SUPREME COURT OF VICTORIA

COURT OF APPEAL

Nos. 9191 of 1994
9219 of 1994
9220 of 1994
9221 of 1994
9222 of 1994

CAMPBELL'S CASH & CARRY PTY. LTD.
Appellant

v.

THE DIRECTOR OF PUBLIC PROSECUTIONS (COMMONWEALTH)
(on behalf of WILLIAM HADDEN and MICHAEL PHELAN)
Respondent

JUDGES: TADGELL, BATT and BUCHANAN, JJ.A

WHERE HELD: MELBOURNE

DATES OF HEARING: 11 and 12 February 1998

DATE JUDGMENT HANDED DOWN: 10 March 1998

CATCHWORDS:

Statutes - Interpretation - Meaning of "the public, or a section of the public" - Whether meaning dictated by context - Whether decisions from other areas applicable - Whether words of limitation

Tobacco Advertising Prohibition Act 1992 (Cth), s.10.

Appeal - Question of law - The question of whether facts fall within a statute is a question of fact - Whether it is reasonably open to hold that facts fall within a statute is a question of law.

Magistrates' Court Act 1989 (Vic.), s.92.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr R.M.Garratt QC and Mr P.D. Corbett	Hall & Wilcox
For the Respondent	Mr D. Lane	The Director of Public Prosecutions (Cth)

TADGELL, J.A.: In my opinion each of these appeals should be dismissed. I publish my reasons.

BATT, J.A.: I agree. I publish my concurrence in the reasons of Buchanan JA.

BUCHANAN, J.A.: I would dismiss each appeal. I publish my reasons.

TADGELL, J.A.: In the case of each of these five appeals there will be an order that the appeal be dismissed with costs.

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For the Respondent	Mr D.J. Lane	The Director of Public Prosecutions (Cth)

SC/SD V.G.R.S. 9603 2404

CAMPBELL'S CASH & CARRY PTY.LIMITED

v.

THE DIRECTOR OF PUBLIC PROSECUTIONS (COMMONWEALTH)

(on behalf of William Hadden and Michael Phelan)

TADGELL, J.A.: I have had the benefit of reading in draft the reasons prepared by Buchanan, J.A., in which I concur.

CERTIFICATE

I certify that this page is a true copy of the reasons for judgment of Tadgell, J.A. of the Court of Appeal (Tadgell, Batt and Buchanan, JJ.A.) of the Supreme Court of Victoria delivered on 10 March 1998.

DATED this day of 1998.

_____
Associate

SC/SD
TADGELL, J.A.
Campbell's Cash & Carry Pty. Ltd. v. The DPP (Cth)

CAMPBELL'S CASH & CARRY PTY. LIMITED

v.

THE DIRECTOR OF PUBLIC PROSECUTIONS (COMMONWEALTH)

(on behalf of William Hadden and Michael Phelan)

BATT, J.A.: I concur in the judgment of Buchanan, J.A.

CERTIFICATE

I certify that this page is a true copy of the reasons for judgment of Batt, J.A. of the Court of Appeal (Tadgell, Batt and Buchanan, JJ.A.) of the Supreme Court of Victoria delivered on 10 March 1998.

DATED this day of 1998.

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Associate

CAMPBELL'S CASH & CARRY PTY.LIMITED

v.

THE DIRECTOR OF PUBLIC PROSECUTIONS (COMMONWEALTH)

(on behalf of William Hadden and Michael Phelan)

BUCHANAN, J.A.: Five charges brought against the appellant alleging breaches of s.15(1)(b) of the Tobacco Advertising Prohibition Act 1992 ("the Act") were dismissed by a magistrate. The section prohibits authorizing or causing the publication of tobacco advertisements by certain corporations, of which the appellant was one. The meaning of "publish a tobacco advertisement", as far as is presently relevant, is to make the advertisement available or distribute it to or bring it to the notice of "the public, or a section of the public". See s.10 of the Act.

In the Magistrates' Court the parties agreed upon a statement of the facts. No evidence was led. According to the statement the appellant carried on business as a wholesale grocer, supplying persons who applied for and were issued with membership cards. Membership cards were issued in respect of three primary schools. Lakeside Primary School in Reservoir applied for membership in order to obtain goods to stock its canteen and for its staff association. Keon Park Primary School applied for membership to obtain goods for school camps and for functions conducted by the parents and friends association and its staff association. Blackburn Primary School became a member in order to obtain supplies for its canteen.

Written applications made by two of the three schools were annexed to the statement. Each application identified the school and the individual applying for membership on behalf of the school, referred to an annual membership fee of $25 and concluded with the words "Thank you for being a Campbell's Cash and Carry customer". The application form contained a section headed "Office Use Only", which provided for a statement setting out the nature of the customer's business,

whether the customer was a member of certain retailers' associations, whether the customer was taking over the business of a previous card-holder, and whether the person processing the application had seen a driver's licence, proof of business, liquor licence or credit cards, and recorded whether the customer was exempt from sales tax. Although no application form for Blackburn Primary School was annexed to the statement of agreed facts, the parties accepted that the school obtained a membership card in the same manner as the other two schools. It was stated that each of the schools received a brochure from the appellant advertising goods at special prices. The goods described in the brochures included cigarettes and loose tobacco.

The magistrate dismissed the charges on the ground that those who received the brochures were not the public or a section of the public.

The respondent appealed from the magistrate's decision to a single judge of the Supreme Court pursuant to s.92 of the Magistrates' Court Act 1989, which conferred a right of appeal "... on a question of law". The questions stated in the order made pursuant to Rule 58.09 of the Rules of the Supreme Court were:

> "A. Did the learned Magistrate err in law by concluding that recipients of the brochure, distributed by the Respondent, were not members of '... the public or a section of the public' pursuant to section 10(1) of the Tobacco Advertising Prohibition Act 1992 (Cth)?
>
> B. Did the learned Magistrate err in law by concluding that the Respondent had not published the tobacco advertisement contrary to section 15(1)(b) of the Tobacco Advertising Prohibition Act 1992 (Cth)?"

Each appeal from the Magistrates' Court was upheld. The learned judge rejected the argument that the persons who received the brochures were identified by a special characteristic which isolated them in a private capacity in that the granting by the appellant of their applications for membership created a personal relationship which distinguished them. He said:

> " If there is an eligibility requirement to gain a membership card it must be that someone is engaged in business or more precisely, in the terms of the certificate, that one is purchasing for a "business, partnership, club,

> hotel, trade or professional association". That description is so far-reaching as to include very large and indefinable numbers of the public, for the requirement is one easily satisfied, as this case shows, by the widest range and number of persons in the community. It seems to me that there is not a bar to admission in the sense or context described by Lowe, J. Further, in my opinion there is no common thread or tie or relationship between such persons of the type considered in In re Income Tax Acts, Thompson and Compton, the three cases relied on by the respondent as demonstrating the requisite element of personal relationship. In the circumstances of this case the three schools are properly to be regarded as a section of the public."

The appellant contended that the learned judge determined a question of fact, not law. The appellant said that the meaning of the expression "public or section of the public" was a question of law, but the learned judge did not identify any error of law by the magistrate in construing that expression. The judge held that the agreed facts fell within the words of the Act as properly construed by the magistrate. The appellant said that the application of the meaning of the expression to the facts was a question of fact. The appellant agreed that the magistrate would have erred in law if there was not evidence to found a reasonable doubt as to the commission of the alleged offences. The appellant contended that there was sufficient evidence and that the learned judge erred in weighing all the evidence to reach his own conclusion as to the guilt of the appellant.

In Collector of Customs v. Pozzolanic (1993) 43 F.C.R. 280, at p.287, the Full Federal Court set out five general propositions as to whether the proper interpretation and application of a statute to a given case raised questions of fact or law. The fifth proposition was said to be:

> "The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law ..."

The Full Court qualified the proposition by saying that when a statute used words according to their ordinary meaning and it was reasonably open to hold that the facts of the case fell within those words, the question whether they did or did not was one of fact. In Collector of Customs v. Agfa Gervaert Ltd. (1996) 186 C.L.R. 389, at p.395, the

High Court cited the Full Court's five propositions and the qualification and said, at p.396, that such general expositions of the law were helpful in many circumstances. See also S v. Crimes Compensation Tribunal [1998] 1 V.R. 83, at p.89, per Phillips, J.A.

The appellant accepted that the appropriate criteria to determine whether a group of persons answered the description "the public, or a section of the public" were those found in decisions concerned with revenue and charities, which were applied by the learned judge.

In In re Income Tax Act (No. 1) [1930] V.L.R. 211, the Court considered whether a gift to the Ancient Fraternity of Free and Accepted Masons of two cottages was a gift to a public benevolent asylum, and in that context considered whether the members of the association of masons were the public or a section of the public. Lowe, J. said, at pp.222-223:

> "Having regard to the composition of the public, certain large groups may readily be recognized, the members of which have a common calling or adhere to a particular faith or reside in a particular geographical area. There is no bar which admits some members of the public to those groups and rejects others. Any member of the public may, if he will, follow a particular calling, adhere to a particular faith or reside within a particular area. Of the members of such a group it may be said in a real sense that they are primarily members of the public, and such a group may well constitute a section of the public. ... A club, a literary society, a trade union may all have numerous members, but I think that none of these could properly be called a section of the public. They stand on the other side of the line. The distinguishing feature of these latter bodies is that it is an association which takes power to itself to admit or exclude members of the public according to some arbitrary test which it sets up in its rules or otherwise."

A like distinction was made by the High Court in Thompson v. Federal Commissioner of Taxation (1959) 102 C.L.R. 315, where the question was whether a bequest to masonic schools was exempt from duty under the Estate Duty Assessment Act as a gift for "public educational purposes", a term defined to include "the establishment or endowment of an educational institution for the benefit of the public or a section of the public". The Court held that it was not, as membership of the

masonic order was obtained by election by existing members in accordance with the rules of the association. At p.320, Dixon, C.J. said:

> "For the purpose of the question raised it is enough to say that a candidate for membership must be nominated by two master masons, and his qualifications and moral and general character are enquired into by a committee and his admission is determined by a ballot of the lodge."

Dixon, C.J. relied upon decisions from the law of charities. He said, at p.322:

> "In In re Scarisbrick; Cockshott v. Public Trustee [1951] Ch.622, at p.649, Jenkins L.J. set out five general propositions upon this subject, in relation however to a case concerned with the relief of poverty. His Lordship in doing so said: 'An aggregate of individuals ascertained by reference to some personal tie (e.g., of blood *or contract*), such as the relations of a particular individual, the members of a particular family, the employees of a particular firm, *the members of a particular association*, does not amount to the public or a section thereof for the purposes of the general rule.'
>
> The words I have italicized apply to the facts here. Of course the foregoing considerations operate directly only upon the law of charity not upon the application of s.8(5). But they do provide something more than an analogy. For it is obvious that the statutory exemption is *in pari materia*."

In In re Compton [1945] 1 Ch. 123, the Court of Appeal held that a trust "for the education of Compton and Powell and Montague children" was not a valid charitable trust because the beneficiaries were defined by reference to a personal relationship. At p.131 Lord Greene, M.R., said:

> "I come to the conclusion, therefore, that on principle a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift. And this, I think, must be the case whether the relationship be near or distant, whether it is limited to one generation or is extended to two or three or in perpetuity. The inherent vice of the personal element is present however long the chain and the claimant cannot avoid basing his claim on it."

If the foregoing cases supply the appropriate test to determine whether a group of persons who receive a tobacco advertisement are "the public, or a section of

the public", in my opinion the magistrate arrived at a conclusion which was simply not open to him, that is, it was not open to conclude that there was a reasonable doubt whether the recipients of the brochure constituted a section of a public so defined. His error was one of law.

Even if "the School", which is said in the statement of agreed facts in respect of each charge to have "received from Campbell's a brochure", is taken to refer only to the individual who applied for the card on behalf of the school, the appellant did not admit or exclude persons as cardholders according to any arbitrary test. The statement of agreed facts shows that provided an applicant for a card was purchasing the appellant's wares for others, the appellant was prepared to deal with him or her. The relevant facts which determined whether the recipients of the brochures answered the statutory description were confined to those set out in the agreed statement of facts and the documents attached to that statement. From the statement and the documents it appears that the appellant accepted as customers every person who certified in the application form that he or she was purchasing for or on behalf of a business, partnership, club, hotel, trade or professional association, who provided information and proof of identity and who paid a fee of $25. Cf. Jennings v. Stephens, infra, at p.484.

It was submitted on behalf of the appellant that the appellant may have exercised an arbitrary power to refuse applications. In my opinion that is not an inference which was open to the magistrate to draw from the agreed facts. The statement of agreed facts discloses a system whereby the appellant registered the names of retail customers and recorded information that was useful to the appellant in dealing with them, rather than a system for selecting a particular group of customers according to an arbitrary test.

For the foregoing reasons I consider that persons to whom the appellant sent brochures were members of the public or a section of the public according to the

construction of the term which was accepted by the appellant and applied by the learned judge.

It is not necessary for the determination of this appeal to decide the question whether the phrase "public, or a section of the public" in the Act is to be construed according to criteria developed in other areas, or indeed the question whether the phrase is one of limitation, but I would not wish my view that the appeal should be dismissed to be taken as an endorsement of the view that it is appropriate to construe the phrase in the Act in the light of decisions dealing with the law as to charities.

The phrase "the public, or a section of the public" is to be construed according to its context. In Corporate Affairs Commission (S.A.) v. Australian Central Credit Union (1985) 157 C.L.R. 201, at p.208, the majority of the High Court said of the phrase "section of the public" in the Companies Code provisions dealing with prescribed interests:

> "The question whether a particular group of persons constitutes a section of the public for the purposes of s.5(4) of the Code cannot be asked in the abstract. For some purposes and in some circumstances, each citizen is a member of the public and any group of persons can constitute a section of the public. For other purposes and in other circumstances, the same person or the same group can be seen as identified by some special characteristic which isolates him or them in a private capacity and places him or them in a position of contrast with a member or section of the public."

Later, at p.211, their Honours said:

> "It is legitimate to consider ... whether the relevant group of persons is one which Parliament could reasonably be expected to have had in mind as part of the investing public to be protected by the disclosure requirements ...."

So in the present case it is legitimate to consider whether the retailers supplied by the appellant constituted a group which Parliament could reasonably be expected to have had in mind as part of the public to be protected from exposure to advertisements for

tobacco products. See also In re Income Tax Act (No. 1), supra, at p.221 per Lowe, J.; Jennings v. Stephens [1936] 1 Ch.469, at p.476, per Lord Wright, M.R.

The law of charity does not recognize a gift as charitable unless it is directed to the public benefit, or is for the relief of poverty. If the gift is one for the benefit of a class, the requirement of public benefit is not satisfied unless the members of the class are not numerically negligible and the quality which distinguishes them from other members of the community is not one which depends upon a personal relationship to a single propositus or to several propositi. A justification for the latter requirement was advanced by Lord Simonds in Oppenheim v. Tobacco Securities Trust Ltd. [1951] A.C. 297, which was concerned with the question whether a gift for the education of children of employees of British American Tobacco Ltd. was charitable. At p.307 his Lordship said that the range of institutions that the law regarded as charitable should be limited. He referred with approval to the following statement of Morton, L.J., in Re Hobourn Aero Components Limited's Air Raid Distress Fund [1946] 1 Ch. 194, at pp.208-9:

> "Charities are rightly privileged as regards freedom from income tax and freedom from the restrictions imposed by the rule against perpetuities, and it is important that those privileges should really be restricted to purposes which benefit the public or some section of the public. I think In re Drummond [1914] 2 Ch.90, imposed a very healthy check upon the extension of the legal definition of 'charity' ..."

In In re Drummond Eve, J. held that a bequest to contribute to the holiday expenses of those employed in a department of a company was not charitable, although there were 500 possible beneficiaries.

In my view it is not appropriate to approach the construction of the Act in such a fashion. The Act was intended to promote public health by protecting persons from the effects of messages that might persuade them to start smoking or to continue smoking. See s.3 of the Act. The Act did not confer a privilege which should be kept in check. Masons might not be a section of the public for the purposes of the law of

charity, but I do not consider that Parliament contemplated it would be lawful to direct tobacco advertisements to masons.

The respondent advanced a test which was borrowed from the law of copyright to determine whether a class of persons constituted a section of the public within the meaning of the Act. In that context the word "public" was at first contrasted with "domestic and private". Again I doubt that it is appropriate to apply that concept of the public to the Act. In the law of copyright the courts are concerned to protect the owner of the copyright, and the public is regarded as the copyright owner's public. Thus in Duck v. Bates (1884) 13 Q.B.D. 843, at p.847, Brett, M.R. said:

> "[T]he representation must be other than domestic and private. There must be present a sufficient part of the public who would also go to a performance licensed by the author as a commercial transaction ...."

In Harms (Incorporated) and Chappell & Co. v. Martans Club [1927] 1 Ch.526, at p.532, Lord Hanworth, M.R. said:

> "In dealing with the tests which have been applied in the cases, it appears to me that one must apply one's mind to see whether there has been any injury to the author. Did what took place interfere with his proprietary right?"

Finally, in Jennings v. Stephens [1936] Ch.469, at p.485, Greene, L.J. said:

> "The question may therefore be usefully approached by enquiring whether or not the act complained of as an infringement would, if done by the owner of the copyright himself, have been an exercise by him of the statutory right conferred upon him. In other words, the expression 'in public' must be considered in relation to the owner of the copyright. If the audience considered in relation to the owner of the copyright may properly be described as the owner's 'public' or part of his 'public', then in performing the work before that audience he would in my opinion be exercising the statutory right conferred upon him; and anyone who without his consent performed the work before that audience would be infringing his copyright."

The concept of the copyright owner's public has been adopted in this country. See, for example, Rank Film Production Ltd. v. Colin S. Dodds [1983] 2 N.S.W.L.R. 553, at p.559; Telstra Corporation Ltd. v. Australian Performing Right Association Ltd. (1997) 71

A.L.J.R. 1312, at pp.1317-8 per Dawson and Gaudron, JJ., at pp.1342-3 per Kirby, J. and at p.1328 per McHugh, J. In my opinion it is not relevant to the attainment of the objectives of the Act to distinguish between a section of the public and a domestic group.

The learned judge accepted that the words "the public, or a section of the public" were words of limitation. I doubt that they are. I think that Parliament intended to convey that, subject to certain defined exceptions, tobacco advertisements were to be just as unlawful where groups of the public were concerned as they were where members of the public at large were concerned. That conclusion derives support from the difficulty of identifying any criterion marking out sections of the public from other groups of persons which is relevant to the withdrawal from the other groups of persons of protection from messages that may persuade them to start smoking or to continue smoking.

The Act expressly allows tobacco advertisements to be published in particular circumstances. Thus sub-s.10(3) allows tobacco advertisements to be published to persons involved in the manufacture, distribution or sale of tobacco products. Sub-section 10(4) provides that the activities of public and certain other libraries are not caught by the Act. Section 16 permits advertising at places where tobacco products are offered for sale. Section 17 permits the publication in Australia of foreign periodicals containing tobacco advertisements. Section 18 permits the publication of tobacco advertisements in connection with certain sporting or cultural events. Section 19 permits publication of tobacco advertisements which are accidental or incidental to the publication of other matter. Section 20 allows individuals to publish tobacco advertisements if that is not done in the course of the manufacture, distribution or sale of tobacco products and the publishers do so on their own initiative and do not benefit thereby. In the light of that catalogue of exceptions I do not think the phrase "the public or a section of the public" is to be interpreted so as to widen the range of persons to whom tobacco advertisements can be published.

In Race Relations Board v. Charter [1973] A.C. 868, the House of Lords held that the words "the public or a section of the public" in a statute proscribing discrimination on the ground of colour, race or ethnic or national origins in the supply of goods and services did not apply to a personally selected group of people meeting in private premises. The majority of the members of the House recognized that the words "section of the public" were apt to denote any person or persons, but found in the statute indications that that was not intended, and accordingly treated the words as words of limitation. Thus Lord Reid said, at p.885, of the words "a section of the public":

> "Read literally the words denote two or more persons associated together in any way - perhaps any one person could be a section of the public but I shall assume not. But that cannot be the meaning of those words in this context. The head of a household provides facilities for all members of his household. Suppose he has in his household three servants one of whom is coloured, and, although asked to do so, he refuses to the coloured servant facilities which he provides for the others and says that he does so on the ground of colour. The board admit that that is not within the scope of the Act. Plainly there is discrimination within the meaning of section 1 and the only possible ground for excluding such a case from the operation of the Act is that the household is not a section of the public. Various sections of the Act make it clear that it is not intended to interfere with people's domestic lives and counsel for the Board both made it clear that they did not contend otherwise."

On the other hand, there are no sections in the Act which make it clear that it was not intended to interfere with people's domestic or private lives. The Act was intended "to improve public health" (s.3) by removing an inducement to start or continue smoking. In my opinion the attainment of that objective is threatened by requiring that the Act be limited to advertisements to persons aggregated in one or other of their public roles.

I would dismiss each appeal.

CAMPBELL'S CASH & CARRY PTY.LIMITED

v.

THE DIRECTOR OF PUBLIC PROSECUTIONS (COMMONWEALTH)

(on behalf of William Hadden and Michael Phelan

CERTIFICATE

I certify that the preceding 10 pages are a true copy of the reasons for judgment of Buchanan, J.A. of the Court of Appeal (Tadgell, Batt and Buchanan, JJ.A.) of the Supreme Court of Victoria delivered on 10 March 1998.

DATED the day of 1998.

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Associate

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