
Around the nation: Tasmania

Editor: Justice Stephen Estcourt

LINKS WITH CANBERRA: TASMANIAN CASES IN THE HIGH COURT

When the judges of the Supreme Court of Tasmania ceded their chambers for three days to the justices of the High Court of Australia on 29 February 2016, it can be rightly stated that the oldest Supreme Court in the Federation was honouring a tradition almost as old as the most important court in the nation itself. However, that statement has not always been without historical controversy. The High Court of Australia has not always been acknowledged as the most important court in the country. When the Court was established, as is well known, the *Constitution* had not abolished rights of appeal to the Privy Council, but rather had merely placed the High Court above the State courts.

The Chief Justices of the Supreme Courts, with the exception of Sir Samuel Griffith, who had of course been appointed as Chief Justice of the High Court, were either opposed to, or did not support, the establishment of the Court. Sir Samuel Way, the Chief Justice of South Australia, went so far as to say that the proposed travelling court was “no more needed than the 5th wheel on a coach”.

And the Supreme Court of Tasmania has not always been acknowledged as the oldest court in Australia. On the basis that the Supreme Court of New South Wales was established by the Third Charter of Justice of 1823, the Tasmanian Supreme Court is the oldest by 10 days as it was proclaimed publicly on 7 May 1824, and the New South Wales Supreme Court did not hold its proclamation ceremony until 17 May 1824.

The date on the Third Charter of Justice is 1823 but it took approximately seven months for the two copies of the Charter to be delivered to Hobart (Chief Justice Pedder on the *Hibernia*) and to Sydney (Chief Justice Forbes on the *Guilford*). Both ships arrived at their destinations in March 1824 but the proclamation declaring the Tasmanian Supreme Court “open for business” pre-dates the opening of the Supreme Court of New South Wales.

The position of the High Court as the highest Australian court is beyond doubt since the Court unanimously observed in *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461 that the power of the Court to grant a certificate allowing an appeal to the Privy Council “has long since been spent” and is “obsolete”.

Similarly, the position of the Tasmanian Supreme Court as Australia’s first Supreme Court should be regarded as settled. Former Chief Justice of the High Court, the Hon Justice Murray Gleeson AC, made the following concession on 3 November 2003 at a ceremony to mark the centenary of the High Court, held in the same courtroom in which that Court first sat on 23 February 1904:

Your Excellency, Chief Justice Cox, Attorney-General, Mr President of the Law Society, Mr Estcourt,

This ceremonial sitting is to mark, in Hobart, the Centenary of the High Court. My colleagues and I are delighted and honoured by the presence of all who have joined us for that purpose. We are grateful to the Attorney-General, and to the representatives of the Law Society and the Bar Association, for their expressions of goodwill, which we value highly.

I should mention in particular the presence of the Governor of Tasmania, and the Chief Justice and other members of Australia’s oldest Supreme Court. As a former Chief Justice of the second oldest Supreme Court, I am happy to make that acknowledgment.

The tradition of the High Court sitting in the Supreme Court of Tasmania’s court buildings when it visits Hobart has continued to the present time, notwithstanding the development some three decades ago of the superb Federal Court complex just a stone’s throw across St David’s Park.

Not all things have remained the same however, since the High Court’s first visit in 1904. That visit was expressly to hear the appeal in *D’Emden v Pedder* (1904) 1 CLR 91, a case involving the Deputy Postmaster-General of Tasmania, who had refused to pay stamp duty of 2d on his salary. The travelling arrangements were noticeably different back then. According to the *North Western Advocate and the Emu Bay Times* of Thursday, 28 January 1904, the Chief Justice, accompanied by Lady Griffith, arrived at Burnie from Melbourne on the steamer *Flora*, staying at the Furner’s Bay View



Hotel in Burnie before visiting Launceston on the way to Hobart to hear the appeal in *D'Emden v Pedder*. Senior puisne judge of the High Court, Sir Edmund Barton, on the other hand, was about to sail from Sydney for Hobart, and the third member of the Court, Mr R E O'Connor, had been on holiday in South Africa and was thought to be on his return voyage and due to reach Hobart "about" 23 February 1904, the date the Court was to sit.

In an address given in Hobart to the Royal Society of Tasmania on 1 December 2015, the Hon Justice Alan Blow OAM, Chief Justice of Tasmania, adumbrated the long list of Tasmanian cases in the High Court. After recounting the facts and decision in *D'Emden v Pedder*, his Honour noted that in the decades that followed the 1932 banning by the Victorian Parliament of the importation of potatoes from Tasmania, there followed many tedious s 92 cases in relation to the validity of Tasmanian transport legislation, particularly in relation to the regulation of goods vehicles and the imposition of charges for permits. He cited: *Hughes v Tasmania* (1955) 93 CLR 113; *Russell v Walters* (1957) 96 CLR 177; *Britton Bros Pty Ltd v Atkins* (1963) 108 CLR 529; *IXL Timbers Pty Ltd v Attorney-General (Tas)* (1963) 109 CLR 574; *Deacon v Mitchell* (1965) 112 CLR 353; *Webb v Stagg* (1965) 112 CLR 374; *Brambles Holdings Ltd v Pilkington* (1972) 126 CLR 524; *Holloway v Pilkington* (1972) 127 CLR 391; *SOS (Mowbray) Pty Ltd v Mead* (1972) 124 CLR 529; *Pilkington v Frank Hammond Pty Ltd* (1974) 131 CLR 124.

A long list indeed. Chief among them though was *Cole v Whitfield* (1988) 165 CLR 260, where, in a joint judgment, the seven judges of the High Court held that the Tasmania regulations prescribing the minimum size for rock lobster were compatible with s 92. The Court abandoned previous approaches to s 92 and adopted a new one by which State legislation would only be regarded as incompatible with s 92 if it was discriminatory against interstate trade and commerce in a protectionist sense,

The most significant constitutional case in the High Court concerning Tasmania however was undoubtedly the *Tasmanian Dam Case* (*Commonwealth v Tasmania* (1983) 158 CLR 1). As will be recalled, the High Court held that the Commonwealth Government had the power to stop the Tasmanian Government from building the Gordon below Franklin Dam. The majority of the High Court, Mason, Murphy, Brennan and Deane JJ, held that, because of Australia's obligations under the *Convention Concerning the Protection of the World Cultural and Natural Heritage*, Commonwealth regulations prohibiting the construction of the dam were valid because the Commonwealth had the power to make laws in relation to external affairs, and because of the Convention obligations, the Commonwealth had the power to make laws stopping the dam.

Some non-constitutional Tasmanian cases in the High Court have been of importance in the development of the law. In *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ held that under the common law of Australia, any special rule relating to the liability of an occupier for fire escaping from his premises and the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 had been absorbed by the principles of negligence. In *Carr v The Queen* (1988) 165 CLR 314, the prosecution had relied on an unsigned record of interview without which the evidence would not have been strong enough to prove guilt beyond reasonable doubt. Mr Carr was found guilty. An appeal to the High Court succeeded. The majority took the view that, in the circumstances, the jury should have been warned that, when police officers are very experienced at giving evidence, it can be difficult to tell whether they are being truthful or not.

Two Tasmanian cases about injunctions have gone to the High Court in recent years. The first was *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, and the second, *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57. In the former case, activists from an animal welfare organisation had entered a possum abattoir as trespassers and had installed hidden video cameras. They supplied the resultant footage to the national broadcaster, the ABC. The abattoir proprietor applied for an injunction to prohibit the airing of the footage on television. The High Court held that, although when a case is pending in a court that court has the power to grant a temporary injunction, the granting of an injunction is inappropriate when there is no basis for claiming damages or any other remedy. In the second case, a Mr O'Neill was serving a life sentence for murdering a boy in the 1970s. The ABC was proposing to screen a film about him that

suggested he had committed a number of other murders, including the murders of the Beaumont children in Adelaide in the 1960s. Mr O'Neill sued the ABC for damages for defamation, and obtained an interlocutory injunction to restrain the ABC from screening the program while his case was pending. A majority of the High Court took the view that free speech was an important consideration that had not been given appropriate weight, and that the case was one where a court should not restrain the publication of allegedly defamatory material because there was a right to damages and that was an adequate remedy.

The High Court's last visit to Tasmania prior to 2016 was 10 years ago in 2006.

Prior to the February 2016 sitting of the Court in Hobart, the most recent Tasmanian case to come before the Court in Canberra was *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390. In that case the Court affirmed its earlier decision in *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469, that a publican did not have a duty to prevent a customer from exposing himself or herself to a risk of harm.

Of the two Tasmanian appeals heard by the High Court in March 2016, one concerned a dispute as to whether the sea floor under fish farms in Macquarie Harbour on Tasmania's west coast is "land" liable to council rates (*Coverdale v West Coast Council* (2016) 90 ALJR 562; [2016] HCA 15 (reported in this issue)). The other concerned the scope of the duty that a testator's solicitor owes to an intended beneficiary in circumstances where a family provision application could possibly have been avoided if relevant advice had been given and accepted by the testator (*Badenach v Calvert* (2016) 90 ALJR 610; [2016] HCA 18 (reported in the June issue)).

As Blow CJ said in his address to the Royal Society:

Having regard to the size of its population, Tasmania seems to have generated more than its share of important High Court cases over the years, and that phenomenon seems likely to continue.

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