

THE COMMONWEALTH OF AUSTRALIA AND ANOTHER

v.

THE STATE OF QUEENSLAND AND ANOTHER

JUDGMENT
(ORAL)
5.11.87

MASON C.J.
WILSON J.
BRENNAN J.
DEANE J.
DAWSON J.
TOOHEY J.
GAUDRON J.

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On the hearing of this demurrer to the plaintiffs' action for declaratory relief the question arose whether this Court should in the exercise of its discretion to grant relief of that kind proceed to determine the matters sought to be raised in the action and by the defendants' demurrer. By their statement of claim the plaintiffs originally sought a declaration -

" that each of sections 6, 7, 8, 8A, 28 and Part III of the Industrial (Commercial Practices) Act (Queensland) 1984-1987 is inconsistent with the:

- Conciliation and Arbitration Act 1904;
- Trade Practices Act 1974;
- Crimes Act 1914

and is to that extent invalid".

The main thrust of the plaintiffs' case is that the relevant provisions of the Industrial (Commercial Practices) Act ("the Queensland Act") are inconsistent with the provisions of ss.45D and 45E of the Trade Practices Act 1974 (Cth) and with s.30K of the Crimes Act 1914 (Cth) and are to that extent invalid. The plaintiffs ask us to determine as

abstract questions of law important and complex questions which are necessarily involved in the making of such a declaration. The statement of claim does not allege or particularize an actual case in which an issue as to the validity or operation of the Queensland Act has arisen for decision. The plaintiffs' counsel concedes that, even if the plaintiffs' arguments are accepted by this Court, the provisions of the Queensland Act will have some valid operation by reason of the presence in that Act of a reading down provision (s.5). Just what that valid operation might be would depend on a consideration of the ambit of a number of heads of Commonwealth legislative power in their application to a wide variety of hypothetical factual situations. The Court would not undertake the task of charting in the abstract the outer limits of a legislative power of the Commonwealth in order to ascertain what the valid operation of a State law might be. Moreover, to determine the operation of the Queensland Act would call for an interpretation of its provisions as they might apply to that variety of hypothetical factual situations.

These considerations would have warranted a refusal to exercise the Court's discretion to grant declaratory relief in the terms originally sought in the statement of claim. To have determined the questions thus raised would have

resulted in the giving of what would have amounted virtually to an advisory opinion.

Counsel for the plaintiffs then sought to amend the prayer for relief in the statement of claim in order to seek -

" 1. A declaration that sections 6, 7, 8, 8A, 28 and Part III of the Industrial (Commercial Practices) Act (Queensland) 1984-1987 are invalid or alternatively inoperative to the extent that they cover conduct that contravenes section 45D and 45E with their additional operation by virtue of section 6 of the Trade Practices Act 1974 or would, but for sections 45D(1B), 45D(3), 85(6) or 88(7) or (7A) contravene sections 45D or 45E.

2. A declaration that sections 6, 7, 8, 8A, 28 and Part III of the Industrial (Commercial Practices) Act (Queensland) 1984-1987 are invalid or alternatively inoperative to the extent that they cover conduct that contravenes section 30K of the Crimes Act 1914, or would but for the presence of reasonable cause or excuse, contravene section 30K."

The amended declaration which the plaintiffs seek relates to conduct which contravenes or would, but for particular defences, contravene the specified provision of Commonwealth law. To determine whether a State law is invalid by virtue of s.109 in its application to conduct of a kind proscribed by a law of the Commonwealth or would be invalid but for the provisions of the reading down section,

it is necessary to identify with precision the elements and character of the conduct which is said to fall under both laws. Unless the Court were confident that the elements and character of the conduct proscribed by both laws were identical, it would be inappropriate to make a declaration in the abstract which would be invoked in future concrete cases.

Differences between the texts of the two sets of laws, as exist in this case, and differences in the general law of criminal responsibility affecting the operation of the respective statutes make it undesirable to endeavour to identify, in advance of a concrete set of facts, the content of the statutes which are said to attract the operation of s.109. The undesirability is more manifest when a reading down provision converts the question from one of inconsistency as such to one of the scope and operation of the State law.

For these reasons, the declaration sought in the amended prayer should be refused.

It follows that the action should be dismissed with costs.