HIGH COURT OF AUSTRALIA

HAYNE J

JOOSSE & ANOR — APPLICANTS

AND

AUSTRALIAN SECURITIES AND INVESTMENT COMMISSION — RESPONDENT

Joosse v Australian Securities and Investment Commission; Burke v The Queen; Bowers v Askin; Young v Deputy Commissioner of Taxation; David Keys Australia Pty Ltd v Textile Clothing and Footwear Union of Australia
(M35/1998) [1998] HCA 77
Date of Order: 15 December 1998
Date of Publication of Reasons: 21 December 1998

ORDER

1. *Application dismissed.*

2. *Certify for counsel.*

Representation:

W Joosse appeared in person for the applicants

D M J Bennett QC, Solicitor-General for the Commonwealth with P J Hiland for the respondent (instructed by Australian Securities and Investment Commission)

HIGH COURT OF AUSTRALIA

HAYNE J

BURKE APPLICANT

AND

THE QUEEN RESPONDENT

21 December 1998
M63/1998

ORDER

1. *Application dismissed.*

2. *Certify for counsel.*

Representation:

S Gillespie-Jones for the applicant

J D McArdle QC for the respondent (instructed by Solicitor for Public Prosecutions (Victoria))

HIGH COURT OF AUSTRALIA

HAYNE J

BOWERS APPLICANT

AND

ASKIN & ANOR RESPONDENTS

21 December 1998
M65/1998

ORDER

1. *Application dismissed with costs.*

2. *Certify for counsel.*

Representation:

The applicant appeared in person

W J Martin QC with T S Monti for the respondents (instructed by Berrigan & Doube)

HIGH COURT OF AUSTRALIA

HAYNE J

YOUNG APPLICANT

AND

DEPUTY COMMISSIONER OF TAXATION RESPONDENT

21 December 1998
M93/1998

ORDER

1. *Application dismissed with costs.*

2. *Certify for counsel.*

Representation:

The applicant appeared in person

D M J Bennett QC, Solicitor-General for the Commonwealth with G L Ebbeck for the respondent (instructed by Australian Government Solicitor)

HIGH COURT OF AUSTRALIA

HAYNE J

DAVID KEYS AUSTRALIA PTY LTD & ANOR APPLICANTS

AND

TEXTILE CLOTHING AND FOOTWEAR UNION OF AUSTRALIA RESPONDENT

21 December 1995
M95/1998

ORDER

1. *Application dismissed with costs.*

2. *Certify for counsel.*

Representation:

I S Henke, a Director of each applicant, appeared in person for the applicants

D C Langmead for the respondent (instructed by Maurice Blackburn & Co)

CATCHWORDS

Joosse & Anor v Australian Securities and Investment Commission

Burke v The Queen

Bowers v Askin & Anor

Young v Deputy Commissioner of Taxation

David Keys Australia Pty Ltd & Anor v Textile Clothing and Footwear Union of Australia

High Court - Practice and procedure - Removal of causes - Points raised in application not arguable.

Constitutional Law - Sovereignty - Whether certain legislation invalid due to a "break in sovereignty".

Constitutional Law - Whether certain legislation invalid because royal assent not validly given.

International Law - Sovereignty - Whether certain legislation made pursuant to treaties invalid because treaties not registered as international arrangements.

Words and phrases - "sovereignty".

Constitution, covering cl 5, s 58.
Judiciary Act 1903 (Cth), s 40.
Royal Style and Titles Act 1973 (Cth).
Statute of Westminster Adoption Act 1942 (Cth).

1 HAYNE J. Application is made in each of five separate proceedings for an order removing the cause into this Court pursuant to s 40 of the *Judiciary Act* 1903 (Cth). It is said that each of the causes arises under the Constitution or involves its interpretation.

2 I have heard the five applications together because they raise similar issues. It is as well to say something briefly about the proceedings that give rise to the present applications.

Joosse & Anor v Australian Securities and Investment Commission (M35 of 1998)

3 The applicants were directors of a company, Bellechic Pty Ltd, that is now in liquidation. On 2 April 1998, the Australian Securities and Investment Commission began proceedings in the Magistrates Court at Melbourne against both applicants alleging breaches of ss 475(1), 530A(1)(a) and (2)(a) of the Corporations Law. The applicants allege that certain Acts - described as "*The Magistrates Court Act*, *The County Court Act & The Supreme Court Act*, *The Police Act*, *The Corporations Law* (Cth), *The Workplace Relations Act* 1996 and *The Taxation Administration Act* 1953 (Cth)" are invalid or inoperative.

Burke v The Queen (M63 of 1998)

4 This application relates to a criminal proceeding pending in the County Court of Victoria. The applicant has been presented on a presentment alleging three counts of using a false document, three counts of attempting to obtain a financial advantage by deception and two counts of obtaining a financial advantage by deception. The applicant has been arraigned but no jury has been empanelled. The trial is presently fixed to begin in April 1999. It would seem that the legislation that is attacked is the *Statute of Westminster Adoption Act* 1942 (Cth), *Australia Act* 1986 (Cth), *Judiciary Act* 1903 (Cth), *County Court Act* 1958 (Vic), *Legal Profession Practice Act* 1958 (Vic), *Police Regulation Act* 1958 (Vic), *Magistrates' Court Act* 1989 (Vic) and the *Supreme Court Act* 1986 (Vic).

Bowers v Askin & Anor (M65 of 1998)

5 In 1990, the respondents commenced an action in the County Court of Victoria against the applicant claiming damages for negligence in relation to veterinary care allegedly given by the applicant to a racehorse. The action proceeded through interlocutory stages until 1996 when it was struck out. It has since been reinstated and fixed for trial. The applicant contends that the *Magistrates' Court Act* 1989 (Vic), *County Court Act* 1958 (Vic), *Supreme Court Act* 1986 (Vic) and what he describes as "the Rules of Tort, Contract, Negligence and damages as arising from the Common Law of the United Kingdom as affects Australia" are invalid or inoperative.

Young v Deputy Commissioner of Taxation (M93 of 1998)

6 The material that has been filed reveals little about the underlying proceeding. It seems, however, that it is a proceeding instituted by the Deputy Commissioner and is pending in the Federal Court in its bankruptcy jurisdiction. The legislation said to be in issue is the *Magistrates' Court Act* 1989 (Vic), *County Court Act* 1958 (Vic), *Supreme Court Act* 1986 (Vic), "*Income Tax Assessment Act* 1936/42 (Cth)", *Income Tax Assessment Act* 1997 (Cth), *Taxation Administration Act* 1953 (Cth), *Crimes (Taxation Offences) Act* 1980 (Cth), *Fringe Benefits Tax Assessment Act* 1986 (Cth), *Fringe Benefits Tax (Application to the Commonwealth) Act* 1986 (Cth), *Commonwealth Electoral Act* 1918 (Cth) and the *Bankruptcy Act* 1966 (Cth).

David Keys Australia Pty Ltd & Anor v Textile Clothing and Footwear Union of Australia (M95 of 1998)

7 Little about the underlying proceeding is revealed by the material filed in this application other than that it concerns companies in some way associated with the applicants in the first matter (M35 of 1998) and is pending in the Federal Court of Australia. The legislation said to be in issue is the *Federal Court of Australia Act* 1976 (Cth), the *Workplace Relations Act* 1996 (Cth), the *Commonwealth Electoral Act* 1918 (Cth), the *Occupational Superannuation Standards Act* 1987 (Cth) and the Occupational Superannuation Standards Regulations 1987 (Cth).

8 In those cases where I have said little is known about the underlying proceeding, the fact that so little is known would, itself, be reason enough to refuse the application. It is not demonstrated in those cases that the cause, or any part of the cause, arises under the Constitution or involves its interpretation.

9 In the case of *Burke v The Queen* there is a different but no less important difficulty in the way of granting the application to remove the cause. To grant that application would lead to the fragmentation of the criminal process and that is reason enough to refuse it. This Court has said repeatedly that the criminal process should not be interrupted by testing interlocutory rulings that may be given in the course of proceedings[1].

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1 See, for example, *R v Iorlano* (1983) 151 CLR 678 at 680 per Gibbs CJ, Murphy, Wilson, Brennan and Dawson JJ; *Re Rozenes; Ex parte Burd* (1994) 68 ALJR 372 at 373 per Dawson J; 120 ALR 193 at 195; *R v Elliott* (1996) 185 CLR 250 at 257 per Brennan CJ, Gummow and Kirby JJ.

10 It is as well, however, to say something about the substance of the points raised in each of the applications.

11 In all five proceedings the applicants contend that there has been an unremedied, perhaps even irremediable, "break in sovereignty" in Australia that leads to the conclusion that some (perhaps much) legislation apparently passed by the Parliament of the Commonwealth, or one or more State Parliaments, is invalid. The written arguments that have been submitted (and supplemented orally) are not always articulated clearly and logically. Nevertheless, the following elements can be identified in the various submissions.

12 First, the Constitution is an Act of the United Kingdom Parliament. Yet it has been held in this Court that sovereignty rests with the people of Australia[2]. This is said to lead to the invalidating of certain of the provisions of the Constitution or, perhaps, to those provisions no longer operating. It is also said to lead to the invalidating of some State or Commonwealth legislation. Why this should be so was not spelled out clearly. Secondly, the references in the Constitution to the Queen were intended as references to the Queen in the sovereignty of the United Kingdom[3], yet since the *Royal Style and Titles Act* 1973 (Cth) the Queen has been the Queen of Australia and there has been no alteration to the Constitution. Accordingly, so the argument goes, the Royal Assent has not been validly given to a number of Acts of the Commonwealth Parliament. Thirdly, Australia attained international recognition of its independent and sovereign identity when it signed the Treaty of Versailles or when it became a founding member of the International Labor Organisation. Yet treaties made by Australia, including in particular the arrangements reflected in the *Statute of Westminster Adoption Act* 1942 (Cth), were not registered as international arrangements as was required by those parts of the Treaty of Versailles establishing the League of Nations. Again this is said to lead in some unspecified way to the invalidating of some legislation.

13 These three principal themes were developed to varying degrees and in various ways in each of the applications now under consideration. Some, but not all, also sought to develop two other points: first that the *Commonwealth Electoral Act* being affected by the earlier mentioned difficulties, no legislation passed after a particular date was valid for the want of valid election of members

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2 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 70 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138 per Mason CJ; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 172-173 per Deane J.

3 Constitution, covering cl 2.

of parliament and second that some international treaties concerning human rights have direct operation in Australian domestic law.

14 Whether or not it is strictly open to me to do so, I am content to deal with the applications on the basis that each advances all of the various points that have been urged in support of any of the particular applications to remove.

15 Nevertheless, each application should be dismissed. None of the applicants identifies a point having sufficient merit to warrant removal of the cause concerned into this Court. The points that it is sought to agitate are not arguable.

16 "Sovereignty" is a concept that legal scholars have spent much time examining. It is a word that is sometimes used to refer to very different legal concepts and for that reason alone, care must be taken to identify how it is being used. H L A Hart said of the idea of sovereignty that[4]:

> "It is worth observing that an uncritical use of the idea of sovereignty has spread similar confusion in the theory both of municipal and international law, and demands in both a similar corrective. Under its influence, we are led to believe that there *must* in every municipal legal system be a sovereign legislator subject to no legal limitations; just as we are led to believe that international law *must* be of a certain character because states are sovereign and incapable of legal limitation save by themselves. In both cases, belief in the necessary existence of the legally unlimited sovereign prejudges a question which we can only answer when we examine the actual rules. The question for municipal law is: what is the extent of the supreme legislative authority recognised in this system? For international law it is: what is the maximum area of autonomy which the rules allow to states?"

For present purposes, what is critical is: what is the extent of the supreme legislative authority recognised in this system and what are the rules for recognising what are its valid laws[5]?

17 When one examines the history of Australia since 1788 it is possible to identify the emergence of what is now a sovereign and independent nation.

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4 H L A Hart, *The Concept of Law*, (1961) at 218. See also Wade, "The Basis of Legal Sovereignty", (1955) 13 *Cambridge Law Journal* 172; Heuston, "Sovereignty", in Guest (ed), *Oxford Essays in Jurisprudence*, (1961) at 198-222; Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined", (1976) 92 *Law Quarterly Review* 591.

5 Hart, *The Concept of Law*, (1961) at 97-120.

Opinions will differ about when sovereignty or independence was attained[6]. Some steps along that way are of particular importance - not least the people of the colonies agreeing "to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution"[7]. But when it is said that Australia is now a "sovereign and independent nation" the statement is in part a statement about politics and in part about what Stephen J in *China Ocean Shipping Co v South Australia*[8] called "the realities of the relationship this century between the United Kingdom and Australia". What those realities were in 1900 can be gauged from the fact that the delegates negotiating with the Imperial authorities in 1900 about the terms in which the Imperial Parliament was to enact the Constitution were well content to seek to persuade the Colonial Office that the "Commonwealth appears to the Delegates to be clearly a 'Colony'"[9]. As the century moved on, further attention was given to the place of Imperial legislation in the self-governing dominions. The Imperial Parliament enacted the *Statute of Westminster* in 1931 but it was not until 1942 that the Commonwealth Parliament enacted legislation adopting the *Statute of Westminster*[10]. And then in 1986 the *Australia Acts* were passed. All these Acts deal with the place of Imperial legislation in Australia. Each can be seen as reflecting the then current view of the relationship between Australia and the United Kingdom. In large part, then, each deals with an aspect of political sovereignty.

18 Similarly, the way in which Australia has engaged in international dealings can be seen to have changed since federation. And it may be that the Treaty of Versailles or some other international instrument can be seen as according Australia a place in international dealings which it may not have had before the instrument was signed. But what is significant for the disposition of the present applications is not whether the Westminster Parliament could now, or at some earlier time might have been expected to, pass legislation having effect in Australia. Neither is it whether Australia is treated by the international

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6 *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 181 per Barwick CJ, 194 per Gibbs J, 208-214 per Stephen J, 240 per Aickin J; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 184 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ, 191-192 per Gaudron J.

7 Constitution - Preamble.

8 (1979) 145 CLR 172 at 209.

9 Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, (1901) at 352.

10 *Statute of Westminster Adoption Act* 1942 (Cth).

community as having a particular status. The immediate question is what law is to be applied in the courts of Australia. The former questions about the likelihood of Imperial legislation and of international status can be seen as reflecting on whether Australia is an independent and sovereign nation. But they do so in two ways: whether some other polity can or would seek to legislate for this country and whether Australia is treated internationally as having the attributes of sovereignty. Those are not questions that intrude upon the immediate issue of the administration of justice according to law in the courts of Australia. In particular, they do not intrude upon the question of what law is to be applied by the courts.

19 That question is resolved by covering cl 5 of the Constitution. It provides:

> "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State".

It is, then, to the Constitution and to laws made by the Parliament of the Commonwealth under the Constitution that the courts must look. And necessarily, of course, that will include laws made by the States whose Constitutions are continued, the powers of whose parliaments are continued, and the existing laws of which were continued (subject, in each case, of course, to the Constitution) by ss 106, 107 and 108 of the Constitution. It is not relevant to the inquiry required by covering cl 5 to inquire how Australia has been treated by other nations in its dealings with them or to inquire whether the Westminster Parliament could or could not pass legislation that has effect in Australia. Covering cl 5 provides that the Constitution and the laws made by the Parliament of the Commonwealth under the Constitution are binding on the courts, judges, and people of every State and of every part of the Commonwealth. None of the points that the applicants seek to make touches the validity of any of the laws that are in question or would make those laws any the less binding on the courts, judges, and people.

20 As I have noted earlier, the second of the three themes identified by the applicants relies on the *Royal Style and Titles Act*. As I understand it, the principal burden of the argument is that an Act of Parliament, changing the style or title by which the Queen is to be known in Australia, worked a fundamental constitutional change. The fact is, it did not. So far as Commonwealth legislation is concerned, it is ss 58, 59 and 60 of the Constitution that deal with the ways in which the Royal Assent may be given to bills passed by the other elements of the Federal Parliament. So far as now relevant, s 58 governs. It provides that the Governor-General "shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name". And there is no material that would suggest that has not been done in the case of each Commonwealth Act that now is challenged.

21 The third element in the submissions made by the applicants, and the one to which greatest significance was given in oral argument, asserts that significance is to be attached to certain of Australia's international dealings. These contentions fail to take account of certain basic principles. First, provisions of an international treaty to which Australia is a party do not form part of domestic law unless incorporated by statute[11]. It follows that what one of the applicants referred to as various human rights instruments do not of themselves give rights to or impose obligations on persons in Australia. Similarly, the Charter of the United Nations does not have the force of law in Australia[12]. Next, in so far as this limb of the argument sought to make some point about "sovereignty" it is again necessary to note the distinction between sovereignty in international law and sovereignty in the sense described by Hart as "the supreme legislative authority recognised in this system"[13]. The points which the applicants seek to make are points touching the first of these matters, not the second. It is the second that is the critical question in the courts and it is the second that is resolved by having regard to covering cl 5.

22 Lastly, it is necessary to deal with the contentions about the *Commonwealth Electoral Act*. These contentions depend entirely upon acceptance of one or other of what I have earlier called the three main themes of argument. Because I consider that they are not arguable, no separate question arises about the *Commonwealth Electoral Act*. Nevertheless, it may be noted that it was established very early in the life of the federation that if there are any defects in the election of a member of a house of the Parliament the proceedings of that house are not invalidated by the presence of a member without title[14]. Moreover, there are at least some circumstances in which invalidating defects in the *Commonwealth Electoral Act* will not invalidate the elections held under it[15].

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11 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 480-481 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

12 *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582 per Barwick CJ and Gibbs J.

13 Hart, *The Concept of Law*, (1961) at 218.

14 *Vardon v O'Loghlin* (1907) 5 CLR 201 at 208 per Griffith CJ, Barton and Higgins JJ.

15 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 53 per Gibbs J. (See also the statement as to the effect of the order in these matters recorded at (1975) 7 ALR 593 at 651.)

23 For these reasons, the points which it is sought to agitate in this Court have insufficient merit to warrant the orders that are sought. Each application is dismissed. In each of matters M65 of 1998, M93 of 1998 and M95 of 1998 the applicants will pay the respondents' costs. I make no order for costs in either M35 of 1998 or M63 of 1998 as each arises out of a criminal or quasi-criminal matter. I certify for counsel.