

# HIGH COURT OF AUSTRALIA

GLEESON CJ,  
GAUDRON, GUMMOW, KIRBY AND HAYNE JJ

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H A BACHRACH PTY LTD

PLAINTIFF

AND

THE STATE OF QUEENSLAND

FIRST DEFENDANT

CABOOLTURE SHIRE COUNCIL

SECOND DEFENDANT

KEYLIM PTY LTD

THIRD DEFENDANT

*H A Bachrach Pty Ltd v The State of Queensland*  
(B16-1997) [1998] HCA 54  
2 September 1998

## ORDER

- 1. Demurrers by the first and third defendants allowed.*
- 2. Judgment for the defendants with costs.*

### Representation:

E J P F Lennon QC with R M Derrington and G F Carney for the plaintiff  
(instructed by Phillips Fox)

P A Keane QC, Solicitor-General for the State of Queensland with  
R W Campbell and G R Cooper for the first defendant (instructed by Crown  
Solicitor for Queensland)

No appearance for the second defendant

J C Sheahan SC with J D McKenna for the third defendant (instructed by  
Minter Ellison)



**Interveners:**

B M Selway QC, Solicitor-General for the State of South Australia with L K Byers (instructed by Crown Solicitor for South Australia) intervening in support of the first defendant.

L S Katz SC, Solicitor-General for the State of New South Wales with N Hopkins appearing on behalf of the Attorney-General for Victoria (instructed by Victorian Government Solicitor) intervening in support of the defendants.

L S Katz SC, Solicitor-General for the State of New South Wales with S Gageler (instructed by Crown Solicitor for New South Wales) intervening in support of the defendants.

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



## **CATCHWORDS**

H A Bachrach Pty Ltd v The State of Queensland & Ors

Constitutional law – Restrictions on Commonwealth and State legislation imposed by Constitution, Ch III – Judicial power – Whether *Local Government (Morayfield Shopping Centre) Act 1996 (Q)* interferes with the exercise of judicial power or judicial process of the Supreme Court of Queensland, contrary to requirements of Ch III.

The Constitution, Ch III.

*Local Government (Morayfield Shopping Centre) Act 1996 (Q)*.

*Local Government (Planning and Environment) Act 1990 (Q)*.



1 GLEESON CJ, GAUDRON, GUMMOW, KIRBY AND HAYNE JJ. This action was commenced in the original jurisdiction of this Court on the basis that it is a matter arising under or involving the interpretation of the Constitution within the meaning of s 30(a) of the *Judiciary Act* 1903 (Cth). The plaintiff seeks a declaration that an Act of the Queensland legislature is invalid. There are three defendants. The first and third defendants have demurred to the Statement of Claim. The second defendant submits. The demurrers are before the Court for determination.

2 The plaintiff owns land in the Shire of Caboolture on which there is a shopping centre. The third defendant, Keylim Pty Ltd, ("Keylim") wished to build a shopping centre on land at Morayfield in the same shire. That necessitated rezoning. The second defendant, the Caboolture Shire Council, approved such rezoning. The plaintiff appealed unsuccessfully to the Planning and Environment Court. Before the plaintiff could pursue a further appeal to the Court of Appeal of the Supreme Court of Queensland, the Queensland Parliament enacted the *Local Government (Morayfield Shopping Centre Zoning) Act* 1996 (Q) (the Act), which had the effect of permitting the development. The plaintiff asserts that the Act is invalid, primarily on the ground that it involves an interference with the exercise of judicial power. It is also claimed that the Act "constitutes an unwarranted intervention in the judicial process of the Supreme Court of Queensland as part of an integrated Court system exercising the judicial power of the Commonwealth" and is incompatible with Ch III of the Commonwealth Constitution. The first and third defendants contend that the Act is a law with respect to the use of a particular area of land at Morayfield, that it does not interfere with the exercise of judicial power, and that it is within the law-making power of the Queensland Parliament.

3 The operation of the Act is to be understood against the background of the *Local Government (Planning and Environment) Act* 1990 (Q) (the Planning and Environment Act). That legislation, according to its statement of objectives (s 1.3), provides a code by which a local government (such as the second defendant) or the Minister may undertake the planning of an area to facilitate orderly development and provides a framework for a person to apply for approval in respect of a development proposal and appeal rights in respect of such an application. It should be noted, however, that in Queensland, as in other Australian States, the legislature has, on occasion, enacted special legislation taking particular land either wholly or partly out of the general scheme of such a code<sup>1</sup>. When a

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1 eg *Local Government (Harbour Town Zoning) Act* 1990 (Q); *Local Government (Robina Central Planning Agreement) Act* 1992 (Q); *Sanctuary Cove Resort Act* 1985 (Q).

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2.

State legislature enacts legislation which sets up a general scheme of town planning and development control it does not thereby surrender its power to deal differently, by legislation, with particular areas of land where this, for a reason which commends itself to Parliament, is regarded as appropriate. Whether such a power should be exercised in relation to a given area becomes a political question.

4 It suffices for present purposes to note the following features of the Planning and Environment Act. Planning schemes are provided for in Pt 2. There is a scheme, prepared under previous legislation, known as the town planning scheme for the Shire of Caboolture. The Council is empowered to rezone land, with or without conditions, and make amendments to the planning scheme (ss 4.3, 4.4). When an application for such rezoning and other amendments is made, a "person" is entitled to make an objection (s 4.3(8)). An objector who is dissatisfied with the Council's decision has a right to appeal to the Planning and Environment Court (s 7.1). The plaintiff exercised that right. The Planning and Environment Court was empowered to conduct a review of the Council's decision (s 7.2). It did so, and dismissed the appeal. The plaintiff then had a right to appeal to the Queensland Court of Appeal on the ground of error or mistake in law (s 7.4(3)). On the hearing of that appeal the Court of Appeal would have been entitled to remit the matter to the Planning and Environment Court for determination in accordance with the terms of the judgment. That might have involved questions of conditions, as well as the bare issue of allowance or disallowance of the rezoning or amendment of the permitted uses.

5 There had been a previous history of applications to rezone the Morayfield land for shopping centre development, and of objections by the plaintiff. In 1994 Keylim sought and obtained certain approvals from the second defendant, over the plaintiff's objections. The plaintiff appealed. On 10 May 1996 the Planning and Environment Court dismissed the plaintiff's appeal. On 15 May 1996 the Minister for Local Government and Planning introduced into the Queensland Legislative Assembly a Bill for the Act. On 25 July 1996 the plaintiff appealed to the Queensland Court of Appeal. On 26 July 1996 the Bill was enacted.

6 The Act commenced on 30 July 1996, the date of the Royal Assent. Section 12 of the Act states that the Act expires one year after the commencement of that section, namely on 30 July 1997. However, s 10 provides that s 20A of the *Acts Interpretation Act* 1954 (Q) applies, with the result that "the effect" of the Act did not "end" merely because of its expiry.

7 The scheme of the Act is as follows.



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8       The Act is described in its long title as an Act to make provision about the planning scheme for the Shire of Caboolture. The subject land is described as the "rezoned Morayfield shopping centre land". The Act refers to a planning deed made by Keylim, the Council of the Shire of Caboolture, and any other party named in it, in a form to be approved under a regulation. Section 3 provides that the rezoned Morayfield shopping centre land is included in the central commercial zone of the planning scheme in the Shire of Caboolture, and the purposes for which the land may be used without the consent of the Council "are taken to include" certain identified purposes. Section 5 provides that anything done on the Morayfield shopping centre land under a planning deed of the kind referred to in the Act is lawful. Section 7 provides that compensation is not payable by the State or the Council merely because of the enactment or the operation of the Act or anything done to carry out or give effect to the Act. Section 9(2) provides that, for the purpose of the Planning and Environment Act, the Act is taken to operate as an amendment of the relevant planning scheme, and the provisions of a planning deed of the kind referred to are taken to be conditions attached to an amendment of the planning scheme under the Planning and Environment Act.

9       Both in form and in substance, the Act is legislation with respect to the use that may lawfully be made of the Morayfield land. Its provisions are of general effect, for the future, and they bind the Council, Keylim, the plaintiff, and any other person who may have an interest in, or claim to exercise rights in relation to, the use of the subject land.

10       In its Statement of Claim the plaintiff relates the legislation to the history of the plaintiff's objection to the rezoning and development, its appeal to the Planning and Environment Court, and its proposed further appeal to the Court of Appeal. Allegations are made concerning statements by the Minister in the Legislative Assembly, when the Bill was introduced, as to concern on the part of the Government that the plaintiff's appeals might frustrate or delay the proposed development, and as to the Government's view that the plaintiff's litigation was frivolous. It is alleged that the introduction and enactment of the Bill was "designed" (by whom is not entirely clear) to demonstrate that the State of Queensland does not respect the authority of the courts, that it is willing to interfere in pending litigation, and that it will, if necessary, nullify decisions of the courts.

11       These allegations prompted a debate as to whether the manner in which the plaintiff put its case involved an infringement of Art 9 of the Bill of Rights 1689

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(Eng) in its application to the Queensland legislature<sup>2</sup>. In terms, Art 9 was directed to the English Parliament and provided that the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament. However, under pressure of argument that issue receded in importance, and its resolution is unnecessary.

12 Whether the Act constitutes an impermissible interference with judicial process, or offends against Ch III of the Constitution, does not depend upon the motives or intentions of the Minister or individual members of the legislature. The effect of the legislation is to be considered in context, and the plaintiff is entitled to point to the litigious background for such assistance as may be gained from it. However, it is the operation and effect of the law which defines its constitutional character, and the determination thereof requires identification of the nature of the rights, duties, powers and privileges which the statute changes, regulates or abolishes.<sup>3</sup> An adequate appreciation of the operation of the Act, and its proper characterisation, as a matter of substance and not merely of form, may require consideration of the history of the plaintiff's pursuit of its legal rights under the Planning and Environment Act. However, it does not advance the plaintiff's argument to attribute malevolent designs to the Minister or to other persons who promoted or supported the legislation.

13 It will be apparent that the Queensland Supreme Court (including the Court of Appeal) is not a federal court created by the Parliament within the meaning of s 71 of the Constitution, and that the litigation pending in the Court of Appeal did not involve the exercise by it of federal jurisdiction invested pursuant to a law made by the Parliament under s 77(iii) of the Constitution. Hence the reliance by the plaintiff upon the decision with respect to the Supreme Court of New South Wales in *Kable v Director of Public Prosecutions (NSW)*.<sup>4</sup>

14 However, *Kable* took as a starting point the principles applicable to courts created by the Parliament under s 71 and to the exercise by them of the judicial power of the Commonwealth under Ch III. If the law in question here had been a law of the Commonwealth and it would not have offended those principles, then

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2 See *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 466-467.

3 *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 727, 738; 152 ALR 540 at 546-547, 562.

4 (1996) 189 CLR 51.

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an occasion for the application of *Kable* does not arise. The submissions for the first and third defendants and for the interveners correctly proceeded on that footing.

15        There are some matters which appertain exclusively to the judicial power.<sup>5</sup> For example, the determination of criminal guilt and the trial of actions for breach of contract and for civil wrongs are inalienable exercises of judicial power.<sup>6</sup> Changes by the legislature to what might be called town planning legislation previously enacted by it are not of this character. Rather, the rights, duties, powers and privileges created by such legislation are more aptly seen under a "functional" analysis of separation of powers as taking their character from the nature of the body dealing with them. Thus, when entrusted in an appropriate context to a court, dealings with those rights, duties, powers and privileges may attract the exercise of judicial power but they need not necessarily be so entrusted.<sup>7</sup>

16        Let it be accepted, as the plaintiff contends, that the pursuit by the plaintiff of its rights as an objector to the application of the third defendant, and the possibility of further legal proceedings, constituted the occasion for the intervention by the Queensland Parliament in the matter of the proposed Morayfield shopping centre development, and prompted the decision to facilitate the development by creating a special legal regime which would apply by way of amendment to that set up by the Planning and Environment Act. It does not follow that the legislature was acting beyond power, or interfering in any relevant sense with the exercise of judicial power. Parliament had the power to enact a special law relating to the use of land at Morayfield. It was not deprived of that power by pending, or threatened, legal proceedings under another law which it had previously enacted, and which it could repeal or amend as it saw fit.

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5    *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444.

6    See *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 706; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258, 269.

7    *Cominos v Cominos* (1972) 127 CLR 588 at 606-607; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 665-666; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 360-361.

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17 The authorities recently considered in *Nicholas v The Queen*<sup>8</sup> show that there may be circumstances in which legislation will be found invalid upon the ground that it involves a usurpation of or interference with judicial power, or an impermissible interference with the exercise of judicial power. *Liyanage v The Queen*<sup>9</sup> is an example. However, as Mason J pointed out in *R v Humby; Ex parte Rooney*<sup>10</sup> the circumstance that a statute affects rights in issue in pending litigation does not necessarily involve an invasion of judicial power<sup>11</sup>.

18 In this regard, the distinction between powers that are exclusively judicial and those that take their character from the body or tribunal on which they are conferred is important. A statute affecting litigation with respect to the guilt of a particular individual or group of individuals charged with criminal offences will involve quite different considerations from one affecting litigation as to rights which the Parliament may choose to have determined either by a judicial or non-judicial body.

19 In *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*<sup>12</sup> this Court was concerned with legislation enacted during the pendency of an application to the Court to quash a decision of the Australian Conciliation and Arbitration Commission empowering the deregistration of an organisation of employees. Before the application could be heard, the Parliament passed an Act cancelling the registration of the organisation. The Act was held valid. The Court said<sup>13</sup>:

" It is well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution.

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8 (1998) 72 ALJR 456; 151 ALR 312

9 [1967] 1 AC 259.

10 (1973) 129 CLR 231 at 250.

11 See also *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 503, 579-580.

12 (1986) 161 CLR 88.

13 (1986) 161 CLR 88 at 96-97.

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'Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action'.

...

It is otherwise when the legislation in question interferes with the judicial process itself, rather than with the substantial rights which are at issue in the proceedings ...

Here the situation is very different. The Cancellation of Registration Act does not deal with any aspect of the judicial process. It simply deregisters the Federation, thereby making redundant the legal proceedings which it commenced in this Court. It matters not that the motive or purpose of the Minister, the Government and the Parliament in enacting the statute was to circumvent the proceedings and forestall any decision which might be given in those proceedings."

20 Those observations are directly applicable to the present case. It may be added that the fact that they were made in a context relating to the judicial power of the Commonwealth, and with reference to Ch III of the Constitution, makes the plaintiff's reliance upon *Kable* of no avail.

21 An attempt was made by the plaintiff to demonstrate that the Act interfered with the judicial process itself. Reliance was placed upon the language of s 3, providing that for the purposes of the relevant planning scheme "the column 3 purposes are taken to include" certain specified purposes. This use of language was compared with the legislation considered by the Court of Appeal of New South Wales in *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations*<sup>14</sup>. The legislation considered in that case was, however, quite different from the Act. It specifically addressed current litigation, prescribed that for the purposes of determining the issues in that litigation certain facts were to be taken as established, and dealt with the costs of the litigation.

22 The plaintiff's legal proceedings are not mentioned in the Act. The manifest purpose and effect of the Act is to establish a legal regime affecting the Morayfield shopping centre land, binding the developer, the Council, and all other persons including the plaintiff. Indeed, assuming that the ultimate objective of the

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14 (1986) 7 NSWLR 372.

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Government was to bring about the result that the Morayfield shopping centre could lawfully be constructed as expeditiously as possible, it would not have been sufficient to enact legislation which merely addressed the plaintiff's legal proceedings. In order to achieve the desired result, it was necessary to enact legislation binding all those who might possibly be concerned, in the future, with the proposed development and all those who might avail themselves of the broad standing provision in respect of "a person" provided by s 4.3(8) of the Planning and Environment Act.

23        The same consideration answers the plaintiff's argument that this was legislation *ad hominem*. An examination of the terms of the Act reveals that this is not so, and the objective attributed to Parliament by the plaintiff is such that it could not be so. Legislation *ad hominem* would not have achieved that objective. It was not enough to deal with the plaintiff's legal proceedings. It was necessary to ensure that the proposed development was lawful.

24        The challenge to the validity of the legislation fails.

25        The demurrers by the first and third defendants should be allowed. There should be judgment for the defendants in the action with costs.