



Announcement of the Court of Appeal in Terrorism Matters

23 June 2017

On Friday last 16 June 2017 the Court convened a mention in the matters of the Commonwealth Director v MHK and the Commonwealth Director v Besim.

The two matters were cases involving terrorism offences heard by this Court on 9 June 2017. The Commonwealth Director appealed on the ground that the sentences in each case were manifestly inadequate. The Court's decision in each case was reserved.

The purpose of the mention on 16 June 2017 was to enable the legal representatives for the Honourable Greg Hunt MP, the Minister for Health, the Honourable Michael Sukkar MP, the Assistant Treasurer and the Honourable Alan Tudge MP, the Minister for Human Services to respond to the Court in relation to an article published in *The Australian* newspaper on 13 June 2017.

Also at the mention were the publisher, the editor and the journalist responsible for the article, we will call these parties, 'the *Australian* parties'.

During the mention the Court heard submissions from the Solicitor-General for the Commonwealth of Australia on behalf of the Ministers, counsel for the *Australian* parties, the lawyer on behalf of the Commonwealth Director for Public Prosecutions and the counsel for the parties in the appeals, MHK and Besim.

At the commencement of the hearing the Court made an announcement expressing its concern about the article and the statements of the three Ministers reported in the article. The Court stated that the statements on their face:

- Failed to respect the doctrine of separation of powers;
- Breached the principle of sub judice; and
- Reflected a lack of proper understanding of the importance to our democracy of the independence of the judiciary from the political arms of government.

The Court was gravely concerned that there was a prima facie case that the Ministers and the *Australian* parties had committed a contempt of court.

As a consequence of our concerns, the Court requested that the Ministers or their legal representatives and the *Australian* parties or their legal representatives appear before the Court to make any submissions as to why they should not be referred for prosecution for contempt.

The decisions of the Court in each of the MHK and Besim matters were published earlier this morning.

In an announcement at the commencement of the hearing on 16 June 2017 the Court said the following, it is important to repeat part of our remarks:

There are important principles of law that arise when anyone speaks about a court's decision or its conduct during a hearing, before the decision is delivered.

We would add, in the strongest terms, the legal notions of contempt of court do not exist to protect judges or their personal reputations. These laws exist to protect the independence of the judiciary in making decisions that bind governments and citizens alike. These laws further exist to protect public confidence in the judiciary.

At the completion of the Court's announcement the parties were called upon to make any submissions they wished.

At the outset the Solicitor-General for the Commonwealth read a joint statement to the Court prepared by the three Ministers. In the statement the Ministers admitted the making of the statements and said they were made 'in response to an article that was published by the ABC on Friday 9 June 2017'.

The Ministers said in their statement to the Court:

While we intended to make legitimate comment on that particular issue, we did not intend our remarks to undermine public confidence in the judiciary. Nor did we intend to suggest or imply that the Court would not apply the law in disposing of the matters before it.

They continued:

In retrospect, we regret using language that was capable of conveying that meaning when no such meaning was intended. Nor did we intend

that our statements would pressure this Court in relation to the manner in which it disposed of the appeal concerning Mr Besim. Nor had we ever believed that it would be possible that our statements could influence this Court.

The Ministers' statement otherwise purported to explain and justify their statements in the article.

After the Solicitor-General completed reading the statement an exchange occurred between the bench and the Solicitor-General. The Court repeatedly noted that there was no apology or retraction by the three ministers.

We were informed by the Solicitor-General that each of the Ministers were lawyers. It was conceded by the Solicitor-General that the topics of terrorism and sentencing did not fall within the portfolios of any of the Ministers. It was also accepted that the Ministers were ignorant of the cases heard by this Court on 9 June save for what was contained in an on-line article on the ABC. Additionally, it came to light through the *Australian* parties' submissions, the Ministers were the instigators of the statements which in turn triggered the article.

At an advanced stage of the submissions by the Solicitor-General, whilst urging the Court that the Ministers had not committed a contempt, he received instructions from one of the Ministers, Mr Sukkar, that he was 'content to expressly withdraw one statement attributed to him in the article about "hard left activist judges"! When questioned, the Solicitor-General stated that the Minister withdrew the statement but did not apologise for it.

Much further on in the hearing, following further exchanges between the bench and the Solicitor-General he informed the Court he had received instructions to withdraw three of the statements in the article. The withdrawn statements were that of Mr Hunt with respect to using the "ideological experiments" language; the statement of Mr Sukkar previously withdrawn; and the statement attributed to Mr Tudge, referring to the "judges being divorced from reality". Such was the extent of the Ministers' withdrawal. Again there was no apology. The instructions were plainly received in running whilst counsel was addressing the Court and following the Court expressing doubt, scepticism, even incredulity at what was being said on behalf of the Ministers.

The Court then called upon the *Australian* parties. Their senior counsel described the newspaper's position as, namely, that The *Australian* was 'the messenger' or 'the medium through which the comments of the Ministers were communicated to its readers'.

In the course of submissions for the *Australian* parties it was revealed that the three Ministers submitted statements over the period of one hour, unsolicited, to the journalist who is the National Affairs Editor for The *Australian*. Senior counsel for The *Australian* was questioned by the Court as to whether the transcript of the hearing of the Court on 9 June 2017 had been obtained or sought prior to publication of the article. At that time it was understood it had not. Subsequently after the hearing on 16 June the Court was informed that The *Australian* in fact made an enquiry as to the availability of the transcript on 13 June, the day of publication, and was advised that, at that stage, it was not available.

Further, the Court was informed that prior to publication the journalist only had an ABC online article and the Ministers' communications. It was conceded by senior counsel for the *Australian* parties that his clients knew that the matter before the Court was sub judice at the time of publication.

When well advanced in his submissions, senior counsel for the *Australian* parties informed the Court his clients apologised for and retracted the publication 'sincerely and fully'.

With respect to the other parties to the appeal who were present, the Director did not consider it appropriate to make submissions. Senior counsel for both respondents to the appeals made short submissions expressing concern about the contempt that had been perpetrated by the article and the risk and fears of their respective clients.

The Court then reserved our decision.

Four days later on 20 June 2017 the Judicial Registrar to the Court of Appeal received a letter from the lawyer acting for the Ministers informing the Court:

Having reflected further on the matters raised during that mention, the Ministers wish to offer an apology to the Court. They would be grateful if the matter could either be relisted for that purpose or, if it would be more convenient to the Court, if they could be given leave to submit a written statement to the Court containing that apology.

We turn to the disposition of this grave matter. The Court has formed the view that there is a strong prima facie case with respect to the Ministers. We have formed the view that the publication and the statements involved a serious breach of the sub judice rule. It must be understood that sub judice is designed to protect litigants' right to have their cases decided on their merits without

external intervention, influence and commentary. Furthermore, it was of significant concern to the Court that three Ministers of the Crown would make the statements they did. The Court further notes that at some point, possibly within 48 hours before the Court hearing on 16 June and thus shortly before the announcement of the partial retraction already described, the Ministers publicly stated that they stood by their statements in the article.

Dealing with the *Australian* parties, we note their full apology and retraction was made to the Court, albeit initially in qualified terms, at an early opportunity. Nevertheless, the Court is of the view that the *Australian* parties were not merely 'the messenger' for the Ministers' statements. The *Australian* parties chose to publish the statements, and did so prominently on the front page of the newspaper, with a prominent and eye-catching headline. The newspaper added its own comments, and editorialised when notwithstanding, on their own acknowledgment, the statements of the Ministers were 'extraordinary'. In doing so the *Australian* prima facie aggravated the contempt. Notwithstanding the apology and retraction, the Court is satisfied that the publication by The *Australian* was egregious and a very serious matter. The Court is satisfied that there was a prima facie, serious breach of sub judice.

However, the Court accepts the *Australian* parties' full apology. It is sufficient acceptance by them of their contempt of Court and sufficient purging of the contempt.

We turn to the Ministers. The Solicitor-General has appeared before the Court today and made a full and unqualified apology for the statements on behalf of the Ministers and retracted the statements in their entirety. Nonetheless, the Court notes that the apology and retraction were not made at the earlier opportunity, namely at the mention last Friday. The admission and retraction followed a stern discussion between the bench and the Solicitor-General and days of reflection. We also note that since the hearing on 16 June, the position of the three Ministers has been the subject of wide comment in the media. On one view, it has only been after the stern discussion with the bench and the commentary in the media that the Ministers have made their apologies and retractions. The delay is most regrettable and aggravated the contempt.

However, the Court accepts that the Ministers have sufficiently acknowledged and accepted their contempt of Court and sufficiently purged their contempt.

There is one matter we emphasise. The Court has accepted in this instance the apologies and retractions proffered. It should not have come to this, namely two court hearings. But for the apologies and retractions we would have

referred the groups, namely the Ministers and the *Australian* parties to the Prothonotary of the Supreme Court for prosecution for contempt of Court.

The Court states in the strongest terms that it is expected there will be no repetition of this type of appalling behaviour. It was fundamentally wrong. It would be a grave matter for the administration of justice if it were to reoccur. This Court will not hesitate to uphold the rights of citizens who are protected by the sub judice rule.