CASE NOTES by Mark Hunter

NAALAS v Bradley and NTA

Federal Court No. D17 of 2001

Judgment of Wilcox J delivered 24 July 2001

CONTEMPT - CRIMINAL - PUNISHMENT

The applicant ("NAALAS") laid a charge of criminal contempt of court against the Hon. Denis Burke MLA, Chief Minister and Attorney-General of the Northern Territory of Australia.

The charge related to a proceeding ("the principal proceeding") which was commenced in the Northern Territory Supreme Court in April 2000 and was recently transferred to the Federal Court. In the principal proceeding, NAALAS has challenged the validity of the 1998 appointment of Mr Hugh Bradley to the position of Chief Magistrate of the Northern Territory.

The charge arose out of comments made by Mr Burke in a press conference he gave outside Parliament House in Darwin on the afternoon of 7 June this year. Excerpts from the press conference were broadcast that evening on Darwin television and radio.

During the press conference Mr Burke raised the subject of the principal proceeding, and made various accusations against NAALAS, including using taxpayers' money "...in such an irresponsible way" with the intent of securing the abolition of mandatory sentencing and trying to "...rip the whole judicial system apart by (making) allegations which are unfounded".

Mr Burke rejected a prompt and written request made by NAALAS for him to publicly retract and apologise for these comments.

At the hearing of the contempt charge, NAALAS relied upon further allegations made against it by Mr Burke during the press conference, including that NAALAS:

- was attempting to "destroy the reputation" of the first respondent;
- was attempting to "impugn the reputation" of the Chief Justice;
- in seeking to have mandatory sentencing overturned, did not care who it destroyed; and
- was engaged in a "destructive process...destructive against individuals".

Counsel for NAALAS argued that these comments by Mr Burke were calculated, or had the tendency, to:

- improperly pressure NAALAS to discontinue or compromise the principal proceeding; and
- dissuade potential witnesses from giving frank and comprehensive evidence on behalf of NAALAS.

Counsel for Mr Burke (and the respondents) argued that none of the comments made by him during the press conference had "a real and definite tendency to interfere with the course of justice" in the principal proceeding.

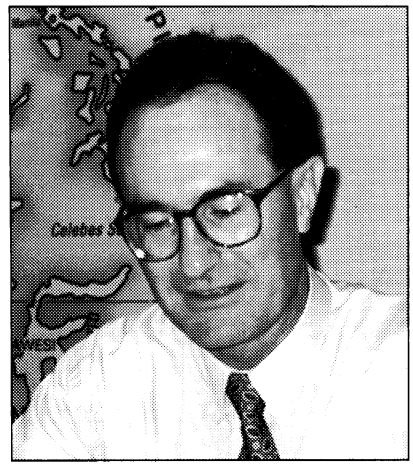
HELD

1. Mr Burke intended, by comments he made during the press conference, to interfere with the administration of justice. His comments also had this tendency.
2. Mr Burke is, beyond reasonable doubt, guilty of contempt of court.
3. Mr Burke is ordered to pay, personally and by way of penalty, the sum of $10,000 to the Registrar of the Court.
4. Mr Burke is ordered to pay, personally, the costs of NAALAS on this application.

In discharging the onus of proof borne by NAALAS, it was not incumbent upon NAALAS to prove that Mr Burke intended to interfere with the administration of justice or that his comments actually interfered with the conduct by NAALAS of the principal proceeding.

In reaching his decision, Justice Wilcox placed reliance upon, inter alia:

- the fact that the very existence of NAALAS, as a voluntary association formed under Territory law, could be terminated by the Territory Parliament;
- the fact that Mr Burke had, in an interview in July 2000, accused NAALAS of "wasting millions of taxpayer dollars" and stated, "I reckon they should close a lot of these Aboriginal legal aid organisations down"; and
- the fact that at least one NAALAS board member, following the summary dismissal of the principal proceeding on 16 June 2000 by Olney J, expressed opposition to the decision by NAALAS to challenge the appointment of the first respondent as Chief Magistrate;



Mark Hunter, barrister in Darwin

His Honour determined that Mr Burke's comments on 7 June had a real, and not a fanciful or merely theoretical tendency:

- to put pressure on NAALAS to discontinue the principal proceeding; and
- to deter persons, and particularly lawyers, from supplying information to NAALAS or willingly giving evidence on its behalf.

Wilcox J noted that Mr Burke's political party controlled the Territory Parliament and that, as Chief Minister, his position on the closure of NAALAS was an opinion expressed by a powerful person.

Justice Wilcox observed that, in raising the subject of the principal proceeding during the press conference, Mr Burke had not been responding to questions put by his interviewers. In commenting upon the conduct of NAALAS in the principal proceeding, the history of Mr Burke's media comments "...suggest a campaign on these topics by Mr Burke, not a public debate by others to which

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he merely made a contribution".

His Honour warned Mr Burke that a repetition of his criminal contempt could "quite possibly" result in his imprisonment.

Appearances

Applicant - Moses and Keyzer / G. James

Respondents (and Burke) - Collins and Grant / SFNT.

Commentary

Mr Burke's case stands as the first occasion that a serving Attorney-General in Australia has been dealt with for contempt of court.

It is interesting to compare the factual circumstances of Mr Burke's case and *DPP v Wran* (1986) 7 NSWLR 616, which is the only other instance in Australia of a government leader being found guilty of contempt of court.

On 28 November 1985 Premier Neville Wran, as he then was in New South Wales, agreed to an immediate interview requested of him without notice by radio journalists. The (now deceased) Mr Justice Lionel Murphy had earlier the same day been granted a retrial on two charges of attempting to pervert the course of justice.

Justice Wilcox noted that the video of Mr Burke approaching the group of journalists "conveys the impression that the press conference was pre-arranged".

In *direct* response to a question put by one of his interviewers, Mr Wran stated that he held "a very deep conviction" that Mr Justice Murphy was innocent and that the retrial would result in a "different" verdict.

Justice Wilcox observed that Mr Burke's unlawful comments were not responsive to any of the questions which were posed by his interviewers.

Mr Wran gave evidence, in the first instance by affidavit, in defence of the charge brought against him by the DPP. He was called by his senior counsel, Tom Hughes QC, to give additional evidence-in-chief. He was then cross-examined and denied any intention to prejudice potential jurors who might have heard or read the opinion he had expressed. He told the Court of Appeal of New South Wales that Mr Justice Murphy had for more than 40 years been "a very close friend".

Their Honours found Mr Wran guilty of contempt, but accepted his evidence that he did not specifically intend to commit the offence. He was fined.

Mr Burke elected not to give evidence.

Mark Hunter is a barrister in Darwin.

Law Society Annual General Meeting 5 September 2001

GST CASH FLOW — A PROBLEM FOR SOME LAW FIRMS

On 30 June 2001 the Law Council of Australia met with the Minister for Small Business, the Hon Ian Macfarlane MP, and his advisors to discuss the serious cash flow problems experienced by individual lawyers and/or law firms.

The Minister for Small Business suggested that those individual lawyers and/or law firms could make an application to the Australian Taxation Office for authority to remit GST payments on a cash basis and refers to Goods and Services Tax Ruling No 2000/13 entitled "Goods and services tax: accounting on a cash basis". Attention is particularly drawn to paragraphs 27 - 32 (reprinted below) which set out the procedures that need to be followed should a taxpayer wish to account for GST on a cash basis where the taxpayer does not otherwise satisfy the test to account on a cash basis (i.e. turnover is $1 million or more).

Permission to account on a cash basis

27 If you do not satisfy the requirements set out in paragraph 20 of the ruling you cannot choose to account for GST on a cash basis.

28 However, under subsection 29-45(1), you can apply in the approved form to the Commissioner for permission to account on a cash basis.

29 The factors which the Commissioner must consider when making this decision are:

- the nature and size of the enterprise that you carry on; and
- the nature of the accounting system that you use.

30 You do not need to apply for permission to account on a cash basis if you satisfy the requirements under section 29-40 and are able to choose to account on a cash basis.

31 For the purposes of applying for permission to account on a cash basis, an application is in the "approved form" if the application:

- is in writing;
- provides details about the nature and size of each of your enterprises and the nature of your accounting system which makes it appropriate for you to account on a cash basis; and
- is signed by the person with the legal authority to represent you.

32 Based on the information provided in the application, the Commissioner will determine whether it is appropriate to permit you to account on a cash basis. This decision will depend on the particular facts and circumstances of each case.

Contact the ATO or your accountant for further information.