

CHURCH OF SCIENTOLOGY INC. v. MR JUSTICE WOODWARD<sup>1</sup>

*Constitutional law — Australian Security Intelligence Organization — Executive power in relation to collection of information in the interests of security — Constitutional law — Constitution s. 116 — No religious test shall be required as a qualification for any office or public trust under the Commonwealth*

Anyone attending the Melbourne sitting of the High Court of Australia on 1 November 1979 would have been witness to an interesting event. For present before Aickin J. was the Solicitor-General for the Commonwealth to argue in defence of the Director-General of the Australian Security Intelligence Organization (ASIO) against an attack (or rather counter-attack if the plaintiff was to be believed) brought by the Church of Scientology Inc.<sup>2</sup>

The plaintiff Church of Scientology was an organization incorporated under the laws of South Australia in 1969. The defendant was the Director-General of Security holding office under the Australian Security Intelligence Organization Act 1956 (Cth) ("the Act"). The background to the litigation makes for fascinating reading.

The plaintiff alleged (having gained this information it said through a "leak" in ASIO itself) that ASIO was divided into divisions; that one such division had "target organizations"<sup>3</sup> for which it was responsible; that religious organizations such as Ananda Marga and Scientology were included among the "target organizations"; that members of Ananda Marga had been harassed and that Scientology was the next "to be hit". The plaintiff further alleged that it had already suffered various types of tortious and criminal interference by officers of ASIO including interference with cars and telephones, and the restriction of free movement. In these circumstances the plaintiff sought various forms of relief against the defendant including an injunction restraining the defendant from causing or permitting ASIO to continue to obtain, correlate or evaluate information concerning the plaintiff, and damages. As the action was brought against the defendant in his capacity as Director-General of Security under the Act and as it was a matter in which the Commonwealth or a person being sued on behalf of the Commonwealth was a party, or was a matter in which an injunction was sought against an officer of the Commonwealth, the High Court had original jurisdiction.<sup>4</sup>

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<sup>1</sup> Unreported decision 1 November 1979. High Court of Australia; Aickin J.

<sup>2</sup> In form, the proceedings before Aickin J. arose from a summons taken out on behalf of the defendant asking that the plaintiff's statement of claim be struck out pursuant to 0.26 r. 18 (High Court Rules) on the ground that it did not disclose a reasonable cause of action or alternatively that the proceedings should be stayed under 0.63 r.2 on the ground that there was not a reasonable or probable cause of action disclosed or that the proceedings were vexatious and oppressive.

<sup>3</sup> When pressed to define the expression, counsel for the plaintiff offered the following: an organization that is the subject of continued surveillance in respect of which intelligence is to be indefinitely assembled.

<sup>4</sup> S. 75(iii) and (v) Constitution.

The plaintiff sought to rely in essence on two causes of action:

1. That "the defendant has wrongfully caused or permitted ASIO to obtain, correlate and evaluate information concerning the plaintiffs and has communicated that information to other persons";

2. In so far as the provisions of the Act authorise or permit ASIO to obtain, correlate and evaluate intelligence concerning the plaintiffs and at the direction of the defendant to communicate such intelligence to others, it is a law prohibiting the free exercise of religion and contravenes section 116 of the Constitution.

It will be convenient to treat each cause of action separately.

### 1. *Wrongfully Obtaining Information*

In its statement of claim the plaintiff gave particulars of this first cause of action which stated that ASIO had characterised the plaintiff as a "target organization" and as a "security risk", and that ASIO had undertaken the continuous assembling of information concerning the plaintiff. Such information, asserted the plaintiff, was not "intelligence relevant to the protection of the Commonwealth from acts of espionage, sabotage and subversion" within the meaning of the Act; nor was the plaintiff itself a person or organization in respect of which the Commonwealth "required" (that is, needed) protection from acts of espionage, sabotage or subversion. In consequence, therefore, and this was the basis of the plaintiff's first cause of action, the continued obtaining, correlation and evaluation of information concerning the plaintiff and the communication of such information to other persons was beyond the powers of ASIO and was unlawful.

There was considerable argument between counsel as to the exact legal nature of ASIO. One thing, however, was clear: the Act did not in any legal sense establish ASIO as an entity with distinct legal personality. Sections 4 and 5 of the Act are relevant.

4(1) The Australian Security Intelligence Organization, being the Organization established in pursuance of a directive given by the Prime Minister on the sixteenth day of March, One thousand nine hundred and forty-nine, is, subject to this Act, continued in existence.

5(1) The functions of the Organization are—

(a) to obtain, correlate and evaluate intelligence relevant to security and, at the discretion of the Director-General, to communicate any such intelligence to such persons, and in such manner, as the Director-General considers to be in the interests of security.

There was, according to the defendant, a short answer to the plaintiff's first claim. As ASIO was not a statutory corporation or a body with any distinct legal personality, the doctrine of *ultra vires* was irrelevant. The flaw in the plaintiff's argument, according to the defendant, was that in asserting that the collection and correlating of information about the Church of Scientology was beyond the powers of ASIO, it sought to apply to the defendant and to officers of ASIO conceptions applicable only to statutory corporations. The underlying assumption of the plaintiff's case was that ASIO was in the same legal position as a statutory

corporation and that the function as specified in section 5 of the Act set the limit to its powers and those of the defendant.

The defendant instead argued that ASIO was an organization without any discrete legal personality, and its officers merely public servants employed in the executive arm of the Commonwealth. The defendant and officers of ASIO were in the same legal position as any private individual who might wish to obtain information and correlate and evaluate it in relation to security or indeed any topic, and to communicate such information to other persons. And as any individual could gather information and communicate it, subject always of course to the general law of trespass and defamation, so too could the defendant and officers of ASIO. Reference at this point should be made to *Clough v. Leahy*<sup>5</sup> which strongly supports the defendant's line of argument. That case was concerned with the inquisitorial powers of the Commonwealth Royal Commission and Griffith C.J. said:

We start, then, with the principle that every man is free to do any act that does not unlawfully interfere with the liberty or reputation of his neighbour. . . . That is the general principle. . . . and that which is lawful to an individual can surely not be denied to the Crown . . .<sup>6</sup>

In reply, and in an attempt to overcome the doctrine in *Clough's* case, the plaintiff sought to raise a proposition which is of some considerable constitutional importance. The basis of the defendant's argument was that ASIO not being a statutory corporation, the defendant and its officers had all the rights (and obligations) of individuals. Not so argued the plaintiff. Whatever a person *qua* an individual might choose to do by way of collection and dissemination of information, the situation was fundamentally different where such activities are undertaken by executive officers of the Commonwealth. For ASIO, although not incorporated, was given a continued existence, even if only administratively as an organization by section 4(1) of the Act, which section also declared that such existence was made subject to the Act. Further, the absence of words such as "without affecting the generality of the powers of the organization" together with the placing of ASIO under the control of the defendant Director-General also suggests that section 5 of the Act is in law the charter of the organization setting out exhaustively its duties and powers.

The difficulty in turn with this line of argument is that ASIO as an organization is part of the Public Service of the Commonwealth (whether subject to the Public Service Act or not) and is a section of the organization which is called the executive government of the Commonwealth, exercising executive power. The executive power itself generally speaking, is not defined in the Constitution otherwise than by distinction from the legislative and judicial power. The plaintiff's contention, therefore, amounted more generally to the proposition that the doctrine of *ultra vires* was applicable in the situation of an executive direction given to a member of the public service by his executive head to engage himself in

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<sup>5</sup> (1904) 2 C.L.R. 139.

<sup>6</sup> *Id.* 157. Cf. *Lockwood v. The Commonwealth* (1954) 90 C.L.R. 177.

the collection of information. And in support of this larger proposition the plaintiff sought to find a constitutional limitation which is built into any appraisal of executive action or evaluation of the exercise under section 61 of the Constitution of the executive power of the Commonwealth. In other words the executive acting as the executive can only carry out the execution and maintenance of the Constitution and of the laws of the Commonwealth. The executive, it is true, need not rely on specific legislation such as the Act in order to protect the Commonwealth from acts of espionage, sabotage or subversion; the defence power and perhaps the incidental power combined with section 61 would authorise the same result.<sup>7</sup> And in any case there is, as Sir Owen Dixon expressed it, the inherent power of the polity to protect itself. But, and this was the point of the plaintiff's submission, each of these alternative sources of executive action has a limit or a boundary; the setting up of a polity does not set the executive at large and the Court can always look to see whether executive action taken for the purpose of the protection of the Commonwealth is in fact serving that purpose.<sup>8</sup>

Aickin J., however, accepted the arguments of the defendant and accordingly struck out the plaintiff's first cause of action.

The question of power or lack of power to do an act is one which can only be asked in relation to bodies corporate and to the power, or more properly, authority of one person to bind another or act so as to impose liability on another. The latter sense is not presently relevant.

Here we are concerned with acts of individual public servants (in a wide sense of that term), employed in a non-corporate organization. ASIO is properly to be regarded as part of the executive government. Here there can be no question of lack of statutory authority to communicate information to such persons as the Director-General directs or approves. Nor can there be any lack of executive authority to make enquiries on any matter in the light of the observation of Griffith C.J. in *Clough v. Leahy*<sup>9</sup> . . . though the power to compel answers is another question.<sup>10</sup>

Aickin J. refused to be drawn into the argument as to the limits of the executive power of the Commonwealth.

No doubt the executive power of the Commonwealth is not unlimited . . . but the observations of Griffith C.J. [in *Clough*] . . . in which Barton and O'Connor JJ. joined, demonstrate there is no limitation relevant to the present case. It is not necessary for the purposes of the present summons to attempt to define the limits of the executive power nor the extent to which executive, as distinct from statutory powers, are capable of review by the Court.<sup>11</sup>

As a final argument the plaintiff submitted that section 5 of the Act

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<sup>7</sup> The limits on the executive and legislative powers of the Commonwealth with respect to the control of subversive activities are canvassed in the judgment of Sir Owen Dixon in the *Communist Party* case (1950) 83 C.L.R. 1, 185 ff.

<sup>8</sup> The matter has been discussed more recently by Mason J. in *Victoria v. The Commonwealth* (1975) 134 C.L.R. 338.

<sup>9</sup> (1904) 2 C.L.R. 139, 157.

<sup>10</sup> Transcript of judgment 12.

<sup>11</sup> *Id.* 12-13.

together with section 70 of the Crimes Act 1914 (Cth) supports the argument that there is a statutory limit on the powers of the defendant. Section 5 authorises officers of ASIO to communicate information in certain circumstances and section 70 of the Crimes Act makes it a criminal offence to do so without authority. Aickin J., however, was not persuaded.

This argument appears to me to confuse lawfulness with lack of power. . . . Actual communication [in contravention of the Crimes Act] however is not beyond power in any relevant sense of that expression and could not be regarded as a nullity. The fact that it is a criminal offence is enough to demonstrate that it is not a nullity. The fact that an act constitutes a criminal offence does not mean that the individual does not effectively perform the act.<sup>12</sup>

The judgment of Aickin J. on these points is, with respect, unimpeachable. For there can be no doubt but that all governmental organizations, whether State or Commonwealth, can make what inquiries they wish. So too can an individual; it may be impertinent, and it may be highly undesirable and deserving of censure, but it is not unlawful.<sup>13</sup> And on the basis that the Act does not establish ASIO as a statutory corporation, how then could section 5 of the Act limit the powers of individual public servants and the executive government to make any such inquiries? Test the matter this way: what would be the situation of the parties in the absence of the Act? Clearly the establishment of an organization such as ASIO is authorised by the executive power of the Commonwealth. And such directives as are referred to in section 4 of the Act could equally as clearly encompass the collection and dissemination of information. It would then be a novel proposition of law indeed which sought to impose on individual public servants, who are no more and no less than members of an organization which is part of the Commonwealth Public Service, restrictions applicable to a body corporate, especially when there is no restriction, or rather no relevant restriction, on the executive power of the Commonwealth. This is not a case, it should be added, of an Act which imposes obligations on people or confers rights on people; the only authority that is given is the authority to employ. In a situation such as this the doctrine enunciated in *Clough v. Leahy*<sup>14</sup> and *Lockwood v. The Commonwealth*<sup>15</sup> provides a complete answer to the plaintiff's case.

## 2. *Scientology and Section 116 of the Constitution*

Section 116 of the Constitution states in part "The Commonwealth shall not make any law . . . for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth".

<sup>12</sup> *Id.* 11-12.

<sup>13</sup> There is probably no cause of action for breach of privacy at common law. Cf. *Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor* (1937) 58 C.L.R. 479 and *Malone v. Metropolitan Police Commissioner* [1979] 2 W.L.R. 700.

<sup>14</sup> (1904) 2 C.L.R. 139.

<sup>15</sup> (1954) 90 C.L.R. 177.

In its statement of claim the plaintiff alleged that the defendant caused or permitted ASIO to communicate security assessments to Ministers concerning persons employed or proposed to be employed in offices under the Commonwealth or under authorities of the Commonwealth to the effect that such persons as are members of the Church of Scientology are "security risks" by reason of their membership of the Church. This assertion, according to the plaintiff, amounted to the defendant causing or permitting ASIO to require a religious test as a qualification for an office under the Commonwealth.

The plaintiff also argued that in so far as the provisions of the Act authorise or permit ASIO to obtain, correlate and evaluate intelligence concerning the plaintiff, and at the direction of the defendant to communicate such information to others, it is a law prohibiting the full exercise of religion.

With respect to the "religious test" argument, the defendant conceded that section 116 did impose restriction on what might broadly be termed executive actions. The defendant also allowed that if members of the plaintiff Church wished to join ASIO, and the defendant himself were to say that he would have no Scientologists, that action of the defendant could be said to require a religious test. The allegation however was that the defendant caused or permitted ASIO to require a religious test. Counsel for the defendant gave the example of the Prime Minister, before employing a particular person, seeking the advice of the defendant. If the defendant were then to advise against employment because of that person's membership of the Church of Scientology, it could not, according to the defendant, be said that the defendant was requiring a religious test as a qualification for employment. Aickin J. agreed with this submission and dismissed the plaintiff's cause of action on this ground out of hand. "The plaintiff's argument . . . seems untenable on its face. The provision of information to a prospective employer cannot be regarded as the imposition of a religious test by the provider of the information."<sup>16</sup>

Now given that the question before the High Court was whether the statement of claim disclosed a reasonable cause of action, it may be said that Aickin J. dismissed this part of the plaintiff's case too summarily. For the plaintiff's particulars alleged that security assessments are made by ASIO on prospective Commonwealth employees, and that being an adherent of Scientology or a member of the Church is treated as, in effect, a disqualification for certain offices under the Commonwealth. In characterising members of the Church of Scientology as "security risks" and in informing Ministers of such characterisation in respect of employees or prospective employees of the Commonwealth, ASIO is in effect setting up a religious test as qualification for office under the Commonwealth. And surely it is open to argue that the proper interpretation of those words in section 116 is that no instrumentality of the Commonwealth should participate in any steps which impose a religious test as part of the qualification.

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<sup>16</sup> Transcript of judgment 10.

So far as the free exercise of religion allegation was concerned, the defendant argued in the first place that a corporation could not have a religious belief and therefore could not exercise a religion.<sup>17</sup> In any event, argued the defendant, the plaintiff's claim assumes that a doctrine or an act of subversion is protected under section 116 if that doctrine or act contains a religious element or motive. Aickin J. agreed with these submissions and therefore struck out the last of the plaintiff's causes of action. His Honour was on firmer ground with respect to this aspect of the section 116 claim, for the assertion by the plaintiff that continued investigation of the Church of Scientology by ASIO amounted to a restriction of the free exercise of religion involves the notion that individuals would be free to destroy the Constitution and the organs of the State, so long as they were activated by a religious motive. This proposition is not only incorrect on its face but is also inconsistent with the *Jehovah's Witnesses* case.<sup>18</sup>

The action before Aickin J. was heard as in chambers and the issues were decided on the pleadings. No facts were therefore found; nevertheless, if the plaintiff's assertions were true, whilst there may not be a remedy in law perhaps there should be.

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#### *Postscript*

Following the judgment of Aickin J. the plaintiff chose to begin fresh proceedings rather than amend its pleadings. The arguments were of necessity different since on 1 June 1980 the Australian Security Intelligence Organization Act 1979 came into force and repealed the 1956 Act. The plaintiff claimed that the continued surveillance by ASIO, not being authorized by the 1979 Act, was unlawful and not simply *ultra vires*; the plaintiff repeated its arguments that the surveillance was a contravention of section 116 of the Commonwealth Constitution, and that, in so far as the surveillance was not authorized by legislation, it was not a proper exercise of the executive power of the Commonwealth. The defendant again sought to have the Statement of Claim struck out, on the basis that the exercise by ASIO of its functions and powers as set out in the Act is unreviewable by a court and that in any event, even if the ASIO activities complained of were outside the ASIO charter, the activities were not thereby unlawful. Wilson J. accepted the defendant's submissions and struck out the Statement of Claim. The plaintiff has indicated its intention to appeal to the Full Court of the High Court.

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<sup>17</sup> See *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943) 67 C.L.R. 116, 147 per Latham C.J.

<sup>18</sup> *Id.* 146-147 per Latham C.J.; 149 per Rich J.; 154-155 per Starke J.; 159-161 per Williams J.

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