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Relying on fishy advice: The Ostrowski decision

Abstract
On 16 June 2004, the High Court of Australia decided in Ostrowski v Palmer [2004] HCA 30 that the defence of honest and reasonable mistake of fact cannot be used on the basis that a commission of a strict liability offence was induced by the provision of misleading advice from a government agency. In the case the High Court reinstated a conviction against a Western Australian rock lobster fisherman for fishing in a marine life protection zone despite the fact that the fisherman, Mr Jeffrey Palmer, had gone to the WA Fisheries Department to find out where he could fish, and had received and acted on misleading advice from the Department. All five justices who heard the case felt compelled to uphold the principle that ignorance of the law is no excuse despite the obvious harshness of the result for Mr Palmer. The decision is instructive for its clarification of the operation of the honest and reasonable mistake defence enshrined in all Australian jurisdictions, the conduct of prosecutions where harsh penalties will be imposed on people who honestly and reasonably believe they are acting within the law, and the responsibility government departments have to provide accurate information to the public on the laws they administer.

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Editorial commentary

RELYING ON FISHY ADVICE: THE OSTROWSKI DECISION

Introduction

On 16 June 2004, the High Court of Australia decided in *Ostrowski v Palmer* [2004] HCA 30 that the defence of honest and reasonable mistake of fact cannot be used on the basis that a commission of a strict liability offence was induced by the provision of misleading advice from a government agency. In the case the High Court reinstated a conviction against a Western Australian rock lobster fisherman for fishing in a marine life protection zone despite the fact that the fisherman, Mr Jeffrey Palmer, had gone to the WA Fisheries Department to find out where he could fish, and had received and acted on misleading advice from the Department. All five justices who heard the case felt compelled to uphold the principle that ignorance of the law is no excuse despite the obvious harshness of the result for Mr Palmer. The decision is instructive for its clarification of the operation of the honest and reasonable mistake defence enshrined in all Australian jurisdictions, the conduct of prosecutions where harsh penalties will be imposed on people who honestly and reasonably believe they are acting within the law, and the responsibility government departments have to provide accurate information to the public on the laws they administer.

The facts

On 11 November 1998, Mr Palmer, a commercial fisherman of 25 years experience, went to the Fremantle office of Fisheries WA to inform himself of the permissible fishing areas in zone B of the western rock lobster fishery. He was told that the current regulations were unavailable but would be available if he returned in a couple of days. On 13 November 1998, he returned to the office and was advised by an office worker at the public counter that they still did not have the regulations but she could photocopy their office copy for him. It was accepted by the prosecution that the inference was that the photocopy version would be a complete set of the regulations covering the area. Mr Palmer was given a bunch of material including the Fish Management Plan[1] and a pamphlet relating to recreational rock lobster fishing. It was also accepted by the prosecution that the office worker should have been aware that Mr Palmer was a commercial fisherman because he had ordered a commercial research logbook at the same time. Unfortunately for Mr Palmer, what was missing in the material given to him was reg 34, or any reference to it. Regulation 34 of the Fish Resources Management Regulations (WA) made under the *Fish Resources Management Act 1994* (WA)[2] provides that it is an offence for a commercial fisher to fish for rock lobster in a specified area around Quobba Point, near Carnarvon. The penalty for the offence is $5,000 with an additional mandatory penalty of 10 times the value of any fish the subject of the offence.[3]

In February 1999, Mr Palmer laid 54 lobster pots in the restricted area. He saw fisheries officers checking his pots but they did not act to stop him fishing until they pulled his pots a couple of days later. Mr Palmer, quite obviously, had not concealed his fishing activities as he believed he was fishing lawfully at that spot pursuant to his commercial licence and in reliance on the information given to him by the WA Fisheries Department which did not reveal that rock lobster fishing was prohibited at that location. He had even scrupulously avoided fishing in the one (separate) area closure described in the pamphlet. He was subsequently charged for breaching reg 34.

The Magistrate's decision

Mr Palmer was convicted at Carnarvon Magistrates Court, even though the magistrate accepted that he had "acted entirely honestly and … reasonably throughout".[4] The magistrate found that the defence of honest and reasonable mistake set out in s 24 of the *Criminal Code* (WA) was

[1] West Coast Rock Lobster Limited Entry Fishery Notice 1993.

[2] *Fish Resources Management Act 1994* (WA), ss 256, 257(1)(a) and (b).

[3] *Fish Resources Management Act 1994* (WA), s 222.

[4] *Ostrowski v Palmer* [2004] HCA 30 at [71].

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unavailable because the defence relates only to mistakes of fact, not to mistakes of law. Here, Mr Palmer mistakenly believed that his activities were lawful. This was a mistake of law. The magistrate ordered Mr Palmer to pay a fine of $500 and imposed the mandatory penalty of $27,600 (ten times the value of the lobster seized) and costs of $2,000.

The Appeal to the Full Court of the Supreme Court of Western Australia

Mr Palmer successfully appealed the Magistrate's decision in the Full Court of the Supreme Court of Western Australia.[5] In a split decision, two Justices (Malcolm CJ and Olsson AUJ) held that the s 24 defence of honest and reasonable mistake was available to Mr Palmer because his mistake as to the existence of the law could not be disassociated from the "fact" that the fisheries department had provided him with misleading information on which he subsequently relied.[6] As such, he honestly and reasonably operated under a mistake of fact (that he had all relevant information) which led him to having a mistaken view about what the law was. Steylter J dissented, characterising the mistake as one regarding the law only.

The Appeal to the High Court of Australia

The Crown was granted special leave to appeal the Supreme Court's decision to the High Court of Australia. It was concerned that the majority judgment of the Supreme Court had misconstrued a core provision of the *Criminal Code* and had set a legal precedent that would allow people who had relied on misleading or incorrect information from a government agency to have an excuse for breaking the law. As such, the need to clarify that the honest and reasonable mistake defence could only apply strictly to mistakes of fact was, according to the Crown, "greater than the separate injustice" to Mr Palmer that would result in a ruling upholding the conviction.[7] The High Court was reluctant to grant leave to appeal and only did so on the condition that the Crown pay Mr Palmer's costs irrespective of the final determination of the matter.[8]

The case turned on the correct application to the facts of ss 22 and 24 of the *Criminal Code* (WA). Section 22 of the Code enshrines the principle that ignorance of the law is no excuse:

> **Ignorance of law: *Bona fide* claim of right**
>
> **22.** Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by an offender is expressly declared to be an element of the offence.

Section 24 codifies the common law defence of honest and reasonable mistake of fact:

> **Mistake of fact**
>
> **24.** A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
>
> The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

The Court considered the scope of the s 24 defence and found that it relates only to mistakes about the conduct of the elements of the offence. It is not enlarged by the curious wording in the section of "state of things" to encompass mistakes about the existence of the law creating the offence,[9] because this would nullify s 22.[10] The offence had three elements: (1) being the

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[5] *Palmer v Ostrowski* [2002] WASCA 39.

[6] *Palmer v Ostrowski* [2002] WASCA 39 at [77].

[7] High Court of Australia, *Ostrowski v Palmer*, transcript of application for special leave to appeal, 9 May 2003, No P25 of 2002, p 2.

[8] High Court of Australia, *Ostrowski v Palmer*, transcript of application for special leave to appeal, 9 May 2003, No P25 of 2002, p 7.

[9] *Ostrowski v Palmer* [2004] HCA 30 at [10]. Note that with regard to the potential incongruity of the heading ("mistake of fact") and the section (mistaken belief in the existence of "any state of things"), s 32(2) of the *Interpretation Act 1984* (WA) provides that section headings are not to be taken to be part of the written law.

[10] *Ostrowski v Palmer* [2004] HCA 30 at [29] and [32].

holder of a commercial fishing licence, (2) fishing for rock lobster, and (3) doing so in the restricted area. Mr Palmer was not mistaken about any of these elements. He knew he held a commercial fishing licence, he knew he was fishing for lobster, and he knew precisely where he was fishing. Unfortunately, he mistakenly believed that fishing for rock lobster under a commercial licence at that location was lawful. He operated under a mistake of law which provided no defence due to the rule in s 22 that ignorance of the law is no excuse. It was beside the point that Mr Palmer was "induced to fish in forbidden waters by the provision to him of inaccurate or incomplete materials"[11] by an official at the responsible government department – that did not change his mistake from one of law to one of fact. There was no compounding of the earlier mistaken factual belief that he had been given a complete set of regulations with the subsequent mistaken belief about the existence of the law creating the offence.[12] The Court therefore allowed the appeal and reinstated the conviction against Mr Palmer. The only good news for Mr Palmer was that at the end of its case before the High Court the Crown agreed to reimburse him for the penalty and fines, thus indicating that the prosecution itself finally believed that it should have exercised its discretion not to prosecute in the first place.

Despite winning the appeal, the Crown received scathing criticism from the High Court for its handling of the matter. Callinan and Heydon JJ thought it was extraordinary that the Crown pressed for prosecution in light of Mr Palmer's reliance on inaccurate governmental advice and knowing that a harsh mandatory penalty would be imposed. It appeared to be "an act of mindless oppression".[13] They stated that it was:

> impossible not to sympathise with the respondent. On any fair and objective view he was not culpable in any way. To the contrary – he was most diligent. He went to the office of the administering authority twice in order to ascertain what his obligations were. Entirely openly and strictly in accordance with his licence he sought to comply with his understanding of what he could do based on official information personally provided by officials.[14]

However, they found it necessary to allow the appeal because:

> [a] mockery would be made of the criminal law if accused persons could rely on, eg, erroneous legal advice, or their own often self-serving understanding of the law as an excuse for breaking it.[15]

The other Justices likewise felt compelled to allow the appeal so as not to undermine the principle that ignorance of the law is no excuse.

It is to be noted that at the appeal stage in the Supreme Court of Western Australia, Mr Palmer sought to rely on an alternative defence. Canadian cases were cited in support of the proposition that there could be a defence of "officially induced error".[16] However, the Supreme Court decided (with the High Court subsequently agreeing) that the defence could not be considered because it had not been raised at first instance in the Magistrates Court.[17] The prosecution had accepted the facts as found by the Magistrate but might have presented its case differently if it were aware that this novel defence would be raised at a later stage. It would have been unfair to the prosecution to allow consideration of the defence at the appeal stage. Even though this defence could be raised in future litigation where similar facts are presented, there would be difficulties in allowing it in light of the interpretative practices adopted for states with *Criminal Codes* and for it to extend to exculpate an accused mistaken solely in relation to a matter of law.[18]

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[11] *Ostrowski v Palmer* [2004] HCA 30 at [61].

[12] In cases where there is a mistaken belief about a matter which involves mixed questions of facts and law, the mistake would generally be characterised as one of fact: *Thomas v The King* (1937) 59 CLR 279 per Dixon J at 306. Cf *Strathfield Municipal Council v Elvy* (1992) 25 NSWLR 745 per Gleeson CJ at 751.

[13] *Ostrowski v Palmer* [2004] HCA 30 at [70].

[14] *Ostrowski v Palmer* [2004] HCA 30 at [84].

[15] *Ostrowski v Palmer* [2004] HCA 30 at [85].

[16] *R v Jorgensen* [1995] 4 SCR 55 per Lamer CJ.

[17] *Palmer v Ostrowski* [2002] WASCA 39 at [97].

[18] See *Palmer v Ostrowski* [2002] WASCA 39 per Olsson AUJ at [92-94].

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Consequences of the High Court's decision

The *Ostrowski case* shows that the increasingly common combination in environmental law of strict liability offences and severe mandatory penalties can be harsh and unfair where there is an honest accused. The Court was required to impose the mandatory penalty once the commission of the elements of the offence had been established. It could not take into account mitigating factors such as Mr Palmer's reliance on inaccurate government advice to reduce the penalty.

The decision confirms that people must fully inform themselves of the laws that regulate their activities. It is in this sense that the *Ostrowski case* is important because in today's highly regulated society there can be "an enormous variety of circumstances" in which people can misunderstand their legal obligations or be unaware of them.[19] In the fisheries context, there is a complex and evolving array of legislation, regulations and license conditions. Even though nothing more can reasonably be expected of fishers than to go to the relevant fisheries department and ask what specific laws apply to them in the area in which they intend to fish, there are no grounds to escape liability for a strict liability offence inadvertently committed in reliance on misleading advice from any source – including senior government officials and barristers.

The corollary of the rule that ignorance of the law is no excuse is that the law should be readily accessible.[20] It is now more necessary than ever for fisheries departments to provide fishers with accurate, up to date and sufficient detail about the laws that regulate their conduct. This needs to occur throughout a department's public relations operations – in its notices to licensed fishers, on its website and at its front office. It is also necessary for prosecutors to give serious consideration to exercising their discretion not to prosecute (or to discontinue a commenced prosecution) where the facts establish the existence of a blameless accused.

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[19] High Court of Australia, *Ostrowski v Palmer*, transcript of proceedings, 20 October 2003, No P35 of 2003, 1394.

[20] *Ostrowski v Palmer* [2004] HCA 30 at [2] per Gleeson CJ and Kirby J citing *Blackpool Corporation v Locker* [1948] 1 KB 349 per Scott LJ at 361.

FEDERAL ISSUES: THE GREENTREE CASE

The decision of Sackville J in *Minister for the Environment & Heritage v Greentree (No 2)* [2004] FCA 741 (11 June 2004) represents a milestone for federal environmental law in Australia. While the federal government won the constitutional power to directly regulate land management issues in the States in the 1983 Tasmanian dam dispute, this is the first court case where it has used its constitutional powers to directly regulate private land management in a State.[1] The case is significant in terms of the operation of the central piece of federal environmental legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), particularly regarding the application of the existing lawful use provisions in ss 43A and 43B. The case is also remarkable politically because the federal environment Minister acted despite the traditional and quite deeply ingrained reluctance in Australian governments to enforce environmental laws against farmers.

In *Greentree* the federal environment Minister sought an injunction, pecuniary penalty and remediation order under s 475 of the EPBC Act against wheat farmers who had cleared part of the Gwydir Ramsar wetland in northern NSW, on a property known as "Windella", and then ploughed and sown a wheat crop in the wetland. The court had earlier granted an interim injunction in the case restraining the respondent wheat farmers from cultivating the land.[2] The area in question was located on private land owned by the respondent farmers in freehold (the previous owner had voluntarily agreed to the land being included in the listing of the Ramsar wetland in 1999 and the respondents had purchased the land in 2002 knowing of the listing).

After rejecting legal arguments made by the farmers that the listing of the Ramsar wetland in question was invalid and that the clearing, ploughing and cultivation of wheat were existing lawful uses, Sackville J considered the impacts of the farmers' actions and concluded at [199] that:

> Once it is accepted that the Windella Ramsar site retained attributes as a wetland immediately before the actions … took place, the conclusion seems to me inevitable that those activities had a significant impact on the ecological character of the site. The simple fact is that the entire site, other than a narrow strip … was cleared and ploughed and later sown with wheat. In essence … the site has been "sterilised". Perhaps the sterilisation was not complete since … even in its cleared state an inundation of the site would allow a range of native wetland plants to re-establish themselves over time, at least if they did not have to compete with crops. But by the time the interlocutory injunction was granted, the Windella Ramsar site was not recognisable as an area of wetland with native vegetation and fauna.

Sackville J allowed the parties to make further submissions on the final terms of the orders and the level of pecuniary penalty that will be imposed. No appeal had been lodged at the time of writing.

This case is the second civil action by the Minister under the EPBC Act. In *Minister for the Environment & Heritage v Wilson* [2004] FCA 4 (16 January 2004), a pecuniary penalty of $12,000 was awarded against a shark fisherman who set a net in the Great Australian Bight Marine Park (a Commonwealth reserve) in contravention of s 354(1) of the EPBC Act.

Chris McGrath
Barrister

[1] Of course, the federal government has used indirect means such as fiscal powers and export licences to regulate land management issues within the States for decades (see, eg, *Murphyores Inc Pty Ltd v Cth* (1976) 136 CLR 1) and regulation of offshore fisheries and marine protected areas by the federal government is common (see, eg, *Olbers v Cth (No 4)* [2004] FCA 229).

[2] See McGrath C, "Casenote: Minister for the Environment & Heritage v Greentree [2003] FCA 857" (2003) 20 EPLJ 476.

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