CASE NOTES

THE CHURCH OF SCIENTOLOGY INC. AND ANOTHER v. Mr JUSTICE WOODWARD AND OTHERS

Constitutional Law — Powers of Commonwealth Statutory body — Non-application of judicial review — A.S.I.O. Act 1979 (Cth) ss. 4, 8, 17, 20 and 21.

Medieval public law has been summed up in the lines from Seneca: 'To Kings belongs authority over all men, to subjects ownership'.[1] The judgment of Wilson J. in *The Church of Scientology Inc. and another v. Mr Justice Woodward and others*[2] may illustrate the limited progress that the common law in Australia has made in its understanding of the State, and the bounds that courts are prepared to place on State functions.

The litigation before Wilson J. took the form of a request by the defendants that the plaintiffs' statement of claim be struck out. The plaintiffs had sought relief against A.S.I.O. (the Australian Security Intelligence Organisation, of which the first defendant is Director-General) under a number of headings, but this note is restricted to the claims related to the Australian Security Intelligence Organisation Act 1979 (Cth) and its predecessor Act of 1956.

The functions of A.S.I.O. are specified in the 1979 Act in s. 17(1) as, *inter alia*:

(a) to obtain, correlate and evaluate intelligence *relevant to security*;
(b) *for purposes relevant to security and not otherwise*, to communicate any such intelligence to such persons, and in such manner, as are appropriate to those purposes, . . .[3]

'Security' is defined in s. 4 of the 1979 Act as, *inter alia*, the protection of the Commonwealth and its component States, Territories and people from:

(i) espionage;
(ii) sabotage;
(iii) subversion;
(iv) active measures of foreign intervention; or
(v) terrorism, . . .

The plaintiffs complained of harassment by A.S.I.O. and the passing of information on the plaintiffs to third parties, as they had alleged in similar litigation before Aickin J. in 1979 under the 1956 Act.[4] Wilson J. gave six grounds for striking the claim out[5] and they may be condensed to three principal reasons.

The first were what might be called 'political' reasons. The structure of the 1979 Act vests the control for decision-making on collecting intelligence and passing it on, which previously lay with the responsible Minister, in the Director-General (s. 8). The 'legislature makes clear its reliance upon the integrity and competence of the Director-General to ensure that A.S.I.O. conforms to its charter, and it pays some attention

[1] McIlwain C., *The Growth of Political Thought in the West* (1932) 373.
[2] (1980) 54 A.L.J.R. 542.
[3] Emphasis added.
[4] Unreported, see case note by Leslie Glick (1980) 11 *Federal Law Review* 102.
[5] (1980) 54 A.L.J.R. 542, 548-9.

to political processes in relation to the office'[6] by, *inter alia*, having the Director-General report in general terms to the Leader of the Opposition in the House of Representatives.[7] Furthermore, the provision in s. 20 of the Act that:

> The Director-General shall take all reasonable steps to ensure that —
>
> (a) the work of the Organization is limited to what is necessary for the purposes of the discharge of its functions; and

that the organization operates without prejudice or bias, was dismissed by Wilson J. as exhibiting 'the character of a political exhortation rather than a legal command'.[8]

The second reason given for the inapplicability of judicial review was the structure of the Act. Most importantly the Act provided in ss. 54-71 for a review of an adverse security assessment before the Security Appeals Tribunal in circumstances quite removed from the openness of normal court proceedings. Wilson J. referred to this as 'the provision of a specific form of judicial review of one aspect only of the operations of A.S.I.O. . . .'.[9]

The third reason given stemmed from the Solicitor-General for the Commonwealth's argument in Wilson J.'s words,[10] 'that even if it be possible to characterize [information gathering] as outside [A.S.I.O.'s] proper function, that does not make the conduct unlawful. Similarly with the alleged improper communication of information, neither statute or common law provides a remedy unless the published statement be defamatory and not protected by privilege'. Wilson J. initially[11] put aside the issue of communicating intelligence, by referring to the continuing capacity of A.S.I.O. to collect information on individuals even though previous gleanings may have been barren of information relevant to security. Subsequently[12] Wilson J. tacitly agreed with the Solicitor-General's argument, by approving the reasoning in Aickin J.'s unreported 1979 judgment.

To return to the 'political' reasons, it is apparent that in an attempt to limit political direction in the immediate running of A.S.I.O., the Act waters down the already debased notion of ministerial control. In an attempt at reasserting Parliamentary supremacy the Act provides for general briefing of the Leader of the Opposition. Although courts still refer to the notion of ministerial responsibility to justify their refusal to exercise judicial *review*,[13] the concept has been thoroughly denounced by Professor Hogg.[14] It seems implausible that a general briefing of the Leader of the Opposition on A.S.I.O. activities will restrain individual excesses or abuses of power by A.S.I.O. The legislature may rely on the integrity and competence of the Director-General, but under the Australian system of government the public expect the courts to ensure that arms of executive government remain within their statutory charter.

The dismissal of s. 20 as 'a political exhortation rather than a legal command'[15] only drew the Court further from the function of review. All legislation exhibits to some degree political as well as legal aspects[16] and only a determinedly activist bench bent on the most open judicial law-making could follow Wilson J.'s lead of classifying legislation as not legally binding on a court.

As to the second line of reasoning, the provision in the A.S.I.O. Act of an avenue of appeal against an adverse security assessment bears no relationship to the funda-

[6] (1980) 54 A.L.J.R. 542, 548.
[7] Section 21.
[8] (1980) 54 A.L.J.R. 542, 548.
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] (1980) 54 A.L.J.R. 542, 549.
[13] *E.g. per* Barwick C.J. in *Salemi v. Mackellar* (1977) 137 C.L.R. 396, 403.
[14] (1969) 43 *Australian Law Journal* 215, 218-19.
[15] *Supra* n. 8.
[16] Griffith J. A. G., 'The Political Constitution' (1979) 42 *Modern Law Review* 1.

mental issue in this case: whether A.S.I.O. exceeded its statutory powers. The existence in the Act of a simulacrum of natural justice, foreclosing judicial review for omissions from the full complement of due process procedures, should not prevent a court carrying out its quite separate function of reviewing alleged action by a government agency in excess of the powers granted to it by Parliament.

In the final line of reasoning, Wilson J. pronounced that even if information gathering or collecting had proceeded outside A.S.I.O.'s 'proper function' (*i.e.* without relevance to security), because the conduct was not unlawful, in the absence of defamation, no remedy was provided as no individual's legal rights had been infringed. Here is the hub of the problem: under this approach a statutory body is clothed with the full capacity of natural persons. No reference is made to the question of whether the activity complained of is *ultra vires* the powers enumerated in the statute creating the body. Rather, the body is assumed to be of full capacity and limited in its activities only by the rights recognized by law as inhering in individuals. There is no right to privacy in Australian common law, and hence no privacy related limit on the information that can be collected on and communicated about an individual. No personal right existed, analogous to private property, by which the authority of Seneca's King might be circumscribed.[17]

Wilson J. relied at this point on the decision of Aickin J. in the previous, unreported, *Scientology case.* Aickin J. spoke of the confusion of 'lawfulness with lack of power'.[18] His Honour reasoned that if a communication of information from within the Commonwealth Public Service was unauthorized, it might be unlawful by virtue of the Commonwealth Crimes Act, but the 'fact that it is a criminal offence is enough to demonstrate that it is not a nullity' for lack of power.[19]

Leslie Glick wrote in his note[20] that '[t]he judgment of Aickin J. on these points is, with respect, unimpeachable'. It may be that the logic of Aickin J., based on the narrowest of premises, is unimpeachable, but a satisfactory resolution of the social issue involved does not necessarily follow from such limited reasoning. The 1956 A.S.I.O. Act contained a rubric similar to that in its 1979 successor: under s. 5(1)(a) the collection of information had to be 'relevant to security' and dissemination of information 'in the interests of security'. Aickin J. allowed no question of adequacy of statutory or executive authority to gather or pass information. He relied on the comments of Griffith C.J. in *Clough v. Leahy*[21] regarding the undesirability but non-illegality of an individual making impertinent enquiries into his neighbour's affairs. This reasoning led Griffith C.J. (speaking for the High Court) to allow the Crown in right of New South Wales to establish a Royal Commission with powers of enquiry, but not of compulsion, to extract answers.

It may be that the activities of A.S.I.O. should be subject to judicial review, not merely with regard to the terms of the governing statute,[22] but with a view to constitutional restraints on Commonwealth executive action.[23] It may be one thing for a State Government to create a body which may act impertinently, but quite another for the Commonwealth to do so with its limited heads of power. Relevance to security of A.S.I.O. activity becomes doubly important in the light of a necessary connection with the defence power.

[17] McIlwain *supra.*
[18] Transcript of judgment, 11.
[19] Transcript, 12.
[20] *Supra* 106.
[21] (1904) 2 C.L.R. 139, 157.
[22] Yardley D. C. M., 'The Abuse of Powers and its Control in English Administrative Law (1970) 18 *American Journal of Comparative Law* 565.
[23] Mason J., *Victoria v. Commonwealth (The A.A.P. Case)* (1975) 134 C.L.R. 338, 396.

Aickin J. related A.S.I.O.'s untrammelled capacity to its non-corporate status. In *R. v. Criminal Injuries Compensation Board, ex parte Lain*[24] however, Parker L.C.J. allowed for judicial review in 'every case in which a body of persons of a public as opposed to a purely private or domestic character had to determine matters affecting subjects . . .'.[25]

A final point of interest is the similarity of the fact situations in the two *Scientology cases* to that in *Pullan v. McLellan*[26] before the Supreme Court of British Columbia. That plaintiff contended that under the relevant statute, documents relating to criminal records could only be distributed to persons engaged in the administration of the law, and that in fact such documents had gone to a person not so engaged. The court found such activity not unlawful, but based its reasoning[27] on *Atkinson v. Newcastle Waterworks Co.*,[28] which concerned the non-provision of a service prescribed by statute. Plainly, this was irrelevant to the problem in *Pullan*, and provides no succour to the respondents in the forthcoming appeal to the Full High Court from the decision of Wilson J.

M. J. Tooley wrote:

> . . . no one in the middle ages asked 'What is a state and how is it constructed?' but only 'Who are the rulers and what are their powers?'.[29]

It would seem that our public law has, not merely in crucial aspects, not advanced since the middle ages, but, if our courts are not prepared to identify and demarcate executive powers, our law is retrograde.

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NGATAYI v. R.[1]

Conviction for wilful murder — Ability of the accused to comprehend the trial process — Question as to whether tribal aboriginals ought to be tried under a system of law alien to their understanding.

Ngatayi was a full blooded tribal aborigine who had been living at the La Grange Mission in north-west Western Australia for some time when the offence occurred. On May 9 1979, another mission resident named Kumbarley White was stabbed four times and killed by Ngatayi for motives which never fully emerged, although it seemed that the accused blamed White for the recent death of his niece. Ngatayi stated that he had consumed six bottles of beer before attacking White, and was apparently drunk at the time of the offence.

He was charged with the wilful murder of White before the Supreme Court of Western Australia,[2] and, through an interpreter, pleaded 'guilty'. Counsel for the defence submitted that his client's plea should not be accepted at its face value

[24] [1967] 2 Q.B. 864, 882.
[25] Yardley *supra* 573.
[26] [1946] 1 W.W.R. 130.
[27] *Ibid.* 132.
[28] (1877) 2 Ex.D. 441.
[29] Editing Bodin J., Six *Books of the Commonwealth*, xiv.
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[1] (1980) 30 A.L.R. 27. High Court of Australia: Barwick C.J., Gibbs, Mason, Murphy and Wilson JJ. Case decided July 3, 1980 in Canberra.
[2] Then sitting in Broome.