

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

THE ATTORNEY-GENERAL OF
THE COMMONWEALTH & ANOR

APPELLANTS

AND

ANTONY GORDON OATES

RESPONDENT

Attorney-General v Oates [1999] HCA 35
Date of Order: 23 June 1999
Date of Publication of Reasons: 5 August 1999
P47/1998

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders and declaration of the Full Court of the Federal Court of Australia made 6 July 1998 and in place thereof order that the appeal to the Full Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

H C Burmester QC, Acting Solicitor-General for the Commonwealth with
P R Macliver for the appellants (instructed by Australian Government
Solicitor)

G A Flick SC with P J Hannan for the respondent (instructed by
Michell Sillar)

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Commonwealth Law Reports.

CATCHWORDS

Attorney-General v Oates

Companies - Procedure - Commencement of prosecutions - Indictable offences against *Companies (Western Australia) Code* - Application of Corporations Law, s 1316 - Time period between conduct alleged to give rise to offences and commencement of prosecution in excess of five years - Whether prosecution must be commenced within five years - Whether consent of Minister always necessary to commence prosecution if five years has elapsed.

Criminal law and procedure - Indictable offences against *Companies (Western Australia) Code* - Prosecution of offences - Commencement of prosecutions - Whether prosecution must be commenced within five years - Whether consent of Minister always necessary to commence prosecution if five years has elapsed.

Corporations Act 1989 (Cth), ss 39, 73.

Corporations Law, s 1316.

Judiciary Act 1903 (Cth), ss 38(e), 39, 39B.

Companies (Western Australia) Code, ss 229(1), 229(4), 570.

Companies and Securities (Interpretation and Miscellaneous Provisions) (Western Australia) Code, ss 34, 35, 36.

Corporations (Western Australia) Act 1990 (WA), ss 2, 10, 80A(2), 85, 87, 91.

Justices Act 1902 (WA), ss 20, 42, 51, 97.

1 GLEESON CJ, McHUGH, GUMMOW, KIRBY AND HAYNE JJ. What follows are the reasons of the Court for the orders made on 23 June 1999 allowing this appeal from the Full Court of the Federal Court (Foster, von Doussa and Finkelstein JJ)¹ and ordering that the appeal to the Full Court against the decision of Moore J² be dismissed with costs.

2 The appellants, the Attorney-General of the Commonwealth and the Minister for Justice of the Commonwealth, challenge the holding by the Full Court that, upon its true construction, s 1316 of the Corporations Law imposes a five year time limit within which any prosecution for an offence against the Corporations Law must be commenced.

3 Section 1316 of the Corporations Law states:

"Despite anything in any other law, proceedings for an offence against this Law may be instituted within the period of 5 years after the act or omission alleged to constitute the offence or, with the Minister's consent, at any later time."

The facts

4 On 12 January 1995, an officer of the Australian Securities Commission ("the ASC") laid a number of complaints against the respondent in accordance with ss 42 and 97 of the *Justices Act* 1902 (WA) ("the Justices Act"). Section 42 provides that proceedings before Justices shall be commenced by a complaint and s 97 applies Pt V of the Justices Act where a defendant is charged before Justices with an indictable offence. Sixteen of the 17 charges were for offences against ss 229(1) and (4) and 570 of the *Companies (Western Australia) Code* ("the WA Code")³.

1 *Oates v Williams* (1998) 84 FCR 348.

2 *Oates v Williams* (1998) 81 FCR 296.

3 Section 229(1) and (4) provided:

"(1) An officer of a corporation shall at all times act honestly in the exercise of his powers and the discharge of the duties of his office.

Penalty –

(a) in a case to which paragraph (b) does not apply – \$5,000; or

(Footnote continues on next page)

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Section 570 is a general penalty provision. The remaining charge was of conspiracy with others to defraud, contrary to s 412 of the *Criminal Code* (WA)⁴. The charges concern dealings involving three corporations, Bell Resources Ltd, Bond Corporation Holdings Ltd and Freefold Pty Ltd, and the offences allegedly were committed in the period between 26 August 1988 and 29 May 1989. Section 36 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) (Western Australia) Code* ("the WA Interpretation Code") provided for the laying of complaints by the ASC and its delegates.

- 5 On 5 January 1995, before the date of the complaint, the then Minister for Justice of the Commonwealth had consented to the institution of proceedings against the respondent with respect to the alleged offences against ss 229 and 570 of the WA Code.

Reasons of the Federal Court

- 6 In the Federal Court, the respondent sought relief under s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") against the present appellants. He claimed that he had been denied procedural fairness in that the Minister had failed to give him a hearing before consenting to the institution of proceedings.

- 7 An action seeking mandamus and certiorari against those officers of the Commonwealth who are the present appellants had been commenced in the Supreme Court of Western Australia. Given the terms of s 75(v) of the Constitution, this would have involved the exercise of federal jurisdiction by the Supreme Court. A law of the Parliament under s 77(iii) of the Constitution conferring that jurisdiction was required to support any such proceedings. The

(b) where the offence was committed with intent to deceive or defraud the company, members or creditors of the company or creditors of any other person or for any other fraudulent purpose – \$20,000 or imprisonment for 5 years, or both.

...

(4) An officer or employee of a corporation shall not make improper use of his position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation.

Penalty: \$20,000 or imprisonment for 5 years, or both."

- 4 Section 412 was repealed by s 24 of the *Criminal Law Amendment Act* 1990 (WA).

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investment by s 39 of the Judiciary Act of State courts with federal jurisdiction is expressed in broad terms. However, the effect of s 38(e) of the Judiciary Act⁵ is to render the jurisdiction of the High Court exclusive of the jurisdiction of the Supreme Court in the matter commenced there by the respondent⁶. Section 39B(1) is an independent investment of jurisdiction in the Federal Court in matters within s 75(v) of the Constitution which are brought against certain officers of the Commonwealth, including the present appellants.

8 Moore J dismissed the application to the Federal Court⁷. His Honour held that the Minister had not been required to accord procedural fairness to the respondent when the Minister exercised the function under s 1316 of the Corporations Law. That being so, Moore J found it unnecessary to deal with the appellants' primary submission that s 1316 did not require consent to the bringing of the prosecutions against the respondent for offences against ss 229 and 570 of the WA Code⁸. An appeal by the present respondent was successful and the Full Court granted a declaration that "[t]he consent given on 5 January 1998 under s 1316 of the Corporations Law to the institution of prosecutions against the [respondent] is void".

9 In *Jago v District Court (NSW)*⁹, Brennan J referred to authorities which establish "that there is no time limit for the commencing of a prosecution unless statute so provides in particular cases". The Full Court held¹⁰ that the phrase in s 1316, "[d]espite anything in any other law", is "a reference to any law, whether common law or statute, that is inconsistent with the requirement that a prosecution must be commenced within five years". The appellants in this Court challenge that holding and its corollaries: that prosecutions for offences against the Corporations

5 Section 38(e) identifies "matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court".

6 *State Bank (NSW) v Commonwealth Savings Bank* (1984) 154 CLR 579 at 583.

7 (1998) 81 FCR 296.

8 (1998) 81 FCR 296 at 318.

9 (1989) 168 CLR 23 at 41.

10 (1998) 84 FCR 348 at 353.

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Law, even those prosecuted on indictment where otherwise there is no time limit¹¹, must be instituted within the five year period; and, if that period has elapsed, the consent of the Minister is always necessary. The appellants submit that s 1316 is facultative rather than restrictive in character and does not impose any special limitation upon the period within which all prosecutions, whether conducted summarily or on indictment, must be commenced.

- 10 Even if those submissions be rejected, the appellants submit that their appeal nevertheless should succeed. This is because they challenge the further holdings of the Full Court that, before giving consent under s 1316, the then Minister had been subject to an obligation to afford to the respondent procedural fairness and that that obligation had not been discharged.

The legislative scheme

- 11 As has been indicated, the relevant alleged offences were against the law of Western Australia, namely the WA Code. It is appropriate to indicate the statutory path by which s 1316 was said to be applicable and the statutory basis for the conferral of functions on a Commonwealth, not a State, Minister in s 1316.
- 12 By the time the complaint was laid, the WA Code had been repealed. The repeal was effected, commencing on 1 January 1991, by the joint operation of ss 2, 85 and 87 of the *Corporations (Western Australia) Act* 1990 (WA) ("the WA Corporations Act"). However, s 85(1) thereof operated to continue the operation of the WA Code and the WA Interpretation Code in respect of the offences with which the respondent subsequently was charged. The sub-section produced the result that these laws continue to operate of their own force unless the matters arose after 1 January 1991. Both the WA Code and the WA Interpretation Code fell within the definition of the term used in s 85(1), "the co-operative scheme laws"¹². The general purpose of the new legislation was to replace the co-operative scheme, of which the WA Code was a part, with what is known as the national scheme. However, it should be noted that s 85(2) of the WA Corporations Act provides that where statutes such as the WA Code or the WA Interpretation Code are

11 However, criminal proceedings may be stayed for the purpose of preventing injustice to the accused caused by undue delay: *Jago v District Court (NSW)* (1989) 168 CLR 23.

12 The expression "the co-operative scheme laws" is defined in s 84 of the WA Corporations Act.

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inconsistent with statutes forming part of the new national scheme, such as the WA Corporations Act itself, the former do not operate to the extent of the inconsistency.

13 Section 91(3) of the WA Corporations Act states:

"The Commonwealth Minister has, in respect of the prosecution of offences against the co-operative scheme laws, the same functions and powers as he or she has in respect of the prosecution of offences against a national scheme law of this jurisdiction."

14 The expression a "national scheme law of this jurisdiction" is defined in s 3(1) of the WA Corporations Act so as to include the WA Corporations Act itself and "the Corporations Law of Western Australia". That term in turn is defined in s 3(1) as meaning "the provisions applying by reason of section 7". Section 7 of the WA Corporations Act applies, as a law of Western Australia, the Corporations Law set out in s 82 of the *Corporations Act* 1989 (Cth) ("the Commonwealth Corporations Act"). By these means, s 1316 of the statute enacted by the Commonwealth and identified as "the Corporations Law" became, from 1 January 1991, notionally re-enacted as a law of the State of Western Australia.

15 Section 91(3) of the WA Corporations Act uses the term "Commonwealth Minister" and, by s 3(1) of the WA Corporations Act, this has the meaning given to "the Minister" by s 80A(2) of the Corporations Law. Section 80A(2) had been inserted, with effect from 18 December 1990, by the *Corporations Legislation Amendment Act* 1990 (Cth)¹³. It states that, where a provision of the Corporations Law refers to a Minister, using that term without specifying which Minister is referred to, the expression means:

"(a) if, for the time being, 2 or more Ministers administer the *Corporations Act* 1989 – any one of those Ministers; or

(b) otherwise – the Minister for the time being administering that Act".

The term "Minister" as used in s 80A(2) is defined by sub-s (1) of that provision so as to mean "one of the Queen's Ministers of State for the Commonwealth and, in relation to any particular Minister, includes any other Minister or member of the Executive Council for the time being acting for or on behalf of that Minister". The Administrative Arrangements Order in force on 5 January 1995, when the then Minister for Justice gave the consent to which reference has been made, provided

13 Schedule 1.

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that the Commonwealth Corporations Act was administered by the Minister who administered the Attorney-General's Department. At that time, the Ministers of State who administered that Department were the Attorney-General, the Minister for Justice and the Minister for Consumer Affairs¹⁴.

- 16 The effect of s 91(3) of the WA Corporations Act, the text of which is set out earlier in these reasons, is, by force of State law, to repose certain functions in Ministers of the Commonwealth. In *Byrne v Garrisson*¹⁵, Gowans J considered a provision in similar terms found in s 265(1) of the *Companies Act 1958* (Vic) ("the 1958 Victorian Act"). His Honour said that he was¹⁶:

"not at all satisfied that it is necessary to find power and authority conferred by statute on the Attorney-General. His consent is made a condition of the valid institution of proceedings. In giving it or withholding it he performs a ministerial function. Its exercise will determine the validity or otherwise of proceedings taken. But I doubt whether he needs any power conferred by the legislature to give his consent."

To the same effect, in the context of the power conferred on the Minister by s 6A(1) of the *Migration Act 1958* (Cth), are the observations of Gibbs CJ in *Minister for Immigration and Ethnic Affairs v Mayer*¹⁷. His Honour said:

"The Minister needs no statutory authority to execute an instrument in writing by which he determines that someone has the status of a refugee. ... The existence of the instrument in writing is an objective fact which, if the person in question is the holder of a temporary entry permit which is in force, will satisfy condition (c) of s 6A(1)".

However, the preferable approach is to construe the provision in question as impliedly conferring upon the Minister statutory authority to make the determination or give the consent which satisfies a condition imposed by the statute. That was the interpretation of s 6A(1)(c) given by Mason, Deane and

14 The Administrative Arrangements Order appeared in the *Commonwealth of Australia Gazette*, S199, 6 June 1994.

15 [1965] VR 523.

16 [1965] VR 523 at 532.

17 (1985) 157 CLR 290 at 295.

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Dawson JJ in *Mayer*¹⁸, and we would apply it to s 1316. Indeed, as will now appear, the Commonwealth law, which is part of the legislative arrangements, relevantly proceeds on the footing that it is s 1316 itself which is expressed to confer a power or function on the Minister. To this law we now turn.

17 Section 1316 applies in this case as a law of Western Australia. Particular considerations arise where the officer selected by State legislation for the exercise of such a function is a Commonwealth Minister or other officer of the Commonwealth. In such a situation, the co-operative legislation proceeds on the basis that Commonwealth legislation is necessary.

18 Section 73 of the Commonwealth Corporations Act empowers the Governor-General to make regulations which are necessary or convenient to be prescribed for carrying out or giving effect to that statute. Regulation 3 of the Corporations (Commonwealth Authorities and Officers) Regulations (Cth)¹⁹ provides that "authorities and officers of the Commonwealth have the functions and powers that are expressed to be conferred on them by or under a corresponding law".

19 The regulation states that a person will answer the description of "officer of the Commonwealth" if he or she is an "officer of the Commonwealth within the meaning of Part 8 [of the Commonwealth Corporations Act]". Section 38 of the Commonwealth Corporations Act (which is in Pt 8) defines "officer" in relation to the Commonwealth as including "a Minister". The phrase "corresponding law" in reg 3 is to be construed so as to include the WA Corporations Act. The result is, and the contrary has not been suggested, that the Commonwealth has assented to the drawing in of its Ministers for the operation, as part of the law of Western Australia, of such provisions as s 1316 of the Corporations Law.

The construction of s 1316

20 It is convenient now to turn to what we have identified as the threshold issue, namely the true construction of s 1316 of the Corporations Law. The appellants submit that s 1316 does not after five years confer an immunity from prosecution in respect of indictable as well as summary offences. The appellants fix upon the opening expression "[d]espite anything in any other law" as indicating that the

18 (1985) 157 CLR 290 at 301-302. Their Honours' reasoning was followed and applied in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 273 and *Kruger v The Commonwealth* (1997) 190 CLR 1 at 157.

19 SR No 457 of 1990.

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section displaces what otherwise would be obstacles and does so by empowering or authorising the commencement of proceedings which otherwise would be barred by reason of a time limitation imposed by some other statute.

21 The appellants submit that if the section had been designed to require the written consent of the Minister to all prosecutions instituted more than five years after the alleged offence, whether or not there was any other law imposing a time limitation, there would have been no occasion to include the words "[d]espite anything in any other law". Further, it is said that if the legislature had intended to prohibit the institution of any prosecution more than five years after the commission of the alleged offence, without the Minister's consent, it would have been more appropriate to have used the word "shall" rather than "may" in relation to the first of the alternatives referred to in s 1316. For example, s 163(4) of the *Trade Practices Act* 1974 (Cth) provides that certain "[p]roceedings ... shall not be instituted except with the consent in writing ...".

22 The body of law directly in point here is that of Western Australia. The appellants point to s 51 of the Justices Act. This requires that proceedings for a "simple offence" be instituted within 12 months from the time when the matter of complaint arose. The phrase "simple offence" is defined in s 4 of that statute as an offence punishable by summary conviction and s 20 provides that proceedings for any offence not declared to be treason, felony, a crime or a misdemeanour, and for which no other provision is made, may be heard and determined in a summary manner. Other relevant provision was made by s 35 of the WA Interpretation Code. This provides that an offence against the WA Code that was not punishable by imprisonment or was punishable by imprisonment for a period not exceeding six months was, unless the contrary intention appeared, punishable summarily (s 35(1)). An offence punishable by imprisonment for a period exceeding six months was punishable on indictment (s 35(2)). The offences against the WA Code with which the respondent was charged attract a penalty of imprisonment for five years. That meant that s 35(2) of the WA Interpretation Code applied so as to make the offences punishable on indictment.

23 That regime was subject to the operation of sub-ss (3) and (4) of s 35. The effect of sub-s (3) was that an offence otherwise punishable on indictment would be punishable summarily if the proceedings were brought in a court of summary jurisdiction and the prosecutor requested the court to hear and determine the proceedings. However, sub-s (4) limited the power of the court of summary jurisdiction so that it might not impose a period of imprisonment exceeding two years in respect of any one offence against the WA Code or impose cumulative periods of imprisonment exceeding in the aggregate five years in respect of offences against the WA Code.

- 24 Section 34 of the WA Interpretation Code had made provision in terms resembling s 1316 of the Corporations Law. It stated:

"Notwithstanding anything in any other law, proceedings for an offence against a relevant Code may be instituted within the period of 5 years after the act or omission alleged to constitute the offence or, with the consent of the Ministerial Council, at any later time."

- 25 Section 3(c) of the WA Interpretation Code provided that for the purposes of that Code, a "relevant Code" included any Code to which the *Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act 1981* (WA) ("the WA Application Act") applied by reason of a relevant application provision in an Act. Section 4 of the WA Interpretation Code went on to provide that a provision in an Act was a relevant application provision in relation to a Code if the provision stated that the WA Application Act applied to the Code concerned. Section 4 of the WA Code provided that the WA Code had effect subject to and in accordance with the WA Application Act. Accordingly, s 4 of the WA Code was a relevant application provision, and the WA Code was a "relevant Code" for the purposes of s 34 of the WA Interpretation Code.

- 26 The present litigation has proceeded on the footing that s 91(3) of the WA Corporations Act operates to displace s 34 of the WA Interpretation Code in respect of proceedings for offences against the WA Code which had not been instituted before the commencement of the WA Corporations Act. It will be recalled that s 85(2) of the WA Corporations Act provided that a statute such as the WA Code did not operate after 1 January 1991 if it was inconsistent with a

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provision of the new national scheme, such as s 91(3) of the WA Corporations Act²⁰.

- 27 The immediate point is that, were it not for s 1316 of the Corporations Law (and before it, s 34 of the WA Interpretation Code) making "other provision" within the meaning of s 20 of the Justices Act, the Justices Act would have applied with the result that numerous offences under the WA Code punishable by summary conviction could not have been prosecuted in Western Australia unless they were detected and prosecution commenced within the 12 month period stipulated in s 51 of the Justices Act. There would have been no such time limitation upon offences punishable on indictment. That was conceded. But this state of the law with respect to punishment on indictment did not remove the perceived mischief respecting the prosecution of offences summarily. It was with that mischief that legislation such as s 34 and s 1316 was concerned. That is the nub of submissions for the appellants.

Support from the legislative history

- 28 The legislative history supports these submissions. Section 10 of the WA Corporations Act has the effect of relevantly applying in relation to the Corporations Law and as a law of Western Australia the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act"). Section 15AB of the Interpretation Act therefore applies. This permits consideration of material which is capable of assisting in the ascertainment of the meaning of s 1316 if s 1316 be, as is the case, otherwise "ambiguous or obscure". In any event, at common law, the legislative history of s 1316 and other statutes *in pari materia* would be a matter to which regard could be had as throwing light on the mischief²¹ to the correction of which a provision such as s 1316 was directed²².

20 Section 85(3) stated:

"For the purposes of subsection (2), a co-operative scheme law is inconsistent with a national scheme law if it would be inconsistent within the meaning of section 109 of the Constitution of the Commonwealth of Australia if the national scheme law were an act of the Commonwealth."

21 See as to that term *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 614-615.

22 *Wacando v The Commonwealth* (1981) 148 CLR 1 at 25-27; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315; *CIC* (Footnote continues on next page)

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- 29 In Western Australia, before the enactment of s 34 of the WA Interpretation Code, provision had been made by s 381(2) of the *Companies Act* 1961 (WA) ("the 1961 WA Act"). This had stated:

"Notwithstanding anything in any Act proceedings for any offence against this Act may be brought within the period of three years after the commission of the alleged offence or, with the consent of the Minister, at any later time."

- 30 Section 381(2) of the 1961 WA Act mirrored sub-s (2) inserted in s 383 of the *Companies Act* 1938 (Vic) by s 17 of the *Companies Act* 1955 (Vic)²³. This change had followed the acceptance of a recommendation by the Statute Law Revision Committee (Vic). The Committee had recommended as follows²⁴:

"TIME FOR PROSECUTING OFFENCES

44. Evidence was given to the Committee of many persons suspected of offences under the Companies Acts escaping prosecution owing to the fact that most offences under the Companies Acts are punishable on summary conviction and must be prosecuted within twelve months of commission. Owing to the complicated nature of most frauds relating to companies and firms and the fact that lengthy investigation is usually necessary before a case for prosecution is ready for presentation it will be readily seen that a limitation period of twelve months is far too short.

Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 99, 112-113. It may be noted that in the United States the phrase "legislative history" tends to be used more narrowly to refer to the institutional progress of a bill to enactment: Kingsford Smith, "Interpreting the Corporations Law – Purpose, Practical Reasoning and the Public Interest", (1999) 21 *Sydney Law Review* 161 at 191; Eskridge and Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy*, 2nd ed (1995) at 733-734.

- 23 The *Companies Act* 1938 (Vic) as so amended was repealed by s 2 of the 1958 Victorian Act which, in turn, was replaced by the *Companies Act* 1961 (Vic). This contained, in s 381(2), a provision in the terms of s 381(2) of the 1961 WA Act.
- 24 *Report on Amendments of the Statute Law to deal with Fraudulent Practices by Persons Interested in the Promotion and/or Direction of Companies and by Firms*, (1954) at 19.

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Consideration was given by the Committee to a proposal that all offences under the Companies Acts should be indictable offences but this would have the disadvantage of rendering indictable a number of minor offences which could more conveniently be dealt with summarily.

45. The Committee therefore recommend—

- (a) that, notwithstanding the general provision in the *Companies Act* 1938 relating to summary offences, any offence under the Act be prosecutable within three years after its commission; and
- (b) that power be given to the Attorney-General to authorize prosecution after a period of three years has elapsed from the commission of an offence if he is satisfied that the investigation into the company could not be properly completed within that period and that no injustice will be done by prosecution after that time."

In introducing the Bill for the amendment to s 383, the Attorney-General had referred to the recommendations of the Committee and said that what was then cl 18 gave effect to par 45 of the Committee's Report. The Attorney-General continued²⁵:

"Section 210 of the Justices Act 1928 provides that summary offences shall be triable only within one year after they have been committed, unless otherwise specially provided in any case. In the case of offences under the Companies Act it is often impossible to obtain the information within that time. Indeed, often the fact that an offence has been committed is not readily ascertainable within one year after the commission of the offence. Accordingly, it is proposed to extend the period in which proceedings may be brought for offences against the Act from one year to three years after the commission of the offence, and to provide further that with the consent of the Attorney-General, prosecutions may be brought at any later time."

31 Earlier provision to deal with the mischief addressed by the Attorney-General in the above passage had been made in the *Companies Act* 1948 (UK). Special

25 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 19 October 1955 at 1104.

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provision as to summary proceedings was enacted in s 442. Sub-sections (1) and (2) thereof stated:

"(1) All offences under this Act made punishable by any fine may be prosecuted under the Summary Jurisdiction Acts, and proceedings under those Acts in respect of any such offence may, notwithstanding anything to the contrary therein, be taken by the Director of Public Prosecutions or by the Board of Trade at any time within twelve months from the date on which evidence sufficient in the opinion of the Director or the Board, as the case may be, to justify the proceedings comes to his or their knowledge:

Provided that proceedings shall not be so taken more than three years after the commission of the offence.

(2) For the purposes of the foregoing subsection, a certificate of the Director of Public Prosecutions or the Board of Trade as to the date on which such evidence as aforesaid came to his or their knowledge shall be conclusive evidence thereof."

32 Section 11 of the *Summary Jurisdiction Act* 1848 (UK) had fixed a period of six months from the commission of the offence as the time within which summary proceedings had to be brought. The enactment of s 442 implemented a recommendation in the *Report of the Committee on Company Law Amendment* ("the Cohen Committee") which had reported in 1945²⁶. In par 168, after referring to s 11 of the 1848 statute, the Committee had said:

"This provision has led to no prosecution being instituted in many cases, for example, where the offence does not come to light until the company has been wound up and where prosecution by indictment is not suitable owing to the relative smallness of the offence. As regards bankruptcy offences, section 164(2) of the Bankruptcy Act provides that summary proceedings shall not be instituted after one year from the first discovery thereof either by the official receiver or by the trustee in the bankruptcy, or, in the case of proceedings instituted by a creditor, by the creditor, nor in any case shall they be instituted after three years from the commission of the offence. We recommend that a similar provision should be inserted in the Companies Act so that summary proceedings would be capable of being instituted within one year of discovery by the Registrar of Companies, or, if the company is in

26 Cmd 6659.

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liquidation, by the liquidator, provided that not more than three years has elapsed from the commission of the offence."

33 There is nothing which detracts from the significance to be attached to this well established pattern of legislation by the use in s 1316 of "despite" rather than, as in the earlier statutes, "notwithstanding". The word "notwithstanding" is given as a synonym for "despite" in the Oxford English Dictionary²⁷.

34 It is also necessary to recall that s 34 of the WA Interpretation Code and s 1316 of the Corporations Law each formed part of what were intended to be single integrated systems of corporate regulation enacted in all jurisdictions of the Commonwealth. State law concerning the bringing of prosecutions for offences was not, at the times s 34 and s 1316 were enacted (and still is not), uniform and differed from Commonwealth law on this subject. Some States maintained distinctions between felonies, misdemeanours and other offences; some did not²⁸. Provisions about the time within which proceedings might be brought differed widely from State to State and operated by reference to different criteria²⁹. It is, then, not surprising that a facultative provision like s 34 or s 1316 was included in the relevant legislation and it is not surprising that each took the form it did when it was intended to operate against very diverse legislative backgrounds.

27 *New Shorter Oxford English Dictionary*, (1993), vol 1 at 647.

28 For example, Victoria abandoned the distinction between felonies and misdemeanours in 1981: *Crimes Act* 1958 (Vic), s 322B(1). New South Wales still retains the distinction: *Crimes Act* 1900 (NSW), ss 9 and 10.

29 In Victoria, a 12 month time limit applies to the prosecution of summary offences: *Magistrates' Court Act* 1989 (Vic), s 26(4). The classification of offences as summary or indictable is made by reference variously to the statutory source of the offence (see, eg, *Crimes Act*, s 2B; *Occupational Health and Safety Act* 1985 (Vic), s 47(3)), the penalty applicable to the offence (see *Sentencing Act* 1991 (Vic), s 112), or the terms of the provision creating the offence (see, eg, *Drugs, Poisons and Controlled Substances Act* 1981 (Vic), s 71). By contrast, in Queensland, a one year time limit applies to the prosecution of a "simple offence". That term is defined to mean any offence punishable on summary conviction before a Magistrates Court by fine, imprisonment or otherwise (see *Justices Act* 1886 (Q), ss 4 and 52).

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15.

Conclusion

- 35 We conclude that the appellants succeed in their submission that s 1316 did not require the Minister's consent to the bringing of prosecutions against the respondent for offences under ss 229 and 570 of the WA Code. That being so, there is no occasion to consider the further submission which is presented on the footing that if such consent was necessary it was attended by an obligation to accord procedural fairness and that this obligation had not been discharged in favour of the respondent.