**10/09; [2009] VSC 135**

**SUPREME COURT OF VICTORIA**

# *BREGUET v HAMMERTON*

**Bongiorno J**

**18 March, 2, 8 April 2009**

**CRIMINAL LAW – CHARGES ARISING OUT OF VARIOUS PROTEST ACTIVITIES BY FIVE DEFENDANTS IN VICTORIAN FORESTS – DEFENDANTS ALL PLEADED GUILTY TO THE CHARGES – VARIOUS DISPOSITIONS MADE BY THE MAGISTRATE – APPLICATION MADE BY PROSECUTOR FOR THE DEFENDANTS TO PAY COMPENSATION FOR EXPENSES CLAIMED TO HAVE BEEN INCURRED IN REMOVING THE DEFENDANTS FROM THE FOREST LOCATIONS IN WHICH THE OFFENCES HAD BEEN COMMITTED – APPLICATIONS DISMISSED FOR SEVERAL REASONS – WHETHER MAGISTRATE IN ERROR: *ADMINISTRATIVE ARRANGEMENTS ACT* 1983, S3; *SENTENCING ACT* 1991, SS49, 75, 86; *CONSERVATION, FORESTS AND LANDS ACT* 1987, SS3, 6, 88, 96, 97; *INTERPRETATION OF LEGISLATION ACT* 1984, S23.**

**HELD: Appeals dismissed with costs.**

**1. In relation to the application for compensation against the defendant Hammerton, the Magistrate made no error of law in dismissing the application on the ground that Hammerton's means were such that he should not be required to pay compensation in the circumstances.**

**2. Section 97(1)(b) of the *Conservation, Forests and Lands Act* 1987 ('CFL Act') in conjunction with s86 of the *Sentencing Act* confers a right on "the Secretary" to obtain an order for "compensation" against a person convicted or found guilty of an offence "under a relevant law". Although the *Sentencing Act* designates the "offender" as the person against whom an order for compensation under that Act might be made, the CFL Act refers instead to "the person so convicted or released or made the subject of a community based order". This means that to be liable to a compensation order a person must not only be found guilty or convicted of a relevant offence but he or she must also satisfy one of the criteria required by the CFL Act; that is to say he or she must be a person "so convicted or released or made the subject of a community based order". The meaning of the section is tolerably clear and it defines the class of persons against whom an order may be made. It excludes all others.**

**3. As two of the defendants were fined without conviction, the basis upon which a compensation order could have been made by the Magistrate never existed. Accordingly, the applications against them for compensation could never have succeeded as a matter of law.**

**4. In relation to the application for compensation against Page, the prosecutor relied upon a certificate tendered to the Court setting out the quantum of compensation sought. The Magistrate was in error in dismissing the application on the ground that the certificate had not been served in accordance with s88(4) of the CFL Act. Section 97(3)(b) of the CFL Act requires no such compliance and, as that is the provision which governs the use of certificates in compensation applications, subject to any other valid objection, the certificate should have been admitted as evidence of that which it certified.**

**5. The prosecution never proved (or even sought to prove) that the corporation sole which is the Secretary of the Department of Sustainability and Environment incurred any of the charges, costs or expenses for which it sought compensation. Such evidence as there was before the Magistrate was to the effect that those charges, costs and expenses were incurred by the Department of Sustainability and Environment, an entity which has no legal personality and hence no capacity to contract on its own behalf or incur expenses. The certificates upon which the prosecutor relied did not purport to certify that the Secretary had incurred expense. Thus they availed the informant in each case nothing in his pursuit of a claim for compensation under s97 of the CFL Act. The affidavits of the authorised officers made no reference to the Secretary as being the entity which incurred the relevant debts. They referred to the Department as the debtor in each case. In the absence of evidence that the appropriate corporate entity was responsible for payment of the charges, costs and expenses claimed by the prosecutor pursuant to s97(1)(b) of the CFL Act, the Magistrate would have been bound to dismiss each of the applications as not having been proved. Accordingly, the applications before the Magistrate could never have lawfully succeeded on the evidence presented.**

**BONGIORNO J:**

1. These five cases are all appeals against decisions of the Magistrates' Court dismissing applications for compensation pursuant to s86 of the *Sentencing Act* 1991 and s97 of the *Conservation, Forests and Lands Act* 1987 (CFL Act). These sections create a statutory right to compensation, in certain circumstances, for charges, costs and expenses incurred by the Secretary of the Government Department which administers the CFL Act if those charges, costs or expenses are incurred because of the commission of offences against a number of different statutes (called "relevant laws") administered by that Department. The Secretary's right to compensation depends upon a finding of guilt against the person charged with a relevant offence and a particular consequent disposition by the Court.

2. Each of Hammerton, Page, Bird, Bayliss and Caulfield pleaded guilty before the Magistrates' Court to relevant offences arising out of various protest activities they engaged in between September 2005 and December 2007 in Victorian forests. Bayliss and Caulfield were fined without conviction; the other three were released on undertakings without conviction. In each case, following their being dealt with by the Magistrate, the prosecutor for the Department claimed compensation for expenses which it claimed to have incurred in removing the respondents from the forest locations in which they had committed the offences, including the costs of removing them from machinery to which they had chained various parts of their bodies.

3. As instituted, each of these appeals was brought in the name of the Department of Sustainability and Environment. But that Department was not a party to the prosecutions before the Magistrates' Court. Those prosecutions were brought, in accordance with the *Magistrates' Court Act* 1989, by authorised officers under s 83 of the CFL Act. Such officers have the authority to prosecute and to take proceedings on behalf of the Secretary or the Department by virtue of s96(1)(a) and (c) of that Act.

4. As only the parties to a proceeding in the Magistrates' Court have a right of appeal pursuant both to ss92 and 109 of the *Magistrates' Court Act* 1989, each of the notices of appeal was irregular in form. However, on the application of counsel for the appellant before the hearing of the appeals commenced, leave to amend the notice of appeal in each case was granted without objection by counsel for the respondents. Thus, they proceeded as appeals by the informants in each of the Magistrates' Court proceedings. The standing of those informants to bring the appeals is a necessary inference from the same statutory provision which permits them to bring an application on behalf of the Secretary of the Department.

5. The cases of Hammerton, Page, Bayliss and Bird were all heard on 4 July 2008 in that order. The case of Caulfield was heard on 21 July. A transcript was produced of each of the cases with the exception of Hammerton and part of the case of Page. However, with respect to the case of Hammerton, affidavits were filed by both the appellant and the respondent deposing to what the Magistrate said as she dismissed the appellant's claim. Counsel for Hammerton (and all the other respondents), Mr Mueller, submitted that the Court should accept, for the purposes of this appeal, that she did so on grounds clearly within the discretion committed to her by the relevant legislation. Mr Hanks QC, for the appellants, but faintly contested this submission and, in effect, conceded that if the Court accepted Mr Mueller's interpretation of the affidavit evidence then the appeal could not succeed against Mr Hammerton.

6. Hammerton pleaded guilty to two charges: one of carrying out an activity in a public safety zone in contravention of the *Safety on Public Land Act* 2004 and one of failing to comply with the direction given by an authorised officer contrary to the same Act. The Magistrate adjourned each of the charges for nine months upon an undertaking by Hammerton to be of good behaviour in the meantime. He was not convicted and an application for compensation was refused. He was ordered to pay costs and certain property was forfeited.

7. Although the Magistrate heard some argument as to legal deficiencies in the appellant's case against Hammerton, she did not rule on that argument, instead deciding the case in his favour on the discretionary basis that his means were such that he should not be required to pay compensation in the circumstances. Mr Hanks did not suggest that a finding to that effect did not justify a dismissal of the application. The Magistrate made no error of law in so dismissing it. Accordingly, the appeal in respect of Hammerton must be dismissed regardless of the outcome of each of the other appeals.

**The Right to Claim Compensation**

8. Section 97(1)(b) of the CFL Act in conjunction with s86 of the *Sentencing Act* confers a right on "the Secretary" to obtain an order for "compensation" against a person convicted or found guilty of an offence "under a relevant law". To qualify for an order for such compensation the Secretary must have "incurred charges, costs or expenses because of the commission of the offence".

9. Although the *Sentencing Act* designates the "offender" as the person against whom an order for compensation under that Act might be made, the CFL Act refers instead to "the person so convicted or released or made the subject of a community based order". This unfortunate disconformity means that to be liable to a compensation order, such as those sought in these cases, a person must not only be found guilty or convicted of a relevant offence but he or she must also satisfy one of the criteria required by the CFL Act; that is to say he or she must be a person "so convicted or released or made the subject of a community based order". Despite the presence of an errant "so", the meaning of the section is tolerably clear even if clumsily drafted. It defines the class of persons against whom an order may be made. It excludes all others.

10. The phrase in which the criteria are expressed in the CFL Act can be traced to s92 of the *Penalties and Sentences Act* 1985 (10260), the legislative predecessor of s86 of the *Sentencing Act*. That section referred not to "the offender", as does the *Sentencing Act*, but to a person who:

> (a) is convicted of an offence; or
>
> (b) without being convicted of an offence is ordered to be released upon entering into a recognisance conditioned for that person's appearance at a later time and for that person's good behaviour in the meantime; or
>
> (c) has a probation order made against that person ...

11. Whilst it is undoubtedly appropriate to construe the word "released" in s97(1)(b) of the CFL Act as applying to a person who is found guilty of a relevant offence and released without conviction pursuant to s 75 of the Sentencing Act (as were 3 of the respondents in these cases), none of the criteria in s97(1)(b) can be construed so as to confer upon the Secretary a right to compensation against a person who is found guilty of a relevant offence and fined pursuant to s49 of the *Sentencing Act* but not convicted. Caulfield and Bayliss were fined without conviction. Thus, in respect of these two respondents, the basis upon which a compensation order could have been made by the Magistrate never existed.

12. When this apparent problem for the appellants' cases against Bayliss and Caulfield was drawn to Mr Hanks' attention, he put an argument that sought to call in aid the words used in s86 of the *Sentencing Act* to attach liability to them. That argument cannot be accepted. The limited application of s97(1)(b) is clear. The appeals in respect of Bayliss and Caulfield cannot succeed for the simple reason that no order for compensation could ever have been lawfully made against them once the Magistrate chose the disposition she did in each of their cases. These appeals will be dismissed.

**Who or what is the Secretary?**

13. At all times relevant to these appeals, ss3 and 6 of the CFL Act, on their face, created the Department Head of the Department of Sustainability and Environment a body corporate under the name "Secretary to the Department of Natural Resources and Environment" (sic). That body corporate is referred to throughout the CFL Act as "the Secretary". It has perpetual succession and an official seal, the due affixation of which all courts must take judicial notice. It can sue and be sued, and own real and personal property.

14. This body corporate was originally created by the CFL Act when it was first enacted in 1987. At that time, its name was "Director General of Conservation, Forests and Lands". The Crown Lands Act (Amendment) Act 1993 (48/1993) altered the definition of "Department" in s3 of the CFL Act to "Department of Conservation and Natural Resources". It also changed the name of the body corporate in s6 of the CFL Act to "Secretary to the Department of Conservation and Natural Resources". A further amendment effected by the Public Sector Reform (Miscellaneous Amendments) Act 1998 (46/1998) altered the definition of "Department" to "Department of Natural Resources and Environment". It also changed the name of the body corporate in s6 to "Secretary to

the Department of Natural Resources and Environment". Finally, the Fisheries (Amendment) Act 2003 (56/2003) altered the definition of "Department" yet again to "Department of Sustainability and Environment". However it did not change the name of the body corporate created by s6. It remained in the statute as "Secretary to the Department of Natural Resources and Environment".

15. After argument on these appeals had concluded, the Court drew the parties' attention to these legislative provisions and the fact that the Secretary referred to in those sections of the CFL Act which related to compensation orders appeared to be a body whose title was "Secretary to the Department of Natural Resources and Environment". They were invited to make any further submissions they wished in light of this history and in light of the fact that the only reference to the Secretary which appears to have been made in the course of any of the Magistrates' Court proceedings was to the Secretary of the Department of Sustainability and Environment, and even that reference had been made only in passing. The proceedings appear to have been conducted in that Court as if the applicant for compensation was the Department of Sustainability and Environment—a body devoid of legal personality which, unlike the Secretary, has no capacity to sue or be sued, and is not the party upon whom the right to compensation is conferred by the CFL Act.[1]

16. Mr Mueller declined the Court's invitation to address these issues. However, Mr Hanks provided a memorandum which directed the Court's attention to the Administrative Arrangements Act 1983 (AA Act) and presented an argument to the effect that that Act together with Orders-in-Council made pursuant to s3 of that Act on 23 December 2002 had the effect of changing the name of the body corporate created by s6 of the CFL Act to "Secretary to the Department of Sustainability and Environment". He also provided to the Court a copy of Victoria Government Gazette (Special) No. S246 published on Tuesday, 24 December 2002 which contained Administrative Arrangements Order (No. 183) 2002.

17. The AA Act provides for the issuing of Orders-in-Council which can have the effect of requiring a reference in an Act (and various other documents) to a Minister, Department or officer by a description specified in the Order to be construed as a reference to a Minister, Department or officer described in the Order. In his written memorandum in response to the Court's original query as to the curious name of the body corporate in s6 of CFL Act, Mr Hanks submitted that the Order-in-Council of 24 December 2002 was effective to change the name of that body corporate to "Secretary to the Department of Sustainability and Environment" because it changed the name of the "Body" formerly called "Secretary to the Department of Natural Resources and Environment" to "Secretary of the Department of Sustainability and Environment".

18. Whilst it is true that the Order-in-Council of 24 December 2002 effected the name change contended for by Mr Hanks, it did so only if the person bearing the description before and after the change was an "officer". Whilst "officer" is not defined in the Order-in-Council itself, it is defined in the AA Act—the Act under which the Order-in-Council was created. Thus, s23 of the *Interpretation of Legislation Act* 1984 applies so as to require the term to be given the same meaning in the subordinate instrument as it has in the Act pursuant to which it is created. In the AA Act the term "officer" has two distinct meanings:

> (a) an employee under Part 3 of the *Public Sector Management and Employment Act* 1998 or of a declared authority within the meaning of that Act; or
> (b) in relation to a declared authority within the meaning of that Act, a person or body specified in an order under s 47(2)(b) of that Act to have the functions of an Agency Head within the meaning of that Act.

19. Mr Hanks submitted that that definition, in terms, included the Secretary. That is to say, it included the body corporate created by s6 of the CFL Act. His memorandum did not identify which part of the above definition was said to be relevant but, as there appears to be no reference relative to a declared authority relevant to this case, the submission must contemplate that the body corporate created under s6 is an employee under Part 3 of the *Public Sector Management and Employment Act* 1998 (now replaced by the *Public Administration Act* 2004). Although the provisions of that Part apply to an Agency Head which, by definition, includes the person who is the Department Head, the term "employee" is inapt to include the body corporate or corporation sole created by s6 of the CFL Act. Such a corporation cannot, in its corporate manifestation, take on any of the ordinary incidents of employment.

20. A corporation sole is a body politic having perpetual succession, constituted in a single person, who, in right of some office or function, and subject to the statute creating it, has the legal personality of corporation. It consists of the office holder and his successors in perpetuity, even if, from time to time, the office to which it relates is vacant.[2]

21. The body corporate created by s6 of the CFL Act has a number of stated attributes and powers. Nothing in those attributes or powers would suggest that that corporation could, in any sense, be an employee, even if the person who is, for the time being, the Department Head (and hence an Agency Head within the meaning of Part 3 of the Public Sector Management and Employment Act 1998), is such an employee.

22. In *Hubbard Association of Scientologists International v The A-G*[3] the Full Court of this Court considered the question of whether the Attorney-General was, *eo nomine*, a corporation sole. In the course of that examination Gowans J (with whom Menhennitt and Dunn JJ agreed) enunciated the characteristics of a corporation sole in terms particularly apposite to the current problem. He quoted from *Salmond on Jurisprudence*[4]:

> In the case of corporations sole, the purely legal nature of their personality is equally apparent. The chief difficulty in apprehending the true nature of a corporation of this description is that it bears the same name as the natural person who is its sole member for the time being, and who represents it and acts for it. Each of them is the Sovereign, or the Solicitor to the Treasury, or the Secretary of State for War. Nevertheless under each of these names two persons live. One is a human being, administering for the time being the duties and affairs of the office. He alone is visible to the eyes of laymen. The other is a mythical being whom only lawyers know of, and whom only the eye of the law can perceive. He is the true occupant of the office; he never dies or retires; the other, the person of flesh and blood, is merely his agent and representative, through whom he performs his functions. The living official comes and goes, but this offspring of the law remains the same for ever.

23. The corporation sole created by s6 of the CFL Act cannot be an employee pursuant to Part 3 of the *Public Sector Management and Employment Act* 1998. Hence, Mr Hanks' argument that the Order-in-Council of 24 December 2002 was, alone, sufficient to change the name of the body corporate created by s6 of the CFL Act must be rejected.

24. However, the matter did not rest there. After Mr Hanks' memorandum was considered by the Court, further matters were raised which resulted in a second Order-in-Council being produced by Mr Hanks. That Order-in-Council, promulgated pursuant to s10 of the *Public Sector Management and Employment Act* 1998 (46/1998) on 5 December 2002, had changed the name of the Department of Natural Resources and Environment before the Order of 24 December effected the changes it purported to make.

25. Moreover, the AA Act specifically contemplates the situation created by the Order-in-Council of 5 December 2002. It provides that, where the name of a Department is changed by an Order-in-Council under s 10 of the *Public Sector Management and Employment Act* 1998, and the Department Head is a corporation sole the name of which includes the name of the Department, that corporation's name is similarly changed.[5] Thus the Order-in-Council of 5 December 2002 was sufficient of itself to change the name of the body corporate created by s6 of the CFL Act to "Secretary of the Department of Sustainability and Environment". Although Mr Hanks did not refer to it, s38AAA of the *Interpretation of Legislation Act* 1984 may be relevant to the same question.[6]

26. The effect of the above is that, as at the date the respondents in these cases were prosecuted, the "Secretary" was the corporate entity known as "Secretary of the Department of Sustainability and Environment". This affects the consideration by this Court of the Magistrate's decisions in those two cases where an appeal remains viable.

**The Magistrate's decisions**

27. These cases were heard over two days in July 2008. The first, Hammerton, was heard on the morning of 4 July 2008. The cases of Page, Bayliss and Bird were heard after Hammerton, commencing on the morning of 4 July and concluding in the afternoon. In the course of the hearing of Hammerton's case an argument was raised concerning s88(2) of the CFL Act and a certificate issued under that section which was tendered by the prosecutor to the Magistrate, purportedly to prove the quantum of the claim for compensation. It is common ground that the

Magistrate did not further consider or rule upon the arguments concerning s88 of the CFL Act in the course of Hammerton's case, but did so in the succeeding case, that of Page who pleaded guilty to two charges laid under the *Forests Act* 1958; one of failing to comply with the lawful request of an officer and one of obstructing an authorised officer in the exercise of his duty. Two other charges were withdrawn. The magistrate released Page pursuant to s75 of the *Sentencing Act* and adjourned the further hearing of both charges for 12 months upon an undertaking by the defendant to be of good behaviour in the meantime.

28. In the course of the hearing of the prosecution, the prosecutor read, without objection, a summary of facts which applied to the offences alleged against Page and also those alleged against Bayliss. On the application for compensation, she tendered a certificate purportedly issued pursuant to s88(2) of the CFL Act, an affidavit of one Garry Graham Dash sworn 25 October 2005, and a tax invoice from Australasian Jet dated 27 September 2005 for $5,335.00. She sought an order for $1,333.75 against Page, being a quarter of the total amount of the invoice. No objection was taken by the Solicitor for the defendant to the tender of these documents. Nor, it would appear, was any argument presented to the Court concerning their admissibility either on the ground of relevance or otherwise to the issue of compensation. That they did not refer to the only entity capable of making a claim for compensation seems to have escaped everyone's attention.

29. Such transcript as is available of the hearing of the Page case contains a ruling by the Magistrate concerning the application for compensation and, in particular, the proof of the quantum of that compensation by the production of a certificate issued pursuant to s88 of the CFL Act. As I understand Her Honour's ruling, it was that, as the prosecutor relied upon such a certificate and such certificate had not been served in accordance with s88(4) of the CFL Act, the application for compensation failed. Thus, the Magistrate dismissed the application without appearing to consider any of the other evidence tendered by the prosecutor in support of the compensation application—either as to its admissibility or its evidentiary value.

30. Section 97 of the CFL Act applies s86 of the *Sentencing Act* 1991 to claims for compensation by the Secretary. Section 86 confines the Court to a consideration of specific evidence in deciding such an application. Sub-sections (7), (8) and (9) of s86 are in the following terms:

> (7) On an application under this section –
> (a) a finding of any fact made by a court in a proceeding for the offence is evidence and, in the absence of evidence to the contrary, proof of that fact; and
> (b) the finding may be proved by production of a document under the seal of the court from which the finding appears.
>
> (8) A court must not exercise the powers conferred by this section unless in the opinion of the court the relevant facts sufficiently appear from evidence given at the hearing of the charge or from the available documents, together with admissions made by or on behalf of any person in connection with the proposed exercise of the powers.
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> (9) In sub-s (8) ***the available documents*** means:-
> (a) any written statements or admissions which were made for use, and would have been admissible, as evidence on the hearing of the charge; or
> (b) the depositions taken at the committal proceeding; or
> (c) any written statements or admissions used as evidence in the committal proceeding; or
> (d) any victim impact statement made to the court for the purpose of assisting it in determining sentence.

31. In dealing with an application pursuant to s97 of the CFL Act the Court may also have regard to a statement in a certificate provided for by s97(3)(b) of that Act. Such a certificate may provide evidence of the amount of charges, costs or expenses incurred. It is similar, but not identical, to the certificate provided for by s88(2) of the Act—the certificate relied upon in this case by the prosecutor. Having regard to the restrictions imposed on the material which the Court can take into account in making an order for compensation imposed by s86(8) of the *Sentencing Act* as applied by s97(1), (2) and (3) of the CFL Act, the effect of a certificate purportedly issued by the Secretary under s88 can be no more than it would have if it had been specifically issued under s97(3). That is to say, statements in such a certificate are merely evidence of the facts asserted, not necessarily proof of those facts.

32. Section 88 of the CFL Act is a facultative provision, of which there are many examples in the statute book. It provides a convenient method of placing evidence before a court. Often, such evidence might reasonably be expected not to be contested. However, statutes generally provide some method for challenging the facts stated. An example is the method provided by s88(3) of this Act.

33. Section 88 contemplates that such certificates will be used in "proceedings under a relevant law", that is to say in proceedings under the Act itself, its regulations, some 20 statutes specified in Schedule 1 to the Act, and regulations under those statutes. Thus, the CFL Act provides a wide spectrum of operation for certificates of the Secretary provided under s88. As the provision is facultative, there is no compulsion on its being used in any particular proceeding. Certainly there is no compulsion that such a certificate be used in pursuit of the claim for compensation by the Secretary pursuant to s97 of the Act—particularly as that section provides its own method of proof, though it too is facultative and in no sense an essential part of the procedure.

34. Section 86(5)(a) of the *Sentencing Act* 1991 contemplates that an application for compensation under that section and, hence, under s97 of the CFL Act, will be made "as soon as practicable after the offender is found guilty or convicted or the (relevant) offence". In conformity with this section, an application for compensation is normally made, orally, after the offender has pleaded guilty or been found guilty after a contested trial. It follows that the procedure prescribed by s88 of the CFL Act cannot be used, in the ordinary case, upon such an application. Section 88(4) requires the certificate to be served with the application. Further, as the Magistrate acknowledged in her ruling, the person served with such a certificate is provided, by s88(3), with a process for contesting the facts stated in it. The time limit imposed by that process means, again, that the procedure is inapposite for use on a compensation application. However, s97(3)(b) imposes no such restrictions on the use of a certificate for the purposes of that section. That section does not require the service of such a certificate at all. It can be produced by the applicant for compensation and tendered to the Court upon the hearing of the application. Of course, should such evidence be produced in that way the Court before which the application is heard would be obliged to consider whether its production in that way and at that time caused prejudice to the party against whom the application is being made. If so, the Court has ample procedural remedies available to it to ensure that such prejudice is eliminated. The most obvious remedy for such late notice would be an adjournment with or without costs, depending upon the circumstances. A prudent prosecutor would ordinarily have provided the person against whom an application for compensation was going to be made with a copy of the certificate, and probably his or her other proofs, in sufficient time to enable proper consideration to be given to them. Doing so may, again depending on the circumstances, avoid the necessity for an adjournment. Such a course may result in admissions being made which would expedite the compensation proceedings, thus eliminating the expense of an adjournment and other inconvenience.

35. It follows from the above that if the Secretary's certificate was otherwise unimpeachable the Magistrate was in error in dismissing the prosecutor's application for compensation merely because the certificate was not served in accordance with s88(4) of the CFL Act. If it was a valid certificate, it was a valid certificate for the purposes of s97(3)(b) of the Act and should have been treated as such. That it purported to be issued under s 88 cannot be definitive of its status. If it in fact complied with s97(3)(b) then it could be used for the purpose contemplated by that section, that is to say, proof of the matters certified: *Brown v West*[7]. A mistake as to the source of the power to issue a certificate does not invalidate the certificate.

36. The Magistrate was in error in considering herself bound to dismiss the application for compensation against Page and Bird because there had been no compliance by the informant with s88(4) of the CFL Act. Section 97(3)(b) requires no such compliance and, as that is the provision which governs the use of certificates in compensation applications, subject to any other valid objection, the certificate should have been admitted as evidence of that which it certified.

37. That the Magistrate was in error, however, does not necessarily determine the outcome of this appeal. If it is the case that, even if the Magistrate had not been in error, the application for compensation could not have succeeded, this Court must dismiss these appeals. If the certificates are incompetent for a reason other than that given by the Magistrate, it must do so for the same reason it will dismiss the appeals in the cases of Bayliss and Caulfield: the application against them could never have succeeded as a matter of law.

38. An examination of the evidence (including the certificates tendered) in the cases of Page and Bird reveals that the prosecution never proved (or even sought to prove) that the corporation sole which is the Secretary of the Department of Sustainability and Environment incurred any of the charges, costs or expenses for which it sought compensation. Such evidence as there was before the Magistrate was to the effect that those charges, costs and expenses were incurred by the Department of Sustainability and Environment, an entity which, as has already been observed, has no legal personality and hence no capacity to contract on its own behalf or incur expenses. The certificates upon which the prosecutor relied do not purport to certify that the Secretary had incurred expense. They did not mention the Secretary other than as a witness to the affixation of a seal. Thus they availed the informant in each case nothing in his pursuit of a claim for compensation under s97 of the CFL Act. The affidavits of the authorised officers, in both the Page case and the Bird case, if they were admissible at all on a claim under s97(1)(b) of the CFL Act (of which there must be some doubt, having regard to ss86(8) and (9) of the *Sentencing Act*), make no reference to the Secretary as being the entity which incurred the relevant debts. They refer to the Department as the debtor in each case, as also do the invoices of Australasian Jet. Further, the Order-in-Council of 5 December 2002 was never in evidence before the Magistrate so as to prove the correct name of the only entity which could claim compensation.

39. In the absence of evidence in the Magistrates' Court that the appropriate corporate entity was responsible for payment of the charges, costs and expense claimed by the prosecutor pursuant to s97(1)(b) of the CFL Act, the Magistrate would have been bound to dismiss each of the applications as not having been proved.

40. In the circumstances, none of the grounds of appeal advanced by the informants in any of these appeals can succeed: the applications before the Magistrate could never have lawfully succeeded on the evidence presented.

41. The order of the Court is that each of these appeals be dismissed with costs.

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[1] *Ex-Christmas Islanders Association Inc. v Attorney-General* [2005] FCA 1867 at [45]; 149 FCR 170 per French J.
[2] *Halsbury's Laws of England*, 4th ed. (2006 re-issue), Vol 9(2), para 1111.
[3] [1976] VicRp 10; [1976] VR 119.
[4] *Salmond on Jurisprudence*, 12th ed., p 68.
[5] ss2(1) and 7, *AA Act*
[6] Its relevance would depend upon whether the reference to the name of the Department in the name of the body corporate created by s6 of the *CFL Act* is a "reference in an Act or subordinate instrument to a particular Department". It is unnecessary to decide that question.
[7] [1990] HCA 7; (1990) 169 CLR 195 at 203-4; 91 ALR 197; (1990) 64 ALJR 204.

**APPEARANCES:** For the appellants Breguet & Ors: Mr P Hanks QC, counsel. Solicitor for the Department of Sustainability and Environment. For the respondents Hammerton & Ors: Mr K Mueller, counsel. Bleyer Lawyers.

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