

FEDERAL COURT OF AUSTRALIA

Elbe Shipping SA v Giant Marine Shipping SA [2007] FCA 1000

CORRIGENDUM

**ELBE SHIPPING SA v GIANT MARINE SHIPPING SA, BEING THE OWNERS OF
THE SHIP “GLOBAL PEACE” AND ADSTEAM HARBOUR PTY LIMITED
NSD 124 OF 2006**

**SQ MARINE SA v GIANT MARINE SHIPPING SA BEING OWNERS OF THE SHIP
“GLOBAL PEACE” AND ADSTEAM HARBOUR PTY LIMITED
NSD 125 OF 2006**

**DOWSETT J
5 JULY 2007 (CORRIGENDUM 7 AUGUST 2007)
BRISBANE**

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

NSD 124 OF 2006

**BETWEEN: ELBE SHIPPING SA
Plaintiff**

**AND: GIANT MARINE SHIPPING SA, BEING THE OWNERS OF
THE SHIP "GLOBAL PEACE"
First Defendant**

**ADSTEAM HARBOUR PTY LIMITED
Second Defendant**

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

NSD 125 OF 2006

**BETWEEN: SQ MARINE SA
Plaintiff**

**AND: GIANT MARINE SHIPPING SA, BEING THE OWNERS OF
THE SHIP "GLOBAL PEACE"
First Defendant**

**ADSTEAM HARBOUR PTY LIMITED
Second Defendant**

JUDGE: DOWSETT J

DATE: 5 JULY 2007

PLACE: BRISBANE

CORRIGENDUM

1 The reasons for judgment delivered by the Honourable Justice Dowsett on 5 July 2007 had incorrect paragraph numbering. The judgment following this corrigendum should replace that judgment in its entirety.

I certify that the preceding one (1) numbered paragraph is a true copy of the Corrigendum to the

Reasons for Judgment of the Honourable Justice
Dowsett.

Associate:

Dated: 7 August 2007

FEDERAL COURT OF AUSTRALIA

Elbe Shipping SA v Giant Marine Shipping SA [2007] FCA 1000

CONSTITUTIONAL LAW – judicial power – whether legislation infringes or usurps judicial power of Commonwealth – whether legislation invalid

PROCEDURE – motion to set aside subpoena to produce documents – production of documents to court prohibited under s 60 of *Transport Safety Investigation Act 2003* (Cth) – whether the power of the court to order the production of documents by subpoena is properly characterised as practice and procedure – subpoena set aside

Constitution ss 49, 51, 98

Transport Safety Investigation Act 2003 (Cth) ss 3, 7, 53, 56, 57, 58, 60

Admiralty Act 1988 (Cth) s 59

Judiciary Act 1903 (Cth) s 78B

Evidence Act 1995 (Cth) ss 16, 130

Parliamentary Privileges Act 1987 (Cth)

Sankey v Whitlam (1978) 142 CLR 1 discussed

Nicholas v The Queen (1998) 193 CLR 173 applied

Warren v Warren [1997] QB 488 cited

Williamson v Ah On [(1926) 39 CLR 95 cited

Kizon v Palmer (1997) 72 FCR 409 cited

Rann v Olsen (2000) 172 ALR 395 cited

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First Defendant**

**ADSTEAM HARBOUR PTY LIMITED
Second Defendant**

JUDGE: DOWSETT J

DATE OF ORDER: 5 JULY 2007

WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1. The subpoena issued to the Proper Officer of the Australian Transport Safety Bureau be set aside.
2. The plaintiff pay the Proper Officer's costs of and incidental to the motion of 21 February 2007.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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JUDGE: DOWSETT J

DATE: 5 JULY 2007

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REASONS FOR JUDGMENT

1 On 24 January 2006 the tug "Tom Tough" was assisting the vessel "Global Peace" to berth in Gladstone Harbour. The plaintiff in each of these actions alleges that in so doing, the tug came into contact with the hull of the Global Peace causing damage which led to the discharge of oil into harbour waters. The plaintiff in action NSD 124 of 2006 alleges that oil came into contact with the hull of its vessel, "Medi Vitoria", causing loss and damage. The plaintiff in action NSD 125 of 2006 alleges that oil damaged its vessel, "Nord Stream". Each plaintiff sues the first defendant as owner of "Global Peace", seeking damages. It is not

presently necessary to address the potentially difficult legal questions concerning the extent of the first defendant's responsibility for the conduct of the tug, its master and crew. The first defendant denies liability. On 18 April 2007, after I had received submissions in connection with the motion with which I am presently concerned, Adsteam Harbour Pty Ltd, the owner of the tug, was joined as second defendant in each action.

THE MOTION

2 On 23 October 2006, on the application of the plaintiff in each case, the Registrar issued a subpoena directed to:

*'The Proper Officer
Australian Transport Safety Bureau
15 Mort Street
Canberra City ACT 2601.'*

3 Although it is not entirely clear, it seems that the subpoena was intended to compel production of documents in each case, and not attendance to give oral evidence. I am presently considering a notice of motion which seeks an order that in each case, the subpoena be set aside. The applicant is said to be Australian Transport Safety Board. However counsel announced that they appeared for Australian Transport Safety Bureau, the body named in the subpoena. I have been unable to identify any such legal entity. The *Transport Safety Investigation Act 2003* (Cth) (the "Act") contemplates the appointment of an Executive Director of Transport Safety Investigation (the "Executive Director"). That officer and his delegates have numerous responsibilities and powers under the Act. It may be that the subpoena ought to have been directed to the Executive Director, but no such point has been taken. I infer that the Australian Transport Safety Bureau comprises the Executive Director's staff, and that there is a person who is recognizable as the "Proper Officer" of that organization to whom a subpoena might properly be addressed. I proceed upon the basis that such person is the applicant pursuant to the notice of motion.

THE SUBPOENA

4 Pursuant to s 21 of the Act the Executive Director investigated the collision between Global Peace and the tug and, in August 2006, published a report. This report is publicly available. In effect, the plaintiffs seek access to the material upon which the report is based.

A schedule to the subpoena provides as follows:

Schedule

The documents and things you must produce are as follows, copies of:

(Note: In this Subpoena the term "Incident" means the collision between MV "Global Peace" and the Tug "Tom Tough" resulting in the discharge or escape of oil from the "Global Peace" into Gladstone Harbour at Gladstone on 24/25 January 2006).

- 1. Any documents or other records in relation to oil analysis, sampling analysis, testing or testing results of the oil discharged from the "Global Peace" on 24 and 25 January 2006.*
- 2. Any documents or other records or reports or survey reports or status or situation reports or similar documents in relation to the extent or known extent, spread, range and distribution of the oil discharged or escaped from the "Global Peace" as a result of the Incident.*
- 3. Any photographs or other images, whether electronic or hard copy of the extent or known extent, spread, range and distribution of the oil discharged or escaped from the "Global Peace" as a result of the Incident.*
- 4. Any Gladstone vessel traffic service (VTS) records or documents in relation to the incident, whether audio, digital, electronic or written from 12 noon on 24 January 2006 to the time of the departure of the "Global Peace, including but not limited to the extent or known extent, spread, range and distribution of the oil discharged or escaped from the "Global Peace" as a result of the Incident.*
- 5. Any documents, statements or other records of interview of the Master, Pilot, officers or crew of the "Global Peace" or the "Tom Tough" in relation to the Incident, including but not limited to the extent or known extent, spread, range and distribution of the oil discharged or escaped from the "Global Peace" as a result of the Incident.*
- 6. Any records or records of investigation or inspection or reports or survey reports or similar documents in relation to the extent of damage and/or holing of the shell plating of the "Global Peace" by way of the port deep fuel oil tank at or about frames 42-46 as a result of the Incident.*
- 7. Any records or records of investigation or inspection or reports or survey reports or similar documents in relation to the fender and support beam arrangement of the starboard quarter fender of the "Tom Tough".*
- 8. Any Master's Notes of Protest in relation to the Incident, including but*

not limited to the extent or known extent, spread, range and distribution of the oil discharged or escaped from the "Global Peace" as a result of the Incident.'

THE PROPER OFFICER'S RESPONSE

5 On 2 November 2006 a Deputy Director of the Bureau notified the Registrar that:

- it held documents which were responsive to the subpoena;
- such documents were '*restricted information*' as defined in s 3 of the Act;
- such documents were held by '*staff members*' as there defined;
- the Executive Director had not issued a certificate pursuant to s 60(5) of the Act; and
- in those circumstances the documents could not be disclosed by staff members to the Court.

6 As I have said the Proper Officer has applied to set aside the subpoena.

THE PLAINTIFFS' MOTION FOR NON-PARTY DISCOVERY

7 After hearing oral submissions I reserved my decision. I then formed the view that the plaintiffs ought to have sought non-party discovery pursuant to O 15A rather than the issue of a subpoena. I was concerned that certain statutory provisions upon which the Proper Officer relies in support of the motion might not apply to an order pursuant to O 15A in the same way as to a subpoena. I accordingly invited the parties to make submissions. The plaintiffs then sought leave to issue notices of motion seeking orders pursuant to O 15A r 8. However the parties do not consider the distinction to be of any importance for present purposes. I proceed upon that basis.

PLAINTIFFS' SUBMISSIONS

8 In their written submissions, the plaintiffs challenge the validity of ss 53, 56, 57, 58 and 60 of the Act. However I understand the Proper Officer to rely only on s 60. I need not consider the other sections. The plaintiffs submit that s 60 of the Act is '*an impermissible interference with the jurisdiction vested in the Federal Court*' by the *Admiralty Act 1988* (Cth) (the "Admiralty Act"). They submit that in these actions, the Federal Court is

exercising jurisdiction conferred upon the Court pursuant to s 76(ii) and (iii), s 77 and s 71 of the Constitution *'and that jurisdiction cannot be ousted directly or ... indirectly.'* They submit that s 60 is *'not a law with respect to any plenary power within s.51 and/or s 98 of the Constitution and accordingly, is invalid and/or to be read down under s.15A of the Acts Interpretation Act ... so as to create no offence by disclosure to a court under compulsion of subpoena and so as not to interfere with the Court's process and power to compel production of documents'* It is further submitted that it is for the Court and *'not an executive director'* to decide whether documents should be produced or withheld and questions of admissibility in federal matters. This proposition is said to flow from the decision of the High Court in *Sankey v Whitlam* (1978) 142 CLR 1 at 38.

9 Appropriate notices have been given pursuant to s 78B of the *Judiciary Act 1903* (Cth). There has been no intervention and no application for removal.

SECTION 60 OF THE ACT

10 Section 60 of the Act provides:

'Staff members

- (1) *A person who is or has been a staff member is guilty of an offence if:*
 (a) *the person makes a record of information; and*
 (b) *the information is restricted information.*

Maximum penalty: Imprisonment for 2 years.

- (2) *A person who is or has been a staff member is guilty of an offence if:*
 (a) *the person discloses information to any person or to a court; and*
 (b) *the information is restricted information.*

Maximum penalty: Imprisonment for 2 years.

Non-staff members

- (3) *A person who has, or had, access to restricted information under section 62 must not:*
 (a) *make a record of the information; or*
 (b) *disclose the information to any person or to a court.*

Maximum penalty: Imprisonment for 2 years.

Defences

- (4) *Subsection (1), (2) or (3) does not apply to:*
 (a) *anything done by a person in performing functions under this Act or in connection with this Act; or*
 (b) *disclosure to a court in criminal proceedings for an offence*

- against this Act; or*
- (c) *disclosure to a court in civil proceedings where:*
 - (i) *the Executive Director issues a certificate under subsection (5); and*
 - (ii) *the court makes an order under subsection (6).*

Note: A defendant bears an evidential burden in relation to a matter in subsection (4). See subsection 13.3(3) of the Criminal Code.

Certificate

- (5) *The Executive Director may issue a certificate in relation to restricted information, stating that the disclosure of the information is not likely to interfere with any investigation.*

Courts

- (6) *If the court is satisfied that any adverse domestic and international impact that the disclosure of the information might have on any current or future investigations is outweighed by the public interest in the administration of justice, the court may order such disclosure.*
- (7) *The court may direct that the restricted information, or any information obtained from the restricted information, must not:*
 - (a) *be published or communicated to any person; or*
 - (b) *be published or communicated except in such manner, and to such persons, as the court specifies.*
- (8) *If a person is prohibited by this section from disclosing restricted information, then:*
 - (a) *the person cannot be required by a court to disclose the information; and*
 - (b) *any information disclosed by the person in contravention of this section is not admissible in any civil or criminal proceedings (other than proceedings against the person under this section).'*

11 The relevant provisions seem to be subss 60(2) and 60(8). The prohibition applies to a limited class of person (staff members) and to a limited class of information (restricted information). Those terms are defined in s 3 as follows:

'staff member means:

- (a) *the Executive Director; or*
- (b) *an APS employee who is assisting the Executive Director in exercising powers under this Act; or*
- (c) *a person to whom the Executive Director, has delegated any of the Executive Director's powers under this Act';*

and:

'restricted information means any of the following (but does not include OBR information):

- (a) *all statements (whether oral or in writing) obtained from persons by a*

- staff member in the course of an investigation (including any record of such a statement);*
- (b) all information recorded by a staff member in the course of an investigation;*
 - (c) all communications with a person involved in the operation of a transport vehicle that is or was the subject of an investigation;*
 - (d) medical or private information regarding persons (including deceased persons) involved in a transport safety matter that is being or has been investigated;*
 - (e) in relation to a transport vehicle that is or was the subject of an investigation-information recorded for the purposes of monitoring or directing the progress of the vehicle from one place to another or information recorded in relation to the operation of the vehicle;*
 - (f) records of the analysis of information or evidential material acquired in the course of an investigation (including opinions expressed by a person in that analysis);*
 - (g) information contained in a document that is produced to a staff member under paragraph 32(1)(b) or 36(3)(a) or (4)(a).'*

12 The prohibition is further limited in that the Executive Director may determine that disclosure is not likely to interfere with any investigation. In that event the Court must consider whether or not the material should be received as a matter of public interest. Thus the Court's power to compel disclosure is only removed if the Executive Director has not so determined. The prohibition does not apply to criminal proceedings for an offence against the Act.

13 The definitions of "restricted information" and "staff member" demonstrate that the prohibition primarily concerns information obtained as the result of investigations conducted pursuant to the Act. There is no prohibition upon the independent collection of the same information. On-board recording information ("OBR information") is in a different category, but I do not understand it to be relevant for present purposes. The prohibition in s 60 is not limited in its operation to proceedings in Commonwealth and state courts exercising federal jurisdiction. It also applies to proceedings in state courts exercising state jurisdiction.

14 It seems likely that much of the material will be in the form of statements from witnesses. Such statements would not usually be admissible in evidence unless the witnesses in question were called. Of course hearsay is no longer an absolute bar to admissibility. Nonetheless, one suspects that the material would be more valuable in directing the plaintiffs' lines of inquiry than as evidence.

JURISDICTION AND POWER

15 This matter concerns the power of the Federal Court to compel the production of documents. The plaintiffs seem to assume that conferment of jurisdiction must involve the unlimited power to compel the giving of evidence including such production. The Court's jurisdiction is conferred by statute. Delineation of such jurisdiction is therefore a matter of statutory construction. Parliament may give or withhold any aspect of the judicial power of the Commonwealth. A grant of subject matter jurisdiction such as that in s 9 of the Admiralty Act will usually carry with it a grant of the power necessary to perform the relevant judicial functions. See *Nicholas v The Queen* (1998) 193 CLR 173 at [23]. If Parliament expressly withholds or withdraws a particular power, there can be no basis for asserting that the Court has it. It is possible that the withholding or withdrawal of a power necessary to the performance of a particular judicial task may render it impossible for the Court to perform its judicial function. In that case the conferment of jurisdiction might fail or be implicitly revoked. In construing the legislation which confers relevant jurisdiction upon it, the Court will seek to give effect to all aspects of such legislation. However, at the end of the day, clear legislative provisions must be given appropriate effect. Quite clearly, Parliament intended to deprive this Court of the power to compel the disclosure of restricted information by staff members, save where the Executive Director has issued a certificate. In my view it is no answer to say that because the Federal Court has statutory jurisdiction to determine the issues raised in these actions, s 60 must necessarily be unconstitutional in so far as it applies to it. I say nothing about the application of the section to the High Court or to state courts.

16 A further misconception underlies the plaintiffs' attempt to draw an analogy between public interest immunity, as a basis for resisting the disclosure of documents, and this legislation. The plaintiffs refer to the decision in *Sankey v Whitlam* (1978) 142 CLR 1 at 38 as authority for the proposition that the validity of a claim to such immunity is a matter for the court in question. At that time, however, the *Evidence Act 1995* (Cth) (the "Evidence Act") had not been enacted. The question of the admissibility or otherwise of such evidence is now regulated by s 130 of that Act. There has been no suggestion that s 130 constitutes an unlawful interference with proceedings in this Court.

17 Historically, the courts have not enjoyed such a wide power to compel the giving of

evidence as is implied by the plaintiffs' submissions. For example, as the Court of Appeal held in *Warren v Warren* [1997] QB 488, under the common law judges were competent, but not compellable, witnesses as to matters of which they became aware, relating to, and as a result of, the performance of the judicial function. In Australia that position is now regulated by s 16 of the Evidence Act. Other provisions contained in Division 1 of Part 2.1 of the Evidence Act also regulate the compellability of witnesses. The *Parliamentary Privileges Act 1987* (Cth) regulates the calling of parliamentarians as witnesses and the proof of parliamentary proceedings. This legislation was no doubt enacted pursuant to s 49 of the Constitution. Nonetheless it demonstrates the fallacy of the general proposition asserted by the plaintiffs that it is for a court to determine, in its absolute discretion, who should be summoned to give evidence and the evidence which should be given.

THE DECISION IN *NICHOLAS*

18 The relationship between the judicial power of the Commonwealth and Parliament's legislative authority in connection with witnesses and evidence was explained by the High Court in *Nicholas* (supra). That case concerned the power of a criminal court to exclude evidence upon the ground that it had been obtained in circumstances in which unlawful conduct had been committed by law enforcement officers. In light of an earlier decision of the High Court, Parliament had legislated to prohibit the exclusion of evidence on that ground. The accused submitted that the legislation was invalid as purporting to direct a court to exercise its discretionary power in a manner, or to produce an outcome which was inconsistent with, the essential character of a court or with the nature of judicial power. At [20] et seq, Brennan CJ said:

'20. ... *A law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid However, a law which merely prescribes a court's practice or procedure does not direct the exercise of the judicial power in finding facts, applying law or exercising an available discretion. For the purposes of the accused's first submission, the function of a court to which s 15X relates is the finding of facts on which the adjudication and punishment of criminal guilt depends.*

21. *Section 15X does not impede or otherwise affect the finding of facts by a jury. Indeed, it removes the barrier which Ridgeway placed against tendering to the jury evidence of an illegal importation of narcotic goods where such an importation had in fact occurred. Far from being inconsistent with the nature of the judicial power to adjudicate*

and punish criminal guilt, s 15X facilitates the admission of evidence of material facts in aid of correct fact finding.

22. *However, to identify the adjudication of criminal guilt as the relevant exercise of judicial power is not to deal with the effect of s 15X on which the accused relies to challenge its validity. The accused's argument is not that the adjudication by the jury of criminal guilt is affected by s 15X but that s 15X governs the determination by the trial judge of the challenge to the admission of evidence of an illegal importation. The argument assumes that the exercise of discretion to admit or reject evidence is itself an exercise of judicial power distinct from a step in the practice or procedure which governs the exercise of judicial power.*
23. *The judicial power of a court is defined by the matters in which jurisdiction has been conferred upon it. The conferral of jurisdiction prima facie carries the power to do whatever is necessary or convenient to effect its exercise. The practice and procedure of the court may be prescribed by the court in exercise of its implied power to do what is necessary for the exercise of its jurisdiction ... but subject to overriding legislative provision governing that practice or procedure. The rules of evidence have traditionally been recognized as being an appropriate subject of statutory prescription. A law prescribing a rule of evidence does not impair the curial function of finding facts, applying the law or exercising any available discretion in making the judgment or order which is the end and purpose of the exercise of judicial power. E.S. Roscoe ... observing that the common law had produced a law of evidence of such high technicality as "justly merited the wholesale condemnation of Bentham" credits Lord Denman with the initiation of the move for legislative reform. The preamble to the Evidence Act 1843 (Imp) ... shows the need which was perceived to warrant legislative intervention:*

"Whereas the Inquiry after Truth in Courts of Justice is often obstructed by Incapacities created by the present Law, and it is desirable that full Information as to the facts In Issue, both in Criminal and in Civil Cases, should be laid before the Persons who are appointed to decide upon them"

it was enacted that certain evidentiary rules be changed. Even though judicial opinion was opposed to the enactment of the Criminal Evidence Act 1898 ... it would not have occurred to the Imperial Parliament that a legislative power to prescribe rules of evidence might be regarded as a usurpation of judicial power.'

19 At [24] Brennan CJ referred to earlier decisions, in particular the decision of Higgins J in *Williamson v Ah On* [(1926) 39 CLR 95 at [122] and continued:

'However, Isaacs J pointed out a difference between a rule of evidence and a provision which, though in the form of a rule of evidence, is in truth an impairment of the curial function of finding the facts and hence an usurpation of judicial power. He said:

"It is one thing to say, for instance, in an Act of Parliament, that a man found in possession of stolen goods shall be conclusively deemed to have stolen them, and quite another to say that he shall be deemed to have stolen them unless he personally proves that he got them honestly."

If a court could be directed by the legislature to find that an accused, being found in possession of stolen goods, had stolen them, the legislature would have reduced the judicial function of fact finding to the merest formality. The legislative instruction to find that the accused stole the goods might prove not to be the fact. The legislature itself would have found the fact of stealing. Isaacs J continued:

"The first is a parliamentary arbitrary creation of a new offence of theft, leaving no room for judicial inquiry as to the ordinary offence; the second is only an evidentiary section, altering the burden of proof in the ordinary case of theft, and requiring certain pre-appointed evidence to fit the special circumstances in the interests of justice, because the accused best knows the facts, and leaving the Court with these provisions to examine the facts and determine the matter." '

20

At [26], Brennan CJ continued:

'If s 15X had simply declared that evidence of an illegal importation should be admitted, denying any discretion in the trial judge to exclude the evidence, the provision would simply have enlarged the evidentiary material available to a jury to assist it to find the facts truly. It would have been a mere procedural law assisting in the court's finding of material facts. No exception could be taken to such a law consistently with the authority cited above. But s 15X leaves the trial judge with a discretion to reject evidence of importation of narcotic goods in an authorized controlled operation, requiring only that in exercising the discretion, the illegal conduct of law enforcement officers should be disregarded. The existence of the judicial discretion does not alter the classification of the law as a law governing the admission of evidence and therefore a law governing procedure. The procedure for determining the admission of evidence of illegal importation is affected, but the judicial function of fact finding is unchanged and the judicial power to be exercised in determining guilt remains unaffected.'

21

Toohy J said at [53]:

'It is a considerable step to reason that legislation may not affect the way in which judicial power is exercised. It is an even bigger step to contend that the

legislature may not provide that evidence possessing a certain character must be treated in a certain way or that evidence of a particular character must be rejected or, for that matter, admitted. It might be necessary, in a particular situation, to look closely at the consequences of rejecting or admitting the evidence. Those consequences may, for instance, be so inimical to the idea of a fair trial that a question arises as to the power of the legislature, at any rate where the judicial power of the Commonwealth is involved. In Polyukhovich v The Commonwealth ..., where the operation of a law retroactively was one of the issues, I said:

“It is only if a law purports to operate in such a way as to require a court to act contrary to accepted notions of judicial power that a contravention of Chapter III may be involved.”

The operation of s 15X falls far short of that situation. It postulates a particular evidentiary footing upon which a court may then proceed where the admissibility of evidence that narcotic goods were imported into Australia is at issue. Section 15X is an evidentiary provision. It does not determine whether a charge of an offence ... will succeed or fail.’

22

Gummow J said, at [144]-[146]:

- ‘144. The present dispute does not turn upon the nature of the liabilities of the accused under s 233B of the Customs Act which are subjected to determination by the exercise of judicial power, nor upon the consequences of that determination. The accused is liable to the determination of criminal guilt and the consequent infliction of punishment. There is a correlative right of the accused to the determination of that guilt and the infliction of punishment by the exercise of judicial power. What is at the heart of the complaint by the accused is legislative prescription as to the manner of the exercise of the judicial power at his trial.*
- 145. The essential question concerns the limitation imposed by s 15X upon the discretion which the trial court otherwise would enjoy to exclude evidence that the heroin in question was imported into Australia in contravention of the Customs Act. Is this such an interference with the governance of the trial and a distortion of its predominant characteristics as to involve the trial court in the determination of the criminal guilt of the accused otherwise than by the exercise of the judicial power of the Commonwealth?*
- 146. The legislative powers of the Commonwealth do not extend to the making of a law which authorises or requires a court exercising the judicial power to do so in a manner which is inconsistent with its nature ... Thus, a legislative direction requiring a court not to release a person held in unlawful custody is a direction as to the manner (and outcome) of the exercise of its jurisdiction and is an impermissible*

intrusion into the exercise of the judicial power ... Nor would a legislative direction be valid if it required a court in exercise of the judicial power of the Commonwealth to order exercise of the judicial power of the Commonwealth to order imprisonment, not on the basis that the persons in question had breached any criminal law, but upon an opinion formed by reference to material, not necessarily admissible in legal proceedings, that, on the balance or probabilities, they might breach such a law.'

23 At [162] his Honour concluded:

'The section in its operation, if not necessarily on its face, deals not with proof but with a discretion to exclude evidence of facts. It operates to facilitate the proof by the prosecution of its case by the admission of evidence that otherwise was liable to exclusion. The case for the accused is made that much more difficult than it would have been if s 15X had not been enacted. However, the section does not deem any ultimate fact to exist, or to have been proved. It leaves untouched the elements of the crimes for which the accused is to be tried. Nor does s 15X change the amount or degree of proof essential to convict him from that required when the alleged offences were committed.'

24 At [232] et seq, Hayne J said:

- '232. It was submitted that the discretion to reject evidence of illegally procured offences is a common law (as opposed to statutory) discretion which is exercised by the courts to protect the integrity of their processes. No doubt this is so. Equally there is no doubt that a court which exercises the discretion is exercising judicial power. Thus, when the trial judge ruled that the evidence which the prosecution proposed to lead of the importation of the heroin which it was alleged that Nicholas had, or had attempted to have, in his possession should be excluded, the trial judge was exercising the judicial power of the Commonwealth. But it by no mean follows from these considerations that Parliament may make no law touching the discretion.*
- 233. At the outset it is necessary to recall that the discretion is one which is rooted in public policy and requires the balancing of competing considerations. Part 1AB seeks to have the Court strike that balance differently in some kinds of cases, presumably because the Parliament considers that the public interest requires it. The effect of Nicholas' contentions is that only the courts may determine what the public interest requires. I do not accept that that is so.*
- 234. The facts that the discretion is a creature of the common law and is concerned with the protection of the integrity of the courts' processes do not mean that the discretion cannot be affected by legislation. There are many rules which have been developed by the common law*

which have been changed or even abolished by legislation and yet it is not suggested that such legislation intrudes upon the separation of judicial and legislative powers. Nor do the facts that the discretion is designed to protect the integrity of the courts and that the discretion is "an incident of the judicial powers vested in the courts" ... take the discretion altogether beyond the reach of the legislature. Whether other considerations would arise if Parliament attempted to abolish the discretion altogether is a question I need not, and do not, address. The legislation now in question does not abolish the discretion – it affects only some kinds of prosecutions and then only in the limited circumstances that are prescribed in the legislation.

235. *Moreover, Part 1AB is concerned with a rule about the reception or rejection of certain evidence. That Parliament may make laws prescribing rules of evidence is clear and was not disputed. Plainly, Parliament may make laws (as it has) on subjects as diverse as the circumstances in which hearsay may be received ... or the circumstances in which confessional statements by accused persons may be admitted in evidence and it may do so to the exclusion of the previous common law rules*

236. *The common law rules that were developed in these areas were often, if not always, developed with questions such as reliability of evidence or fairness to the accused at the forefront of consideration and thus, at least to that extent, with questions of the integrity of the curial process and its results well in mind. And yet such legislation does not infringe the separate of powers.'*

25 At [238] his Honour continued:

'Once it is accepted that the legislature may make or change the rules of evidence it is clear that it may make or change the rules governing the discretionary exclusion of evidence. In particular, it may make or change rules governing the factors which a court is to take into account in exercising that discretion.'

26 See also *Kizon v Palmer* (1997) 72 FCR 409, per Lindgren J at 446-7, Jenkinson and Kiefel JJ concurring, and *Rann v Olsen* (2000) 172 ALR 395, per Doyle CJ at [190]-[192], Prior J at [230], Perry J at [258], Mullighan J at [284] and Lander J at [391].

27 In light of these authorities there is simply no room for the submission that Parliament cannot make laws relating to the admissibility or inadmissibility of evidence. There may be extreme cases in which the consequence of a statutory provision is that a judicial function performed in accordance with it would not be recognizable as judicial in nature. That may

lead to the conclusion that the provision is unlawful or that the conferment of jurisdiction was not, or is no longer, valid. However it cannot be seriously suggested that the present case is of that kind. No attempt was made to establish that it was.

28 The plaintiffs also submit that the power conferred on the Executive Director by subs 60(5) is judicial and therefore not capable of conferment upon that officer. There is no reason for treating the power as being judicial in nature other than that it results in evidence not being receivable in a court. Once it is accepted as it must be, that Parliament may legislate to exclude certain matters from being received in evidence, there seems to be no reason why it should not be able to empower an identified person to determine whether or not the Act's protection should be invoked or waived. If this argument were valid, it would seem to follow that the legislation extending such protection should also be characterized as judicial and not legislative. There is nothing in this point. The submission is also put in a slightly different way. It is said that the legislation subordinates exercise of the judicial power to an executive discretion. While such a proposition has the typical appeal of a rhetorical flourish, it fails to address the fundamental problem that the authorities recognize the power of Parliament to legislate in connection with rules of evidence.

29 Finally, the plaintiffs submit that s 60 *'compromises the integrity of the judicial system, because it goes to the question of the power of the court to make orders with which the executive or, in this case, with which people will comply.'* The administration of law is, no doubt, a public function of primary importance in a civilized society, but other functions are also important. Whilst the courts balance the interests of one litigant against another, Parliament must balance the interaction between different public functions. It is for Parliament to determine the balance between the right of a litigant to lead evidence and the objects identified in s 7 of the Act. There is nothing in this point.

CONSTITUTIONAL POWER

30 As to the assertion that there is no head of power which authorizes enactment of s 60, the Proper Officer relies upon subss 51(i) [xx] and [xxix] and s 98 of the Constitution. The plaintiffs have made no attempt to demonstrate any basis for arguing that the legislation is beyond the power conferred by those provisions. My understanding of their argument is rather that there is no express authorization for legislation which has the effect of restricting

the power of this Court to compel classes of witnesses to give evidence of a particular kind. As I have said that argument cannot be maintained. Section 60 is within power.

ORDERS

31 In each action the subpoena should be set aside. The plaintiffs should pay the Proper Officer's costs of and incidental to the motion. I will entertain any application pursuant to O 15A r 8 should the plaintiffs wish to proceed further with that course.

I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett.

Associate:

Dated: 5 July 2007

Counsel for the Plaintiff:	Mr A W Street Mr McClure
Solicitor for the Plaintiff:	Norton White
Counsel for the First Defendant:	The first defendant did not appear
Counsel for the Second Defendant:	The second defendant did not appear
Counsel for the Australian Transport Safety Bureau:	Dr Perry SC Ms Mitchelmore
Solicitor for the Australian Transport Safety Bureau:	Australian Government Solicitor
Date of Hearing:	26 February 2007
Date of Judgment:	5 July 2007

GENERAL DISTRIBUTION

FEDERAL COURT OF AUSTRALIA

Elbe Shipping SA v Giant Marine Shipping SA [2007] FCA 1000

CONSTITUTIONAL LAW – judicial power – whether legislation infringes or usurps judicial power of Commonwealth – whether legislation invalid

PROCEDURE – motion to set aside subpoena to produce documents – production of documents to court prohibited under s 60 of *Transport Safety Investigation Act 2003* (Cth) – whether the power of the court to order the production of documents by subpoena is properly characterised as practice and procedure – subpoena set aside

Constitution ss 49, 51, 98

Transport Safety Investigation Act 2003 (Cth) ss 3, 7, 53, 56, 57, 58, 60

Admiralty Act 1988 (Cth) s 59

Judiciary Act 1903 (Cth) s 78B

Evidence Act 1995 (Cth) ss 16, 130

Parliamentary Privileges Act 1987 (Cth)

Sankey v Whitlam (1978) 142 CLR 1 discussed

Nicholas v The Queen (1998) 193 CLR 173 applied

Warren v Warren [1997] QB 488 cited

Williamson v Ah On [(1926) 39 CLR 95 cited

Kizon v Palmer (1997) 72 FCR 409 cited

Rann v Olsen (2000) 172 ALR 395 cited

**ELBE SHIPPING SA v GIANT MARINE SHIPPING SA, BEING THE OWNERS OF THE SHIP “GLOBAL PEACE” AND ADSTEAM HARBOUR PTY LIMITED
NSD 124 OF 2006**

**SQ MARINE SA v GIANT MARINE SHIPPING SA BEING OWNERS OF THE SHIP “GLOBAL PEACE” AND ADSTEAM HARBOUR PTY LIMITED
NSD 125 OF 2006**

DOWSETT J
5 JULY 2007
BRISBANE

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

NSD 124 OF 2006

**BETWEEN: ELBE SHIPPING SA
Plaintiff**

**AND: GIANT MARINE SHIPPING SA, BEING THE OWNERS OF
THE SHIP "GLOBAL PEACE"
First Defendant**

**ADSTEAM HARBOUR PTY LIMITED
Second Defendant**

JUDGE: DOWSETT J

DATE OF ORDER: 5 JULY 2007

WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1. The subpoena issued to the Proper Officer of the Australian Transport Safety Bureau be set aside.
2. The plaintiff pay the Proper Officer's costs of and incidental to the motion of 21 February 2007.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

NSD 125 OF 2006

**BETWEEN: SQ MARINE SA
 Plaintiff**

**AND: GIANT MARINE SHIPPING SA BEING OWNERS OF THE
 SHIP "GLOBAL PEACE"
 First Defendant**

**ADSTEAM HARBOUR PTY LIMITED
Second Defendant**

JUDGE: DOWSETT J

DATE OF ORDER: 5 JULY 2007

WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1. The subpoena issued to the Proper Officer of the Australian Transport Safety Bureau be set aside.
2. The plaintiff pay the Proper Officer's costs of and incidental to the motion of 21 February 2007.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

NSD 124 OF 2006

**BETWEEN: ELBE SHIPPING SA
Plaintiff**

**AND: GIANT MARINE SHIPPING SA, BEING THE OWNERS OF
THE SHIP "GLOBAL PEACE"
First Defendant**

**ADSTEAM HARBOUR PTY LIMITED
Second Defendant**

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

NSD 125 OF 2006

**BETWEEN: SQ MARINE SA
Plaintiff**

**AND: GIANT MARINE SHIPPING SA, BEING THE OWNERS OF
THE SHIP "GLOBAL PEACE"
First Defendant**

**ADSTEAM HARBOUR PTY LIMITED
Second Defendant**

JUDGE: DOWSETT J

DATE: 5 JULY 2007

PLACE: BRISBANE

REASONS FOR JUDGMENT

1 On 24 January 2006 the tug "Tom Tough" was assisting the vessel "Global Peace" to berth in Gladstone Harbour. The plaintiff in each of these actions alleges that in so doing, the tug came into contact with the hull of the Global Peace causing damage which led to the discharge of oil into harbour waters. The plaintiff in action NSD 124 of 2006 alleges that oil came into contact with the hull of its vessel, "Medi Vitoria", causing loss and damage. The plaintiff in action NSD 125 of 2006 alleges that oil damaged its vessel, "Nord Stream". Each plaintiff sues the first defendant as owner of "Global Peace", seeking damages. It is not

presently necessary to address the potentially difficult legal questions concerning the extent of the first defendant's responsibility for the conduct of the tug, its master and crew. The first defendant denies liability. On 18 April 2007, after I had received submissions in connection with the motion with which I am presently concerned, Adsteam Harbour Pty Ltd, the owner of the tug, was joined as second defendant in each action.

THE MOTION

1 On 23 October 2006, on the application of the plaintiff in each case, the Registrar issued a subpoena directed to:

*'The Proper Officer
Australian Transport Safety Bureau
15 Mort Street
Canberra City ACT 2601.'*

2 Although it is not entirely clear, it seems that the subpoena was intended to compel production of documents in each case, and not attendance to give oral evidence. I am presently considering a notice of motion which seeks an order that in each case, the subpoena be set aside. The applicant is said to be Australian Transport Safety Board. However counsel announced that they appeared for Australian Transport Safety Bureau, the body named in the subpoena. I have been unable to identify any such legal entity. The *Transport Safety Investigation Act 2003* (Cth) (the "Act") contemplates the appointment of an Executive Director of Transport Safety Investigation (the "Executive Director"). That officer and his delegates have numerous responsibilities and powers under the Act. It may be that the subpoena ought to have been directed to the Executive Director, but no such point has been taken. I infer that the Australian Transport Safety Bureau comprises the Executive Director's staff, and that there is a person who is recognizable as the "Proper Officer" of that organization to whom a subpoena might properly be addressed. I proceed upon the basis that such person is the applicant pursuant to the notice of motion.

THE SUBPOENA

2 Pursuant to s 21 of the Act the Executive Director investigated the collision between Global Peace and the tug and, in August 2006, published a report. This report is publicly available. In effect, the plaintiffs seek access to the material upon which the report is based. A schedule

to the subpoena provides as follows:

Schedule

The documents and things you must produce are as follows, copies of:

(Note: In this Subpoena the term "Incident" means the collision between MV "Global Peace" and the Tug "Tom Tough" resulting in the discharge or escape of oil from the "Global Peace" into Gladstone Harbour at Gladstone on 24/25 January 2006).

- 1. Any documents or other records in relation to oil analysis, sampling analysis, testing or testing results of the oil discharged from the "Global Peace" on 24 and 25 January 2006.*
- 2. Any documents or other records or reports or survey reports or status or situation reports or similar documents in relation to the extent or known extent, spread, range and distribution of the oil discharged or escaped from the "Global Peace" as a result of the Incident.*
- 3. Any photographs or other images, whether electronic or hard copy of the extent or known extent, spread, range and distribution of the oil discharged or escaped from the "Global Peace" as a result of the Incident.*
- 4. Any Gladstone vessel traffic service (VTS) records or documents in relation to the incident, whether audio, digital, electronic or written from 12 noon on 24 January 2006 to the time of the departure of the "Global Peace, including but not limited to the extent or known extent, spread, range and distribution of the oil discharged or escaped from the "Global Peace" as a result of the Incident.*
- 5. Any documents, statements or other records of interview of the Master, Pilot, officers or crew of the "Global Peace" or the "Tom Tough" in relation to the Incident, including but not limited to the extent or known extent, spread, range and distribution of the oil discharged or escaped from the "Global Peace" as a result of the Incident.*
- 6. Any records or records of investigation or inspection or reports or survey reports or similar documents in relation to the extent of damage and/or holing of the shell plating of the "Global Peace" by way of the port deep fuel oil tank at or about frames 42-46 as a result of the Incident.*
- 7. Any records or records of investigation or inspection or reports or survey reports or similar documents in relation to the fender and support beam arrangement of the starboard quarter fender of the "Tom Tough".*
- 8. Any Master's Notes of Protest in relation to the Incident, including but*

not limited to the extent or known extent, spread, range and distribution of the oil discharged or escaped from the "Global Peace" as a result of the Incident.'

THE PROPER OFFICER'S RESPONSE

3 On 2 November 2006 a Deputy Director of the Bureau notified the Registrar that:

- it held documents which were responsive to the subpoena;
- such documents were '*restricted information*' as defined in s 3 of the Act;
- such documents were held by '*staff members*' as there defined;
- the Executive Director had not issued a certificate pursuant to s 60(5) of the Act; and
- in those circumstances the documents could not be disclosed by staff members to the Court.

3 As I have said the Proper Officer has applied to set aside the subpoena.

THE PLAINTIFFS' MOTION FOR NON-PARTY DISCOVERY

4 After hearing oral submissions I reserved my decision. I then formed the view that the plaintiffs ought to have sought non-party discovery pursuant to O 15A rather than the issue of a subpoena. I was concerned that certain statutory provisions upon which the Proper Officer relies in support of the motion might not apply to an order pursuant to O 15A in the same way as to a subpoena. I accordingly invited the parties to make submissions. The plaintiffs then sought leave to issue notices of motion seeking orders pursuant to O 15A r 8. However the parties do not consider the distinction to be of any importance for present purposes. I proceed upon that basis.

PLAINTIFFS' SUBMISSIONS

5 In their written submissions, the plaintiffs challenge the validity of ss 53, 56, 57, 58 and 60 of the Act. However I understand the Proper Officer to rely only on s 60. I need not consider the other sections. The plaintiffs submit that s 60 of the Act is '*an impermissible interference with the jurisdiction vested in the Federal Court*' by the *Admiralty Act 1988* (Cth) (the "Admiralty Act"). They submit that in these actions, the Federal Court is

exercising jurisdiction conferred upon the Court pursuant to s 76(ii) and (iii), s 77 and s 71 of the Constitution *'and that jurisdiction cannot be ousted directly or ... indirectly.'* They submit that s 60 is *'not a law with respect to any plenary power within s.51 and/or s 98 of the Constitution and accordingly, is invalid and/or to be read down under s.15A of the Acts Interpretation Act ... so as to create no offence by disclosure to a court under compulsion of subpoena and so as not to interfere with the Court's process and power to compel production of documents'* It is further submitted that it is for the Court and *'not an executive director'* to decide whether documents should be produced or withheld and questions of admissibility in federal matters. This proposition is said to flow from the decision of the High Court in *Sankey v Whitlam* (1978) 142 CLR 1 at 38.

6 Appropriate notices have been given pursuant to s 78B of the *Judiciary Act 1903* (Cth). There has been no intervention and no application for removal.

SECTION 60 OF THE ACT

7 Section 60 of the Act provides:

'Staff members

(1) *A person who is or has been a staff member is guilty of an offence if:*

- (a) *the person makes a record of information; and*
- (b) *the information is restricted information.*

Maximum penalty: Imprisonment for 2 years.

(2) *A person who is or has been a staff member is guilty of an offence if:*

- (a) *the person discloses information to any person or to a court; and*
- (b) *the information is restricted information.*

Maximum penalty: Imprisonment for 2 years.

Non-staff members

(3) *A person who has, or had, access to restricted information under section 62 must not:*

- (a) *make a record of the information; or*
- (b) *disclose the information to any person or to a court.*

Maximum penalty: Imprisonment for 2 years.

Defences

(4) *Subsection (1), (2) or (3) does not apply to:*

- (a) *anything done by a person in performing functions under this Act or in connection with this Act; or*
- (b) *disclosure to a court in criminal proceedings for an offence*

- against this Act; or*
- (c) *disclosure to a court in civil proceedings where:*
 - (i) *the Executive Director issues a certificate under subsection (5); and*
 - (ii) *the court makes an order under subsection (6).*

Note: A defendant bears an evidential burden in relation to a matter in subsection (4). See subsection 13.3(3) of the Criminal Code.

Certificate

- (5) *The Executive Director may issue a certificate in relation to restricted information, stating that the disclosure of the information is not likely to interfere with any investigation.*

Courts

- (6) *If the court is satisfied that any adverse domestic and international impact that the disclosure of the information might have on any current or future investigations is outweighed by the public interest in the administration of justice, the court may order such disclosure.*
- (7) *The court may direct that the restricted information, or any information obtained from the restricted information, must not:*
 - (a) *be published or communicated to any person; or*
 - (b) *be published or communicated except in such manner, and to such persons, as the court specifies.*
- (8) *If a person is prohibited by this section from disclosing restricted information, then:*
 - (a) *the person cannot be required by a court to disclose the information; and*
 - (b) *any information disclosed by the person in contravention of this section is not admissible in any civil or criminal proceedings (other than proceedings against the person under this section).'*

8 The relevant provisions seem to be subss 60(2) and 60(8). The prohibition applies to a limited class of person (staff members) and to a limited class of information (restricted information). Those terms are defined in s 3 as follows:

'staff member means:

- (a) *the Executive Director; or*
- (b) *an APS employee who is assisting the Executive Director in exercising powers under this Act; or*
- (c) *a person to whom the Executive Director, has delegated any of the Executive Director's powers under this Act';*

and:

'restricted information means any of the following (but does not include OBR information):

- (a) *all statements (whether oral or in writing) obtained from persons by a*

- staff member in the course of an investigation (including any record of such a statement);*
- (b) all information recorded by a staff member in the course of an investigation;*
 - (c) all communications with a person involved in the operation of a transport vehicle that is or was the subject of an investigation;*
 - (d) medical or private information regarding persons (including deceased persons) involved in a transport safety matter that is being or has been investigated;*
 - (e) in relation to a transport vehicle that is or was the subject of an investigation-information recorded for the purposes of monitoring or directing the progress of the vehicle from one place to another or information recorded in relation to the operation of the vehicle;*
 - (f) records of the analysis of information or evidential material acquired in the course of an investigation (including opinions expressed by a person in that analysis);*
 - (g) information contained in a document that is produced to a staff member under paragraph 32(1)(b) or 36(3)(a) or (4)(a).'*

9 The prohibition is further limited in that the Executive Director may determine that disclosure is not likely to interfere with any investigation. In that event the Court must consider whether or not the material should be received as a matter of public interest. Thus the Court's power to compel disclosure is only removed if the Executive Director has not so determined. The prohibition does not apply to criminal proceedings for an offence against the Act.

10 The definitions of "restricted information" and "staff member" demonstrate that the prohibition primarily concerns information obtained as the result of investigations conducted pursuant to the Act. There is no prohibition upon the independent collection of the same information. On-board recording information ("OBR information") is in a different category, but I do not understand it to be relevant for present purposes. The prohibition in s 60 is not limited in its operation to proceedings in Commonwealth and state courts exercising federal jurisdiction. It also applies to proceedings in state courts exercising state jurisdiction.

11 It seems likely that much of the material will be in the form of statements from witnesses. Such statements would not usually be admissible in evidence unless the witnesses in question were called. Of course hearsay is no longer an absolute bar to admissibility. Nonetheless, one suspects that the material would be more valuable in directing the plaintiffs' lines of inquiry than as evidence.

JURISDICTION AND POWER

12 This matter concerns the power of the Federal Court to compel the production of documents. The plaintiffs seem to assume that conferment of jurisdiction must involve the unlimited power to compel the giving of evidence including such production. The Court's jurisdiction is conferred by statute. Delineation of such jurisdiction is therefore a matter of statutory construction. Parliament may give or withhold any aspect of the judicial power of the Commonwealth. A grant of subject matter jurisdiction such as that in s 9 of the Admiralty Act will usually carry with it a grant of the power necessary to perform the relevant judicial functions. See *Nicholas v The Queen* (1998) 193 CLR 173 at [23]. If Parliament expressly withholds or withdraws a particular power, there can be no basis for asserting that the Court has it. It is possible that the withholding or withdrawal of a power necessary to the performance of a particular judicial task may render it impossible for the Court to perform its judicial function. In that case the conferment of jurisdiction might fail or be implicitly revoked. In construing the legislation which confers relevant jurisdiction upon it, the Court will seek to give effect to all aspects of such legislation. However, at the end of the day, clear legislative provisions must be given appropriate effect. Quite clearly, Parliament intended to deprive this Court of the power to compel the disclosure of restricted information by staff members, save where the Executive Director has issued a certificate. In my view it is no answer to say that because the Federal Court has statutory jurisdiction to determine the issues raised in these actions, s 60 must necessarily be unconstitutional in so far as it applies to it. I say nothing about the application of the section to the High Court or to state courts.

13 A further misconception underlies the plaintiffs' attempt to draw an analogy between public interest immunity, as a basis for resisting the disclosure of documents, and this legislation. The plaintiffs refer to the decision in *Sankey v Whitlam* (1978) 142 CLR 1 at 38 as authority for the proposition that the validity of a claim to such immunity is a matter for the court in question. At that time, however, the *Evidence Act 1995* (Cth) (the "Evidence Act") had not been enacted. The question of the admissibility or otherwise of such evidence is now regulated by s 130 of that Act. There has been no suggestion that s 130 constitutes an unlawful interference with proceedings in this Court.

14 Historically, the courts have not enjoyed such a wide power to compel the giving of

evidence as is implied by the plaintiffs' submissions. For example, as the Court of Appeal held in *Warren v Warren* [1997] QB 488, under the common law judges were competent, but not compellable, witnesses as to matters of which they became aware, relating to, and as a result of, the performance of the judicial function. In Australia that position is now regulated by s 16 of the Evidence Act. Other provisions contained in Division 1 of Part 2.1 of the Evidence Act also regulate the compellability of witnesses. The *Parliamentary Privileges Act 1987* (Cth) regulates the calling of parliamentarians as witnesses and the proof of parliamentary proceedings. This legislation was no doubt enacted pursuant to s 49 of the Constitution. Nonetheless it demonstrates the fallacy of the general proposition asserted by the plaintiffs that it is for a court to determine, in its absolute discretion, who should be summoned to give evidence and the evidence which should be given.

THE DECISION IN *NICHOLAS*

15 The relationship between the judicial power of the Commonwealth and Parliament's legislative authority in connection with witnesses and evidence was explained by the High Court in *Nicholas* (supra). That case concerned the power of a criminal court to exclude evidence upon the ground that it had been obtained in circumstances in which unlawful conduct had been committed by law enforcement officers. In light of an earlier decision of the High Court, Parliament had legislated to prohibit the exclusion of evidence on that ground. The accused submitted that the legislation was invalid as purporting to direct a court to exercise its discretionary power in a manner, or to produce an outcome which was inconsistent with, the essential character of a court or with the nature of judicial power. At [20] et seq, Brennan CJ said:

'20. ... A law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid However, a law which merely prescribes a court's practice or procedure does not direct the exercise of the judicial power in finding facts, applying law or exercising an available discretion. For the purposes of the accused's first submission, the function of a court to which s 15X relates is the finding of facts on which the adjudication and punishment of criminal guilt depends.

21. Section 15X does not impede or otherwise affect the finding of facts by a jury. Indeed, it removes the barrier which Ridgeway placed against tendering to the jury evidence of an illegal importation of narcotic goods where such an importation had in fact occurred. Far from being inconsistent with the nature of the judicial power to adjudicate

and punish criminal guilt, s 15X facilitates the admission of evidence of material facts in aid of correct fact finding.

22. *However, to identify the adjudication of criminal guilt as the relevant exercise of judicial power is not to deal with the effect of s 15X on which the accused relies to challenge its validity. The accused's argument is not that the adjudication by the jury of criminal guilt is affected by s 15X but that s 15X governs the determination by the trial judge of the challenge to the admission of evidence of an illegal importation. The argument assumes that the exercise of discretion to admit or reject evidence is itself an exercise of judicial power distinct from a step in the practice or procedure which governs the exercise of judicial power.*
23. *The judicial power of a court is defined by the matters in which jurisdiction has been conferred upon it. The conferral of jurisdiction prima facie carries the power to do whatever is necessary or convenient to effect its exercise. The practice and procedure of the court may be prescribed by the court in exercise of its implied power to do what is necessary for the exercise of its jurisdiction ... but subject to overriding legislative provision governing that practice or procedure. The rules of evidence have traditionally been recognized as being an appropriate subject of statutory prescription. A law prescribing a rule of evidence does not impair the curial function of finding facts, applying the law or exercising any available discretion in making the judgment or order which is the end and purpose of the exercise of judicial power. E.S. Roscoe ... observing that the common law had produced a law of evidence of such high technicality as "justly merited the wholesale condemnation of Bentham" credits Lord Denman with the initiation of the move for legislative reform. The preamble to the Evidence Act 1843 (Imp) ... shows the need which was perceived to warrant legislative intervention:*

"Whereas the Inquiry after Truth in Courts of Justice is often obstructed by Incapacities created by the present Law, and it is desirable that full Information as to the facts In Issue, both in Criminal and in Civil Cases, should be laid before the Persons who are appointed to decide upon them"

it was enacted that certain evidentiary rules be changed. Even though judicial opinion was opposed to the enactment of the Criminal Evidence Act 1898 ... it would not have occurred to the Imperial Parliament that a legislative power to prescribe rules of evidence might be regarded as a usurpation of judicial power.'

16 At [24] Brennan CJ referred to earlier decisions, in particular the decision of Higgins J in *Williamson v Ah On* [(1926) 39 CLR 95 at [122] and continued:

'However, Isaacs J pointed out a difference between a rule of evidence and a provision which, though in the form of a rule of evidence, is in truth an impairment of the curial function of finding the facts and hence an usurpation of judicial power. He said:

"It is one thing to say, for instance, in an Act of Parliament, that a man found in possession of stolen goods shall be conclusively deemed to have stolen them, and quite another to say that he shall be deemed to have stolen them unless he personally proves that he got them honestly."

If a court could be directed by the legislature to find that an accused, being found in possession of stolen goods, had stolen them, the legislature would have reduced the judicial function of fact finding to the merest formality. The legislative instruction to find that the accused stole the goods might prove not to be the fact. The legislature itself would have found the fact of stealing. Isaacs J continued:

"The first is a parliamentary arbitrary creation of a new offence of theft, leaving no room for judicial inquiry as to the ordinary offence; the second is only an evidentiary section, altering the burden of proof in the ordinary case of theft, and requiring certain pre-appointed evidence to fit the special circumstances in the interests of justice, because the accused best knows the facts, and leaving the Court with these provisions to examine the facts and determine the matter." '

17

At [26], Brennan CJ continued:

'If s 15X had simply declared that evidence of an illegal importation should be admitted, denying any discretion in the trial judge to exclude the evidence, the provision would simply have enlarged the evidentiary material available to a jury to assist it to find the facts truly. It would have been a mere procedural law assisting in the court's finding of material facts. No exception could be taken to such a law consistently with the authority cited above. But s 15X leaves the trial judge with a discretion to reject evidence of importation of narcotic goods in an authorized controlled operation, requiring only that in exercising the discretion, the illegal conduct of law enforcement officers should be disregarded. The existence of the judicial discretion does not alter the classification of the law as a law governing the admission of evidence and therefore a law governing procedure. The procedure for determining the admission of evidence of illegal importation is affected, but the judicial function of fact finding is unchanged and the judicial power to be exercised in determining guilt remains unaffected.'

18

Toohy J said at [53]:

'It is a considerable step to reason that legislation may not affect the way in which judicial power is exercised. It is an even bigger step to contend that the

legislature may not provide that evidence possessing a certain character must be treated in a certain way or that evidence of a particular character must be rejected or, for that matter, admitted. It might be necessary, in a particular situation, to look closely at the consequences of rejecting or admitting the evidence. Those consequences may, for instance, be so inimical to the idea of a fair trial that a question arises as to the power of the legislature, at any rate where the judicial power of the Commonwealth is involved. In *Polyukhovich v The Commonwealth* ..., where the operation of a law retroactively was one of the issues, I said:

"It is only if a law purports to operate in such a way as to require a court to act contrary to accepted notions of judicial power that a contravention of Chapter III may be involved."

The operation of s 15X falls far short of that situation. It postulates a particular evidentiary footing upon which a court may then proceed where the admissibility of evidence that narcotic goods were imported into Australia is at issue. Section 15X is an evidentiary provision. It does not determine whether a charge of an offence ... will succeed or fail.'

19

Gummow J said, at [144]-[146]:

- '144. *The present dispute does not turn upon the nature of the liabilities of the accused under s 233B of the Customs Act which are subjected to determination by the exercise of judicial power, nor upon the consequences of that determination. The accused is liable to the determination of criminal guilt and the consequent infliction of punishment. There is a correlative right of the accused to the determination of that guilt and the infliction of punishment by the exercise of judicial power. What is at the heart of the complaint by the accused is legislative prescription as to the manner of the exercise of the judicial power at his trial.*
- 145. *The essential question concerns the limitation imposed by s 15X upon the discretion which the trial court otherwise would enjoy to exclude evidence that the heroin in question was imported into Australia in contravention of the Customs Act. Is this such an interference with the governance of the trial and a distortion of its predominant characteristics as to involve the trial court in the determination of the criminal guilt of the accused otherwise than by the exercise of the judicial power of the Commonwealth?*
- 146. *The legislative powers of the Commonwealth do not extend to the making of a law which authorises or requires a court exercising the judicial power to do so in a manner which is inconsistent with its nature ... Thus, a legislative direction requiring a court not to release a person held in unlawful custody is a direction as to the manner (and outcome) of the exercise of its jurisdiction and is an impermissible*

intrusion into the exercise of the judicial power ... Nor would a legislative direction be valid if it required a court in exercise of the judicial power of the Commonwealth to order exercise of the judicial power of the Commonwealth to order imprisonment, not on the basis that the persons in question had breached any criminal law, but upon an opinion formed by reference to material, not necessarily admissible in legal proceedings, that, on the balance or probabilities, they might breach such a law.'

20 At [162] his Honour concluded:

'The section in its operation, if not necessarily on its face, deals not with proof but with a discretion to exclude evidence of facts. It operates to facilitate the proof by the prosecution of its case by the admission of evidence that otherwise was liable to exclusion. The case for the accused is made that much more difficult than it would have been if s 15X had not been enacted. However, the section does not deem any ultimate fact to exist, or to have been proved. It leaves untouched the elements of the crimes for which the accused is to be tried. Nor does s 15X change the amount or degree of proof essential to convict him from that required when the alleged offences were committed.'

21 At [232] et seq, Hayne J said:

- '232. It was submitted that the discretion to reject evidence of illegally procured offences is a common law (as opposed to statutory) discretion which is exercised by the courts to protect the integrity of their processes. No doubt this is so. Equally there is no doubt that a court which exercises the discretion is exercising judicial power. Thus, when the trial judge ruled that the evidence which the prosecution proposed to lead of the importation of the heroin which it was alleged that Nicholas had, or had attempted to have, in his possession should be excluded, the trial judge was exercising the judicial power of the Commonwealth. But it by no mean follows from these considerations that Parliament may make no law touching the discretion.*
- 233. At the outset it is necessary to recall that the discretion is one which is rooted in public policy and requires the balancing of competing considerations. Part 1AB seeks to have the Court strike that balance differently in some kinds of cases, presumably because the Parliament considers that the public interest requires it. The effect of Nicholas' contentions is that only the courts may determine what the public interest requires. I do not accept that that is so.*
- 234. The facts that the discretion is a creature of the common law and is concerned with the protection of the integrity of the courts' processes do not mean that the discretion cannot be affected by legislation. There are many rules which have been developed by the common law*

which have been changed or even abolished by legislation and yet it is not suggested that such legislation intrudes upon the separation of judicial and legislative powers. Nor do the facts that the discretion is designed to protect the integrity of the courts and that the discretion is "an incident of the judicial powers vested in the courts" ... take the discretion altogether beyond the reach of the legislature. Whether other considerations would arise if Parliament attempted to abolish the discretion altogether is a question I need not, and do not, address. The legislation now in question does not abolish the discretion – it affects only some kinds of prosecutions and then only in the limited circumstances that are prescribed in the legislation.

235. *Moreover, Part 1AB is concerned with a rule about the reception or rejection of certain evidence. That Parliament may make laws prescribing rules of evidence is clear and was not disputed. Plainly, Parliament may make laws (as it has) on subjects as diverse as the circumstances in which hearsay may be received ... or the circumstances in which confessional statements by accused persons may be admitted in evidence and it may do so to the exclusion of the previous common law rules*

236. *The common law rules that were developed in these areas were often, if not always, developed with questions such as reliability of evidence or fairness to the accused at the forefront of consideration and thus, at least to that extent, with questions of the integrity of the curial process and its results well in mind. And yet such legislation does not infringe the separate of powers.'*

22 At [238] his Honour continued:

'Once it is accepted that the legislature may make or change the rules of evidence it is clear that it may make or change the rules governing the discretionary exclusion of evidence. In particular, it may make or change rules governing the factors which a court is to take into account in exercising that discretion.'

23 See also *Kizon v Palmer* (1997) 72 FCR 409, per Lindgren J at 446-7, Jenkinson and Kiefel JJ concurring, and *Rann v Olsen* (2000) 172 ALR 395, per Doyle CJ at [190]-[192], Prior J at [230], Perry J at [258], Mullighan J at [284] and Lander J at [391].

24 In light of these authorities there is simply no room for the submission that Parliament cannot make laws relating to the admissibility or inadmissibility of evidence. There may be extreme cases in which the consequence of a statutory provision is that a judicial function performed in accordance with it would not be recognizable as judicial in nature. That may

lead to the conclusion that the provision is unlawful or that the conferment of jurisdiction was not, or is no longer, valid. However it cannot be seriously suggested that the present case is of that kind. No attempt was made to establish that it was.

25 The plaintiffs also submit that the power conferred on the Executive Director by subs 60(5) is judicial and therefore not capable of conferment upon that officer. There is no reason for treating the power as being judicial in nature other than that it results in evidence not being receivable in a court. Once it is accepted as it must be, that Parliament may legislate to exclude certain matters from being received in evidence, there seems to be no reason why it should not be able to empower an identified person to determine whether or not the Act's protection should be invoked or waived. If this argument were valid, it would seem to follow that the legislation extending such protection should also be characterized as judicial and not legislative. There is nothing in this point. The submission is also put in a slightly different way. It is said that the legislation subordinates exercise of the judicial power to an executive discretion. While such a proposition has the typical appeal of a rhetorical flourish, it fails to address the fundamental problem that the authorities recognize the power of Parliament to legislate in connection with rules of evidence.

26 Finally, the plaintiffs submit that s 60 *'compromises the integrity of the judicial system, because it goes to the question of the power of the court to make orders with which the executive or, in this case, with which people will comply.'* The administration of law is, no doubt, a public function of primary importance in a civilized society, but other functions are also important. Whilst the courts balance the interests of one litigant against another, Parliament must balance the interaction between different public functions. It is for Parliament to determine the balance between the right of a litigant to lead evidence and the objects identified in s 7 of the Act. There is nothing in this point.

CONSTITUTIONAL POWER

27 As to the assertion that there is no head of power which authorizes enactment of s 60, the Proper Officer relies upon subss 51(i) [xx] and [xxix] and s 98 of the Constitution. The plaintiffs have made no attempt to demonstrate any basis for arguing that the legislation is beyond the power conferred by those provisions. My understanding of their argument is rather that there is no express authorization for legislation which has the effect of restricting

the power of this Court to compel classes of witnesses to give evidence of a particular kind. As I have said that argument cannot be maintained. Section 60 is within power.

ORDERS

28 In each action the subpoena should be set aside. The plaintiffs should pay the Proper Officer's costs of and incidental to the motion. I will entertain any application pursuant to O 15A r 8 should the plaintiffs wish to proceed further with that course.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett.

Associate:

Dated: 5 July 2007

Counsel for the Plaintiff:	Mr A W Street Mr McClure
Solicitor for the Plaintiff:	Norton White
Counsel for the First Defendant:	The first defendant did not appear
Counsel for the Second Defendant:	The second defendant did not appear
Counsel for the Australian Transport Safety Bureau:	Dr Perry SC Ms Mitchelmore
Solicitor for the Australian Transport Safety Bureau:	Australian Government Solicitor
Date of Hearing:	26 February 2007
Date of Judgment:	5 July 2007