



Summary of Judgment

MERINGNAGE v INTERSTATE ENTERPRISES PTY LTD & ORS

[2020] VSCA 30

25 February 2020

Today, the Court of Appeal (Tate, Niall and Emerton JJA) published reasons answering three questions of law referred to the Court by the Victorian Civil and Administrative Tribunal ('VCAT') pursuant to s 96 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) about whether VCAT is a 'court of a State' within the meaning of Ch III of the *Commonwealth Constitution* and the nature of the power sought to be exercised in a proceeding before VCAT where the Commonwealth of Australia ('the Commonwealth') is a party.

The questions referred arise out of an application brought by Mr Meringnage ('Meringnage') in VCAT alleging that he has been discriminated against on the ground of his race and nationality by Interstate Enterprises Pty Ltd ('Interstate'), a recruitment agency, on behalf of RUAG Australia Pty Ltd ('RUAG'), a company involved in the aerospace and defence industry that provides product and services to the Australian Defence Force. Meringnage had applied for a position as a 'trade assistant - metal components' with RUAG, but had been told he did not satisfy the security requirements set out in the International Traffic in Arms Regulations ('ITAR') because he is Sri Lankan, and Sri Lanka is an ITAR 'proscribed country', with the result that its nationals are prohibited from accessing ITAR controlled information, articles, and services in relation to international traffic in arms. Meringnage seeks orders against Interstate, RUAG and the Commonwealth under s 125 of the *Equal Opportunity Act 2010* (Vic).

The Court of Appeal has held that VCAT is not a 'court of a State' within the meaning of Ch III of the *Commonwealth Constitution* and so not capable of exercising judicial power in a matter in which the Commonwealth is a party. The Court found that an aggregation of many of the features of VCAT, most significantly the lack of security of tenure for the overwhelming proportion of its members and reappointment dependent on executive discretion, indicated VCAT is not a State court. The Court further held that in making orders under s 125 of the *Equal Opportunity Act*, VCAT would be exercising judicial power. Given these findings, the Court held that VCAT does not have authority to decide the application brought by Meringnage in respect of the Commonwealth because the presence of the Commonwealth demands the exercise of federal judicial power, rendering the dispute a 'matter' within the meaning of s 75(iii) of the *Commonwealth Constitution*. In reaching this conclusion, the Court rejected an argument that the choice by the Victorian Parliament of VCAT as the forum to enforce rights under s 125 of the *Equal Opportunity Act* thereby means that any such dispute is not a 'matter' requiring the exercise of federal judicial power.

NOTE: This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.