Refusing a *Calderbank* offer

Melissa Tovey reports on *Stewart v Atco Controls Pty Limited (In Liquidation) [No 2]* 2014 [HCA] 31

Introduction

The High Court recently has had cause to consider when a party will have acted reasonably in refusing a *Calderbank* offer where the principal reason for rejection is that party's confidence that it will be successful in the litigation, which confidence is, ultimately, misplaced.

Background

The underlying proceedings, *Stewart v Atco Controls Pty Limited (In Liquidation) [No 2]* 2014 [HCA] 31, which concerned the priority of a liquidator's lien, was summarised in the Winter 2014 edition of Recent Developments.

In brief, at first instance in proceedings brought by Atco Controls Pty Limited (Atco), the Supreme Court of Victoria (Davies J) held that the liquidator of Newtronics Pty Limited (receivers and managers appointed) (in liquidation) (Newtronics), which was a wholly-owned subsidiary of Atco, was entitled to a lien for his professional remuneration and expenses over a fund of $1.25m held by Newtronics prior to being obliged to pay the fund to Atco. The fund comprised settlement proceeds arising from related proceedings involving other parties. Davies J also ordered Atco to pay the liquidator's costs of the proceedings (as distinct from, and in addition to, the sum secured by the lien).

Shortly after commencing those proceedings, the liquidator (Mr Stewart) had offered to Atco that he would claim only a nominal amount for his remuneration and expenses caught by the lien if Atco discontinued the proceedings (the first offer). Atco did not accept this offer. Ultimately, the quantum of Mr Stewart's remuneration and expenses exceeded the amount of the fund, such that there would have been nothing available to pay to Atco.

Atco appealed from the decision of Davies J. Before the hearing of the appeal, Mr Stewart made a further offer to Atco on the following terms (the second offer):

- Mr Stewart to retain the settlement sum (viz. the $1.25m);
- $55,000 paid into court by Atco by way of security for costs of the appeal be released to Mr Stewart; and
- mutual releases.

The second offer, particularly in relation to the release of the security sum, implicitly provided that the liquidator would not press any claim for legal costs of the proceedings below as ordered by Davies J. The second offer was not accepted by Atco.

Atco succeeded on appeal to the Court of Appeal, with the effect that the second offer had no work to do. However, the High Court overturned the Court of Appeal decision and, as a result, made an order for costs in favour of Mr Stewart against Atco in both the Court of Appeal and High Court proceedings.

Issue before the High Court

As a result of the proceedings in the High Court, Mr Stewart applied to the High Court for indemnity costs on the basis of Atco's rejection of the second offer.

As the second offer only related to the Court of Appeal proceedings, the High Court considered only the costs situation in the Court of Appeal, there being no relevant offer in relation to the High Court proceedings.

The issue before the High Court was whether, in light of the Court of Appeal decision being overturned, Atco's rejection of the second offer was such that it was appropriate for the usual rule as to costs to be displaced and whether an order for indemnity costs in relation to the Court of Appeal proceedings was warranted.

It appears that the only argument Atco raised in opposition to the indemnity order was that its conduct in not accepting the second offer was not unreasonable' in circumstances where, inferentially, Atco took the view that it was ultimately going to be successful in the appeal and was successful before the Court of Appeal.

Reasoning

Without deciding whether reasonableness is a factor which militates against the making of an indemnity costs order, the High Court [1] took the view that in this particular instance, something more than just a belief of success was required before the discretion would not be exercised in favour of indemnity costs, after rejection of a *Calderbank* offer.

In particular, the High Court took the view that since the substantive dispute concerning the liquidator's entitlement to a lien was well-established, to succeed Atco would have had to establish that the principle in *In re Universal Distributing Co Ltd (In Liq)*[2] did not apply. In such circumstances, it was not reasonable for Atco to have rejected the second offer.[3] The High Court ordered that the costs of the Court of Appeal proceedings be paid on the indemnity basis.

Comment

Atco appears to have taken the view that its chances of success in the Court of Appeal were sufficient for it to reject the second offer. Against this position were, it appears, at least two factors. First, Atco appeared not to take into account the concession by Mr Stewart that he would accept $55,000 in settlement of any costs order made by Davies J. Although the quantum of that costs wais unknown, it seems to be accepted that this was a considerable concession. Secondly, the second offer also brought with it the certainty, if accepted, that the litigation would be at an end and neither party would be at any greater exposure to costs.

The High Court's decision suggests that practitioners need to be careful about relying solely upon their views as to prospects of success in advising their clients to reject a *Calderbank* offer particularly in areas where the law is well-established and success would require that well-established law to be distinguished.

Endnotes

1. Crennan, Kiefel, Bell, Gageler and Keane JJ.
2. (1933) 48 CLR 171.
3. At [6].

NCAT is a 'court' from which arbitration is referred

Stephen Tully reports on *Subway Systems v Ireland* [2014] VSCA 142.

The Victorian Civil and Administrative Tribunal (VCAT) has been held to be a 'court' such that when an action is brought before it concerning a matter subject to an arbitration agreement, VCAT shall, upon request, refer the parties to arbitration. This was the conclusion made by a majority of the Court of Appeal of the Victorian Supreme Court in *Subway Systems v Ireland* [2014] VSCA 142 (*Subway*). The reasoning is likely to apply to the New South Wales Civil and Administrative Tribunal (NCAT) and to commercial arbitration acts across Australia.

The facts and reasoning in *Subway*

Article 8(1) of the Model Law on International Commercial Arbitration (the 'Model Law') relevantly provides that a 'court' before which an action is brought in a matter subject to an arbitration agreement shall, upon request, refer the parties to arbitration.[1] This is replicated in s 8(1) of the *Commercial Arbitration Act* 2011 (Vic), which was the provision considered in *Subway*, as well as in s 8(1) of the *Commercial Arbitration Act 2010* (NSW).

Subway is a sandwich bar well-known to suburban shopping centres. Subway Systems argued that matters in dispute under the franchise agreement between the parties fell within the scope of an arbitration clause in the agreement. The issue was whether VCAT was a 'court' for the purposes of s 8(1).

Under Article 2(c) of the Model Law, a 'court' means 'a body or organ of the judicial system of a State'. However, that term is not defined in s 2 of the Victorian (or NSW) legislation. The Victorian Act defined 'the Court' (with capitalisation) as the Supreme Court and referred to the Supreme, County and Magistrates' courts as providing arbitration assistance and supervision functions (ss 2, 6).

At first instance VCAT was found not to be a 'court' for the purposes of s 8(1). This was on the basis that the Victorian Act referred specifically to the Supreme, County and Magistrates' courts and, following a comparison with the Model Law provisions, it was held to have been open to parliament to refer expressly to VCAT if that had been intended.[2]

Upon appeal Maxwell P and Beach JA concluded, by different routes, that the word 'court' included VCAT.

Maxwell P considered the ordinary meaning of the word 'judicial' and the substantive character of the functions VCAT performed. Maxwell P was satisfied that VCAT had a recognised adjudicative jurisdiction.[3] Although VCAT is not referred to as a court and its adjudicators are not called judges, it exercised judicial functions with the authority to determine the rights and liabilities of parties to commercial disputes. In Maxwell P's view, the drafters of the Model Law would have 'undoubtedly' intended Article 8(1) to apply to VCAT, and if the Victorian Parliament had deliberately wanted to depart from the Model Law, then this would have been expressly adverted to in the legislation.[4]

Beach JA reviewed the provisions of the Victorian Act, its object and purpose, extrinsic materials and the Model Law. Beach JA considered that the overall objective was to promote low cost, speedy arbitrations over longer, more expensive court trials and, in the interests of a uniform interpretation of the Model Law, hold those parties who chose arbitration to their bargains.[5] Further, Beach JA was satisfied that VCAT possessed all of the features of a court identified under the common law.[6]

In contrast, Kyrou AJA also applied ordinary rules of statutory interpretation to the same materials reviewed by Beach JA but concluded that VCAT was not a court.[7] This was because VCAT did not meet the common law criteria for a court. It was not bound by the rules of evidence, could not enforce its own decisions, some of its members are not legally qualified, it can be required to apply government policy, can offer advisory opinions and, indeed, was established to be an inexpensive, informal and speedy alternative to a court.[8] Furthermore, the definition of 'court' in Article 2 of the Model Law was the only definition which had been entirely omitted from s 2(1) of the Victorian Act. This had significance, because it could not be inferred that the definition was intended to apply to the legislation.[9] The parliament could have easily legislated that VCAT was a court, and the Model Law could have easily said that 'court' was intended to include statutory tribunals which had compulsory dispute resolution functions.[10]

Contrasting interpretative methodologies

Subway is also noteworthy for the contrasting interpretative methodologies employed by the three judges. Although reaching different conclusions, Beach JA and Kyrou AJA adopted orthodox but slightly different approaches as to statutory construction. For Beach JA, the task of statutory construction began and concluded with the legislative text.[11] For Kyrou AJA, the process of statutory construction began with an examination of context.[12] Section 8(1) could not be considered in isolation but had to be read in light of the provisions and purposes of the legislation.[13]

Maxwell P took a different approach altogether. For Maxwell P, distinctive interpretative rules were engaged. The Victorian legislation had a special character because it embodied and gave effect to an international agreement. This meant that certainty and uniformity of interpretation and application between states were paramount. The rules applicable to treaty interpretation had to be applied, unconstrained by technical rules of statutory interpretation.[14] This meant that the working documents of the international body which had formulated the Model Law – for example, an explanatory note from the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) - could be considered.[15] This approach is relatively unremarkable. Indeed, s 2A(3) of the Victorian Act expressly provides that reference may be made to such documents. The High Court has also had occasion to interpret the Model Law by reference to documents from UNCITRAL working groups.[16]

Kyrou AJA, by contrast considered that if the Act had intended that explanatory documents relating to the Model Law were to govern its interpretation, then the parliament would have mandated that they be taken into account.[17]

Conclusions

In proceedings concerning arbitration, Australian courts seek to strike a balance between the exercise of supervisory jurisdiction and party autonomy. An arbitral award will not be set aside as contrary to public policy unless, for example, fundamental norms of justice or fairness have been breached.[18] Now tribunals must equally support disputants resorting to arbitration. The conclusion in *Subway* is likely to be applicable to all other states and territories whose commercial arbitration acts contain materially identical provisions. For NSW, it is likely that any matter brought before NCAT which involves an arbitration agreement can be referred to arbitration upon request.

Endnotes

1. United Nations (UN) Commission on International Trade Law, Model Law on International Commercial Arbitration, UN Doc A/40117, Annex I (1994).
2. *Subway Systems Australia v Ireland* [2013] VSC 550 at [30], [41].
3. *Subway Systems v Ireland* [2014] VSCA 142 at [41]–[42] per Maxwell P.
4. Ibid., at [44], [45], [47] per Maxwell P.
5. Ibid., at [90] per Beach JA.
6. Ibid., at [86] per Beach JA. For the common law criteria, see *Shell Oil Co of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275 at 297 per Lord Sankey LC.
7. *Subway Systems v Ireland* [2014] VSCA 142 at [115] per Kyrou AJA.
8. Ibid., at [96] per Kyrou AJA.
9. Ibid., at [108] per Kyrou AJA.
10. Ibid., at [99], [110] per Kyrou AJA.
11. *Thiess v Collector of Customs & Ors* (2014) 88 ALJR 514 at 518 per French CJ, Hayne, Kiefel, Gageler and Keane JJ.
12. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381, 384.
13. *Subway Systems v Ireland* [2014] VSCA 142 at [102] per Kyrou AJA.
14. See Articles 31 and 32, Vienna Convention on the Law of Treaties [1974] ATS 2.
15. *Subway Systems v Ireland* [2014] VSCA 142 at [29] per Maxwell P.
16. Facilitated by s 17, *International Arbitration Act 1974* (Cth); see *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5 at [11], [14], [20] per French CJ and Gageler J.
17. *Subway Systems v Ireland* [2014] VSCA 142 at [109] per Kyrou AJA.
18. *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 at [55], [111] per Allsop CJ, Middleton and Foster JJ.

Mutual trust and confidence in employment contracts

Rebecca Gall reports on *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

A five member bench of the High Court held unanimously that there is no implied term of mutual trust and confidence in employment contracts.

Background facts

Mr Stephen Barker was employed by the Commonwealth Bank of Australia (CBA) from 1981 until he was made redundant in 2009. At the time of his termination he was employed as an executive manager in Adelaide.

On 2 March 2009 Mr Barker was informed his position was being made redundant but that it was CBA's preference he be redeployed within the bank. On that same day he was required to clear out his desk, hand in his keys and CBA-issued mobile phone and not to return to work. His access to his CBA email account, voicemail and intranet also was terminated.

Over the following weeks, CBA's recruitment consultant attempted to contact Mr Barker via his CBA mobile and email in relation to redeployment opportunities. However, having been deprived of access to these he did not receive the communications until an email was forwarded to his personal email address at the end of March. About a week later, Mr Barker's employment was terminated by reason of redundancy.

Claim

Mr Barker brought proceedings in the Federal Court of Australia alleging that in accordance with his written employment contract and the CBA's Redeployment Policy, CBA:

- would maintain trust and confidence with him; and
- would not do anything likely to destroy or seriously damage the relationship of trust and confidence without proper cause for doing so.[1]

Mr Barker also alleged that CBA had breached the implied term of mutual trust and confidence and this resulted in him being denied an opportunity of redeployment and thereby being retained by CBA.[2]

Issue

The question before the High Court was whether, under the common law of Australia, employment contracts contain a term that neither party will, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confident between them.[3]

Decision

The High Court overturned the decisions of the Federal Court and of the full court and held that a term of mutual trust and confidence was not implied by law into every employment contract as such a step is beyond the legitimate law-making function of the courts.[4]

In reaching this conclusion in a joint judgment French CJ, Bell and Keane JJ discussed three key issues: the concept of 'necessity', comparison with the United Kingdom and the limits on judicial law-making.

Necessity

Central to the decision was the conclusion that the implication of a term of mutual trust and confidence is not 'necessary' in the sense that would justify the exercise of the court's judicial power in a way that may have a significant impact upon employment relationships and the law of contract of employment in Australia.[5]

At [37] French CJ, Bell and Keane JJ stated:

> The implied term of mutual trust and confidence, however, imposes mutual obligations wider than those which are 'necessary', even allowing for the broad considerations which may inform implications in law. It goes to the maintenance of a relationship.

In relation to necessity, their Honours observed that it may be defined by reference to what 'the nature of the contract itself implicitly requires' and may be demonstrated by the futility of the transaction absent the implication but is not satisfied by demonstrating the reasonableness of the implied term.[6]

Justice Kiefel, who delivered separate reasons, similarly found that such a term was not necessary. At [108] her Honour concluded:

> Contracts of employment are not rendered futile because of the absence of a term to this effect. To the contrary, it would not be possible for all employers to give effect to such a term. This tells against the application of such a requirement as a universal rule. It cannot be said to be 'necessary' in the sense described earlier in these reasons.

In addition, her Honour observed that such a term was not necessary in this particular case given a particular term (clause 8) in the written employment agreement.[7]

One aspect of her Honour's reasoning which was not present in the joint judgment was her Honour's consideration as to whether there was a legislative 'gap' which the common law can fill. Justice Kiefel considered the current unfair dismissal legislation which places restrictions on when an employee can bring a claim of unfair dismissal where the termination

of the employment isbecause of redundancy. In this case, Mr Barker was unable to make a statutory claim because his wages exceeded a certain amount.

Her Honour stated at [96]:

> Contrary to the respondent's contention, this does not create a gap which the common law can fill. In *Johnson v Unisys*, Lord Hoffmann noted that certain classes of employees were excluded from the protection of the legislation there in question. Yet, as his Lordship observed, it was the evident intention of the Parliament that the statutory remedy provided be limited in its application. Likewise, the Australian Parliament has determined what remedies are to be provided for unfair dismissal and it has determined who may seek them. (Footnotes omitted)

Rejection of UK approach in Australian context

The majority of the full court of the Federal Court had relied on the House of Lords decision in *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)*[1998] AC 20 at 34 per Lord Nicholls of Birkenhead in finding there was an implied term of trust and confidence referrable to all contracts of employment.

However, French CJ, Bell and Keane JJ rejected such reliance on this decision and concluded that this was not an appropriate occasion for the High Court to follow the approach taken by the courts in the United Kingdom. In so finding, their Honours noted that the regulatory history of the employment relationship and of industrial relations in Australia differs from that of the United Kingdom.

At [18] their Honours said:

> Judicial decisions about employment contracts in other common law jurisdictions, including the United Kingdom, attract the cautionary observation that Australian judges must 'subject [foreign rules] to inspection at the border to determine their adaptability to native soil'. That is not an injunction to legal protectionism. It is simply a statement about the sensible use of comparative law. (Footnote omitted)

Limits on judicial law-making

French CJ, Bell and Keane JJ held that importing a term of mutual trust and confidence into employment contracts would trespass into the province of legislative action in the Australian context, which is not appropriate for the judicial branch of government. Their Honours stated that:

> The complex policy considerations encompassed by those views of the implication mark it, in the Australian context, as a matter more appropriate for the legislature than for the courts to determine. It may, of course, be open to legislatures to enshrine the implied term in statutory form and leave it to the courts, according to the processes of the common law, to construe and apply it. It is a different thing for the courts to assume that responsibility for themselves.[8]

Another concern was that the obligation had a 'mutual aspect' to it and had the potential to apply to employees in circumstances where their conduct was neither intentional nor negligent and not a breach of their existing duty of fidelity but which caused serious disruption to the conduct of their employer's business.[9]

French CJ, Bell and Keane JJ concluded by making it clear that they were not to be taken as commenting on or considering the application of good faith in contracts.[10]

Endnote)

1. At [9] per French CJ, Bell and Keane JJ.
2. At [10] per French CJ, Bell and Keane JJ.
3. At [15] per French CJ, Bell and Keane JJ.
4. At [1] per French CJ, Bell and Keane JJ; at [108] Kiefel J greed such a term was not necessary; at [119] Gageler Jwrote a short separate judgment and agreed with the majority's reasons.
5. At [36] per French CJ, Bell and Keane JJ; at [108] per Kiefel J; at [119] per Gageler J.
6. At [36] per French CJ, Bell and Keane JJ.
7. At [109] per Kiefel J.
8. At [40] per French CJ, Bell and Keane JJ.
9. At [40] per French CJ, Bell and Keane JJ.
10. At [42] per French CJ, Bell and Keane JJ; at [107] per Kiefel J; Gageler J made no comment on this issue in his short reasons.

More new bail law

By Caroline Dobraszczyk

The *Bail Amendment Act 2014* (the amendment Act) makes further changes to the law in relation to bail in NSW. It was assented to on 25 September 2014, *but has yet to be proclaimed*. I say 'further changes' because of course substantial changes were made this year, i.e. commencing from 20 May 2014, which in essence provided for completely new criteria to be satisfied before bail would be granted. The amendment Act makes changes which, to some extent, are similar to the law pre-20 May 2014 and also seem to make it more difficult for an accused person to obtain bail. The most significant changes are as follows.

Currently, section 3(2) states that when making a bail decision the bail authority is to have regard to the presumption of innocence and the general right to be at liberty. This is to be deleted. Instead, there is to be a preamble that states, inter alia, that the New South Wales Parliament has had regard to the common law presumption of innocence and the general right to be at liberty, in enacting the Act. An interesting deletion.

Two flow charts (which set out how to make bail determinations), are now proposed: the first one applies to 'show cause offences', which are defined as offences that are punishable by imprisonment for life, certain specified sexual offences, certain serious violence offences, certain offences under the *Firearms Act 1996* and the *Weapons Prohibition Act 1998*, offences of cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug or plant under the *Drug Misuse and Trafficking Act 1985*, Commonwealth offences under Part 9.1 of the Criminal Code that involve possession, trafficking, cultivation, sale, manufacture, importation, exportation or supply of a commercial quantity of a serious drug, a serious indictable offence that is committed by an accused person while on bail or on parole, an indictable offence, or an offence of failing to comply with a supervision order, committed by an accused person while subject to a supervision order, a serious indictable offence of attempting to commit an offence as stated in the section and a serious indictable offence involving accessorial liability of an offence as stated in the section.

The second flow chart relates to all offences, other than offences for which there is a right of release, and sets out a new unacceptable risk test.

Division 1A is entitled 'Show cause requirement' and provides a new section which states that when making a bail decision for a show cause offence, the bail authority must refuse bail unless the accused person shows cause why his or her detention is not justified. There is no guidance as to what is to be considered when determining whether detention is not justified. If one considers the fundamental principles of bail, issues such as risk of flight, strength of the prosecution case, risks to the community, and risks of any interference in the accused's case, and any special need to not be in custody in order to prepare for the criminal proceedings, would be important issues as well as maybe any health issues which cannot be met in custody. There may of course be other particular issues which are unique to an accused's case. However these are issues to be considered when addressing the new section 17 ie bail concerns. Is it proposed that these issues are to be considered twice if the accused is charged with a show cause offence? The attorney general stated in the second reading speech that 'Victoria and Queensland have show cause requirements in their bail legislation. Courts in those states have noted circumstances that may be relevant to determining 'show cause', including the strength of the prosecution case, preventable delays and urgent personal situations such as the need for medical treatment. Bail authorities in New South Wales will be informed by the approach taken in these other jurisdictions when applying the show cause provisions.' Then, if it is decided that detention is not justified, the bail authority must make a bail decision in accordance with Division 2, i.e. the unacceptable risk test (which, as stated above, applies to all offences except right to release offences). The show cause requirement does not apply if the accused person is under 18 years of age at the time of the offence.

The proposed unacceptable risk test

The bail authority must, before making a bail decision, assess any bail concerns. A bail concern is defined as a concern that the accused person will fail to appear at any proceedings for the offence, or commit a serious offence or endanger the safety of victims or members of the community or interfere with witnesses or evidence. Section 18 then sets out the matters to be considered as part of the assessment, which is an exhaustive list. The list includes some familiar issues but also issues which have not been part of the law before, i.e. the issues are: background of the accused, criminal history, community ties, the nature and seriousness of the offence, strength of the prosecution case, any history of violence, any history of committing a serious offence while on bail, compliance with bail conditions, whether the accused person has any criminal associations, length of time in custody if bail is refused, likelihood of a custodial sentence, if convicted the arguable prospect of success on appeal, any special vulnerability or needs including youth and health, the need for the accused person to be free to prepare for court or for any other lawful reason, the conduct of the accused person towards the victim of the offence or any family member of a victim

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after the offence, and in the case of a serious offence, the views of the victim of the offence or any family member of a victim to the extent this is relevant to the issue of safety of the victim or the community. The bail authority is also to consider under the new section 18 the bail conditions that could reasonably be imposed to address any bail concerns.

For the purpose of deciding whether an offence is a serious offence or where deciding the seriousness of an offence, section 18(2) provides guidance by specifying certain matters to be taken into account when deciding this issue: i.e. whether the offence is of a sexual or violent nature or involves possession or use of an offensive weapon, the likely effect of the offence on any victim and on the community generally, and the number of offences.

Section 19 now states that a bail authority must refuse bail if the bail authority is satisfied, on the basis of an assessment of bail concerns, that there is an unacceptable risk. Section 20A states that bail conditions are to be imposed only if the bail authority identifies bail concerns. Then, a bail authority may impose a bail condition only if satisfied that the bail condition is reasonably necessary to address a bail concern, the bail condition is reasonable and proportionate to the offence, the bail condition is appropriate to the bail concern, it is no more onerous than necessary to address the bail concern, it is reasonably practicable for the accused person to comply with the bail condition and there are reasonable grounds to believe that the condition is likely to be complied with.

The current section 74, which is headed 'Multiple release or detention applications to same court not permitted' is to be amended to require that 'material' information was not presented to the court in the first bail application, before the same court hears a second release or detention application.

It is proposed that any amendments made to the Bail Act by the amendment act is not a change of circumstances for the purposes of the section 74(3) (c) or (4) (b).

So what is proposed is, in essence, to remove the consideration of the presumption of innocence by a bail authority. Certain serious offences are to be bail refused, unless it is shown that the detention is not justified. The current, simple, two-step process in determining unacceptable risk is to be converted into a one step process where bail concerns and bail conditions are to be considered as part of determining unacceptable risk. The additional factors of criminal associations, the conduct of the accused after the offence and the views of the victims, may be part of a bail determination. It is perhaps regrettable that after major amendments to the law of bail earlier this year, with a completely new Act, drafted in clear and precise language, the amendments seem to be a little more convoluted and potentially difficult to apply. We shall see.

New counter-terrorism legislation

By Caroline Dobraszczyk

The Australian Government has been busy passing and considering many new laws in relation to counter terrorism. The first set of laws, contained in the *National Security Legislation Amendment Bill (No 1) 2014* was passed by both Houses on 1 October 2014. This bill mainly amends the *Australian Security Intelligence Organisation Act 1979 (*'the ASIO Act') and the *Intelligence Services Act 2001* ('the IS Act'). The attorney general stated in his second reading speech for this bill that 150 Australians, both in Australia and outside Australia, are involved in the conflicts in Syria and Iraq '…from engagement in fighting to providing support such as funding or facilitation.' He stated that the bill '…contains measures to address practical limitations in the current legislation, which were largely identified by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its *Report on Potential Reforms of Australia's National Security Legislation*, as tabled on 24 June 2013. Some of the main new laws are as follows.

ASIO's warrant based powers, to search, access computers, use surveillance devices and inspect postal or delivery articles, are amended to address some practical limitations. For example, the definition of 'computer' is expanded to mean more than one computer or more than one computer network. Also, the definition of 'listening device' is amended to mean 'any device capable of being used, whether alone or in conjunction with any other device, to overhear, record, monitor or listen to sounds…' An important amendment is to provide for a new 'multiple powers warrant scheme' which will enable ASIO to obtain a single warrant authorizing the exercise of multiple powers in relation to a target. For example, the new proposed Subdivision G provides for the minister to issue an identified person warrant in relation to a person and give conditional approval for ASIO to do one or more of the following--access records at premises, access data in computers, use one or more surveillance devices, access postal articles that are in the post and access articles that are being delivered by a delivery service provider. The subdivision then goes on to set out what ASIO can do in relation to each of these issues once it is authorized to do so by the minister or the director general. There is a stringent test for authorization, eg the minister or director general has to be satisfied, on reasonable grounds, that doing the thing or things under the warrant will substantially assist the collection of intelligence relevant to the prejudicial activities of the identified person.

ASIO will have the capability to conduct covert intelligence operations. Consequently there will be immunity for participants in covert operations. This is similar to Part 1AB of the *Crimes Act 1914* which applies to Australian Federal Police operations.

The bill clarifies the legislative basis for certain cooperative information sharing activities of ASIO and to refer certain matters to law enforcement agencies for investigation.

There will be new offences relating to unauthorized dealings with an intelligence related record, including copying, transcription, removal and retention. These offences will have a maximum penalty of three years imprisonment.

The second set of laws are contained in the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*. The bill will amend several Acts. The attorney general in the second reading speech stated that ' The rapid resurgence in violent extremism and the participation in overseas conflicts by some Australians present new and complex security challenges for our nation. The ongoing conflicts in Syria and Iraq are adding to this challenge and the number of Australians who have sought to take part, either by directly participating in these conflicts or providing support for extremists fighting there, is unprecedented.' Some of the main proposed amendments are as follows:

The bill provides for the control order regime to apply to returning foreign fighters and to those convicted of terrorism offences where it would substantially assist in preventing a terrorist attack.

There is to be a new regime of 'delayed notification search warrants.' This will allow the AFP to covertly enter and search premises without the knowledge of the occupier of the premises and then provide notification at a later stage. The purpose of this is to keep an investigation confidential.

There are to be amendments to the *Foreign Evidence Act 1994* which prescribe great discretion to the court in deciding whether to admit evidence obtained from overseas, in terrorism related proceedings.

The bill provides for a new offence of 'advocating terrorism'. That is, a person will commit an offence if they intentionally counsel, promote, encourage or urge the doing of a terrorist act or the commission of a terrorism offence. The offence carries a maximum penalty of five years. There does not have to be a direct link to an actual act of terrorism or violence being carried out, just advocating terrorism.

There will also be a new offence of entering a foreign country with the intention of engaging in a hostile activity; also an offence of entering in or remaining in an area declared by the

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foreign affairs minister to be an area where a listed terrorist organization is engaging in a hostile activity. The offence of entering a declared area will not apply if the person enters the declared area solely for legitimate purposes which are specified in proposed section 119.3(3). The legitimate purposes include providing aid of a humanitarian nature or making a news report where you are working as a journalist.

There are proposed new laws to allow Customs officers to detain a person where the Customs officer has reasonable grounds to suspect that the person is intending to commit a Commonwealth offence or is a threat to national security or the security of a foreign country. The attorney general stated in the second reading speech, in relation to these particular new laws that 'These amendments play a crucial role in Australia's defence against foreign fighters, as they prevent individuals from travelling outside Australia where their intention is to commit acts of violence.'

The minister for immigration will be able to cancel the visa of a person who is offshore where ASIO suspects that the person might be a risk to security.

The minister for foreign affairs will be able to temporarily suspend a passport to prevent a person who is in Australia from travelling overseas where ASIO has security concerns about that person. ASIO will also be able to prevent persons who they have security concerns about, from going overseas to participate unlawfully in foreign conflicts.

The bill also proposes for laws to cancel the welfare payments for people about which there are security concerns. The attorney general stated in the second reading speech that 'Like the new declared area offence, my expectation is that this new power will only be used in exceptional circumstances where welfare payments are assisting or supporting criminal activity.'

Further consideration of this bill was adjourned to 27 October 2014. There is no doubt that both sets of laws are controversial yet very interesting, and clearly display the federal government's response to the incredible times we live in.