[2006] WASCA 260

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	:	THE COURT OF APPEAL (WA)
CITATION	:	GLEW & ANOR -v- SHIRE OF GREENOUGH [2006] WASCA 260
CORAM	:	WHEELER JA PULLIN JA BUSS JA
HEARD	:	6 NOVEMBER 2006
DELIVERED	:	1 DECEMBER 2006
FILE NO/S	:	CACV 3 of 2006
BETWEEN	:	WAYNE KENNETH GLEW First Appellant KYLIE JUNE GLEW Second Appellant AND SHIRE OF GREENOUGH Respondent

ON APPEAL FROM:

Jurisdiction	:	DISTRICT COURT OF WESTERN AUSTRALIA
Coram	:	WAGER DCJ
Citation	:	GLEW & ANOR -v- SHIRE OF GREENOUGH [2005] WADC 245
File No	:	APP 1 of 2005

Catchwords:

Turns on own facts

Legislation:

Acts Amendment and Repeal (Courts and Legal Practice) Act 2003 (WA)
Commonwealth Constitution, s 51, s 109, s 128
Constitution Act 1889 (WA), s 2
Judiciary Act 1903 (Cth), s 78B

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

First Appellant	:	In person
Second Appellant	:	No appearance
Respondent	:	Mr K E F Yin

Solicitors:

First Appellant	:	In person
Second Appellant	:	No appearance
Respondent	:	Civic Legal

Case(s) referred to in judgment(s):

Broken Hill South Ltd (Public Officer) v The Commissioner of Taxation (New South Wales) (1937) 56 CLR 337
Glennan v Commissioner of Taxation [2003] HCA 31; (2003) 77 ALJR 1195
Matthews v The Chicory Marketing Board (Victoria) (1938) 60 CLR 263
McCawley v R [1920] AC 691
Shaw v Jim McGinty in his capacity as Attorney General [2006] WASCA 231
South Australia v The Commonwealth (1942) 65 CLR 373

The Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73
Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1

Case(s) also cited:

Attorney-General for the State of Western Australia v Marquet (2003) 217 CLR 545
Australian Capital Television Pty Ltd v The Commonwealth of Australia (1992) 177 CLR 106
Heiner v Scott (1914) 19 CLR 381
Leask v The Commonwealth of Australia [1996] HCA 29; (1996) 187 CLR 579
Makucha v Albert Shire Council [1996] 1 Qd R 53
McGinty v The State of Western Australia (1995) HCA 46; (1996) 186 CLR 140
New South Wales v The Commonwealth (1975) 135 CLR 337
Residual Assco Group Ltd v Spalvins [2000] HCA 33; (2000) 202 CLR 629
The Attorney-General for Queensland (at the relation of Goldsbrough, Mort & Co Ltd) v The Attorney-General for the Commonwealth (1915) 20 CLR 148
The Commonwealth of Australia v The State of New South Wales (1923) 33 CLR 1
University of Wollongong v Metwally (1985) 1 NSWLR 722

WHEELER JA:

Background

1 On 9 June 2004, the Shire of Greenough filed a summons in the Local Court at Fremantle against the appellants, Mr and Mrs Glew, seeking arrears of rates for the financial year 2003-2004, penalty interest and costs. The appellants filed an intention to defend and objected to the jurisdiction of the Fremantle Local Court. The action was subsequently transferred to the Local Court at Geraldton, and later listed for trial.

2 There was evidence establishing that, at the relevant time, the appellants were the registered owners of property within the Shire of Greenough, which land was subject to the imposition of rates and service charges. There is no dispute about the calculation of the rates, service charges and penalties, and it was not disputed that the sum claimed was outstanding at the time of hearing.

3 The appellants relied, however, on a variety of constitutional arguments. Unfortunately, those constitutional arguments reveal a number of fundamental misconceptions concerning the Commonwealth and State Constitutions, and they appear to misunderstand aspects of the legislative process and, in particular, the referendum process, pursuant to s 128 of the Constitution. Before I turn to the grounds of appeal, therefore, it is desirable, so that the appellants will understand the following discussion, to set out a very bare outline of the relationships between Commonwealth and State Constitutions and the Commonwealth and State legislative powers which flow from them.

4 I should note that I refer to "the appellants'" arguments because, although Mrs Glew did not appear, she wrote to the Court adopting Mr Glew's arguments.

Australian constitutional structure

5 The settlement of the Australian colonies began as an executive act of the Imperial Crown. Letters Patent - in effect, public instructions - from the Crown were issued to governors. However, in 1823 the Act commonly called the *New South Wales Act* (4 Geo IV, c 96) was passed by the Imperial Parliament. It conferred upon the governor power to enact laws for the "peace welfare and good government" of New South Wales, with the advice of the Legislative Council. Because legislation can restrict or alter the prerogatives of the Crown, this Act began the process of restricting the power of the Crown to govern the colonies. In time,

further Acts of the United Kingdom Parliament not only set up local legislatures, but also provided that those legislatures could set up, and amend, their own constitutions. One of those Acts is referred to in the preamble to the *Constitution Act 1889*, which is an Act passed by the Western Australia legislature of the day pursuant to that authority. When the Commonwealth Constitution was passed as an Act of the United Kingdom Parliament, the former colonies became States.

6 The Commonwealth Constitution is binding on all Courts and Parliaments throughout the country. To the extent that State or Commonwealth law is inconsistent with it, that State or Commonwealth law is invalid. It is, however, a Constitution which was superimposed on, and assumes the existence of, pre-existing State Constitutions which not only continued, but which were able to be altered in accordance with their terms.

7 So far as legislative power was concerned, s 51 of the Commonwealth Constitution listed most of the legislative powers of the Commonwealth. Those powers were not expressed to be exclusive. That is, the Commonwealth Constitution contemplated that both State and Commonwealth Parliaments would be able to make laws in relation to the matters set out in that list. It was only where the Commonwealth had passed a law in relation to one of those listed subject matters, and a State law was inconsistent with the Commonwealth law, that the State law would become invalid or inoperative (s 109). That would not be because the State lacked constitutional power to pass the law, but simply because the Commonwealth legislation was, to the extent that the Commonwealth had passed law, paramount. There is a short list of powers which are exclusive to the Commonwealth Parliament. They include, for example, the power to make laws with respect to the seat of government of the Commonwealth (s 52(i)).

8 Taxation, which is referred to in s 51(ii), is a non-exclusive power, so that both State and Commonwealth Parliaments can pass laws dealing with taxation. However, because of the existence of s 109 of the Commonwealth Constitution, it is possible for the Commonwealth Parliament to give priority to its own taxation law, and/or to impose taxation at a rate such that the practical effect would be that it would not be politically possible for a State to tax the same subject matter. This was the effect achieved in relation to income tax in a case to which the appellants refer, ***South Australia v The Commonwealth*** (1942) 65 CLR 373. In other areas of taxation, where the Commonwealth has not

legislated, it remains both politically and practically possible for the States to impose taxation; an example of such a tax would be land tax.

9 The power of the State Parliaments to legislate stems in each case from the Constitution of the relevant State. In relation to Western Australia, s 2 of the *Constitution Act 1889* (WA) ("the State Constitution") empowers the State to make laws for the "peace, order and good government of Western Australia". That is a very extensive grant of legislative power. The words "peace, order and good government" are to be understood as conferring ample and plenary power on the States to legislate for any matter having a connection with the State (***Union Steamship Co of Australia Pty Ltd v King*** (1988) 166 CLR 1). The State can make any "fact, circumstance, occurrence or thing" in or connected with the State a subject of legislation (***Broken Hill South Ltd (Public Officer) v The Commissioner of Taxation (New South Wales)*** (1937) 56 CLR 337, at 375 per Dixon J).

10 That broad legislative power in the State Constitution is qualified in only three ways. First, as I have noted, in some very limited areas the Commonwealth Constitution provides that the Commonwealth's legislative power is exclusive. That prevents the State from validly legislating at all in that area. Secondly, in some cases, as I have noted, the State can validly legislate, but if there is a valid Commonwealth law inconsistent with the State law, then the Commonwealth law will prevail while it is in operation. Thirdly, some State Constitutions have some restrictions relating to the way in which legislation concerning particular subject matters can be passed, such as s 73 of the State Constitution.

11 So far as the State Constitutions are concerned, unless there is some particular provision in the State Constitution prescribing the "manner and form" for amending particular parts of the Constitution, then the State Parliament is free to amend the State's Constitution in any way it sees fit. That is, the State Constitutions can generally be amended as easily as any other Act. As the Privy Council has said, they occupy "precisely the same position as a Dog Act or any other Act, however humble its subject matter" (***McCawley v R*** [1920] AC 691 at 704).

12 The Commonwealth Constitution can be altered only in the manner provided by s 128 of the Constitution. There is no express power conferred on the Commonwealth Parliament to pass laws proposing amendments to the Constitution. However, such power is implied by the first paragraph of s 128, which provides that a proposed law for the alteration of the Constitution must be passed in a particular manner by

each House of the Commonwealth Parliament, as part of the process of altering the Constitution. The Commonwealth Parliament, then, can propose an alteration to the Constitution to include in it a matter over which the Commonwealth, at the time of passing the law for the proposed change, has no power at all. This was what happened in relation to the referendum concerning local government, to which the appellants refer. The Commonwealth Parliament has no power over local government. However, pursuant to s 128, it passed a law submitting to the electors the question of whether the Commonwealth Constitution should be amended so as to make provision for local government.

13 Once a proposed law for the alteration of the Commonwealth Constitution is passed by both Houses of the Parliament of the Commonwealth in the manner prescribed, it must be submitted to the electors in each State and Territory. If it is passed by the electors in the manner prescribed by s 128, it is to be presented to the Governor-General for the Queen's assent.

14 If it does not so pass, then the referendum fails and the Constitution is not amended. However, the failure of a referendum does not prevent the Commonwealth from proposing amendments on the same subject matter in the future. Nor does the failure of a referendum question either expressly or impliedly prohibit either the Commonwealth Parliament or the Parliament of any State from passing legislation which is otherwise within its power and which touches on the same subject matter as the proposed referendum question. Against that background, I now turn to the appellants' assertions.

15 Reading the grounds of appeal and the submissions together, the issues of concern to the appellants appear to be the following.

Ground 1 - *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA)

16 This ground is concerned with the passage of the abovementioned 2003 Act. It is contended by the appellants that the Local and District Courts of Western Australia do not have lawful authority to administer law within the State since the passage of that Act. The concern appears to be that the Act has "removed Her Majesty and the Crown" from a large number of Acts within Western Australia, including the *District Court of Western Australia Act 1969* (WA) and the *Local Courts Act 1904* (WA).

17 The Act referred to changes the terminology in a large number of statutes of Western Australia. In broad terms, references to the Crown or

to her Majesty are changed to references to the Governor or the State. The first observation to be made about the Act is that it purports to change terminology only, not constitutional reality. That is, it does not attempt to alter the relationship between the Crown and the various bodies contained within the Acts amended.

18 There is no constitutional prohibition upon the alteration of the terminology which refers to the Crown or to her Majesty. Further, the changes of terminology contained within the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* are consistent with constitutional reality. The Governor is, for constitutional purposes, effectively the Queen's representative in Western Australia (s 50 State Constitution) and so is, for practical purposes, "her Majesty" within Western Australia. The "State" is simply another way of referring to the executive power of the Crown in right of the State of Western Australia. Parallel terminology can be found in the Commonwealth Constitution. For example, although the Commonwealth Constitution provides, by s 61, that the executive power of the Commonwealth is "vested in the Queen and is exercisable by the Governor-General as the Queen's representative", a number of sections of the Constitution refer simply to "the Commonwealth" as a shorthand expression for the entity exercising that executive power. A striking example is s 119, which provides that "the Commonwealth shall protect every State against invasion ... ".

19 As is explained in a text book popular in constitutional law courses, "when we talk of the Crown in the context of Australian government in the late twentieth century, we refer to a complex system of which the formal head is the monarch. We do not refer to a replica of sixteenth century English government, where real power was vested in and exercised by the monarch personally. Rather, we mean that collection of individuals and institutions (Ministers, public servants, a Cabinet, the Executive Council, a Governor or Governor-General, and statutory agencies) which exercise the executive functions of government" (Hanks & Cass, "Australian Constitutional Law: Materials and Commentary", 6th ed (1999) at [7.1.6]).

20 The *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* effects no constitutional alteration. Even if it did, and even if it did so invalidly, the consequence would not be that the Courts suddenly lacked jurisdiction. The only consequence of that Act having been passed in a manner which was constitutionally invalid, would be that the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003*, or portions of it, would be invalid and that the Courts and bodies in relation to which

it purported to amend terminology continued to function, but under the former terminology.

Ground 2 - fee simple

21 I regret that I simply do not understand ground 2. It is unintelligible in any legal sense. It appears to assert that there is some constitutional impediment to the State Parliament exercising legislative authority in relation to fee simple or freehold land. Because of the ample plenary power conferred by s 2 of the State Constitution, any proposition to that effect would simply be wrong. Fee simple is, as the appellants say, the most ample and unfettered title known to the common law, but Parliament can change the common law as it sees fit. For a general survey of State power over, and State laws affecting, land, see Bradbrook *et al*, "Australian Real Property Law", 3rd ed (2002) at [1.13].

Grounds 3 and 4 - referendums

22 These grounds appear to revolve around the fate of the 1988 referendum, one question of which was concerned with recognition of local government, and the 1999 referendum, which proposed the alteration of the Commonwealth Constitution so as to move towards what could be described as a "republican" form of government. Each referendum was, of course, defeated.

23 So far as the 1999 referendum is concerned, the proposition appears to be that the failure of that referendum means that it is not open to any State or Federal government to "remove" her Majesty from the Commonwealth or State constitutional structure. The short answer to that proposition is that there is no legislation involved in this appeal by which either the Commonwealth or the State Parliament has sought to do so.

24 So far as the 1988 referendum is concerned, the proposition appears to be that, because that referendum was defeated, there arises some prohibition upon the State which would preclude it from passing legislation setting up local government authorities. That proposition misunderstands the referendum process. The 1988 referendum contained a proposal to amend the Commonwealth Constitution by inserting a proposed s 119A, which proposed section would have required each State to provide for the establishment and continuance of a system of local government. Because it was defeated, there is no Commonwealth constitutional requirement that a State provide a system of local government. However, the absence of a *requirement* to establish a system of local government does not imply any absence of power to do so. Each

State has always had, pursuant to the power to legislate for the peace, order and good government of that State, a power to set up a system of local government as the State sees fit.

25 In Western Australia, s 52 of the State Constitution imposes a positive duty on the State government to maintain a system of local governing bodies. The appellants, as I understand it, assert that s 52 is invalid, because it was not passed by referendum. There seems to me to have been no constitutional requirement that it be passed by referendum. However, even if it were invalid, there would still remain power pursuant to s 2 of the State Constitution to set up a system of local government, such as that contained in the *Local Government Act 1995* (WA).

Ground 5 - taxation

26 This ground asserts that the State Parliament cannot legislate for the imposition of taxation by way of the levying of rates on real property (and therefore cannot authorise local governments to do so). The first step in the argument is that rates are taxes. That may well be correct, since a tax is, broadly, a compulsory exaction of money by a public authority, for a public purpose (***Matthews v The Chicory Marketing Board (Victoria)*** (1938) 60 CLR 263, at 276 per Latham CJ). The next step is that the power to impose taxation is, therefore, conferred upon local government. This, too, may well be correct. It should be noted that it is, of course, open to the State and Federal Parliaments to confer law-making powers on authorities other than the Parliament itself: ***The Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan*** (1931) 46 CLR 73.

27 However, the rest of the argument is incorrect. The rest of the argument is either that, because the Commonwealth Parliament has power to legislate with respect to taxation, the States cannot, or, alternatively, it may be that the scheme of uniform taxation which was held to be valid in ***South Australia v The Commonwealth*** (*supra*) somehow has the effect of rendering State laws providing for rates on real property invalid, pursuant to s 109 of the Commonwealth Constitution. However, as I have pointed out, the taxation power is not one which is exclusive to the Commonwealth, but one which is concurrent, so that laws imposing taxation can be passed by both State and Federal Parliaments. Further, s 109 renders invalid or inoperative only State laws which are inconsistent with relevant Commonwealth law. There is no Commonwealth law relevant to local council rates, since the Commonwealth has not enacted legislation "covering the field" of rates on land. This ground, too, must fail.

Section 78B *Judiciary Act 1903* (Cth)

28 A further point raised by Mr Glew in oral argument was to the effect that, because no notice had issued pursuant to s 78B of the *Judiciary Act 1903* (Cth) prior to the hearing before the learned Magistrate, that and any subsequent proceedings were "invalid". I assume, although there was, strictly speaking, no evidence of the assertion, that 78B notices were issued only prior to the hearing of the appeal to Wager DCJ. As a matter of statutory construction, s 78B does not have the effect of rendering "invalid" any proceeding in which a notice should have been, but was not, given: ***Glennan v Commissioner of Taxation*** [2003] HCA 31; (2003) 77 ALJR 1195 at [13]. Further, s 78B is not intended to apply where there is merely an allegation that a constitutional point arises, if that point is unarguable, or vexatious: ***Shaw v Jim McGinty in his capacity as Attorney General*** [2006] WASCA 231 at [42].

Conclusion

29 As his Honour Magistrate King recognised, the appellants' submissions are based on a misunderstanding of the Commonwealth and State Constitutions and are entirely lacking in legal merit. The appeal must fail and Mr and Mrs Glew must pay their rates.

30 **PULLIN JA**: I agree with Wheeler JA

31 **BUSS JA**: I agree with Wheeler JA.

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	:	THE COURT OF APPEAL (WA)
CITATION	:	GLEW & ANOR -v- SHIRE OF GREENOUGH [2006] WASCA 260 (S)
CORAM	:	WHEELER JA PULLIN JA BUSS JA
HEARD	:	6 NOVEMBER 2006
DELIVERED	:	1 DECEMBER 2006
SUPPLEMENTARY DECISION	:	10 JANUARY 2007
FILE NO/S	:	CACV 3 of 2006
BETWEEN	:	WAYNE KENNETH GLEW First Appellant KYLIE JUNE GLEW Second Appellant AND SHIRE OF GREENOUGH Respondent

ON APPEAL FROM:

Jurisdiction	**:**	DISTRICT COURT OF WESTERN AUSTRALIA
Coram	**:**	WAGER DCJ
Citation	**:**	GLEW & ANOR -v- SHIRE OF GREENOUGH [2005] WADC 245
File No	**:**	APP 1 of 2005

Catchwords:

Costs - Turns on own facts

Legislation:

Public Interest Disclosure Act 2003 (WA), s 13

Result:

Appellants to pay respondent's costs

Category: B

Representation:

Counsel:

First Appellant	:	In person
Second Appellant	:	No appearance
Respondent	:	Mr K E F Yin

Solicitors:

First Appellant	:	In person
Second Appellant	:	No appearance
Respondent	:	Civic Legal

Case(s) referred to in judgment(s):

Nil

Case(s) also cited:

Nil

1 **WHEELER JA**: At the delivery of judgment in this matter on 1 December 2006, counsel for the respondent applied for an order that the appellants pay the respondent's costs of the appeal on a solicitor/client basis. By way of a letter dated 4 December 2006, the respondent's solicitors withdrew that application and instead sought an order that the appellants pay the respondent's costs of the appeal to be taxed.

2 The appellants were granted leave to file written submissions in response by 15 December 2006.

3 The appellants make six submissions as to why they should not be required to pay the respondent's costs. The first of the submissions refers to the *Public Interest Disclosure Act 2003* (WA), in particular s 13 and s 14. Section 13 reads as follows:

> "**13. Immunity for appropriate disclosure of public interest information**
>
> A person who makes an appropriate disclosure of public interest information to a proper authority under section 5 -
>
> a) incurs no civil or criminal liability for doing so; and
>
> b) is not, for doing so, liable –
>
> (i) to any disciplinary action under a written law…"

"Public interest information" is defined by s 3 as:

> "… information that tends to show that, in relation to its performance of a public function … a public officer … is, has been, or proposes to be, involved in –
>
> (a) improper conduct;
>
> (b) an act or omission that constitutes an offence under a written law…"

"Public officers" include, *inter alia*, Ministers of the Crown and judicial officers.

4 These sections are not relevant to this case. The allegations made by the appellants against various public officers in relation to the constitutionality of the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA) are vexatious and wholly without foundation, and cannot be classified as "public interest information". In any event, the order for costs against the appellants is not sought as a result of their purported disclosure of any such information, but rather as a result of the unsuccessful appeal brought in this Court by the appellants, in relation to the decision that they must pay their local government rates. It is not necessary to set out s 14, which is irrelevant for substantially the same reasons.

5 The appellants' second submission asserts that there is a "Federal Public Interest and Disclosure Act", which provides a fund to cover legal costs in matters of public interest. There is no Act which performs this function, and even if there were, it would not be applicable in this situation for the reasons outlined above.

6 The third submission asserts that it is an offence under the *Criminal Code* (WA) to not report an indictable offence. No indictable offence is in issue in this case. Submission 4 refers to s 73 *Constitution Act 1889* (WA), which is irrelevant to the issue of costs. Submissions 5 and 6 relate to the respondent's application for indemnity costs that has since been withdrawn.

7 In summary, the appellants' submissions do not demonstrate any reason as to why costs should not follow the event. The order will therefore be that the appellants pay the respondent's costs of the appeal to be taxed.

8 **PULLIN JA**: I agree with Wheeler JA.

9 **BUSS JA**: I agree with Wheeler JA.