

203.

SB
14/12

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY**

No.M21 of 1995

B E T W E E N :

ALEC KRUGER
First Plaintiff

HILDA MUIR
Second Plaintiff

CONNIE COLE
Third Plaintiff

PETER HANSEN
Fourth Plaintiff

KIM HILL
Fifth Plaintiff

ROSIE NAPANGARDI McCLARY
Sixth Plaintiff

and

**THE COMMONWEALTH OF
AUSTRALIA**
Defendant

**IN THE HIGH COURT OF AUSTRALIA
DARWIN OFFICE OF THE REGISTRY**

No D5 of 1995

B E T W E E N :

GEORGE ERNEST BRAY
First Plaintiff

JANET ZITA WALLACE
Second Plaintiff

MARJORIE FOSTER
Third Plaintiff

and

**THE COMMONWEALTH OF
AUSTRALIA**
Defendant

SUBMISSIONS OF WESTERN AUSTRALIA (INTERVENING)

SEPARATION OF POWERS

1. While no exhaustive definition of the nature of judicial power has been formulated, the essence of the judicial function has been seen as involving the settling of controversies and questions as to the existence of rights or obligations between citizens or between citizens and the State.

Huddart Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330 at 357
(Griffith CJ)

R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd
(1970) 123 CLR 361 at 374-5.

In the context of laws providing for or authorising the detention of some person, the central issue is whether the detention is punitive in character, or whether it has some other objective. The provisions of the Aboriginals Ordinance which might be said to authorise detention are not punitive in character, and for that reason do not amount to, or authorise, an exercise of judicial power.

Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 27-29
(Brennan, Deane & Dawson JJ), 50 (Toohey J), 55 (Gaudron J), 70-71,
72 (McHugh J)

2. An important aspect of the exercise of judicial power is that it generally involves the application of the law to pre-existing facts in order to determine pre-existing rights and obligations, as opposed to the prescription of a new regime of rights for the future.

Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 67
(McHugh J)

Polyukhovich v The Commonwealth (1991) 172 CLR 501 at 607-8
(Deane J)

As such, criminal laws involve sanction being available as a result of the person engaging in some past conduct. Likewise, Bills of Attainder have as an essential

element the punishment of individuals or sufficiently identified groups *for conduct engaged in in the past*.

Polyukhovich v The Commonwealth (1991) 172 CLR 501 at 535 (Mason CJ), 612 (Deane J), 647 (Dawson J)

Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 70 (McHugh J)

Of course if detention can be characterised as punitive then it can only exist as an incident of the judicial function of adjudging and punishing criminal guilt.

Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 27 (Brennan, Deane & Dawson JJ)

Therefore, legislation providing for detention as punishment other than for past breach of the criminal law will involve an exercise of judicial power. However, detention will be less easily seen as punitive, and therefore as involving the exercise of judicial power, where it is not imposed in consequence of the person's past conduct.

3. None of the provisions of the Aboriginals Ordinance referred to in the pleading operate by reference to past conduct of the person who may be detained. The Ordinance does not judge the guilt of any person of a crime, nor does it authorise the executive to do so as a precondition to the exercise of statutory powers. Those provisions therefore lack an important, usually central, characteristic associated with the exercise of judicial power.

Kariapper v Wijesinha [1968] AC 717 at 736-8

R v White; ex parte Byrnes (1963) 109 CLR 665 at 670-1

4. In determining whether the exercise of a particular power is legislative, executive or judicial in character, historical practice plays an important and sometimes decisive role.

Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 67 (McHugh J)

The custody and guardianship of aboriginal children was the subject of legislative and/or executive provision in Australian States and Territories in the first part of this century, as was the power to cause aboriginals to be removed to and kept within reserves or institutions.

Aborigines Act 1905 (WA), s 8 (guardianship of children), 12 (removal to reserves).

Aborigines Act 1928 (Vic), s 6(I) (power to prescribe place of residence), 6(V) (power to prescribe for care custody and education of children)

Aborigines Act 1934 (SA) s 10 (guardianship of children), 17 (removal to reserves)

Aboriginals protection and the restriction of sale of Opium Act 1897 (Qld) s 9 (Removal to reserves), 31 (6)-(9) (prescriptions in relation to children)

Aborigines Protection Act 1909 (NSW) s 20(e) (regulation for care custody and control of aborigines) (but see also s8A, introduced by the Aborigines Amendment Protection Act 1936, providing for a Magistrate to make orders for removal to reserves and the Aborigines Protection (Amendment) Act 1940 which made provision in relation to aboriginal children))

5. Section 7 of the Aboriginals Ordinance is not a law providing for the detention of any adult citizen. Rather, it is a law providing for the custody and guardianship of children. A similar type of provision is to be found in section 63F(1) of the Family Law Act 1975 (C'th), which provides for the parents of a child to which the section applies to have guardianship and joint custody of the child, and by section 35 of the Family Court Act 1975 (WA) which provides for the mother of a child born out of marriage to have the custody and guardianship of that child. The legislation considered in *R v Director-General of Social Welfare (Vic); ex parte Henry* (1975) 133 CLR 369, under which the Director-General was made the guardian of immigrant children, is a further example of this type of provision.
6. The existing family law provisions as to the guardianship of children generally represent a departure from the common law position, which was that the father

was the guardian of a child born in marriage, while a child born out of marriage was seen by the law as the “child of no-one”.

A Dickey Family Law (2nd edition, 1990, Law Book Co), at p 298-9.

7. Section 7 of the Aboriginals Ordinance, in prescribing the guardianship of a class or group of children in ordinary cases, does not amount to an exercise of judicial power. The fact that it makes provision for guardianship on the basis of race does not convert the section into an exercise of judicial power.
8. The control over Aboriginal children exercised by the Chief Protector/Director as guardian was similar in control of a father as guardian of a child born in marriage at common law, at least as the common law was applied at the time. The Aboriginals Ordinance, and the regulations made under it, cannot be seen other than as a law providing for the guardianship of a group of children, and for the legal incidents of that guardianship.

A Dickey Family Law (2nd edition, 1990, Law Book Co), chapter 12, esp at 286-292

In re Agar-Ellis (1883) 24 ChD 317 (The authoritative rejection of the extent of control established by this case did not take place until the 1970's and 1980's: see the review of authorities in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 at 172-3 (Lord Fraser), 182-88 (Lord Scarman))

9. Section 16 of the Aboriginals Ordinance, understood in its context, did not authorise an arbitrary removal of Aborigines to reserves, or the exercise of the power for punitive purposes. The scope and purpose of the Ordinance, apparent from its terms, would authorise the exercise of that power only for purposes concerned with the welfare of the Aboriginal person or persons concerned, although matters such as the welfare of other members of the community could possibly also be taken into account. The exercise of the power for improper purposes, in bad faith, taking into account irrelevant considerations or on unreasonable grounds would have been subject to the supervisory jurisdiction of the Courts. So understood, section 16 did not authorise anything beyond what was reasonably capable of being seen as necessary or appropriate to securing the

welfare of aboriginal persons or, possibly to some extent, their community. It does not provide for the executive to exercise judicial power.

Commonwealth Submissions para 1.27-1.31

Namatjira v Raabe (1959) 100 CLR 664 at 669-70

Waters v The Commonwealth (1951) 82 CLR 188 at 194-5 (Fullagar J)

Bray v Milera [1935] SASR 210 at 215-6 (Richards J)

Bolton v Neilson (1951) 53 WALR 48 at 51-2 (Dwyer CJ)

Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ)

10. The Plaintiffs argue that to exclude laws made under s122 of the Commonwealth Constitution from the requirements of the doctrine of separation of powers would lead to an anomalous situation, in that people in the Territories would be deprived of its protection by reason only of their locality (Plaintiffs' submissions para 27-9, 34). This argument lacks force when the position of the citizens of the States is considered. In the absence of some entrenched provision in a State constitution requiring separation of powers, State laws may vest judicial power in bodies other than courts. As such, the view, taken to date, that the doctrine of separation of powers does not apply to laws made under s122, does not produce any anomaly. The position of people in the Territories is essentially equivalent to that of people in the States.

Kotsis v Kotsis (1970) 122 CLR 69 at 76 (Barwick CJ)

R v Lyndon; ex parte Cessnock Collieries Ltd (1960) 103 CLR 15 at 22

Love v A-G (NSW) (1990) 169 CLR 307 at 319

Gilbertson v South Australia [1978] AC 772 at 783 E-F.

Polyukhovich v The Commonwealth (1991) 172 CLR 501 at 611 (Deane J), 720 (McHugh J)

See other authorities cited in the Commonwealth's submissions at footnote 137 on p 36

11. That the Commonwealth Constitution makes no provision for separation of powers in the States inevitably follows from the fact that the doctrine has been seen as flowing from Chapter III of the Constitution, which makes no provision

for the non-federal jurisdiction of State courts or the vesting of the judicial power of the States other than in relation to the appellate jurisdiction of the High Court. Even if State legislatures cannot confer on a State court functions and powers which are incompatible with it having been invested with federal jurisdiction (as was argued in *Kable v Director of Public Prosecutions NSW*) it does not follow that there is any restriction on State legislatures conferring the judicial power of the State on bodies other than Courts or in exercising that power themselves by legislation.

Amman v Wegener (1972) 129 CLR 415 at 442 (Mason J)

R v Kirby; ex parte Boilermakers' Society of Australia (1956) 94 CLR 254

A-G (C'th) v The Queen (1956) 95 CLR 529

EQUALITY UNDER THE LAW

12. There is no general requirement in the Commonwealth Constitution that Commonwealth laws have uniform operation throughout the Commonwealth.

Leeth v the Commonwealth (1992) 174 CLR 455 at 467-8 (Mason CJ, Dawson and McHugh JJ).

13. Historically, legislation often treated women and non-Europeans in a discriminatory manner. That approach is recognised by the terms of the Commonwealth Constitution itself (see s25, 51 (xix) and (xxvi), 128(3rd para)). Section 51(xxvi) of the Constitution, which gives Parliament the power to make special laws applying to races, clearly authorises adverse as well as positive discrimination.

Koowarta v Bjelke-Petersen (1982) 153 CLR 168 at 186 (Gibbs CJ), 210 (Stephen J), 244 (Wilson J), see also 242 (Murphy J *contra*)

Western Australia v The Commonwealth (1995) 128 ALR 1 at 43 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ)

The Aboriginals Ordinance can be seen as an example of a discriminatory law which has both positive and adverse implications. The Plaintiffs' submissions depend upon ignoring the history of the Australian and British legal systems in seeking to identify a principle of equality, and then applying that principle to legislation long since repealed, and forming part of that history, in an attempt to found a private right of action.

14. Further, the principle postulated by Deane and Toohey JJ in *Leeth* allows for discriminatory laws which "are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment" (at 488). Gaudron J saw impermissible discrimination as being constituted by the different treatment of persons or things that are not relevantly different, or different treatment not reasonably capable of being seen as appropriate and adapted to that difference (at 498). With respect, the decision as to what differences are relevant and the extent and type of difference of treatment which is appropriate involves the making of value judgments which under our system of government are left to the elected representatives of the people, who will be responsible to the people for their decision.
15. Alternatively, to the extent that the Constitution prohibits legislative discrimination generally, the prohibition extends only to laws which discriminate between the citizens of different States, and to Commonwealth laws which discriminate on the basis of locality in a manner not authorised by the power under which the law is purportedly enacted. That is the type of discrimination to which the express provisions of the Constitution are directed, and is the only type of discrimination which can be seen as flowing from the establishment of "one indissoluble *Federal Commonwealth*". The Aboriginals Ordinance, in its application throughout the Territory, does not discriminate on any such basis.

Leeth v the Commonwealth (1992) 174 CLR 455 at 475 (Brennan J)
16. The circumstances of Australia's Aboriginal people have been seen as requiring special legislative provision in many respects throughout the 20th Century. While earlier approaches may now be seen, with the benefit of hindsight and in light of

current community standards and perceptions, as paternalistic, misguided and even harmful, at the time the Ordinance was enacted its provisions were seen by a number of different Australian Parliaments (as disclosed by the express terms and stated purpose of the various legislation) as appropriate and adapted to securing the protection and welfare of a section of Australia's population in need of special care.

17. The decisions of Canadian and United States courts referred to by the Plaintiffs (at para 24-34) depend upon the constructions of Bills of Rights the provisions of which were intentionally omitted from the Commonwealth Constitution and which find no reflection in the Commonwealth Constitution. The reasoning in those cases is not applicable.

Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106 at 135-6 (Mason J)

see cases and materials cited in the Commonwealth's submissions at footnote 176, p 48-49

FREEDOM OF MOVEMENT AND ASSOCIATION

18. The freedom of communication about political and government matters, recognised by recent decisions of this Court, is derived from the Constitutional prescription for representative government. The implication does not extend to freedom of expression generally, but is confined to communication about government and political matters, that being all that is necessary to protect the integrity of the structure established by the Constitution. Any implication of freedom of association must be likewise limited to freedom of association for political purposes or for the purpose of discussing political or government matters.

Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104 at 120-1 (Mason CJ, Toohey and Gaudron JJ)

19. It is significant that it is pleaded that the power under section 16 of the Aboriginals Ordinance was exercised in relation to the Plaintiffs only when they

were under the age of majority. Even in *R v Director-General of Social Welfare (Vic); ex parte Henry* (1975) 133 CLR 369 at 388, Murphy J did not see a provision for the guardianship of immigrant children under 18 as being inconsistent with the Constitutional implications which he perceived as arising from the Constitution's provision for a free society.

The exercise of the power under section 16 of the Ordinance about which the Plaintiffs complain was but an incident of the guardianship of persons below the age of majority (an adult for the purposes of the Constitution being a person over 21: see *King v Jones* (1972) 128 CLR 221). While political rights implied in the Constitution may not be confined to voters, it remains relevant that the Plaintiffs were not of voting age at the time they were allegedly detained. At least to the extent that section 16 authorised minors under guardianship to be removed to and kept within the boundaries of a reserve or institution, it was not inconsistent with any freedom of movement as might be necessary to preserve the Constitution's provision for representative government, or which has been recognised by the authorities.

Pioneer Express Pty Ltd v Hotchkiss (1958) 101 CLR 536 at 549-50 (Dixon CJ, Fullager J concurring at 553), 552 (McTiernan J), 560 (Taylor J); note also Menzies J at 566

R v Smithers; ex parte Benson (1912) 16 CLR 99 at 108-9 (Griffiths CJ), 109-10 (Barton J)

Crandall v Nevada (1868) 6 Wall 35-49; 73 US 745

see the authorities cited in the Commonwealth's submissions at footnote 220, page 59

Winner v SMT (Eastern) (1951) 4 DLR 529 at 559

FUNDAMENTAL RIGHTS AND GENOCIDE

20. Within the limits as to subject matter provided for by the Commonwealth Constitution, Australian Parliaments with the power to legislate for the peace order and good government of their jurisdiction enjoy a broad plenary power to

decide what measures will promote peace, order and good government. That decision is not reviewable by the Courts.

Pickin v British Railways Board [1974] AC 765 at 782

Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR at 9-10

Any limitation on the legislative power of an Australian Parliament must be based on the express terms of, or a securely founded implication drawn from, the Commonwealth Constitution or the entrenched provisions of a State or Territory Constitution. The Plaintiffs have indicated no basis for such a limitation as would invalidate the Aboriginals Ordinance.

21. Authorities referred to by the Plaintiffs, such as *Oppenheimer v Cattermole* [1976] AC 249 and *R v Snow* (1915) 20 CLR 315 are of no assistance to them. *Oppenheimer* was concerned with the recognition of foreign law, while *Snow* was concerned with the meaning of a particular provision of the Commonwealth Constitution, construing it against the background of the common law.
22. Genocide is predicated on an intention to destroy, in whole or in part, a relevant group. The terms of the Aboriginals Ordinance and equivalent legislation in various States, the central theme of which is the welfare of aboriginals, are inconsistent with any such intent. Had the powers conferred by the Aboriginals Ordinance been exercised for the purpose, or with the intent, of destroying any group of Aboriginals, the purported exercise of those powers in such a way would have been *ultra vires* the Ordinance.
23. In any event, although legislation is construed, so far as its language permits, so as not to be inconsistent with established rules of international law, the statutory provisions prevail if such an inconsistency does arise.

Polites v The Commonwealth (1945) 70 CLR 60 at 68-9 (Latham J), 74 (Rich J), 75-6 (Starke J), 78 (Dixon J), 79 (McTiernan J), 80-81 (Williams J)

24. Further, the crimes of genocide, and crimes against humanity existing independently of war crimes, did not acquire their status as part of customary international law until after World War II. The crime of genocide was not recognised as a crime under customary international law until the time of, or possibly just prior to, the adoption of the Genocide Convention 1948. To the extent that conduct prior to that time is said to contravene customary international law, the pleadings must be bad.

Polyukhovich v The Commonwealth (1991) 172 CLR 501 at 587-8 (Brennan J), Toohey J concurring at 657.

ACTION FOR DAMAGES FOR BREACH OF “CONSTITUTIONAL RIGHTS”

25. The Constitutional implications suggested by the Plaintiffs are drawn from the structure of the Constitution in providing for a federal system of representative government, and if they exist they must exist to protect and support that constitutional structure. Whether the implication is referred to as a right or an immunity, it can exist only as a limitation on legislative power, and not as a conferral of positive individual rights.

James v The Commonwealth (1939) 62 CLR 339 at 361-2 (Dixon J)

McClintock v The Commonwealth (1947) 75 CLR 1 at 19 (Latham CJ, McTiernan J concurring), 39-41 (Williams J, Rich J concurring); see also 26-7 (Starke J).

Cunliffe v The Commonwealth (1994) 182 CLR 272 at 326 (Brennan J)

While the invalidity of legislation which infringes one of the implied limitations suggested by the Plaintiffs, if they existed, would possibly remove a justification for otherwise tortious acts or omissions (such as wrongful detention), no private right of action arises from the Constitution itself.

26. In particular, implications drawn as to freedom of communication and movement have been seen as limitations on State and Federal legislative power, existing in

order to protect the system of representative government provided for by the structure of the Constitution. They have not been seen as protecting the individual rights of citizens. There is no support in the authorities for the view that the breach of implied rights of communication, association or movement can give rise to a private action sounding in damages.

Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104 at 125-6 (Mason CJ, Toohey and Gaudron JJ), 147-9 (Brennan J), 168 (Deane J).

27. Nor can any entitlement to damages be formulated by reference to "a constitutional principle of the rule of law".

Northern Territory v Mengel (1995) 129 ALR 1 at 22-3 (Brennan J)

28. Decisions from other countries referred to by the Plaintiffs cannot be applied to the entirely different language and context of the Commonwealth Constitution. Western Australia adopts paragraphs 9.25-9.37 of the Commonwealth's submissions.
29. If it had been intended that a private right of action be available, then given the background of the Crown's immunity from suit at common law (*Biljabu v Western Australia* (1993) 11 WAR 372 at 375) in which the Constitution was developed, one would have expected that this would have been expressly provided for. There is no basis for seeing in the Constitution an implication allowing for actions for damages for breaches of limitations which are themselves implied.

LIMITATION OF ACTIONS

30. As the Limitation Act 1981 (NT) provides for a procedural bar and does not extinguish any civil liability at common law, the law as to limitations would be the law of the forum. The only difficulty in the present case is identifying the forum

whose law must be applied, and this is to be resolved through construing s 79 of the Judiciary Act.

McKain v Miller (1991) 174 CLR 1 at 40-44 (Brennan, Dawson, Toohey & McHugh JJ).

If the limitation provision were substantive, then, to the extent that this case involves a claim in respect of wrongful imprisonment or deprivation of liberty, it would be governed by the law of the place where the wrong occurred. That would be so even if the action were brought in federal jurisdiction, as in such a case the law of the place in which the wrong occurred would not provide for the conduct complained of giving rise to a civil liability of the kind which the plaintiffs claimed to enforce.

McKain v Miller (1991) 174 CLR 1 at 39 (Brennan, Dawson, Toohey & McHugh JJ).

31. Any cause of action based on a so called Constitutional right would have to be brought within a reasonable time, whether that reasonable time is identified by reference to some limitation legislation or some principle equivalent to the equitable defence of laches. Otherwise, governments and individuals acting in reliance on existing unchallenged legislation could not securely order their financial affairs. Limitation provisions and laches have a history long preceding the Commonwealth Constitution, and if a cause of action was implicitly created by the Constitution there is no basis for it having an existence divorced from these aspects of the general law.

DATED the 13th day of December 1995



ROBERT MEADOWS SG



ROBERT MITCHELL

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY**

No. M21 of 1995

B E T W E E N :

ALEC KRUGER

First Plaintiff

HILDA MUIR

Second Plaintiff

CONNIE COLE

Third Plaintiff

PETER HANSEN

Fourth Plaintiff

KIM HILL

Fifth Plaintiff

ROSIE NAPANGARDI McCLARY

Sixth Plaintiff

and

COMMONWEALTH OF AUSTRALIA

Defendant

**IN THE HIGH COURT OF AUSTRALIA
DARWIN OFFICE OF THE REGISTRY**

No D5 of 1995

BETWEEN

GEORGE ERNEST BRAY

First Plaintiff

JANET ZITA WALLACE

Second Plaintiff

MARJORIE FOSTER

Third Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA

Defendant

**SUBMISSIONS OF WESTERN AUSTRALIA
(INTERVENING)**

Prepared by:
The Crown Solicitor for the State of Western Australia
Level 14, Westralia Square
141 St George's Terrace
Perth WA 6000
Tel: 09 264 1806
Fax: 09 321 1385
Ref: (kruger2)
court.highback