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The Perils of Pauline

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Whether or not you share her political views, it has to be admitted that Pauline Hanson has a habit of demanding your attention. This time, in association with a co-founder of her One Nation Party, David Ettridge, she succeeded in becoming Queensland's Most Famous Prisoner (no mean feat when it is considered that among the others on the guest list at the time was the State's former Chief Stipendiary Magistrate, Di Fingleton).

Then, for an encore, she lodged an appeal which set the President of the Queensland Court of Appeal into verbal collision mode with NSW State Premier Bob Carr and Prime Minister John Howard, and drew withering comments from the Chief Justice of Queensland regarding the quality of the legal input during the trial itself. Not even the trial judge emerged unscathed from his criticism.

So what was it all about?

The background

Hanson and Ettridge were jointly charged with fraudulently obtaining the registration of "Pauline Hanson's One Nation" as a political party in Queensland in December 1997. Hanson was further charged with two counts of fraudulently obtaining almost half a million dollars in September 1998 as the result of her party's success in the Queensland State Election earlier that year.

Both charges hung on the assertion that the list of 500 names supplied by them both to the Queensland Electoral Commissioner was bogus, in that the persons named were not members of "the Party" (as we may conveniently refer to "Pauline Hanson's One Nation") who were also Queensland electors. It was never queried that these person were electors – the allegation was that they were not members of the Party. Considering that Hanson and Ettridge themselves were both on record as having insisted that they were not (whether they believed that or not), it seemed like an open and shut case. Unless, of course, you know the first thing about the law of contract.

The Party was formed by Hanson, Ettridge and the equally famous David Oldfield in February, 1997. It was an unincorporated registered association which became a registered federal political party in June, 1997, and a registered Queensland party in December 1997, in time for the impending State elections. Like all political parties it sought supporters, and devotees were invited to complete an application form headed "Pauline Hanson's One Nation", and send it to the Party's NSW address in Manly.

In return for this, each applicant had his or her name entered on the Party's membership list, and received a membership card in the Party's name which contained the battle-cry "Members of Pauline Hanson's One Nation are dedicated to assisting candidates endorsed by Pauline Hanson to win seats in the next Federal Election".

This may not sound very democratic to anyone living outside Zimbabwe, but in the words of Queensland's Chief Justice, Paul de Jersey

"Applying orthodox contract theory, the aggregation of those objective circumstances suggests strongly that the applicant offered to join the political party, which then communicated its acceptance of the offer by the provision of the membership card"

Taking one's eye off the ball

So how did a senior Queensland DPP prosecutor arrive at the conclusion that those who clearly believed themselves to be members of the Party were nothing of the sort, and that the Electoral Commissioner had been duped? This was, as indicated above, the essence of the charges before the trial court. Three additional factors were, in the event, allowed to muddy the waters.

The first was the existence of another organization called "The Pauline Hanson Support Movement" (for brevity "the Supporters"), which had been incorporated in March 1997, and which always had been, and remained, a non-political support group for the lady herself.

In May 1997, the Management Committee of the Supporters (n.b. not the Party) resolved that henceforth, there would be a two-tier membership. The first tier would consist of "One Nation members", who would have full voting rights, while the second tier membership was allocated to what were confusingly described as "Pauline Hanson One Nation supporters", who had no such voting rights.

This was mistakenly interpreted by Crown Counsel as somehow detracting from the voting rights of One Nation "Party" members inside the Party itself, when clearly, since it was a resolution taken within the Supporters organization only, it could only affect voting rights within the Supporters, and not the Party.

As if this were not clear enough to anyone with a basic understanding of how their local golf club constitution operates, it was reinforced by the fact that whereas the second tier membership applications (price $5) were processed through local support movement branches, the first tier applications ($50) went direct to Party HQ in Manly, and resulted in the issue of the "One Nation Member" cards described earlier.

"Me thinks the lady doth protest too much"

If the Crown Prosecutor got it wrong, he was at least in good company. On many occasions prior to the trial, both Hanson and Ettridge had stated (and recorded in writing) their belief that there were only three members of the political party – themselves and David Oldfield. It was held on appeal that "Although evidence of various statements of that ilk made orally or in writing was admissible [against the accused] in relation to proof of the dishonesty alleged in the charge . . . . " this did not make a criminal offence out of something which wasn't. This was the second error committed by the prosecutor.

Put in the language of the most basic criminal law textbook, before anyone may be convicted of a crime, it is not enough merely to possess the *Mens Rea* – one must also commit the Actus Reus. I may discharge as many shotgun cartridges into my noisy neighbour as I like – I will not com-

mit murder if he is already dead before I fire the first shot.

Had any Party subscriber chosen to mount a legal challenge to the arrogant assertion that they were not a member of the Party, then the rules of "offer and acceptance" would have won the day for them. How, then, could it be asserted that the 500 names submitted to the Electoral Commissioner were not those of members "of the political party or a related political party", which was what the Queensland Electoral Act of 1992 required?

In fairness to the Prosecutor, he was also misled by a previous finding in a civil case brought by a disgruntled former member (*Sharples v O'Shea* [2000] QCA 23), to the effect that the registration of One Nation in Queensland had been fraudulent, because the list contained names of Supporters and not Party members. This was his third mistake, particularly since this case was a civil one, in which the burden of proof had been a mere balance of probabilities, and not the "beyond reasonable doubt" required for a criminal conviction.

That judge had in turn been unduly impressed by the many utterances of the defendants that they – and they alone – were members of One Nation, along with a cynical observation by Ettridge at the time when he submitted the list of 500 names to the Electoral Commission Office that " . . . they are only public servants. They just want to see a list of names, they wouldn't check it out". Ironically, for the reasons given above, even if they had "checked it out", no doubt everyone they contacted would have believed themselves (with some justification) to be Party members.

One cannot escape the conclusion, at the end of the day, that while the accused spent several months in jail as the result of an unsupportable conviction, they were to some extent the authors of their own misfortune. The prosecutor, trial judge and jury believed them when they asserted that the Party had only three members – the inevitable consequences of law which flowed from that false assumption did the rest.

"I may not be a lawyer, but . . . . . "

One of the more startling aspects of this case was that one person came very close to appreciating the legal issues ultimately identified and relied upon by the Queensland Court of Appeal – and he was not a lawyer. The Crown Prosecutor missed it, and the trial judge missed it, but at an early stage in the trial, David Ettridge raised, as a legal submission, the possibility that even if the persons whose names were supplied to the Electoral Commissioner were not members of the Party, they were members of the Supporters, and the Supporters club was "part of the same organization" as the Party.

The trial judge seems to have ignored the point, which according to de Jersey CJ, led to a "substantial deficiency" in the way in which the jury were allowed to decide the case, which in itself "would have warranted the quashing of the convictions".

Blame it on the funding

In seeking to explain to the public of Queensland how it had been necessary to mount a five week trial, imprison the defendants, and then decide the appeal on basic principles of contract which are well within the grasp of a Year 11 Legal Studies student, the Chief Justice laid considerable emphasis on a common theme in Queensland public life during 2003 or any other year – adequate funding.

In particular, His Honour said this;

" . . . . . it is my view that had both appellants been represented by experienced trial counsel throughout, the relevance of all of the evidence would more likely have been addressed with appropriate precision.

The case will in my view provide a further illustration of the need for a properly resourced, highly talented, top level team of prosecutors within or available to the Office of the Director of Public Prosecutions. In this complex case, which resulted in a trial of that length, and the consumption of vast public resources, highly talented lawyers of broad common law experience should desirably have been engaged from the outset in the preparation and then presentation of the Crown case . . . . . Had that been done, the present difficulty may well have been avoided".

His Honour was also at pains to avoid criticizing the lawyers who were involved. On the defence side, Ettridge defended himself, while Hanson was represented by one of the state's most experienced criminal solicitors. The Crown Prosecutor was, in turn, one of the most senior of the "in house" DPP staff. Taking these factors into account, it is not just a question of funding per se, but funding at a level at which there is sufficient time and opportunity to properly prepare cases such as this.

Had anyone been in a position to step back from the remorseless grind of meeting yet another court deadline, and look more dispassionately at the essential issues involved, then the penny might have dropped sooner rather than too late.

The President of the Law Council of Australia, Bob Gotterson, was quick to endorse the Chief Justice's words, with his own observation that

"A direct cause of this problem is the failure of State and Commonwealth Governments to adequately fund the justice system, particularly in the area of legal aid".

His words were echoed by Queensland Law Society President Glenn Ferguson, so far as concerns ". . . . . adequate funds provision for legal aid so that those charged can be properly represented".

Both defendants in this case fell within the "wealth trap" of being too well-off to qualify for Legal Aid (and one has to be very poor indeed to qualify for that), but too under-resourced personally to be able to afford a battery of top-flight solicitors and barristers. Bearing in mind that there are normally no "costs orders" in criminal cases, any person accused of crime is faced with the certain knowledge that – win or lose – he or she may well be waving goodbye to tens of thousands of dollars simply to prove their own innocence.

Students of criminal law are faithfully taught the principle which emerged from *Dietrich v R* (1992) 177 CLR 292, to the effect that everyone is entitled to be legally represented at their criminal trial. What the same Court added, as part of the small print, was that *"Australian law does not recognize that an indigent accused on trial for a serious criminal offence has the right to the provision of counsel at public expense".*

Various estimates have been offered of the cost to Pauline Hanson (or, rumour has it, her supporters) of employing a top solicitor for her defence. The sum of $80,000 has been mentioned, and I would hazard a guess that this is an underestimate.

At the end of the day, she was found not guilty. But not

until after months of stress, five weeks of trial, and many weeks in detention awaiting appeal. The appeal was "fast-tracked" because a previous judge dealing with an interim bail application pending the appeal hearing spotted the flaw in the Crown's case after only an hour or two of submissions from counsel. Otherwise, she might still be working in the prison laundry, and befriending fellow prisoners.

How many more (with less command over the media) are still in there, and can society afford not to fund its criminal justice system above the level of mere subsistence?

The Queensland Court of Appeal judgment in *R v Hanson; R v Ettridge* may be found at [2003] QCA 488.

Discussion points

1. If the same legal issues which ultimately determined this case were re-cast in a student assignment exercise (e.g. a membership rights dispute in a local surf lifesaving club), how many Legal Studies students would have arrived at the correct answer?

2. Do you believe that everyone accused of a crime should be entitled to an appropriate level of skilled legal representation free of charge, regardless of their financial means?