

Dud decision in court annoying on any number of counts

By The Canberra Times

1017 words

19 July 2008

[Canberra Times](#)

B09

English

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NSW should appeal to the High Court against this week's Full Federal Court judgment in the World Youth Day case. The court held invalid regulations made by a NSW Minister that provided for fines of up to \$5500 for people who "annoyed" participants in World Youth Day. The decision was a dud on a couple of grounds.

First, it gave the false impression that the court was upholding a right to freedom of speech. But in fact there are virtually no rights to freedom of speech in Australia that cannot be taken away by silly or capricious governments of which the NSW Government is a prime example. Secondly, the court's reasoning was flawed and flew in the face of an earlier High Court case.

Putting aside policy and philosophical reasons for supporting freedom of speech (of which there are many), you have to ask, what on earth was the Federal Court doing in dealing with what was essentially a NSW matter involving NSW law a matter that properly belonged in the NSW courts? The Federal Court's reasoning in handing itself this jurisdiction was bizarre. It said, quite properly, that an action to strike out a law (federal or state) because it offends the Constitution belongs in the federal courts. This action said that the NSW regulation offended what the High Court has held to be an implied freedom of political communication which is necessary for the functioning of the representative system of government spelled out in the Constitution. Fine. The Federal Court should have ruled on that point. But no. The plaintiffs in the case said as an alternative that the regulation went beyond the power granted in the World Youth Day Act. The Act said the Minister may make regulations for the smooth running of the day. The court said that that did not run to regulations against "annoying behaviour". That was a very sound argument, but one that properly belonged in the NSW Supreme Court. How did the Federal Court respond? It said something like, "Before we can look at the constitutional question we have to decide whether the regulation under challenge was a valid regulation in the first place. And it does not matter how weak or baseless the constitutional argument is, that is enough to give us jurisdiction and to determine all the matters contested by the parties."

So folks, if you want a state matter heard in a federal court, concoct any old constitutional argument and tack it on to your state matter. Does it matter? Surely it is a good thing to have all contested issues between parties heard in one court in one action rather than splitting them into state and federal matters and hiving them off to separate courts. Yes, I agree, but with a big but. You should only do this if the Constitution permits it. And in 1999 in the Wakim case the High Court held that the Constitution did not permit it. It struck down both Commonwealth and state legislation that vested state jurisdiction in federal courts. The Constitution permitted the Commonwealth to give federal matters to state courts (for example copyright, tax and so on) but it did not permit traffic the other way. There was nothing in the Constitution that said the states could give, or the federal courts receive, jurisdiction over state matters. The High Court acknowledged that the joint federal-state legislative companies scheme which did this was good policy and very convenient because litigants needed to go to only one court to contest all their issues but it was unconstitutional. The Commonwealth and state Parliaments could not amend the Constitution through the back door, it said. Justice Michael McHugh put it best when he said, "If Australia is to have a system of federal courts, the public interest requires that these courts should have jurisdiction to deal with all existing controversies between litigants in those courts. However, the judiciary has no power to amend or modernise the Constitution to give effect to what the judges think is in the public interest. The function of the judiciary is to give effect to the intention of the makers of the Constitution.'

'But this week the Federal Court, seemingly ignoring the Wakim case, held that the Federal Court Act did give state jurisdiction to the Federal Court and it could rule on whether a state regulation was permitted by a state statute. This may seem fairly esoteric, but it is fundamental. We have to

have the courage to say, "Look, the constitutional framers could not be expected to foresee everything. Sometimes, we have to recognise that the Constitution is broken in parts and needs fixing." This is one such part. And the other part highlighted by this case is the Constitution's failure to guarantee fundamental rights like freedom of speech. We should have a Constitution that prevents over-zealous and authoritarian governments, like the current one in NSW, from infringing fundamental rights.

This week the Federal Court should have said, "Sorry, the Constitution prohibits us from hearing state matters, and the implied right of political communication does not run to religious protests. If you don't like it, you, the people, can do something about it by amending the Constitution but it's not our job to do that for you." Instead, what have we got? Free- speech activists applauding a victory when it was nothing of the kind; an erosion of the authority of the Constitution; a NSW Government unlikely to appeal because the show is over and it will be too politically difficult to explain why they are doing it the masses don't like complex things; and governments still holding virtually unfettered power to interfere with fundamental rights. But despite the Federal Court's actions this week, if I had the choice between judges and a bill of rights as the guardian of my freedom or Morris Iemma's Government, I'd take the judges any day.

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