Decision in Attorney - General of the Commonwealth v. Breckler (1999)

High Court of Australia, 17 June 1999

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Background

The Attorney General of the Commonwealth brought proceedings in the High Court of Australia as appellant from a decision of the Full Federal Court in **Daniel Nathan Breckler and Others v Shirley Leishman** *(1998) 57 FCR (12 February 1998) in which the majority of the Full Court of the Federal Court of Australia held that Section 37 of the* **Superannuation (Resolution) of Complaints Act** *(1993) was wholly invalid because it purported to confer judicial power of the Commonwealth on the Superannuation Complaints Tribunal ("SCT") and is therefore inconsistent with Chapter III of the Constitution. The Full Federal Court dealt with the Breckler matter in conjunction with another matter in* **Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd** *and the Court's substantial reasoning is contained in the* **Wilkinson** *decision at (1997) 79 FCR 469. The effect of the Federal Courts decision in* **Wilkinson** *and* **Breckler** *was that the SCT, which had been established to deal with complaints by members and beneficiaries of regulated Superannuation Funds so as to provide them with a reasonably cost effective and efficient alternative to litigation, was rendered negatory.*

The facts in *Breckler* and in *Wilkinson* involved the question of the SCT being called upon to determine whether the respective superannuation funds had acted unjustly or unreasonably in their determination to deny a potential beneficiary a death benefit either in whole or in part.

Decision in *Wilkinson*

In summary the Full Court's reasoning in holding that Section 37 was an impermissible conferral of judicial power (per Lochhart and Heerey JJ, Sundberg J dissenting) was that the Tribunal functioned in the province of trust and contract law rather than within the province of administration, was given power to decide controversies between parties as to rights which relate to property and that the Tribunal did not create new rights but adjudicated upon disputes about rights and obligations arising from the operation of the law on past and present facts.

Decision in *Breckler*

In *Breckler* the High Court unanimously allowed the Appeal holding that in making its determination the SCT was not purporting to exercise judicial power of the Commonwealth contrary to Chapter III of the Constitution. The joint judgement of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ allowed the appeal essentially for 3 reasons:

1. The trust deed of the Superannuation Fund at issue provided for complaints to be dealt with by the SCT and thus the determination of the SCT involved not an exercise of sovereign power but the arbitration of disputes using procedures and criteria adopted by the Trust instrument;
2. Even absent of a provision in the Trust Deed the relevant provisions of the Complaints Act were only applicable because the fund had the status of a Regulated Fund and the attainment of such a status was the product of an election which is provided to the Trustees under the *Superannuation Industry (Supervision) Act* (1993) ("the Supervision Act") thus the availability of the election suggests a voluntary act, with the trustees agreeing to accept the outcome of an arbitration rather then being bound by decisions of the SCT exercising judicial power;
3. The *Complaints Act* and the *Supervision Act* take the existence of a determination of the SCT as a criterium by reference to which legal norms are imposed and remedies provided for their enforcement. The enforcement of determinations of the SCT will still require an independent exercise of judicial power by a Court to give effect to any determination of the SCT.

Justice Kirby agreed with the orders of the other members of the Court but in doing so raised squarely the need to reconsider, not in this case but in future cases, the doctrine arising out of the decision in *Re Kirby: Ex parte Boilmakers Society of Australia* (1956) 94 CLR 254. His Honour said:

"this appeal from orders of the Full Court of the Federal Court of Australia was not argued in that way. The appeal does not, therefore, afford the occasion for a root and branch reconceptualisation on the meaning and purpose of the provisions in Chapter III of the Constitution. That Chapter creates the judicature as a separate branch of government in a constitutional arrangement which also provides for the legislature and the executive government which are strictly divorced form each other. Yet the analyses required in this case demonstrates once again the lack of essential and constant characteristics for the judicial power of the Commonwealth which will mark it off from the non judicial functions which may be performed by an administrative tribunal established outside the judicature. Once again, this Court is obliged to engage in a somewhat transcendental analysis. It is an unsatisfying task."

The effect of the High Court's decision in *Breckler* is to allow the SCT once more to review decisions of trustees and once again members and beneficiaries of Superannuation fund will have access to alternative resolution and complaints procedures more apt for dealing with reviews of decisions of trustees particu-

larly in the payment of Death and Total and Permanent Disability benefits than Court processes, because of the constraints of the laws of trusts would place on such reviews.

It will be prudent for practitioners to examine their client files to ascertain whether there are any claims available to clients against Superannuation funds for payments of Total and Permanent Disability Benefits and whether such matters can be dealt with by the Superannuation Complaints Tribunal. Most importantly practitioners should be mindful of the time limits imposed by the Complaints Act for the bringing of such complaints. ■

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Medical records to be issued

JOHN KERIN

PEOPLE would get full access to their personal medical records held by doctors and other health professionals, under proposed federal privacy legislation.

Regulations governing the circumstances in which personal health information can be released and used for medical research, by insurers or other medical institutions, also would be tightened.

Federal Privacy Commissioner Malcolm Crompton has prepared an issues paper to underpin planned national guidelines for handling sensitive personal information in the private sector.

Guidelines legislation, due to be introduced by the Howard Government later this year, backs development of a series of industry codes governing the collection, access, use and disclosure of personal information in the private sector.

But the Australian Medical Association warned last night the planned legislation could force doctors to "give up personal notes never intended to be made public" and be a "recipe for litigation".

In the issues paper, which looks specifically at problems associated with sensitive health information, Mr Crompton says there should only "be very limited circumstances when an individual is not entitled to access personal health information about themselves".

The paper says the only exceptions should be where release of information would pose a serious threat to the individual or another person, or it would have unreasonable impact on the privacy of other individuals or where there was a legal dispute and the information would not be made available through the legal process.

Consumers Health Forum national director Kate Moore said yesterday the proposals would be welcomed by consumers who were protected by a hotchpotch of State and industry regimes or no regulation at all.

"We believe the commission has taken the right approach and that is: the consumer should have access to general practitioners' records or other health information held by institutions in the private sector."

> ‘The public tends to view that there's some conspiracy among doctors’
>
> DR TREVOR MUDGE, AMA

But she said it would be a matter of fleshing out what was a broad set of principles to ensure there were codes of practice throughout the health sector to protect the consumer.

AMA Medico Legal Committee chairman Trevor Mudge said doctors wanted a clear distinction drawn between "the patients' right to know factual information" and "doctors' opinions and notes".

"The public tends to get wrapped up in some view that there's some authoritarian conspiracy among doctors to keep information from them," Dr Mudge said.

"That medical profession model is long gone."

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