

# SUPREME COURT OF QUEENSLAND

CITATION: *Cth DPP v Corbett & Ors* [2002] QCA 340

PARTIES: **COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS**  
(respondent)  
v  
**CORBETT, Robert Edward**  
**CORBETT, Anne Shirley**  
**PARKER, Kenneth Edwin**  
**MACKAY, Rodney James**  
**ALLEN, John Andrew**  
**COOPER, Robert Murray**  
**WOOD, Brian Michael**  
(applicants)

FILE NO/S: Appeal No 8933 of 2001  
Appeal No 8949 of 2001  
Appeal No 9117 of 2001  
DC No 1090 of 2001  
Appeal No 9118 of 2001  
DC No 1362 of 2001  
Appeal No 9119 of 2001  
DC No 1089 of 2001

DIVISION: Court of Appeal

PROCEEDING: Removal or Remission

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 6 September 2002

DELIVERED AT: Brisbane

HEARING DATE: 9 July 2002

JUDGES: Davies, Williams and Jerrard JJA  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Applications dated 3 October 2001 by Robert Edward Corbett and Anne Shirley Corbett, 5 October 2001 by Kenneth Edwin Parker, 9 October 2001 by Rodney James Mackay, John Andrew Allen, Robert Murray Cooper and Brian Michael Wood to the District Court be removed into this Court.**  
**2. Dismiss each of those applications.**

CATCHWORDS: CONSTITUTIONAL LAW - OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION -

GENERAL MATTERS - RELATIONSHIP BETWEEN COMMONWEALTH AND STATES GENERALLY - where each applicant was charged with offences under the *Corporations Law of Queensland* - where the indictment for each applicant was presented by the Commonwealth Director of Public Prosecutions - whether the Commonwealth had power to legislate with respect to the offences when the offences were committed - whether s 1401 of the *Corporations Act 2000* (Cth) enables the Commonwealth to prosecute what was, when committed, a state offence

CONSTITUTIONAL LAW - OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION - MATTERS REFERRED BY STATES (CONSTITUTION, s 51(xxxvii)) - whether s 1383 and s 1401 of the *Corporations Act 2000* (Cth) is a valid law with respect to a referred matter

CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - PROSECUTION - FILING OF INFORMATION, PRESENTMENT OR INDICTMENT - QUEENSLAND - whether the Commonwealth Director of Public Prosecutions is entitled to present indictments for offences which were committed under the *Corporations Law of Queensland*

CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - INFORMATION, INDICTMENT OR PRESENTMENT - MOTION TO QUASH - where the Commonwealth Director of Public Prosecutions presented indictments for offences committed under the *Corporations Law of Queensland* - whether the Commonwealth Director of Public Prosecutions had the legislative authority to present the indictments - whether the indictments should be quashed

CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - PERSONS ENTITLED TO CONDUCT PROSECUTION - whether the Commonwealth Director of Public Prosecutions is entitled to conduct the prosecution of offences which were committed under the *Corporations Law of Queensland*

CORPORATIONS - SUPERVISION, REGULATION AND CORRECTION - OFFENCES - PROCEEDINGS - where each applicant was charged with offences under the *Corporations Law of Queensland* - where the indictment for each applicant was presented by the Commonwealth Director of Public Prosecutions - whether the indictments should be quashed on the basis the Commonwealth Director of Public Prosecutions lacks the legislative authority to prosecute the offences

STATUTES - ACTS OF PARLIAMENT - VALIDITY OF LEGISLATION - whether the transitional provisions of the *Corporations Act 2000* (Cth), in particular s 1383 and s 1401, are valid laws of the Commonwealth

*Commonwealth Constitution*, s 51(xxxvii)  
*Corporations (Administrative Actions) Act 2001* (Qld), s 4  
*Corporations (Commonwealth Powers) Act 2001* (Qld), s 4(1)  
*Corporations Act 2001* (Cth), s 1383, s 1400, s 1401  
*Corporations Law of Queensland*, s 1311, s 1064

*Ex parte Walsh and Johnson; in re Yates* (1925) 37 CLR 36, distinguished  
*Polyukhovich v The Commonwealth* (1991) 172 CLR 501, distinguished  
*R v Kidman* (1915) 20 CLR 425, considered

COUNSEL: M J Byrne QC, with D C Shepherd and S R Lewis, for the applicants Corbett and Corbett  
 S A Shirrefs for the applicants Parker, Mackay, Allen, Cooper and Wood  
 D J S Jackson QC, with S J Keim, for the respondent

SOLICITORS: Legal Aid Queensland for the applicants Corbett and Corbett  
 Shand Taylor Lawyers for the applicants Parker, Mackay, Allen, Cooper and Wood  
 Commonwealth Director of Public Prosecutions for the respondent

- [1] **DAVIES JA:** By an indictment presented on 23 April 2001 the applicants Robert Edward Corbett, Anne Shirley Corbett and Kenneth Edwin Parker were charged with a number of offences against s 1311 and s 1064 of the *Corporations Law of Queensland* ("the Law"). By a further indictment presented the same day the applicants Robert Murray Cooper and Brian Michael Wood, and two other persons, were also charged with offences against those sections. And by an indictment presented 21 May 2001 the applicants Rodney James Mackay and John Andrew Allen were charged with offences against those sections. In each case the indictment was presented by the Commonwealth Director of Public Prosecutions. All indictments were presented in the District Court.
- [2] Section 1064 relevantly provided:  
 "(1) A person, other than a public corporation, must not make available, offer for subscription or purchase, or issue an invitation to subscribe for or buy, any prescribed interest."  
 Section 1311 then provided that any person who does an act or thing that the person is forbidden to do under the provisions of the Law is guilty of an offence.
- [3] By application dated 3 October 2001 the applicant Robert Edward Corbett applied to that court for directions and rulings in relation to the following matter:

"That the indictment presented against me be quashed on the basis that the Commonwealth Director of Public Prosecutions lacks legislative authority to prosecute the offences."

- [4] Anne Shirley Corbett made application in identical terms on the same day.
- [5] Then on 5 October 2001 the applicant Parker made a similar application which was later expanded by amendment to include a direction or ruling quashing or staying the indictment on the grounds that:
- (b) the transitional provisions contained in Chapter 10 of the Corporations Act 2001 (Cth) in particular section 1383, 1400 and 1401 are invalid;
- (c) the offences as charged against me in the indictment fail to disclose an offence against the law or laws of the Commonwealth."
- [6] On 9 October 2001 the applicants Mackay and Allen made an application in terms similar to that made by Parker, as did Cooper and Wood.
- [7] On 23 November 2001 all applicants sought removal of their applications into this Court. The Court refused to remove them at that stage pending its decision in *R v Fukusato*<sup>1</sup> which was given on 8 February 2002. The applications were renewed before this Court on 9 July. The Court reserved its decision on those applications but agreed to hear full argument on the substantive points sought to be argued.
- [8] Notice of a Constitutional Matter was given by the applicants to the Attorneys-General of the Commonwealth and each State and Territory pursuant to s 78 of the *Judiciary Act* 1903 (Cth). None of the Attorneys-General wished to intervene in these proceedings.
- [9] The *Corporations Act* 2001 (Cth) ("the Act") commenced operation on 15 July 2001 ("the date of commencement"). It is the commencement of operation of that Act which no doubt caused the addition of paras (b) and (c) in the applications, referred to above, in which they were included.
- [10] In this Court all applicants sought to quash the indictments against them. The applicants Corbett were represented by Mr Byrne QC and Mr Shepherd. The other applicants were represented by Mr Shirrefs. The arguments advanced by these respective counsel differed somewhat but in each case may be described as follows:
1. that s 1401 and s 1383 are not valid laws of the Commonwealth. Alternatively, if they are, they do not permit the prosecution of these indictments by the Commonwealth Director of Public Prosecutions.
  2. That there is no other constitutional basis which authorizes legislation permitting the Commonwealth Director of Public Prosecutions to prosecute these indictments.
- [11] It is convenient to consider the applicants' arguments in that order because if the arguments advanced with respect to 1. are rejected it will be unnecessary to consider those with respect to 2.
- [12] Section 1401 is relevantly in the following terms:

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<sup>1</sup> *R v Fukusato* [2003] 1 Qd R 272.

"(1) This section applies in relation to a right or liability (the *pre-commencement right or liability*), whether civil or criminal, that:

- (a) was acquired, accrued or incurred under a provision of the old corporations legislation of a State or Territory in this jurisdiction that was no longer in force immediately before the commencement; and
- (b) was in existence immediately before the commencement.

However, this section does not apply to a right or liability under an order made by a court before the commencement.

(2) For the purposes of subsections (3) and (4), the new corporations legislation is taken to include:

- (a) the provision of the old corporations legislation (with such modifications (if any) as are necessary) under which the pre-commencement right or liability was acquired, accrued or incurred; and
- (b) the other provisions of the old corporations legislation (with such modifications (if any) as are necessary) that applied in relation to the pre-commencement right or liability.

(3) On the commencement, the person acquires, accrues or incurs a right or liability (the *substituted right or liability*), equivalent to the pre-commencement right or liability, under the provision taken to be included in the new corporations legislation by paragraph (2)(a) (as if that provision applied to the conduct or circumstances that gave rise to the pre-commencement right or liability)."

Section 1383 is relevantly as follows:

"(1) This section applies to a proceeding, other than a federal corporations proceeding, in relation to which the following paragraphs are satisfied:

- (a) the proceeding was started in a court before the commencement; and
- (b) the proceeding was:
  - (i) under a provision of the old corporations legislation of a State or Territory in this jurisdiction; or
  - (ii) brought as, or connected with, a prosecution for an offence against a provision of the old corporations legislation of a State or Territory in this jurisdiction; and
- (c) the proceeding was not an enforcement proceeding, or an appeal or review proceeding, in relation to an order of a court; and
- (d) the proceeding had not been concluded or terminated before the commencement; and
- (e) either:
  - (i) if the proceeding is a primary proceeding - no final determination of any of the existing rights or liabilities at issue in the proceeding had been made before the commencement; or

- (ii) if the proceeding is an interlocutory proceeding - this section applies to the primary proceeding to which the interlocutory proceeding relates.
- (2) In this section:
  - (a) the proceeding to which this section applies is called the *old proceeding*; and
  - (b) the provision of the old corporations legislation referred to in whichever of subparagraphs (1)(b)(i) and (ii) applies is called the *relevant old provision*.
- (3) A proceeding (the *new proceeding*) equivalent to the old proceeding is, on the commencement, taken to have been brought in the same court, exercising federal jurisdiction:
  - (a) if subparagraph (1)(b)(i) applies - under the provision of the new corporations legislation that corresponds to the relevant old provision; or
  - (b) if subparagraph (1)(b)(ii) applies - as, or connected with, a prosecution for an offence against the provision of the new corporations legislation that corresponds to the relevant old provision.

To the extent that the old proceeding, before the commencement, related to pre-commencement rights or liabilities, the new proceeding relates to the substituted rights and liabilities in relation to those pre-commencement rights or liabilities.

- (4) The following provisions apply in relation to the new proceeding:
  - (a) the parties to the new proceeding are the same as the parties to the old proceeding;
  - (b) subject to subsections (5) and (6), and to any order to the contrary made by the court, the court must deal with the new proceeding as if the steps that had been taken for the purposes of the old proceeding before the commencement had been taken for the purposes of the new proceeding."

[13] The Act was enacted by the Commonwealth Parliament pursuant to a referral to it by Parliaments of the States, including Queensland of matters pursuant to s 51(xxxvii) of the *Commonwealth Constitution*. The relevant referring Act was the *Corporations (Commonwealth Powers) Act 2001 (Qld)* ("the referring Act") which commenced on 21 June 2001. By s 4(1) of the referring Act the Queensland Parliament relevantly referred to the Parliament of the Commonwealth:

"(a) the matters to which the referred provisions relate, but only to the extent of the making of laws with respect to those matters by including the referred provisions in Acts enacted in the terms, or substantially in the terms, of the tabled text (including laws containing provisions that authorise the making of Corporations instruments that affect the operation of the Corporations legislation, otherwise than by express amendment);"

The tabled text containing the referred provisions included the Bill for the Act the terms of which were enacted without relevant change in the Act.

[14] It was not submitted by counsel for either group of applicants that the referring Act was, in any way, invalid or that it did not constitute a reference, under s 51(xxxvii)

of the *Commonwealth Constitution*, of the matters to which the referred provisions related. Nor did either submit, at least directly, that s 1401 was not a law with respect to such a matter. Yet the submissions of both counsel for the applicants, if correct, appear to lead to the conclusion, as I shall show, that s 1401 has no valid operation in this case and, it seems, it is unlikely to have any operation.

- [15] Mr Byrne QC made two alternative submissions. In the first place he submitted that unless, when these offences were alleged to have been committed, the Commonwealth had power to legislate with respect to them, to give s 1401 an operation which would permit them to be prosecuted as Commonwealth offences would be to give it an invalid operation. Secondly, he submitted that, if the correct construction of s 1401 is that it enables the Commonwealth to prosecute what was, when committed, a State offence it cannot validly have that operation because the Commonwealth cannot prosecute State offences unless, possibly, they are joined, or could have been joined with prosecutions for Commonwealth offences.<sup>2</sup>
- [16] As to the first of these, it is true that the relevant alleged offences against s 1064 and s 1311 of the Law, taken to be included for this purpose in the Act, were offences which were allegedly committed before the commencement of the Act. It is also true that, when they were committed, if committed as alleged, they were offences against State law. That appears to be precisely the situation in which s 1401 was intended to operate. Liability for the offences was incurred, if incurred at all, under a provision of the old corporations legislation of the State (s 1311) that was no longer in force immediately before the commencement;<sup>3</sup> and that liability was in existence immediately before the commencement.<sup>4</sup>
- [17] Whilst it was accepted by the applicants, as it necessarily had to be, that the Commonwealth could make laws operating on past conduct,<sup>5</sup> Mr Byrne QC submitted that that was true only if the Commonwealth would have had power to legislate with respect to such conduct when it occurred. For that submission he relied, by way of analogy, on some dicta in *Ex parte Walsh and Johnson; In re Yates*.<sup>6</sup>
- [18] In that case two competing views were expressed about the ambit of the immigration power. The majority view of Knox CJ, Higgins and Starke JJ was that that power did not authorize legislation in respect of persons who, having immigrated to Australia, had made their permanent homes here and so become members of the Australian community. However Higgins J also held that the Commonwealth had no power to legislate with respect to immigration which took

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<sup>2</sup> There were no prosecutions for Commonwealth offences joined, or which could have been joined, with the prosecution of breaches of s 1311 and s 1064.

<sup>3</sup> Section 1401(1)(a); s 1064 was repealed on 1 July 1998.

<sup>4</sup> Section 1401(1)(b); that liability was preserved by s 190E of the Law. That is why s 1401 is the relevant provision rather than s 1400.

<sup>5</sup> See *R v Kidman* (1915) 20 CLR 425; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 539, 643 - 644, 715, 717 - 721.

<sup>6</sup> (1925) 37 CLR 36.

place before the Constitution came into effect.<sup>7</sup> The minority view of Isaacs and Rich JJ was that it did apply to persons who had already immigrated and made their permanent homes here but only if they immigrated to Australia since the establishment of the Commonwealth.

- [19] It was the latter view of Higgins J, and the view of Isaacs and Rich JJ which Mr Byrne QC sought to use by way of analogy in this case. He submitted that it followed from these that the power under s 51(xxxvii) did not authorize legislation with respect to conduct, otherwise apparently within the referred power, which arose before the Commonwealth had power to legislate with respect to that conduct.
- [20] Two difficulties may, at the outset, be identified in that submission. The first is that it appears to be contrary to the implicit assumption upon which s 51(xxxvii) seems to be based that, absent the referral, the Commonwealth would not, or would not clearly, have power to legislate with respect to such conduct; otherwise there would be no point in the referral. And the second is that, to limit the operation of a law, otherwise within the referred power, to a prospective operation, would be to give s 51(xxxvii) a narrower operation than has been given to other Commonwealth legislative powers. It was not submitted that any authority other than the views of Higgins, Isaacs and Rich JJ in *Ex parte Walsh and Johnson* compelled such a narrow operation.
- [21] Even on the assumption that those views are correct, they are, in my opinion, distinguishable. It is one thing to say that Commonwealth legislative power does not authorize legislation with respect to acts which occurred before the Commonwealth and, consequently the legislature, came into existence; specifically, in this case, the immigration power could not have applied to such persons because they did not immigrate into the Commonwealth of Australia.<sup>8</sup> It is quite another to say, as the applicants, in effect, say here, that a referred power cannot apply to acts which occurred before the referral if, as would almost invariably be the case, the Commonwealth had no power to legislate with respect to those acts when they occurred. That would be, in effect, to restrict it, unlike the other Commonwealth legislative powers, to a prospective operation.
- [22] Mr Shirrefs, in making a similar submission, relied also upon a statement in the dissenting judgment of Brennan J in *Polyukhovich v The Commonwealth*<sup>9</sup> that "If the law would have been beyond power had it been in force when the relevant conduct was engaged in, the power cannot now be enlarged by retrospective legislation ... A law cannot create the facts which condition the power needed for its own support". However his Honour was there speaking of a quite different proposition namely, as he said in the following sentence, "A purported exercise of a legislative power cannot itself enliven the power to be exercised". Specifically his Honour was saying that legislation cannot make a matter an external affairs matter by purporting to create facts needed for it to be an external affair. That is so whether the legislation purports to operate prospectively or retrospectively. That principle has no relevance to the present question.

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<sup>7</sup> At 111.

<sup>8</sup> See at 81, 99, 111, 127.

<sup>9</sup> (1991) 172 CLR 501 at 555.

- [23] To Mr Byrne QC's submission that the Commonwealth cannot, even under a referred power, prosecute an offence which, when committed, was a State offence, Mr Shirrefs added a submission that as a matter of construction, s 1401 did not purport to make the offence created by State law a Commonwealth offence. These submissions, in my opinion, are based on a misunderstanding of the effect of the referral and of s 1401.
- [24] The referral was, relevantly, in the terms of s 1401. It may be described, generally, as a referral of an existing liability to a State. But the way in which this was done was to deem persons who had incurred a liability to the State under s 1064 and s 1311 of the Law, on the date of commencement, to incur a liability to the Commonwealth equivalent to and in substitution for the liability which they previously had (s 1401(3)); and for that purpose, to deem the Act to include s 1064 and s 1311 (s 1401(2)(a)).
- [25] If that is the correct construction of the referral and of s 1401, it can be seen that it does not enable the Commonwealth to prosecute a State offence. What the referral does is to refer to the Commonwealth power to make laws in respect of what were, at the time of referral, existing liabilities for offences against State legislation; and to do so by deeming those liabilities to be liabilities for equivalent offences against Commonwealth legislation. And that is what s 1401 does.
- [26] Nor do the referral or s 1401 operate upon past conduct by making past conduct unlawful. Rather they operate upon existing liabilities for that conduct. Prosecutions in respect of those liabilities instituted or, subject to the validity and operation of s 1383, continued after the date of commencement would be prosecutions in respect of deemed Commonwealth offences.
- [27] This resolves the question whether the Commonwealth, since the date of commencement, may prosecute the subject offences. It was conceded that, if s 1401 was valid and had the above operation, then immediately after its enactment the Commonwealth Director of Public Prosecutions could have presented fresh indictments in terms of the indictments in issue here; and that it could still do so. But it does not follow that the present indictments are valid. That depends on the operation of the *Corporations (Administrative Actions) Act* 2001 (Qld) ("the Administrative Actions Act") and the validity and operation of s 1383 and s 1401(2)(b) of the Act.
- [28] Section 4 of the Administrative Actions Act applies it to rights and liabilities arising between parties to proceedings, initiated before 15 July 2001, where an allegedly invalid administrative action is relevant to the proceedings. That is the case here because, absent a referral of power and acceptance of that referral, the prosecution of these offences by the Commonwealth Director of Public Prosecutions was allegedly invalid. That was the second argument referred to in [10] above. Section 5 of that Act then provides that every invalid administrative action has and is deemed always to have had the same force and effect for all purposes as it would have had if it had been taken or purportedly taken by a State authority or officer of the State and the relevant function or power had been duly conferred on that authority or officer. The effect of these provisions is that, if these indictments were, absent effective referral and acceptance of referral of power, invalid because they were presented by the Commonwealth DPP, they are deemed to have the same effect as if they were validly presented as State indictments. There can be no doubt

about the power of the State to enact such a provision. Therefore these indictments must be viewed, immediately prior to the date of commencement as valid State indictments.<sup>10</sup>

- [29] They were therefore proceedings to which s 1383 of the Act applied. That is, they were proceedings started in a court before the commencement date brought as a prosecution for an offence against a provision of the old Corporations legislation; they had not been concluded or terminated before the commencement date; and no final determination of any existing rights or liabilities at issue had been made.
- [30] Section 1383 then provides that a new proceeding, equivalent to the old proceeding, is, on the date of commencement, taken to have been brought in the same court exercising federal jurisdiction as a prosecution for an offence against the provisions of the new Corporations legislation that correspond to the relevant old provisions; that is, s 1401. Section 1383 also provides that the new proceedings relates to substituted rights and liabilities in relation to the pre-commencement rights and liabilities. Its validity also depends on whether it is a law with respect to a matter referred to the Commonwealth Parliament by the Queensland Parliament pursuant to s 51(xxxvii) or incidental thereto.
- [31] In my opinion, if s 1401 is a valid law with respect to a referred matter, as I think it is, s 1383 is also a law with respect to a referred matter or with respect to a matter incidental to the execution of the power vested in the Commonwealth Parliament by the referral.
- [32] It follows in my opinion that the indictments are valid indictments and that the applications to quash them must be dismissed.

#### **Orders**

1. Applications dated 3 October 2001 by Robert Edward Corbett and Anne Shirley Corbett, 5 October 2001 by Kenneth Edwin Parker, 9 October 2001 by Rodney James Mackay, John Andrew Allen, Robert Murray Cooper and Brian Michael Wood to the District Court be removed into this Court.
  2. Dismiss each of those applications.
- [33] **WILLIAMS JA:** There is nothing I wish to add to the reasons for judgment of Davies JA. I agree with the orders proposed.
- [34] **JERRARD JA:** I have read and agree with the reasons for judgment and orders of Davies JA.

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<sup>10</sup> Of course it does not follow that the Commonwealth DPP could continue to prosecute these indictments. Whether he could would depend on Commonwealth power and Commonwealth law. However, contrary to the submissions of Mr Shirrefs, that is, in my opinion, irrelevant. It is sufficient for present purposes that, immediately prior to the date of commencement, these were valid State indictments.