

but said that no court in Australia has, as yet, taken the course of setting aside a decision for failure to give reasons. The law of Australia has not progressed so far.

Canwest succeeded in the proceedings against the Treasurer on the basis of (other) error of law.

Constitutional law – Capacity of States to enact laws applying to the Commonwealth

– **Cigamatic doctrine** – *Re Residential Tenancies Tribunal of New South Wales v Henderson and Anor; Ex parte Defence Housing Authority* (High Court of Australia, 12 August 1997) (1997) 146 ALR 495

The Defence Housing Authority (DHA) leased premises at Epping in New South Wales from Mr Henderson, the owner, under a lease for a term of ten years. The function of the DHA is to provide residential dwelling units to the Commonwealth of Australia for occupation by defence personnel.

The owners sought orders against the DHA under the *Residential Tenancies Act 1987* (NSW) authorising the landlord to enter the premises and requiring a copy of a key to be given to the landlord.

The High Court held, by majority, that the New South Wales Act applied to the DHA. First, there was no relevant inconsistency between the Residential Tenancies Act and the *Defence Housing Authority Act 1987*. Second, the Department of Defence was not a department which the Commonwealth had exclusive legislative power over under section 52(ii) of the Constitution.

Most importantly, the Court held there was no general principle of immunity from State legislation which protected the DHA. It was assumed that the DHA was or represented the Crown in right of the Commonwealth. Brennan CJ in agreeing with Dawson, Toohey and Gaudron JJ said there was no reason why the Crown in right of the Commonwealth should not be bound by a State law of general application which governs transactions into

which the Crown in right of the Commonwealth may choose to enter. The executive power of the Commonwealth, exercised by its choice to enter the transaction, is not affected merely because the incidents of the transaction are prescribed by State law.

Brennan CJ, and Dawson, Toohey and Gaudron JJ, distinguished between the capacities of the Crown on the one hand, its rights, powers, privileges and immunities, and the exercise of those capacities on the other.

The purpose of this distinction was to draw a further distinction between legislation which purports to modify the nature of the executive power vested in the Crown – its capacities – and legislation which assumes those capacities and merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities.

Judiciary Act – section 39B(1A)

Alan Robertson has also kindly provided the following note on the impact of the recent amendment made to the *Judiciary Act 1903* by the *Law and Justice Legislation Amendment Act 1997*.

The jurisdiction of the Federal Court has now been enlarged to include any matter arising under any laws made by the Parliament (see section 76(ii) of the Constitution and Schedule 11 to the *Law and Justice Legislation Amendment Act 1997* (Act No 34 of 1997) assented to on 17 April 1997).

Earlier judicial decisions on the meaning of “*matters arising under any laws made by the Parliament*” as that expression appears in section 76(ii) of the Constitution have established the following:

1. It will not be sufficient to enliven this head of the Court’s jurisdiction that the mere interpretation of a federal statute is involved or that the federal statute is involved as an incidental consideration or where it is merely “lurking in the background”.
2. However, where the right or duty in question in the matter owes its existence to the

federal law or depends upon the federal law for its enforcement (whether or not the controversy involves the interpretation of the law) then a matter will have arisen under that law. This head of jurisdiction will be enlivened when it is necessary to determine whether the Commonwealth law in question confers a right or affords a defence which is an issue in the litigation or when a claim is made by one of the parties which is based upon that law ie the statute is relied upon as giving a right claimed or as the direct source of a defence asserted.

Other propositions to be derived from the cases are:

- (a) it does not matter that the questions to be determined arise from a controversy involving a person to whom the Act or other statutory provision is not directed;
- (b) if the question involves the interpretation of a statute to ground a declaration of the extent or limitation of the rights provided thereunder a matter will have arisen under the Act;
- (c) the fact that the relief sought is declaratory will not prevent the jurisdiction being federal in character ie where declaratory powers are to be exercised with regard to a matter arising under a Commonwealth Act;
- (d) a matter may arise under a law of the Parliament either in whole or in part;
- (e) a matter may arise under a law of the Parliament by reason of matters raised in a statement of claim or in a defence or in a reply;
- (f) a matter may arise under a law of the Parliament where the suit could be disposed of by deciding the matter so arising whether or not the suit is so disposed of;
- (g) a claim for damages for breach of a contract or a claim for relief for breach of trust is a claim arising under federal

law if the contract or trust is in respect of a right or property which is the creation of federal law ie the subject matter of a contract or trust exists as a result of federal law;

- (h) the entitlements in question may arise under an Act or under regulations made under such an Act;
- (i) a matter arising under a law of the Parliament may also be a matter arising under the Constitution or involving its interpretation.

The important cases include -

R v Commonwealth Court of Conciliation Arbitration Ex parte Barrett (1945) 70 CLR 141, 154; *Felton v Mulligan* (1971) 124 CLR 367; *Moorgate Tobacco Co Limited v Philip Morris Limited* (1980) 145 CLR 457; *LNC Industries Limited v BMW (Australia) Limited* (1983) 151 CLR 575, 581-2; *O'Toole v Charles David Pty Limited* (1991) 171 CLR 232, 307 and *Re Tooth (No 2)* (1978) 34 FLR 112, 139-140.

In terms of administrative law, the impact of the new provision will be primarily in relation to actions for declarations, particularly against the Commissioner of Taxation, which were often commenced in the High Court. The impact will also be in judicial review action strictly speaking where a Commonwealth body corporate is involved (and thus no officer of the Commonwealth within section 39B) and where the decision in question was not within the AD(JR) Act because it is legislative rather than administrative or because it is within Schedule 1 to that Act and thus excluded from it.

The Ombudsman

20th Anniversary Publication

To commemorate the Ombudsman's 20 year anniversary, the Ombudsman's Office has published "twenty years of the Commonwealth Ombudsman 1977 - 1997". This document is a record of the office and poses some ques-