Making Valid Legislation – How Parliament Sometimes gets it Wrong

A paper delivered by Mark Robinson SC to a Learned Friends conference held at Lord Howe Island in April 2014

There are many ways that Commonwealth and State parliaments can get it wrong.

On occasion, the High Court of Australia rules Commonwealth legislation to be invalid. It does the same to State and Territory legislation from time to time.

The extent of the power of Australian parliaments to make laws is set out in the *Commonwealth of Australia Constitution Act 1900* ("the *Constitution*") and state constitutions, for example the *Constitution Act 1902* (NSW). The Commonwealth and state parliaments have different powers, which are listed in their separate constitutions.

The powers of the Commonwealth government are set out in section 51 of the *Constitution* and include international and interstate trade; foreign affairs; defence; immigration; taxation; banking; insurance; marriage and divorce; currency and weights and measures; post and telecommunications; and invalid and old age pensions.

The Australian states retain legislative powers over many areas such as education, local government, roads, hospitals, police, and schools.

If a parliament makes a law (an Act) that is outside the powers set out in the relevant constitution then the validity of that law can be challenged.

Sections, whole parts, or a complete Act can be declared invalid if the courts find it unconstitutional; that is, if the *Constitution* did not give parliament the power to make that law.

Where an Act is made by a state parliament and covers subjects over which the Commonwealth Parliament has exclusive power, the state Act is said to be inconsistent (section 109 of the *Constitution*).

The Commonwealth Act applies and the state Act, or at least the part of it that is inconsistent, is of no effect (as in the *Tasmanian dam* example above).

Disputes about interpreting the *Constitution* can only be ultimately resolved in the High Court. However, they can arise in any case as a direct attack or as a collateral attack. For example, of your client is being prosecuted under a particular law, it may be that instead of offering a traditional defence, you client might seek to argue that the legislation itself that founds the charge or prosecution is invalid. Such collateral attacks are usually heard by a Supreme Court of the Federal Court. They can be determined there as well.

However, if the issue is sexy enough, the High Court will grab it pursuant to section 40 of the *Judiciary Act 1903* (Cth) which provides:

> "**40 Removal by order of the High Court**
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> > (1) Any cause or part of a cause arising under the Constitution or involving its interpretation that is at any time pending in a federal court other than the High Court or in a court of a State or Territory may, at any stage of the proceedings before final judgment, be removed into the High Court under an order of the High Court, which may, upon application of a party for sufficient cause shown, be made on such terms as the Court thinks fit, and shall be made as of course upon application by or on behalf of the Attorney-General of the Commonwealth, the Attorney-General of a State, the Attorney-General of the Australian Capital Territory or the Attorney-General of the Northern Territory."

This is obviously so that important constitutional law matters are determined by the High Court without having to wait for the matter to filter upwards through the courts (which can take years).

The state parliaments have power to pass Acts on all areas not given to the Commonwealth in its *Constitution*, as well as on some subjects that are in both the state and Commonwealth constitutions. An area where power has been left to state parliaments is trade and commerce *within* a state; in contrast, the Commonwealth parliament has been given power to make laws about trade <u>between</u> the states.

Despite these apparently sharp differences in their powers, the state and Commonwealth governments are often involved in the same projects. Their degree of involvement varies according to their constitutional power, their political will and the amount of money involved.

Main Reasons Why Legislation Might be Set Aside – State matters

The main reasons for a High Court to set aside state legislation include:

- Invalid for breach of the Federal judicial power contained in Chapter III of the Commonwealth *Constitution* – eg:
    - *Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51*;
    - *International Finance Trust Co Ltd v Crime Commission (NSW)*
    - (2009) 240 CLR 319;
    - *South Australia v Totani* (2010) 242 CLR 1; and
    - *Wainohu v NSW* (2011) 243 CLR 181.

- Invalid for directing a particular result in particular proceedings – eg: *Liyanage v The Queen* [1967] 1 AC 259

- Invalid for breaching the implied Commonwealth Constitutional right of freedom of political speech; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; 71 ALJR 818

- Invalid for breaching a Commonwealth Constitutional provision, such as s 109, inconsistency or section 92, freedom of interstate trade and commerce.

To be valid, legislation in NSW must be a law "*for the peace, welfare and good government of New South Wales*" within the *Constitution Act 1902* (NSW), section 5.

However, section 5 of that Constitution has been interpreted in such a broad manner that it is effectively a plenary power for the state parliament to legislate. The law does not strictly have to be examined by reference to whether it is for a purpose involving "peace" or whether it is a purpose involving "welfare" and so on (cf: the views of Street CJ and Mahoney JA in *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 (**NSW BLF Case**). These views have not prevailed.

The power is simply plenary, and therefore a very wide ranging and broad power indeed.

It is so wide that the courts have, one occasion, contemplated just how wide it can be and what are the limits of legislative competence. In the NSW BLF case, Kirby P noted (at p 400):

> "The most vivid illustration is that given by Leslie Stephen in his *Science of Ethics* (1882) at 143. It was quoted by Dicey (ibid at 81) with approval. Stephen referred to the outer limits of legislative competence:
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> > "If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects idiotic before they could submit to it""

Legislation which directs a particular result in particular proceedings may be invalid on the basis it interferes "*with the functions of the judiciary*": *Liyanage v The Queen* [1967] 1 AC 259, 289E-292A; accepted at least in principle in *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 (**Commonwealth BLF Case**), 96; *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 562-563 [17]; and by at least a majority of the Court in *Nicholas v The Queen* (1998) 193 CLR 173, 188 [20] per Brennan CJ, 203 [57] per Toohey J, 211-212 [83] per Gaudron J, 221 [113] per McHugh J, 233 [147]-[148] per Gummow J, 250 [197] per Kirby J.

However, where legislation "*does not deal with any aspect of the judicial process*" but merely makes "*redundant the legal proceedings which [have been] commenced*", that legislation is <u>not</u> invalid: Commonwealth BLF Case, 96. This is so even where "*the motive or purpose of the Minister, the Government and the Parliament in enacting the statute was to*

circumvent the proceedings and forestall any decision which might be given in those proceedings": Commonwealth BLF Case, 96-97.

The boundary is usefully defined by Street CJ in the *NSW BLF Case*, in which his Honour identified what he saw as the relevant differences between the Commonwealth and NSW legislation.

The Commonwealth legislation had provided simply for the cancellation of The Australian Building Construction Employees' and Builders Labourers' Federation: *NSW BLF Case*, 377C-D per Street CJ. The High Court's conclusion as to the effect of that provision is set out above.

However, the NSW legislation provided that the registration of the Building Construction Employees and Builders' Labourers Federation of NSW "*shall, for all purposes, be taken to have been cancelled on 2 January 1985*": NSW BLF Case, 377D-E per Street CJ. His Honour held that this "*infringed the test laid down by the High Court in the [Commonwealth BLF Case]*" and amounted to "*an exercise by Parliament of judicial power*": NSW BLF Case, 378C-D per Street CJ. Ultimately, his Honour held that the NSW Parliament had power to enact the legislation for reasons not relevant to the present matters.

In *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, the High Court appeared to approve the distinctions drawn by Street CJ in the NSW BLF Case, thus implying that legislation of the kind considered in the NSW BLF Case might be invalid if enacted by the Commonwealth Parliament: at 564 [21]. The High Court in *HA Bachrach* also noted that the legislation considered in the NSW BLF Case "*specifically addressed current litigation, prescribed that for the purposes of determining the issues in that litigation certain facts were to be taken as established, and dealt with the costs of the litigation*": at 564 [21]. Accordingly, these are factors likely to be relevant to a determination of whether legislation of this kind constitutes a usurpation of judicial power.

Main Reasons Why Commonwealth Legislation Might be Set Aside

These include:

- The Act is not supported by any head of power in the Constitution;

- The Act is not reasonably appropriate or adapted to any Constitutional head of power;
- The Act is not supported by any matter *incidental* to the execution of any power vested by the Constitution in the parliament, in the Government of the Commonwealth or any Department or officer of the Commonwealth;
- The Act is invalid because it is properly characterised as a judicial power, the exercise of which is incompatible with the executive power of the Commonwealth (Chapter III);
- Breaching the implied Commonwealth Constitutional right of freedom of political speech; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; 71 ALJR 818

In order to be held valid, Commonwealth legislation must be contained within one of the placita in section 51 of the *Constitution*. Parliament has the power to make laws with respect to 39 subject matters. First, the laws must be for the peace, order, and good government of the Commonwealth and also be "*with respect to*" the enumerated heads of power.

This is fulfilled where there is a 'sufficient connection' between the law in question and a head of power (*Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 334 (Mason CJ), 349 (Dawson J), 353-4 (Toohey J); *Leask v Commonwealth* ('Leask') (1996) 187 CLR 579 at 591 (Brennan J), 603 (Dawson J), 614 (Toohey J), 616 (McHugh J), 623 (Gummow J), 633 (Kirby J); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).)

If there is no sufficient connection with a head of power (any head or heads) and it if is not incidental, it will be held to be invalid.

The High Court divides up the heads of power and applies different tests.

For example, there is a difference between "purposive" heads of power and "non-purposive" heads of power. Basically, if the High Court sees the relevant power as being one involving the fulfilment of a purpose, rather than simply legislating about a subject matter, then a much more open-ended test of proportionality is involved, which enables things such as the reasonableness and appropriateness of the law to be raised. The High Court though tends to

be very reluctant to say that the power is purposive because they are concerned about the consequences of such an open-ended question. The plaintiff's arguments (in the High Court challenge to the validity of the PNG Solution, coming on for hearing on 9 May 2014) are a bit of a refinement on the distinction between these types of power. They suggest that even a subject matter power can on occasion involve questions of proportionality. This is not orthodox thinking, but sits in the grey area of undecided questions (thanks to Professor George Williams AO for that short explanation).

Law must be that which is "reasonably capable of being viewed as appropriate and adapted" to a constitutional head of power – see *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at [42] (per Gaudron J).

Also, an impugned provision might be not reasonably appropriate and adapted to any Constitutional head of power (or other forms of that expression, see, for example: *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [85] (per Gummow, Kirby and Crennan JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [489] to [492] (per Hayne J) and at [316] and [322] (per Kirby J)). Indeed, the Act's operation might be out of all proportion to its intended effect.

The character of a law purportedly based on s 51 (xxvi) (the races power) may be denied to a law enacted in manifest abuse of the power of judgment in Parliament deeming the law to be necessary. No manifest abuse existed in parliament's determining that the power of the Minister to make a declaration under s 10 of the *Heritage Protection Act* in respect of particular areas should be withdrawn - see, *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at [42]; see also *Native Title Act Case* (1995) 183 CLR 373 at 460; and *Gerhardy v Brown* (1985) 159 CLR 70 at 138-139, per Brennan 1.

The High Court does not invalidate legislation very often.

In the past 10 years, legislation was only invalidated in the following cases (apart from *Totani* and *Wainohu*:

- *Unions NSW v New South Wales* (2013) 88 ALJR 227
- *The Commonwealth v Australian Capital Territory* (2013) 88 ALJR 118

- *Dickson v The Queen* (2010) 241 CLR 491
- *Rowe v Electoral Commissioner* (2010) 243 CLR 1
- *Roach v Electoral Commissioner* (2007) 233 CLR 162

One memorable example of a Commonwealth law being overturned is *Davis v Commonwealth* (1988) 166 CLR 79, concerning the Australian Bicentenary in 1988 and the banning and regulation of certain words and numbers associated with the celebration.

Thank you.