SHORT PARTICULARS OF CASES
APPEALS

CANBERRA
OCTOBER 2018

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CLUBB v EDWARDS & ANOR (M46/2018)

Court from which cause removed: Supreme Court of Victoria

Date cause removed: 23 March 2018

The question that arises in this appeal is whether s 185D of the *Public Health and Wellbeing Act 2008* (Vic) ("the Act") impermissibly burdens the implied freedom of political communication.

This appeal raises a number of issues similar to those raised by the appeal in *Preston v Avery & Anor* (H2/2018).

The appellant was charged with an offence under s 185D on 4 August 2016. It was alleged that she approached a couple at the entrance of the East Melbourne Fertility Control Clinic, spoke to them and handed them a pamphlet. In proceedings before the Magistrates Court, the appellant challenged the validity of the s 185D on the ground that it infringed the implied freedom of political communication in the Commonwealth Constitution. The Magistrate rejected the appellant's constitutional challenge and found the charge was proven. The appellant appealed to the Supreme Court of Victoria. That appeal was removed to the High Court by order of Gordon J on 23 March 2018.

Section 185D of the Act states: "[a] *person must not engage in prohibited behaviour within a safe access zone*". Section 185B(1) defines a "*safe access zone*" as "*an area within a radius of 150 metres from premises at which abortions are provided*", and "*prohibited behaviour*" as: "*communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is likely to cause distress or anxiety*".

The appellant contends that the legal and practical operation of the communication prohibition in s 185D is extremely wide: it purports to proscribe many communications which would be characterised as political, such as, whether the Commonwealth government should encourage or discourage abortions, and whether federal laws should be changed to restrict or facilitate abortions. The appellant also contends that s 185D does not pursue an end that is compatible with constitutional systems. While the objects clause in the Act refers to safety, well-being and privacy, the appellant contends that the communication prohibition in s 185D in fact deters communications which are apt to cause discomfort, an end which is not compatible with constitutionally prescribed systems. The appellant submits that in its present operation s 185D burdens one side of the abortion debate more than the other and so it discriminates and it distorts political communication. The appellant further submits that the prohibition is not necessary as there are equally practicable, less burdensome alternatives.

The grounds of the appeal include:

The learned Magistrate wrongly held:

(i) that communications in relation to abortion are not, as a matter of law, political communications; and

(ii) that s 185D of the *Public Health and Wellbeing Act* 2008 (Vic) so far as it prohibited communications about abortion in a safe access zone in a manner that was able to be seen or heard by persons accessing or attempting to access or leaving premises at which abortions are provided that is reasonably likely to cause anxiety or distress does not impermissibly burden the implied freedom of political communication implied by the Commonwealth Constitution and was valid.

The Attorneys-General of South Australia, Western Australia, Queensland, New South Wales, and the Commonwealth have filed Notices of Intervention.

A number of organisations have been granted leave to appear as amicus curiae, limited to their written submissions, namely the Castan Centre for Human Rights Law, the Fertility Control Clinic and the Human Rights Law Centre. The Access Zone Action Group was refused leave to appear as amicus curiae.

This matter is listed to be heard together with *Preston v Avery & Anor* (H2/2018).

PRESTON v AVERY & ANOR (H2/2018)

Court from which cause removed: Supreme Court of Tasmania

Date cause removed: 23 March 2018

The question that arises in this proceeding is whether s 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) ("the Act") impermissibly burdens the implied freedom of political communication to the extent that it prohibits 'a protest in relation to terminations that is able to be seen or heard by a person accessing or attempting to access premises at which terminations are provided'.

The appellant was charged on three separate occasions, 5 and 8 September 2014 and 14 April 2015, with offences under s 9(2) of the Act. The first charge related to the appellant holding placards and handing out leaflets near the entrance to the Specialist Gynaecology Centre in Hobart. The second charge related to the same conduct, and included a conversation between the appellant and a woman wishing to access the Centre. The third charge involved the appellant and two other people holding placards outside the Centre and included the appellant failing to comply with a police officer's direction to leave the immediate area.

In proceedings before the Magistrates Court, the appellant challenged the validity of the protesting prohibition on the ground, inter alia, that it infringed the implied freedom of political communication in the Commonwealth Constitution. The Magistrate rejected the appellant's constitutional challenge and found all three of the charges proved. The appellant appealed to the Supreme Court of Tasmania. That appeal was removed to the High Court by order of Gordon J on 23 March 2018.

Section 9(2) of the Act states: "*A person must not engage in prohibited behaviour within an access zone*". Section 9(2) defines an "*access zone*" as "*an area within a radius of 150 metres from premises at which terminations are provided*". "*Prohibited behaviour*" is relevantly defined in s 9(1(b) as: "*a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided*".

This appeal raises a number of issues similar to those raised by the appeal in *Clubb v Edwards & Anor* (M46/2018). The appellant generally adopts the submissions advanced by the appellant in that matter, but makes further submissions. The appellant identifies eight possible objects of the legislation, for example, to deter speech which has the purpose of dissuading or delaying persons from accessing abortions. He submits that each of these objects is constitutionally impermissible. He further submits that the prohibition in s 9(1) is not necessary as there are equally practicable, less burdensome alternatives. The appellant also argues that the prohibition in s 9(1) is not adequate in its balance because it is targeted at a characteristic form of political communication: protest. The burden it inflicts is direct. The prohibition is also targeted, in law or fact, at those who hold particular views on abortion. It therefore distorts debate and is discriminatory.

The grounds of the appeal include:

- The learned Magistrate erred in law in that she found that the effect of s 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) was that "[a] person should not be regarded as accessing or attempting to access the premises until they are doing just that, going into the premises or attempting to enter the premises and then consideration is given to at which point if any whilst doing that if the person can see or hear the protest" and hence found that an offence could only be committed under s 9(2) if a protest could be seen and heard by a person going into the premises (in the sense of actually entering the premises) or attempting to access the premises (in the sense of being closely proximate to the entrance of the premises and intending to go into the premises).

The Attorneys-General of Victoria, South Australia, Western Australia, Queensland, New South Wales, the Northern Territory, Victoria and the Commonwealth have filed Notices of Intervention. LibertyWorks has been granted leave to appear as amicus curiae, limited to its written submissions.

This matter is listed to be heard together with *Clubb v Edwards & Anor* (M46/2018).

GRAJEWSKI v DIRECTOR OF PUBLIC PROSECUTIONS (NSW) (S141/2018)

Court appealed from: New South Wales Court of Criminal Appeal
[2017] NSWCCA 251

Date of judgment: 24 October 2017

Special leave granted: 18 May 2018

On 8 May 2016 Mr Paul Grajewski participated in an environmental protest at the Port of Newcastle. He mounted the stairs of a coal loader, which was in use but was immediately shut down due to safety concerns. After climbing to the top of the loader, Mr Grajewski attached himself to it using a harness and roping device. He then lowered himself through the air to approximately 10 metres above a platform, where he remained suspended until police removed him. The loader was out of operation for more than two hours as a result of Mr Grajewski's actions.

Mr Grajewski was charged with property damage under s 195(1)(a) of the *Crimes Act 1900* (NSW) ("the Crimes Act"), which provides as follows:

> "(1) A person who intentionally or recklessly destroys or damages property belonging to another or to that person and another is liable:
>
> (a) to imprisonment for 5 years ..."

The charge stated that Mr Grajewski "did intentionally or recklessly damage property causing the temporary impairment of the working machinery …". Magistrate Morahan found the offence proved and fined Mr Grajewski $1,000.00.

Mr Grajewski appealed to the District Court against his conviction, contending that he could not have committed the offence charged because the loader had not been damaged.

On 29 May 2017 Judge Bright dismissed the appeal. Her Honour found that although the charge had been imprecisely particularised, there had been the necessary "interference with functionality of the property" so as to establish "damage" within the meaning of s 195(1) of the Crimes Act.

At the request of Mr Grajewski, on 21 June 2017 Judge Bright submitted a question of law to the Court of Criminal Appeal ("the CCA") for determination, under s 5B of the *Criminal Appeal Act 1912* (NSW). The question, which followed a recitation of the facts, was whether the facts could support a finding of guilt of an offence under s 195(1)(a) of the Crimes Act.

The CCA (Leeming JA, Johnson and Adamson JJ) unanimously answered the question in the affirmative. Their Honours held that "destroys or damages" in s 195(1) of the Crimes Act "includes physical interference which obstructs the working of a machine or renders it useless, either permanently or temporarily." Mr Grajewski had so interfered, as his physical presence attached to the loader had caused the machine to be inoperable for two hours.

The ground of appeal is:

- The CCA erred in finding that the offence of damage to property under s 195 of the Crimes Act could be committed solely by temporary interference with property's functionality, in circumstances where there is no physical derangement of the property (temporary or otherwise). Based on this finding, the CCA found that the facts stated supported a finding of guilt for an offence contrary to the provision.

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v LEWSKI & ANOR (M79/2018);
AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v WOOLDRIDGE & ANOR (M80/2018);
AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v BUTLER & ANOR (M81/2018);
AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v JAQUES & ANOR (M82/2018);
AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v CLARKE & ANOR (M83/2018)

Court appealed from: Full Court, Federal Court of Australia
[2016] FCAFC 96 and [2017] FCAFC 171

Date of judgment: 14 July 2017 & 1 November 2017

Date special leave granted: 18 May 2018

The first respondents in each appeal were at all relevant times directors of Australian Property Custodian Holdings Limited ('APCHL'), the responsible entity ('RE') of a managed investment scheme, the Prime Retirement and Aged Care Property Trust (the 'Trust'). On 19 July 2006, the Board of APCHL resolved to amend the Trust's Constitution to provide for substantial new fees to become payable to APCHL on the occurrence of certain events, including listing on the Australian Stock Exchange ("the Listing Fee"). On 22 August 2006, the Board resolved ("the Lodgement Resolution") to lodge with the appellant ("ASIC") a consolidated Constitution incorporating the amendments so that they would become effective pursuant to s 601GC(2) of the *Corporations Act 2001* (Cth) ("the Act"). On 23 August a consolidated Constitution incorporating those amendments was lodged with ASIC. On 3 August 2007, the Trust units were officially listed on the ASX. Over the period from 26 June 2007 to 27 June 2008 the Listing Fee of about $33 million was paid out of scheme property to APCHL and then to entities associated with Lewski (the first respondent in M79/2018).

In August 2012 ASIC commenced civil penalty proceedings against APCHL and each of the directors ('the Directors"). ASIC could not plead, or rely on, the 19 July 2006 conduct to found any contraventions under the Act because it was time-barred by s 1317K from doing so. ASIC's case contained three broad elements. The first attacked the validity of the amendments, on the basis that the RE had not formed the opinion required by s 601GC(1)(b), which would enable it to amend the constitution without allowing members the chance to vote on it by special resolution. The second part of ASIC's case alleged breaches of duty under ss 601FC and 601FD, by APCHL and the directors, in the making of the Lodgement Resolution and the various decisions to make the payments. The third part of ASIC's case invoked s 208 which provides that an RE must not give itself a benefit from scheme funds without member approval. ASIC alleged that APCHL contravened that section by payment of the Listing Fee and that each director was involved in the contravention and thereby contravened s 209(2).

The trial judge (Murphy J) found that all contraventions alleged by ASIC had been established and imposed pecuniary penalties on each director, and disqualification orders on all of them except Clarke. Each of the directors appealed to the Full Court (Greenwood, Middleton & Foster JJ). They submitted

that the trial judge had erred in concluding that the contraventions occurred in the passing of the Lodgement Resolution on 22 August 2006. Rather, the resolution to amend the Constitution made on 19 July 2006 was the conduct which bound the directors to a certain course. It therefore rendered the Lodgement Resolution on 22 August 2006 an uncontroversial act of an administrative nature, which involved no contravention of the Act.

The Full Court first observed the impact of the statutory time limit in s 1317K of the Act. As accepted by the parties, it prevented ASIC from relying solely on the conduct of the Directors on 19 July 2006 as the basis for an application for declarations or orders. The Full Court noted that the question posed on appeal was whether the trial judge had correctly characterised the nature of the conduct of the Directors on 22 August 2006. The question was to determine what the issue for decision was on 22 August 2006, and then, what considerations became relevant to the making of that decision and what responsibilities were upon each director. This enquiry depended upon an analysis of the type of transaction involved at the meeting on 22 August 2006, the context of the transaction at that meeting, and the procedure undertaken in respect of the transaction to determine the scope of the responsibilities of the directors at that time.

The Full Court noted that matters taken into consideration by the trial judge all related to 19 July 2006 considerations. The trial judge in effect ignored the fact that the Directors had in fact made a resolution on 19 July 2006, and although accepting the Directors believed on 22 August 2006 the resolutions were valid, required them to address them again. The trial judge saw the two meetings as '*part of the same course of conduct*', although each meeting had its own purpose. The importance of failing to distinguish the purpose of the two meetings led the trial judge into error by failing to consider each breach alleged in proper context. His Honour made similar errors in considering the duty to act honestly and in the best interests of the members.

The Court noted that the Directors had already considered the amendments on 19 July 2006: it was not contended otherwise by ASIC. The same consideration was not necessary on 22 August 2006. The Court considered that on 22 August 2006, the circumstances surrounding the decision to be made were very different then to those confronting the same Directors on 19 July 2006. Significantly, the Constitution had been purportedly amended, giving APCHL the mandate to pay the relevant fees. On this basis, provided APCHL acted in accordance with the purported amended Constitution (and there was no suggestion it did not), it was entitled to act in the way it did.

On the basis of the above analysis, the Full Court found that the trial judge fell into error and should not have concluded that any of the Directors breached the duties alleged by ASIC.

The grounds of the appeal include:

- The Full Court erred in finding that Part 5C.3 of the *Corporations Act 2001* (Cth) contains a concept of "interim validity" whereby, if the responsible entity of a registered scheme executes a deed purporting to modify the constitution of the scheme but fails to form the opinion necessary under s 601GC(1)(b) to give it the power to do so, the responsible entity becomes bound to lodge a copy of that modification with ASIC, and upon such lodgement the constitution of the registered scheme operates as so modified for all purposes under Part 5C.3 unless and until a Court sets the modification aside.

The second respondent (APCHL) has filed a submitting appearance in each appeal. The first respondent in M83/2018 (Clarke) has also filed a submitting appearance.

The first respondent in each appeal, save for the respondent Clarke in M83/2018, has filed a summons seeking leave to file a Notice of Contention which alleges that the Full Federal Court erred in holding that a member's right to have a managed investment scheme administered according to its terms was a members' right within the meaning of s 601GC(1)(b) of the *Corporations Act 2001* (Cth).