supposed that the Parliament intended such a result. By s 13 of the Act any reference in the Act to the Commissioner is deemed to include, in respect of matters as to which a Deputy Commissioner has exercised any power or function conferred upon him by delegation, a reference to that Deputy Commissioner. The power of delegation conferred by s 8(1) of the *Taxation Administration Act* 1953 (Cth), as amended, enables the Commissioner to make a delegation 'to a Deputy Commissioner of Taxation or other person'. In *Re Reference Under Ombudsman Act, s 11*[10], Brennan J said that 'The practical administrative necessity which warrants an authority's exercising his power by the acts of another disappears when the authority is empowered to delegate all of his powers and functions to that other.' The existence of a power to delegate is of course an important consideration in deciding whether the designated authority may act through an authorized agent. However, the fact that the Act itself contemplates that the delegation will be to a Deputy Commissioner only (notwithstanding that s 8(1) of the *Taxation Administration Act* confers a wider power of delegation) suggests that it was not intended that there should be a wholesale delegation of powers to comparatively minor officials. But in any case it would hardly be practicable to make a delegation of that kind, and it seems to me that there exists, as the Parliament must have known, a

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**9** (1983) 153 CLR 1 at 12-13.

**10** (1979) 2 ALD 86 at 94.

practical necessity that the powers conferred on the Commissioner by the Act should be exercised by the officers of his Department who were acting as his authorized agents. On the whole I have reached the conclusion that the powers conferred by s 264 were not intended to be exercised only by the Commissioner or his delegate personally but may be exercised through a properly authorized officer. This is consistent with the decision in *Lee v Federal Commissioner of Taxation*[11], where it was held that the acts of the Commissioner's officers (no doubt acting within the course of their authority) in performing duties under other sections of the Act were the acts of the Commissioner for the purposes of the Act. In opposition to this view reliance was placed on the fact that express reference to officers authorized by the Commissioner is made in ss 263 and 264, and this, it was said, indicated an intention to exclude action by authorized officers in other cases. Section 263, which refers to 'the Commissioner or any officer authorized by him', is concerned with rights, whereas s 264 is concerned with powers; one may conclude that a power may be exercised through an agent more readily than that a right is conferred upon an agent. The reference in s 264(1)(b) to 'any officer authorized by him' may be explained by the fact that in the context of that provision it is necessary to specify the officer before whom the recipient of the notice is required to attend. The fact that authorization is expressly mentioned in these provisions does not assist the conclusion that s 264 otherwise excluded any possibility of authorization."

12 Murphy J[12] did not deal with the point, but expressed no dissent from it in agreeing with the reasons and answers given by the Chief Justice in respect of questions to which the matters referred to in the quoted passages were relevant.

13 Wilson J said[13]:

"It seems to me that a clear distinction is to be drawn between the delegation of a power and the exercise of that power through servants or agents: see the informative discussion by Brennan J in *Re Reference under Ombudsman Act, s 11*[14]. In *Carltona Ltd v Commissioners of Works*[15] Lord Greene MR described, in words which have become well-

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**11** (1962) 107 CLR 329 at 335.

**12** (1983) 153 CLR 1 at 27.

**13** (1983) 153 CLR 1 at 30-31.

**14** (1979) 2 ALD 86 at 93-95.

**15** [1943] 2 All ER 560 at 563.

known, the necessity in modern government for the shared performance of duties short of delegation. He said:

> 'It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible.'

Denning LJ (as he then was) made the same point in *Metropolitan Borough and Town Clerk of Lewisham v Roberts*[16], when he said:

> 'Now I take it to be quite plain that when a minister is entrusted with administrative, as distinct from legislative, functions he is entitled to act by any authorized official of his department. The minister is not bound to give his mind to the matter personally. That is implicit in the modern machinery of government: see *Carltona Ltd v Commissioners of Works* and an article by Professor Willis[17].'

Cf also *Reg v Skinner*[18]; *In re Golden Chemical Products Ltd*[19].

The defendants make two submissions in answer to the plaintiffs. They would dismiss the English authorities to which I have referred as dealing with the relationship of Ministers of the Crown to their departments. It is true that the emphasis in the cases is primarily expressed in that way. Yet I find the logic of the principle equally persuasive in its application to the head of any large government department, and, a fortiori, to a Deputy Commissioner of Taxation responsible within a State for the implementation of the Commonwealth's laws with respect to taxation. No permanent head of a department in the Public Service is expected to discharge personally all the duties which are performed in his name and for which he is accountable to the responsible

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**16** [1949] 2 KB 608 at 621.

**17** Willis, "Delegatus Non Potest Delegare", (1943) 21 *Canadian Bar Review* 257.

**18** [1968] 2 QB 700.

**19** [1976] Ch 300.

Minister. I share the view expressed by Sachs J in *Commissioners of Customs and Excise v Cure & Deeley Ltd*[20]:

> 'The commissioners are in a position parallel to that of the Ministers referred to in the judgment of Lord Greene in the *Carltona* case[21], in that their functions are so multifarious that they could never personally attend to them all, and the powers given to them are normally exercised under their authority by responsible officials of the department.'"

14 Later his Honour said[22]:

> "Nor does the plaintiffs' argument have the result that s 8 of the *Taxation Administration Act* is otiose, in that there is no need for a power of delegation. There is every need for such a power, in the interests of administrative efficiency and a sensible devolution of power and responsibility throughout Australia. Without the power of delegation, every act performed by departmental officers throughout Australia would be in law the act of the Commissioner, for which he would be responsible. By delegating substantially all of his powers and functions to Deputy Commissioners he transfers the power base to the geographic regions of the country, allowing the Department to operate in each of the States more or less as a separate administrative unit, with the Deputy Commissioner as its head. Without a power of delegation, this decentralisation would be impossible."

15 These three Justices constituted the majority, Aickin J having died before judgment was given[23] and Mason J being the only Justice in dissent on this issue.

16 Whilst it is true that the administration of the Act is vested in the Commissioner and there is an express power of delegation with respect to some matters provided for in the Act, the nature of the Commissioner's activities as

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**20** [1962] 1 QB 340 at 371.

**21** [1943] 2 All ER 560 at 563.

**22** (1983) 153 CLR 1 at 32.

**23** Aickin J died before judgment was delivered in the case argued on 10 and 11 March 1982. The Court directed that the questions concerning the effect of s 263 of the Act should be re-argued before a Bench of seven Justices.

discussed by Gibbs CJ and Wilson J in the passages set out above, and reg 170[24] of the Income Tax Regulations, made under the Act, make it clear that it would be impossible for the Commissioner, or indeed all of the Deputy Commissioners, to carry out personally the functions which have to be carried out in order to give the Act effective operation.

17 There is no reason to suppose, and indeed there is no allegation in the respondent's pleadings that the officer who actually issued the Statutory Notice of Demand acted in any aberrant, unauthorised or otherwise unlawful manner. The respondent's argument that there has been an unlawful delegation is therefore rejected.

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**24** "**Services of notices etc.**

(1) Any notice or other communication by or on behalf of the Commissioner may be served upon any person:

(a) by causing it to be personally served on him; or

(b) by leaving it at his address for service; or

(c) by posting it by prepaid letter post, addressed to him at his address for service;

and in any case to which paragraph (c) applies, unless the contrary is proved, service thereof shall be deemed to have been effected at the time when it would, in the ordinary course of post, have arrived at the place to which it was addressed.

(2) This regulation applies to the service of a notice:

(a) for the purposes of section 451 of the Act – by an attributable taxpayer upon a company that is a CFC within the meaning of Part X; and

(b) for the purposes of section 452 of the Act – by a company that is a CFC within the meaning of that Part upon a partnership;

in the same way as it applies to the Commissioner serving a notice on a person.

(3) In this regulation ***notice or other communication by or on behalf of the Commissioner*** includes a notice or other communication by or on behalf of the Commissioner under the *Income Tax Assessment Act 1997* or Regulations made under that Act."

18 Although it was obscurely put, the respondent also sought to argue that the Commonwealth of Australia, as a creditor under the Act, could not avail itself of the winding up provisions in the Corporations Law because that legislative scheme was a State enactment. The argument is untenable. It, or the same argument under a different guise, has been fully considered and found to be without substance in a number of cases[25] in some of which Mr Fitzgibbon, counsel for the respondent appeared.

19 The next matter which the respondent raises is the so-called "*interregnum* argument" based upon an asserted deficiency in the appointment of Lord Gowrie VC as Governor-General and in the giving of Royal Assent to the Act. The substance of the same argument is set out at length in the reasons for judgment, and emphatically rejected, in *McKewins Hairdressing and Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation*[26] by Gummow J. I fully concur in his Honour's reasoning and argument in regard to it.

20 The final substantive matter advanced by the respondent is to be found in the Reply of the respondent, that the proclamation on 8 March 1986, after the commencement of the *Australia Act* 1986 (Cth) on 3 March 1986, of Her Majesty's Letters Patent dated 14 February 1986 under the Royal Sign Manual and the Great Seal of the United Kingdom reconstituting the office of Governor of Queensland, was an invalid exercise of sovereignty by the United Kingdom with respect to Queensland. It followed, it was submitted, that appointments of judicial officers in Queensland are invalid. How this could have any relevance to Judges appointed before 1986 is left entirely unexplained.

21 However put, the argument misconceives and misunderstands the comprehensive scheme of United Kingdom, Australian and State legislation which collectively was enacted as the *Australia Acts* pursuant to the "request and consent" provisions then found, so far as Australia and the States were concerned, in ss 4 and 9(2) and 9(3) of the *Statute of Westminster* 1931 (Imp) and

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**25** *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation (Cth)* (1999) 74 ALJR 68; 166 ALR 302; *Greer v Deputy Commissioner of Taxation* unreported, High Court of Australia (McHugh J), 26 April 1999; *Re Application to Issue a Proceeding; Ex parte Joosse* (1999) 162 ALR 128; *McKewins Hairdressing and Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation* (2000) 74 ALJR 1000; 171 ALR 335; *Walsh v Professional Nominees Pty Ltd* unreported, Court of Appeal of Queensland (Pincus JA, Thomas and Derrington JJ), 20 July 1998; *Deputy Commissioner of Taxation v Hoperidge Pty Ltd* unreported, Supreme Court of Queensland (Muir J), 28 July 1999; *Re Kevjen Pty Ltd* unreported, Supreme Court of Queensland (Muir J), 4 August 1999.

**26** (2000) 74 ALJR 1000; 171 ALR 335.

in s 51(xxxviii) of the Commonwealth Constitution. The Letters Patent of 14 February 1986 formed part of that scheme and anticipated the enactment by the United Kingdom Parliament of the *Australia Act* 1986 (UK), assent to which was given on 17 February 1986. At the time when the Letters Patent were signed and sealed the use of the Great Seal of the United Kingdom in conjunction with the Royal Sign Manual was appropriate, having regard to the residual responsibilities of the United Kingdom in relation, relevantly, to Queensland at that time. The proclamation thereafter of those Letters Patent was no more relevant to their validity than was the proclamation, after the death of King George V, of His Majesty's commission appointing Lord Gowrie VC to the office of Governor-General[27]. While this is enough to dispose of the argument, I note in relation to Queensland that the operation of the Letters Patent of 14 February 1986 has, in any event, been superseded by the *Constitution (Office of Governor) Act* 1987 (Q) which presently provides for and affirms the office of Governor and the authorities and powers of that office.

22 I have therefore formed a clear view that the Statement of Claim and the Reply, taken separately and together, do not allege facts which, if proved would entitle the respondent to any relief either of the kind which he seeks or otherwise.

23 It is unthinkable that any of the actual relief sought would, or could possibly be granted by a court in any circumstances relevant to this respondent. The first order is claimed in respect of unspecified proceedings, in the future, in any court, for any reason, or, in respect of acts done under the Act. If in the future any proceedings are taken in a court by the applicant against the respondent then that will be the occasion for that court to decide whether the proceedings are properly constituted and may properly be taken. So too, if any other action, if it be of an illegal kind, is sought to be taken by the applicant that would provide the occasion for an appropriate response by the respondent in a court having jurisdiction to deal with the matter.

24 Again, if there be an illegal delegation (of which this case is not an example) then, to the extent that any such illegality may be relevant to the respondent, action may at that time be taken.

25 The second prayer for relief is equally misconceived. There has been no false presentation to any court by any person or persons illegally claiming to be delegates and in any event any claims of that kind, if they had any substance, would fall to be decided in the future.

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**27** See *McKewins Hairdressing and Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation* (2000) 74 ALJR 1000 at 1002-1003 [8]-[18]; 171 ALR 335 at 337-340.

26 There are other serious defects in the respondent's claims and action. The action has been brought by a natural person, a director, in order to seek relief in favour of, that is, effectively on behalf of, a company in liquidation. A director is not a proper party in any such proceedings. If there is to be any challenge to the winding up order it must be made by the company itself with leave pursuant to s 471A of the Corporations Law[28]. The respondent's case should be struck out on that ground also.

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**28** "**Powers of other officers suspended during winding up**

(1) While a company is being wound up in insolvency or by the Court, a person cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer of the company, except:

(a) as a liquidator appointed for the purposes of the winding up; or

(b) as an administrator appointed for the purposes of an administration of the company beginning after the winding up order was made; or

(c) with the liquidator's written approval; or

(d) with the approval of the Court.

(2) While a provisional liquidator of a company is acting, a person cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer of the company, except:

(a) as a provisional liquidator of the company; or

(b) as an administrator appointed for the purposes of an administration of the company beginning after the provisional liquidator was appointed; or

(c) with the provisional liquidator's written approval; or

(d) with the approval of the Court.

(3) This section does not remove an officer of a company from office.

(4) For the purposes of this section, a person is not an officer of a company merely because he or she is:

(a) a receiver and manager, appointed under a power contained in an instrument, of property of the company; or

(b) an employee of the company."

27 There is yet another basis upon which these cases should not be permitted to be maintained. All of the relief which has been sought, to the extent that it has been formulated in an intelligible way, is relief which a court would have a discretion to grant or not to grant. So far as can be ascertained the respondents are seeking injunctions, and perhaps prohibition and declarations. On discretionary grounds alone it would seem to me that no court would grant relief of these kinds here. All of the matters in question could, and should have been raised in the winding up and other proceedings in other courts[29]. To give a different judgment now in the cases in which orders of courts have been made, would be to allow a collateral challenge to, and conflict with, decisions of other courts. (In some of the cases[30] the winding up order has not yet been made.) To the extent that any matters may remain fully undecided the parties in them can argue such matters as they are entitled to and able to argue when they come on for hearing.

28 In three of the cases[31] the factual situation is different from the factual situation in the others. Although winding up proceedings were commenced in them they have been terminated, or the application for winding up has been dismissed by agreement, or stayed on payment of creditors. These different factual situations do not relevantly give rise to any different approach to the applicant's applications in all of the cases. Substantially the same relief is sought and generally similar facts are alleged in these last-mentioned three cases as in the others, and, therefore, if anything, there being no winding up on foot, there is even less basis for the making of the claims by the plaintiffs that they do in those proceedings.

29 The applicants seek to have the Statements of Claim struck out in each case pursuant to O 26 r 18 of the Rules of this Court[32] on the ground that none of

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**29** *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 603.

**30** See *Dooney v Henry* (B70 of 1999), *Dooney v Chapman* (B71 of 1999), *Moeliker v Henry* (B7 of 2000) and *Moeliker v Chapman* (B8 of 2000).

**31** *Gorshkov v Key* (B86 of 1999), *Gorshkov v Chapman* (B87 of 1999) and *Gair v Chapman* (B5 of 2000).

**32** "**Striking out pleading where no reasonable cause of action disclosed**

(1) The Court or a Justice may order a pleading to be struck out on the ground that it does not disclose a reasonable cause of action or answer.

(2) In that case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Justice may order

(Footnote continues on next page)

the Statements of Claim discloses a reasonable cause of action. This is clearly so and I would strike out the Statements of Claim. The applicant also seeks orders that each action be dismissed, or permanently stayed on the basis that it is frivolous or vexatious. In my opinion these proceedings are vexatious, not only as they are articulated, but in any way that they could be articulated in reliance on the facts alleged. The basic points raised by the Statement of Claim and Reply are unarguable. The proceedings are in my opinion hopeless and vexatious[33].

30 The only question is whether I should permanently stay them or dismiss them. There has not been a full hearing and I do not think it appropriate to dismiss the actions. I am prepared to stay them permanently and I would so order.

31 It would follow that the respondents in each case should pay the applicant's costs of all of the proceedings to date. The applicant asks for costs on an indemnity basis. In view of the fact that the arguments were untenable and that some of them have been found wanting in other proceedings I do think the costs should be paid on an indemnity basis.

32 In *William Gair v Stephen Chapman*[34] the applicant submits that the respondent's solicitor, Mr Sockhill, should be ordered to pay the costs on an indemnity basis. The applicant submits that I should follow the same course as followed by Gummow J in *McKewins Hairdressing and Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation*[35].

33 Mr Sockhill has not been heard in action B5 of 2000[36] so far on the question whether he should pay the costs personally, and whether, if he should, he should do so on an indemnity basis.

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the action to be stayed or dismissed, or judgment to be entered accordingly, as is just."

**33** *Munnings v Australian Government Solicitor* (1994) 68 ALJR 169 per Dawson J; 118 ALR 385. That decision was approved on appeal: *Munnings v Australian Government Solicitor [No 2]* (1994) 68 ALJR 429 per Mason CJ, Brennan and Toohey JJ; 120 ALR 586.

**34** B5 of 2000.

**35** (2000) 74 ALJR 1000; 171 ALR 335.

**36** *William Gair v Stephen Chapman*.

34 In each of matters B70 of 1999, B71 of 1999, B79 of 1999, B80 of 1999, B86 of 1999, B87 of 1999, B88 of 1999, B89 of 1999, B5 of 2000, B7 of 2000 and B8 of 2000, I make the following orders:

1. That the action be permanently stayed;

2. That the respondent plaintiff or plaintiffs pay the applicant defendant's costs of the action (including this application) on an indemnity basis.

3. In action B5 of 2000 I order that:

   (i) each party file any further material intended to be relied on before 25 September next;

   (ii) that written submissions be filed by each party before 10 October next; and

   (iii) that the applicant's summons be adjourned to a date to be fixed.