

Non-specific gender

Joanna Davidson reports on *Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11.

Does the NSW Registrar of Births, Deaths and Marriages, on receipt of an application by an unmarried person who has undergone a sex affirmation procedure whose birth has not been registered in NSW,¹ have power to register the person's sex as 'non-specific'? On 2 April 2014, the High Court (comprising French CJ, Hayne, Kiefel, Bell and Keane JJ) unanimously held that the registrar's power to register a person's 'change of sex' did extend so far; but did not extend to registering further categories such as transgender, androgynous or intersex.

Background

Norrie was born in Scotland with male reproductive organs. In 1989 she underwent a 'sex affirmation procedure' within the meaning of s 32A of the *Births, Deaths and Marriages Registration Act 1995* (NSW).² Such a procedure is defined as 'a surgical affirmation procedure involving the alteration of a person's reproductive organs carried out: (a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or (b) to correct or eliminate ambiguities relating to the sex of the person'. Norrie gave evidence below that she undertook the surgery to eliminate the ambiguity in relation to her sex.³ She was of the view that the surgery had not resolved that ambiguity.

On 26 November 2009, Norrie applied to the registrar under s 32DA of the *Births, Deaths and Marriages Registration Act* for her sex to be registered as 'non-specific'.⁴ Section 32DA imposes five conditions on an application to the registrar 'for the registration of a person's sex': an applicant must be 18 years or over; be an Australian citizen or permanent resident; live in NSW and have lived in this state for at least a year; have undergone a sex affirmation procedure; not be married and be a person whose birth is not registered under the Act or a law of another state providing for the registration of births.⁵ Under s 32DC(1), '[t]he registrar is to determine an application under section 32DA by registering the person's change of sex or refusing to register the person's change of sex.' Neither sex nor 'change of sex' is defined in the Act.

Despite the discrepancy between the language of ss 32DA and 32DC as to what is to be registered, it was not disputed that

these provisions provide for a first registration in NSW of an applicant's sex differing from an earlier record (outside NSW) of the applicant's sex.⁶ Norrie's application was accompanied by statutory declarations from two medical practitioners stating that she had undergone a sex affirmation procedure, in accordance with the requirements of s 32DB.⁷ The registrar approved Norrie's application in February 2010 and issued a Recognised Details (Change of Sex) Certificate. In March 2010, the registrar wrote to Norrie advising her that this certificate was invalid.⁸

Norrie applied for review of the decision by the Administrative Decisions Tribunal, which held that it was not open to the registrar to register Norrie's sex as 'non-specific'.⁹ The tribunal's Appeal Panel dismissed Norrie's appeal.¹⁰ Norrie's further appeal to the Court of Appeal was upheld, the court remitting the matter to the tribunal for consideration of whether Norrie might be registered using a specific category of sex not confined to male or female, e.g., intersex, transgender or androgynous.¹¹ The High Court dismissed the appeal but set aside the Court of Appeal's order remitting the matter to the tribunal. A Gender Agenda Inc was granted leave to appear *amicus curiae*. Its written submissions concerning classification of persons as 'intersex' indicate the challenges of future legislative reform in this area.¹²

Construction of the Act

The High Court recognised that the ordinary usage of language referring to the opposite sex invokes the contrasting categories of male and female. Nevertheless, the Act's reference to 'ambiguities relating to the sex of the person' and the context in which the relevant provisions were enacted enabled the court to find that the Act recognised that 'the sex of a person is not ... in every case unequivocally male or female'.¹³

The High Court construed the Act by reference to the purpose of the register and the limited role of the registrar. The registrar's role under s 32DC is confined to recording information provided by community members and does not involve 'moral or social judgments' or the making of decisions about the outcome of any surgical procedure.¹⁴ While accepting

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the registrar's submission that the Act recognises only male and female as registrable classes of sex, the court also accepted Norrie's submission that the register's purpose is to state the truth about matters recorded therein, so far as possible. Classifying Norrie in the register as male or female would involve recording misinformation, because her sex remained ambiguous.¹⁵

The court had regard to the existing state of the law at the time ss 32DA–32DD were introduced into Pt 5A of the Act in 2008. Part 5A was inserted in 1996, by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW). That amending Act introduced definitions of 'recognised transgender person' and 'transgender person' into the *Anti-Discrimination Act 1977* (NSW). The definition of 'transgender person' for the purposes of the Anti-Discrimination Act includes both a person 'who identifies as a member of the opposite sex' and 'who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex'.¹⁶ While Pt 5A of the Act does not use the term 'indeterminate sex', the High Court found that the provisions of Pt 5A are to be applied in the context of express legislative recognition of the existence of persons of indeterminate sex.¹⁷

These aspects of the statutory context, together with the reference to 'ambiguities' in the definition of 'sex affirmation procedure', were sufficient to enable their Honours to conclude that it was open to the registrar to register Norrie's change of sex pursuant to s 32DC by recording a change in classification from male to non-specific.¹⁸ The judgment does not address the registrar's submission that identification of two categories of sex is a fundamental principle or at least assumption of the general system of law.¹⁹

Effect of registration of change of sex

The High Court noted the registrar's acknowledgement that registration of a person's sex as 'non-specific' would not leave a person in 'no-man's land' to the extent that other state laws are premised on a binary male/female division of the sexes.²⁰ This is because the deeming effect of s 32J, which recognises a person whose change of sex is registered under Pt 5A as being of the registered sex for the purposes of other NSW laws, operates subject to 'any law of NSW'. The High Court rejected the registrar's submission that the recognition of more than

two categories of sex would generate unacceptable confusion with only a brief discussion, noting that with the exception of marriage 'for the most part, the sex of the individuals concerned is irrelevant to legal relations'.²¹

Conclusion

The decision removes the prospect that the potential categories of registration of sex under the Act are indeterminate. Registrable classifications of sex under Pt 5A are confined to male, female and non-specific. The judgment provides an example of the consideration of statutory context in the first instance for purposes of construction, in circumstances where references to any category of sex other than male and female in the Act and relevant extrinsic material were limited.

Endnotes

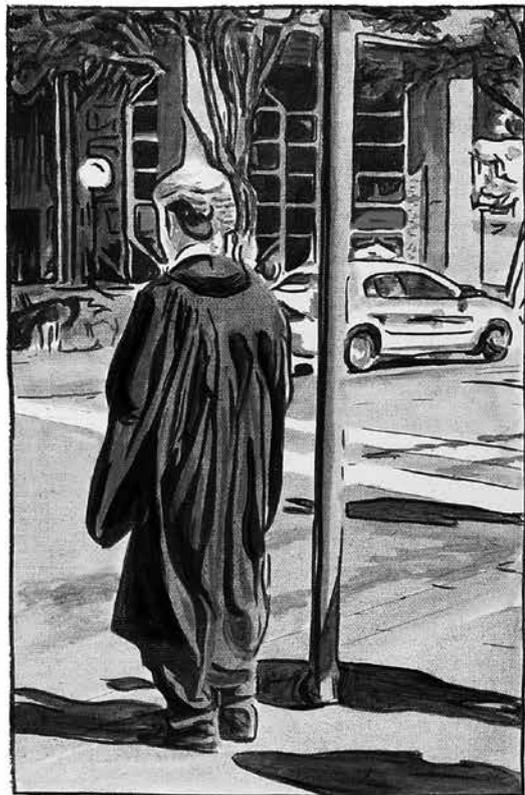
1. Or under a 'corresponding law': *Births, Deaths and Marriages Registration Act 1995* (NSW), s 32DA(1)(c).
2. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [9].
3. *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [6].
4. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [11].
5. See the definition of 'corresponding law': *Births, Deaths and Marriages Registration Act 1995* (NSW), s 4.
6. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [17].
7. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [13].
8. *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [8].
9. *Norrie v Registry of Births, Deaths and Marriages* [2011] NSWADT 102 at [54].
10. *Norrie v Registrar of Births, Deaths and Marriages* [2011] NSWADTAP 53 at [20].
11. *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [204]–[205] per Beazley ACJ, [279] per Sackville AJA, [288]–[290] per Preston CJ (LEC).
12. Cf the provision for the registration of intersex persons in Pt 4 of the *Births, Deaths and Marriages Registration Act 1997* (ACT).
13. *AB v Western Australia* (2011) 244 CLR 390 at [23].
14. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [16], [38].
15. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [30], [32].
16. *Anti-Discrimination Act 1977* (NSW), s 38A.
17. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [18].
18. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [40].
19. See *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA Trans 36.
20. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [43].
21. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [42].

become a member by subscribing to units on the terms on which they are issued (even in circumstances where those terms were the subject of prior arrangement between the responsible entity in the putative member);⁴

- the volition relevant to withdrawal by a member could not be found merely in the choice of the member to sue or not to sue to enforce the terms of the issue of the interest in the managed investment scheme;⁵ and
- there is a ‘real difference’ between the creation of a separate contractual obligation for a responsible entity to redeem an interest, and the creation of an obligation for the responsibility to redeem as part of the terms of issue of the interest. Accordingly, it may be the case that the requisite volition can be found in the terms of a separate contractual obligation on the responsible entity.⁶

Endnotes

1. [2014] HCA 17 at [23].
2. Which the High Court noted was considered extensively by the *Australian Law Reform Commission and the Companies and Securities Advisory Committee* in a joint report published in 1993; [2014] HCA 17 at [24] – [27].
3. [2014] HCA 17 at [28].
4. [2014] HCA 17 at [31].
5. [2014] HCA 17 at [31].
6. [2014] HCA 17 at [31].



The limits of purposive statutory construction

Victoria O'Halloran reports on *Taylor v The Owners of Strata Plan 11564* [2014] HCA 9.

On 2 April 2014 the High Court delivered its judgment in *Taylor v The Owners of Strata Plan 11564* determining that s 12(2) of the *Civil Liability Act 2002* (NSW) does not limit a claim for damages under the *Compensation to Relatives Act 1897* (NSW).

The case is important for two reasons. First, it defines the intersection between the Civil Liability Act and the Compensation to Relatives Act. Secondly, it clarifies the High Court's approach to the limits of purposive statutory construction.

Facts

The husband of the appellant, Susan Joy Taylor, was killed in December 2007 when an awning outside a chemist shop in Balgowlah on Sydney's northern beaches collapsed on him. Mrs Taylor commenced proceedings in the Supreme Court of New South Wales claiming damages pursuant to ss 3 and 4 of the Compensation to Relatives Act for the loss of financial benefits that she and her children had hoped to receive had her husband not been killed.

Prior to his death, Mr Taylor was a successful land surveyor in private practice. The central issue to be determined in this case was whether s 12(2) of the Civil Liability Act operated to limit Mr Taylor's gross weekly earnings and thereby limited the damages which his family was entitled to receive for the loss of expectation of financial support under the Compensation to Relatives Act.

The Civil Liability Act

Section 12 of the Civil Liability Act relevantly provides:

This section applies to an award of damages:

for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity; or

for future economic loss due to the deprivation or impairment of earning capacity; or

for the loss of expectation of financial support.

In the case of any such award, the court is to disregard the amount (if any) by which *the claimant's* gross weekly earnings would (but for the injury or death) have exceeded an amount that is three times the amount of average weekly earnings at the date of the award [emphasis added].

In the Supreme Court proceedings it was accepted by the parties that Mr Taylor's income would have substantially exceeded three times the amount of average weekly earnings. On this

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basis, the parties agreed to the preliminary determination of the question of whether an award of damages to Mrs Taylor and her children under the Compensation to Relatives Act was limited by the operation of s 12(2) of the Civil Liability Act.

The primary judge in the Supreme Court found that s 12(2) of the *Civil Liability Act 2002* did limit the claim for damages for loss of an expectation of financial support to three times gross average weekly earnings.

The New South Wales Court of Appeal found that the literal interpretation of s 12(2) did not apply to the deceased's gross weekly income and so would not limit the award of damages. However, while the Court of Appeal unanimously concluded that the literal meaning of s 12(2) does not apply the limitation to the gross weekly earnings of the deceased, the majority of the Court of Appeal found that the court could construe the provision as if it contained additional words to give effect to its evident purpose to limit the award of damages in respect of high earning individuals.

Mrs Taylor appealed and ultimately, the question before the High Court was whether the s 12(2) limitation was to be construed as applying to the deceased's gross weekly earnings.

The High Court's decision

The majority of the High Court (French CJ, Crennan and Bell J; Gageler and Keane JJ dissenting) found that s 12(2) of the Civil Liability Act did not limit Mrs Taylor's claim for damages pursuant to the Compensation to Relatives Act because s 12(2) did not require the court to disregard the amount by which Mr Taylor's gross weekly earnings would have exceeded three times the average weekly earnings, but for his death.

The High Court found that damages awarded in a Compensation to Relatives Act action are personal injury damages within Part 2 of the Civil Liability Act. However, the claimant in a Compensation to Relatives Act action does not have the same meaning as 'claimant' in s 12 of the Civil Liability Act. In a Compensation to Relatives Act claim the claimant is usually the spouse or child of the deceased. In a Civil Liability Act claim

the claimant is the person who has suffered loss or damage. The Civil Liability Act looks to the gross weekly earnings of the claimant to determine whether their entitlement to damages is limited. This is not the case in a Compensation to Relatives Act action, where the claimant's income is generally not relevant and the deceased person's gross average weekly earnings is not capped by reference to s 12(2) of the Civil Liability Act.

The majority expressed the view that the purpose of s 12 of the Civil Liability Act was to limit the component of an award of damages that is determined by reference to a claimant's high earnings in a claim for personal injury damages brought by or on behalf of high-earning individuals.

On no view in this case could the deceased, Mr Taylor, be considered to be the 'claimant' and as such no limitation should be applied to the deceased's gross weekly earnings.

Purposive statutory construction

Mrs Taylor argued that the NSW Court of Appeal had erred by not giving s 12(2) of the Civil Liability Act its ordinary grammatical meaning.

The majority of the High Court agreed.

The respondents to the High Court appeal contended that s 12(2) of the Civil Liability Act should be given a *purposive interpretation* and as such, words should be added to the section to ensure that the legislative purpose was upheld.

The primary judge in the Supreme Court took the view that the legislative purpose of s 12(2) was to 'limit claims for tortiously caused damage, and to restrict financial loss claims for high-earning individuals'.

As such, the phrase in s 12(2) – 'the claimant's gross weekly earnings' means 'the gross weekly earnings on which *the claimant relies*'.

The majority of the High Court did not support this approach and took the view that the word 'claimant' should be given its ordinary meaning, that is, a person who makes or is entitled to make a claim.

In the majority's view a purposive construction of the word 'claimant' may allow the reading of a provision as if it contained additional words or omitted certain words with the effect of expanding its operation. However, the High Court concluded that any modified meaning must be entirely consistent with the language actually used by the legislature. If a purposive construction is given that departs too far from the statutory text it could violate the separation of powers in the Australian Constitution (citing *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389). The minority High Court judges (Gageler and Keane JJ) agreed with the conclusion reached by Justice Garling at first instance and by the majority in the Court of Appeal, although noted that their reasoning differed slightly from that of the majority in the Court of Appeal in that their Honours considered that the construction adopted by the majority in the Court of Appeal was 'very strained'.

In their view, damages recoverable under the Compensation to Relatives Act are plainly 'personal injury damages' in respect of which Part 2 of the Civil Liability Act applies and the damages that Mrs Taylor was seeking should be limited to three times the average weekly earnings. Their preferred construction of s 12(2) was to construe the reference in s 12(2) to 'the claimant's gross weekly earnings' as a reference to the gross weekly earnings *on which the claimant relies* in the claim for damages that is the subject of an award of damages, rather than the gross weekly earnings of the person who happens to be the claimant.

Conclusion

The High Court has clarified that s 12(2) of the Civil Liability Act does not limit a claimant's entitlement to damages under the Compensation to Relatives Act.

The High Court also clarified that while a purposive approach to statutory interpretation is permissible the proposed modified meaning of the statute must be consistent with the actual language used by the legislature.

'I love you ... I want you to have a home here with me': Proving reliance in proprietary estoppel

Rachel Mansted reports on *Sidhu v Van Dyke* [2014] HCA 19 (Court of Appeal *Van Dyke v Sidhu* (2013) 301 ALR 769; Supreme Court *Van Dyke v Sidhu* [2012] NSWSC 118).

A scenario which would not have been out of place on the Jerry Springer Show provided rich material for the High Court in a recent judgment on proprietary estoppel.

Ms Van Dyke lived with her son and husband in Oaks Cottage, on part of a large rural property, Burra Station. Mr Sidhu and his wife lived in the main house on the property, and owned Burra Station as joint tenants. Mr Sidhu's wife and Ms Van Dyke's husband were brother and sister. When Ms Van Dyke commenced an intimate relationship with Mr Sidhu, her husband soon left the property and after separation, a divorce was finalised. Ms Van Dyke and Mr Sidhu continued their relationship between 1997 and 2006. During this time, Mr Sidhu's wife remained on the property, and Ms Van Dyke continued to live in Oaks Cottage with her son. Mr Sidhu, on several occasions throughout the relevant period, made clear statements (some in writing) to Ms Van Dyke to the effect that he wished her to have Oaks Cottage. He even promised to rebuild the cottage and gift it to her, after the cottage accidentally burned down in early 2006. In mid-2006, the relationship between Mr Sidhu and Ms Van Dyke came to an end.

During the time she lived in Oaks Cottage, considering that it would one day be transferred to her, Ms Van Dyke did not seek full time employment, and carried out significant repair and maintenance work on the cottage and other parts of the rural property for no remuneration. She did not seek a property settlement in the divorce from her husband, on the strength of Mr Sidhu's assurance that she did not need a settlement, because Oaks Cottage was now hers.

All five members of the High Court decided that Ms Van Dyke was entitled to equitable compensation for Mr Sidhu's failure to transfer title to the Oaks Cottage. The two issues in the case were whether Ms Van Dyke had sufficiently proved the element of detrimental reliance required to make out an estoppel; and if so, what was the appropriate basis for equitable compensation in circumstances where the property was not Mr Sidhu's to give.

The courts below – a portable palm tree

Justice Ward at first instance held that reliance was not made out. Her Honour held that it was 'entirely possible that [Ms Van Dyke] would have remained living on the property, carrying out tasks on the property (even if not to the extent of the work she in fact carried out) and working part-time, whether or not the

promises had been made.¹ There was therefore no detriment, given Ms Van Dyke was likely to have done all these things regardless of the promises made by Mr Sidhu. Ward J quoted from an English decision where it was bluntly opined that, if the court had a jurisdiction to hold people to mere moral obligations, 'one might as well forget the law of contract and judge every civil dispute with a portable palm tree.'²

Ward J's decision was reversed by the Court of Appeal, on the basis that the promises alleged by Ms Van Dyke were of a nature to create a presumption of reliance, being 'commonsense and rebuttable presumption of fact that may arise from the natural tendency of a promise'.³ Barrett JA (with whom Basten JA and Tobias AJA agreed) said that, 'Where inducement by the promise may be inferred from the claimant's conduct, as is the case here, the onus or burden of proof shifts to the defendant to establish that the claimant did not rely on the promise'.⁴ Mr Sidhu could not show that Ms Van Dyke did not rely on his promises to her detriment.⁵

In relation to relief, the Court of Appeal declined to order Mr Sidhu to take all necessary steps to procure the actual transfer of the land. This would have involved both obtaining his wife's consent, given they were joint tenants; and council approval for the subdivision. Instead, equitable compensation was awarded, to be measured by a 'sum equal to the value [Ms Van Dyke] would now have had the promises been fulfilled'.⁶

Onus of proof in the High Court – no reversal for reliance

Mr Sidhu appealed to the High Court, submitting that the Court of Appeal had improperly reversed the onus of proof in relation to detrimental reliance. The High Court agreed, holding that the authorities relied on by the Court of Appeal as supporting a presumption of reliance did not do so, and that Ms Van Dyke had the burden of proof in all circumstances.⁷

Nevertheless, the appeal was disallowed, on the basis that Ms Van Dyke had (contrary to Ward J's findings) met the onus of proof for detrimental reliance. In so finding, the High Court reviewed 'the whole of the evidence' that was before the primary judge, to show that Ms Van Dyke had made out 'a compelling case of detrimental reliance'.⁸

The High Court pointed to four reasons why Ms Van Dyke's case on detrimental reliance was made out. First, it was likely 'as a matter of the probabilities of human behaviour' that Ms

Van Dyke's evidence – to the effect that she made certain decisions on the basis of the promises by Mr Sidhu – was true.⁹ Second, Ward J's finding that Mr Sidhu's promises 'played a part' in Ms Van Dyke's willingness to spend time and effort on maintenance warranted the conclusion that she had discharged the onus, notwithstanding that the promises were not the sole inducement for this course of conduct.¹⁰ Third, the fact that Ms Van Dyke had, from time to time, displayed a concern that Mr Sidhu honour his promises (it is assumed the court is here referring to the requests for Mr Sidhu to commit to the promises in writing), indicated that the promises were material to Ms Van Dyke's choices.¹¹ Finally, the court found the applicant's argument, that the promises were 'not a real inducement' to Ms Van Dyke's decision to conduct herself as she did, was simply 'not compelling', following a review of the key parts of her testimony under cross-examination.¹² The High Court recast the question about reliance, asking 'Whether the respondent would have committed to, and remained in, the relationship with the appellant, with all that that entailed in terms of the effect upon the material well-being of herself and her son, had she not been given the assurances made by the applicant.' The court found that it was likely Ms Van Dyke would have conducted herself differently had Mr Sidhu told her, when she elected to remain on the property after her divorce, that she would only remain on the property while it suited him and his wife.¹³

Promising the moon – the measure of relief

At the time of hearing, Mr Sidhu's wife would not consent to the transfer of their jointly held land, and the council had not yet approved the subdivision of the property. This formed part of Mr Sidhu's argument that his promises to Ms Van Dyke were conditional and could not form the basis for reliance. The High Court disagreed, holding that what he had represented to Ms Van Dyke was that he would procure the consent of his wife and the subdivision of the property. In circumstances where Mr Sidhu could not achieve these things, the High Court affirmed the decision of the Court of Appeal to order equitable compensation, rather than requiring Mr Sidhu to take active steps to ensure the transfer of property.¹⁴

Side note – an unrepresented litigant wins the day

Ms Van Dyke's claim started inauspiciously. Unrepresented in the Supreme Court, her claim was struck out by Gzell J, on the basis that Mr Sidhu's wife was not a party, and the promise was only to be fulfilled when the land had been subdivided.¹⁵ However, the Court of Appeal – Young JA (with whom Bathurst CJ and Hodgson JA agreed) – set aside the orders of Gzell J, on the grounds that the learned primary judge 'reacted too quickly' in striking out the claim. The Court of Appeal found that Gzell J should have considered the material more carefully and concluded that it was possible for Ms Van Dyke to succeed.¹⁶

Endnotes

1. *Van Dyke v Sidhu* [2012] NSWSC 118 at [204].
2. *Taylor v Dickens* [1998] 1 FLR (Eng) 806; in *Van Dyke v Sidhu* [2012] NSWSC 118 at [261].
3. *Van Dyke v Sidhu* (2013) 17 BPR 32,545; [2013] NSWCA 198 at [79].
4. *Van Dyke v Sidhu* (2013) 17 BPR 32,545; [2013] NSWCA 198 at [83].
5. *Van Dyke v Sidhu* (2013) 17 BPR 32,545; [2013] NSWCA 198 at [103].
6. *Van Dyke v Sidhu* (2013) 17 BPR 32,545; [2013] NSWCA 198 at [138], [140].
7. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [55], [61].
8. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [67].
9. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [69].
10. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [70]-[73].
11. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [74].
12. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [75].
13. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [76]-[77].
14. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [86].
15. *Van Dyke v Sidhu* [2011] NSWSC 167 at [38].
16. *Van Dyke v Sidhu* [2011] NSWCA 187 at [13]-[14], [19].

Legal professional privilege and national security

Stephen Tully reports on *Timor-Leste v Australia*.



International Court of Justice. Photo: the Peace Palace Library, International Court of Justice.

Can federal investigative agencies covertly acquire your legal advices and other communications sent to your client – which you assume to be protected from disclosure by privilege – without your knowledge or permission for national security reasons? Under Australian common law, yes. National security is capable of falling under the crime or fraud ‘exception’ so as to abrogate privilege. The same conclusion is likely under international law. This note explores recent proceedings where this issue was put by Australia to the International Court of Justice (ICJ or Court) in light of Australian common law and recent law reform developments.

The proceedings in *Timor-Leste v Australia*

The question whether legal professional privilege can be abrogated by national security under international law arose for consideration in *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*. In late 2013 the Australian Security Intelligence Organisation (ASIO) executed search warrants on the Canberra premises of the legal adviser to the Democratic Republic of Timor-Leste (Timor-Leste). Timor-Leste sought provisional orders (that is, interim measures of protection) before the ICJ, the principal judicial organ of the United Nations (UN), claiming that the confidential documents and data seized by Australia related to its legal strategy in a pending Timor Sea Treaty Arbitration between the two states and its future maritime negotiations with Australia. The subject matter of that arbitration included

allegations, reported in the Australian media, that Australia had committed espionage in relation to Timor-Leste’s position during negotiations for a treaty concerning maritime rights in the Timor Sea. The allegations referred to a witness who was said to be a former Australian intelligence officer.

In its submissions, Australia expressed concern that an Australian intelligence officer may have committed an offence under Australian law by disclosing that Australia had allegedly conducted espionage against Timor-Leste during treaty negotiations. It contended that, even if there was an international legal principle akin to legal professional privilege, such a principle was inapplicable when the communication concerned the commission of a crime or fraud, threatened national security or the public interests of a state, or undermined the proper administration of justice. Australia’s argument reflected the common law position.

Legal professional privilege under the common law

Legal professional (or client legal) privilege attaches to confidential communications between clients and lawyers made for the dominant purpose of giving and receiving legal advice, or for use in existing or anticipated litigation. The rationale for the privilege is furthering the administration of justice by fostering trust and candour in the lawyer-client relationship.¹ However, the protection afforded by the privilege only attaches to communications intended for a proper or lawful purpose.

Privilege cannot be claimed over communications that frustrate legal processes.² Nor can privilege be used to protect communications made to further deliberate abuses of statutory power.³ These communications are not within the ordinary scope of professional employment.

Privilege does not attach to communications made to further the commission of an offence or fraud. For example, a search warrant executed in *Propend Finance* concerned privileged material concerning tax evasion.⁴ The improper and dishonest purpose considered in *AWB Limited* was knowingly and deliberately inflating transportation prices to work a trickery on the UN contrary to international and Australian sanctions regimes.⁵ In the latter case, Young J concluded that expression of the principle by reference to communications that facilitated a crime or fraud did not capture its full reach. The principle encompassed a wide species of fraud, criminal activity or actions taken for illegal or improper purposes. The scope of conduct included all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery, and sham contrivances.

The crime or fraud exception would include offences against national security. Given the broad scope of the exception, committing a national security offence would, by reason of that illegality or impropriety, be sufficient to displace the privilege under Australian common law.

Covert investigations and abrogating privilege

A further issue that confronted the ICJ and has already received attention from Australian law reform organisations and legal institutions is whether covert federal investigations for national security purposes can abrogate privilege.

Some federal agencies, including ASIO, possess covert powers including the power to search and seize documents and things.⁶ Their enabling legislation does not contemplate a national security exception for privileged material.⁷ Because targets are unaware that information is being accessed, there is no opportunity to assert privilege at the time of access. Notifying targets may prejudice an investigation.

Concerns have been expressed in the United States that privilege is being eroded under the rubric of national security.⁸ Following press reports of foreign government surveillance of American lawyers' confidential communications with overseas clients and the sharing of privileged information with the National Security Agency (NSA), the president of the American Bar Association

(ABA) expressed his concerns to the NSA.⁹ The NSA responded that it was firmly committed to the rule of law and the bedrock principle of attorney-client privilege.¹⁰ It stated that it had and would continue to protect privileged communications in accordance with legislated privacy procedures.

In 2007 the Australian Law Reform Commission (ALRC) proposed that, in special circumstances, the Australian Parliament may legislate to abrogate client legal privilege in relation to federal investigations.¹¹ Abrogation could be justified on several grounds, including where the nature and gravity of the matter was one of major public importance such as national security. The ALRC concluded that abrogation was appropriate where there was a higher competing public interest.¹² Where exceptional circumstances existed, parliament could legislate to abrogate the privilege for a particular investigation undertaken by, or a particular power of, a federal body.

...states who are settling an international dispute by peaceful means could expect that the preparation and conduct of their case is conducted without interference.

It is difficult to contend that national security is not a significant public interest. However, the effects of encroaching upon legal professional privilege in service of national security are difficult to assess.¹³ Unrestricted communication between a lawyer and client is necessary for the proper functioning of the legal system. If inroads can be made by invoking a higher public interest, in such a way as to exclude the opportunity to assess the competing interests, then application of the privilege becomes uncertain and the underlying policy is effectively undermined.¹⁴ Such challenging questions were neatly sidestepped by the ICJ.

The ICJ's provisional measures order

The majority of the ICJ was satisfied at this stage of the proceedings that Timor-Leste's claimed rights were plausible.¹⁵ The asserted inviolability of a state's right to confidentially correspond with its lawyers could be derived from the sovereign equality of states. States who are settling an international dispute by peaceful means could expect that the preparation and conduct of their case is conducted without interference.

Australia had also argued that there was no risk of irreparable prejudice to Timor-Leste's rights following several undertakings

provided by the attorney-general, the effect of which were to limit the use of the information to national security purposes and ring-fence the information from those involved in negotiations regarding resource exploitation, the ICJ proceedings or the Timor Sea Treaty Arbitration.

A majority of the court reasoned that the undertakings significantly contributed to mitigating the imminent risk of irreparable prejudice created by seizure of the material to Timor-Leste's rights, but did not eliminate this risk entirely. There remained a risk of disclosure because Australia envisaged the possibility of using this confidential and sensitive information in circumstances involving national security. Any breach of confidentiality might be incapable of remedy or reparation. Furthermore, the confidentiality of Timor-Leste's communications with its lawyers was left unaddressed.

Australia was ordered to keep the seized material under seal, ensure that it was not used to Timor-Leste's disadvantage and not to interfere in communications between Timor-Leste and its legal advisers. These orders are binding upon Australia.

Only Judge ad hoc Callinan explicitly considered Australia's submissions in relation to exceptions to the privilege, considering it unlikely that any state would treat national security as inferior, or subject to, legal professional privilege.¹⁶ Judge ad hoc Callinan also considered the undertakings proffered by Australia to be sufficient for the circumstances of the case.¹⁷

Conclusions

The ICJ accepted, on a provisional basis, that a state has a right to conduct arbitration or negotiations without external interference, including the right of confidentiality when communicating with its lawyers. It is probable that, like the position under Australian common law, national security is a lawful reason for abrogating legal professional privilege under international law. However, as Judge ad hoc Callinan cautioned, the extent to which there is a settled principle of legal professional privilege under international law, and moreover immunity to any limitation in an international or national interest, requires further analysis. Assuming the ICJ will find it has jurisdiction, it is hoped clarification will occur at the merits phase of these proceedings.

Endnotes

1. *Attorney-General for the Northern Territory v Maurice* [1986] HCA 80; (1986) 161 CLR 475, 487 (Mason and Brennan JJ).
2. *R v Bell; Ex parte Lees* [1980] HCA 26; (1980) 146 CLR 141.
3. *Attorney-General (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 500.
4. *Commissioner Australian Federal Police v Propend Finance Pty Ltd* [1997] HCA 3; (1997) 188 CLR 501.
5. *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234, (2006) 155 FCR 30 [210]-[212] & [229].
E.g., s 25, *Australian Security and Intelligence Organisation Act 1979* (Cth).
7. Legal professional privilege is not abrogated by statute without a clear indication that was intended: *Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52.
8. E.g., Cohn M, 'The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001' (2003) 71(4) *Fordham L Rev* 3.
9. Letter from J Silkenat, President, American Bar Association (ABA) to General K Alexander, Director, and R De, General Counsel, National Security Agency (NSA), 20 February 2014.
10. Letter from General K Alexander, Director, NSA to J Silkenat, President, ABA, 10 March 2014.
11. Australian Law Reform Commission (ALRC), Discussion Paper 73: *Client Legal Privilege and Federal Investigatory Bodies*, 2007, Proposal 6.1 & [6.151].
12. ALRC, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* [2007] ALRC 107, [6.136], [6.142]-[6.143].
13. *Carter v The Managing Partner, Northmore Hale Davy and Leake* (1995) 183 CLR 121, 157 (Toohey J).
14. *Attorney-General (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 500, 53 (Dawson J).
15. International Court of Justice, Questions relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v Australia*), Order on Request for the Indication of Provisional Measures, 3 March 2014, [26] & [28].
16. Dissenting opinion of Judge ad hoc Callinan, [26].
17. Dissenting opinion of Judge ad hoc Callinan, [21], [31].

The change of position defence

Tom O'Brien reports on *Australian Financial Services Ltd v Hills Industries Ltd* [2014] HCA 14.

For most, the High Court's decision in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*¹ provides welcome clarification of the rationale, scope and application of the defence of change of position in restitution claims. For some unjust enrichment enthusiasts, particularly those across the globe, the decision may cause some consternation.

Facts

A fraudster procured payments by Australian Financial Services and Leasing Pty Ltd (AFSL) to two companies, Hills Industries Ltd (Hills) and Bosch Security Systems Pty Ltd (Bosch). AFSL were defrauded into believing they were purchasing equipment from Hills and Bosch. Hills and Bosch were defrauded into believing that AFSL's payments were being made to discharge the fraudster's outstanding debts.

After receipt of the money, both Hills and Bosch:

- treated the fraudster's debts as discharged;
- recommenced trading with the fraudster; and
- refrained from taking steps they otherwise would have taken to enforce the debts. In particular, Bosch consented to the setting aside of default judgments and discontinued proceedings in respect of the fraudster.

After six months, AFSL discovered the fraud and demanded repayment from Hills and Bosch on the basis that the payments had been made by mistake. The demand was rejected by Hills and Bosch, so AFSL instituted proceedings for recovery of the payments. By that time the fraudster was insolvent.

Issue

The issue before the High Court was whether AFSL's claim for recovery of the monies paid by mistake should be refused because Hills and Bosch had changed their position upon receipt of that money. AFSL submitted that any change of position must be valued, and that the defence should only operate to the extent of that value. For example, if \$10 is mistakenly paid, and the recipient in reliance on that payment gives \$2 to charity, the remaining \$8 should still be recoverable, as opposed to the recipient's partial change of position acting as a complete bar to recovery.²

High Court decision

The High Court unanimously dismissed the appeal, holding that the defence of change of position provided a complete defence to AFSL's restitutionary claims. Three judgments were delivered: French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ; and Gageler J.

Three points of importance are highlighted for the purpose of this short note.

First, the High Court indicated that the ultimate question in determining whether the defence is available is whether recovery of the money would be inequitable³ or unconscionable.⁴ One circumstance in which recovery will be inequitable or unconscionable is where the recipient has changed their position by relying on the receipt of the money in good faith by taking certain actions or by omitting to act, such that they will suffer substantial detriment if they are required to return the money received. For this purpose, the plurality noted the relevance of the 'equitable doctrine concerning detriment' in connection with estoppel.⁵ Gageler J almost⁶ went a step further, to find that the defence of change of position was merely a particular application of the doctrine of estoppel. According to his Honour, this step would avoid uncertainty in defining the scope of the defence and difficulties reconciling it with estoppel.⁷

Second, for the purposes of the defence, detriment is not a narrow or technical concept,⁸ so that it need not consist of expenditure of money or other quantifiable financial detriment.⁹ Gageler J stated:¹⁰

Material disadvantage must be substantial, but need not be quantifiable in the same way as an award of damage. Material disadvantage can lie in the loss of a legal remedy, or of a 'fair chance' of obtaining a commercial or other benefit which 'might have [been] obtained by ordinary diligence' (Footnotes removed).

As the enforcement opportunities forgone by Hills and Bosch were substantial, they were sufficient to ground the defence, despite not being easily quantifiable.¹¹ It was held that it was not appropriate for the court to attempt to quantify such detriment in the same way as an award of damages. Where such detriment could not be easily quantified, the change of position provided a complete answer to the restitutionary claim.¹² However, according to French CJ and Gageler J, where detriment could be easily quantified, the defence may operate pro tanto, so that a payer may recover the money paid, less the monetary detriment incurred by the recipient.¹³

Third, the High Court reaffirmed that in Australia, restitutionary claims and defences are rooted in equity, not unjust enrichment and the corresponding concept of 'disenrichment'. The plurality stated (at [78]):

The principle of disenrichment, like that of unjust enrichment, is inconsistent with the law of restitution as it has developed in Australia.

...the High Court reaffirmed that in Australia, restitutionary claims and defences are rooted in equity, not unjust enrichment and the corresponding concept of ‘disenrichment’.

This aspect of the decision was bemoaned by Professor Graham Virgo of Cambridge University, who queried the continuing significance of unjust enrichment in Australian law. In more strident terms, Professor Virgo questioned whether the equitable basis for restitution had any content, likening Australia’s use of ‘the old language of conscience’ to:¹⁴

nothing more than Hans Christian Andersen’s Emperor, albeit one who thinks he is wearing old clothes, but is actually wearing nothing at all.

As to the continuing significance of unjust enrichment in Australia, in *Lampson (Australia) Pty Ltd v Fortescue Metals Group (No 3)* [2014] WASC 162, Edelman J considered the impact of the High Court’s decision in *Hills Industries*. In a feat of judicial efficiency, no doubt taking advantage of the time difference between Canberra and Perth, Edelman J delivered that judgment on the same day that *Hills Industries* was handed down (7 May 2014). On the continuing role of unjust enrichment in Australia, his Honour explained that:

[p]rovided that unjust enrichment is not applied as a direct source of liability, in Australia the taxonomic category of unjust enrichment has served a useful function and might continue to do so. Like the category of ‘torts’ the category of unjust enrichment assists in understanding even though it is not a direct source of liability. The category directs attention to a common legal foundation shared by a number of instances of liability formerly concealed within the forms of action or within bills in equity.

This is consistent with recent statements of the High Court on the role of unjust enrichment.¹⁵ The role of unjust enrichment in Australia continues to be distinct from that in the United Kingdom. *Hills Industries* is merely confirmatory in that respect.

As to the content of the inquiry into whether retention of money will be inequitable or unconscionable, the plurality emphasised:¹⁶

This is not to suggest that a subjective evaluation of the justice of the case is either necessary or appropriate. The issues of conscience which fall to be resolved assume a conscience ‘properly formed and instructed’¹⁷ by established equitable principles and doctrines.

To adopt and adapt Professor Virgo’s analogy, Australia’s law of restitution is wearing old clothing, which has been, and will continue to be, altered and patched ‘on a case-by-case basis’ so enabling it ‘to meet changing circumstances and demands’.¹⁸

Endnotes

1. [2014] HCA 14; (2014) 307 ALR 513; 88 ALJR 552.
2. See the example given by French CJ at [28].
3. French CJ at [23].
4. Hayne, Crennan, Kiefel, Bell and Keane JJ at [69].
5. at [84].
6. His Honour found it unnecessary to finally decide the question: [156].
7. at [155].
8. [24] (French CJ); [88] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ)
9. [24] (French CJ); [88] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ); [150] (Gageler J).
10. at [150].
11. [30] (French CJ); [83] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ); [150] (Gageler J).
12. [31] (French CJ); [96] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ); [158] (Gageler J).
13. [17] and [28] (French CJ); [153] - [154] (Gageler J).
14. Graham Virgo, ‘Conscience or Unjust Enrichment?: The Emperor’s Old Clothes: *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* on Opinions on High (19 May 2014) <<http://blogs.unimelb.edu.au/opinionsonhigh/2014/05/virgo-hills-industries/>>
15. For example: *Roxborough v Rothmans of Paul Mall Australia Ltd* (2001) 208 CLR 516 at [74] (Gummow J); *Bofinger v Kingsway Group* (2009) 239 CLR 269 at [88] – [89] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); *Equuscorp Pty Ltd v Haxton* (2012) (2012) 246 CLR 498 at [30] (French CJ, Crennan and Kiefel JJ).
16. [76] (French CJ, Crennan and Kiefel JJ).
17. *Citing ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [45].
18. *Commonwealth v Verwayen* (1990) 170 CLR 394 at 443 (Deane J), cited with approval by the plurality in *Hills Industries* at [98].