

APPENDIX 7

Summary of Decisions of Interest

(1) Constitutional law – Parliamentary election – Petition challenging entirety of general election

Gunter v Hollingworth

(30 July 2002, Justice Cooper)

On 12 December 2001, Mr Gunter filed a petition in the High Court of Australia sitting as the Court of Disputed Returns. Mr Gunter pleaded that he was qualified to vote, and did vote, in the election of a member for the Division of Blair in the House of Representatives and in the election for Senators for Queensland in the Senate.

The petition named as respondents the Governor-General, the Governor of Queensland, the Premier of Queensland and the Australian Electoral Commission ('the Commission'). The fifth, sixth, seventh, eighth and ninth respondents filed entries of appearance in the petition proceedings as electors enrolled to vote in the electoral divisions of Ryan, Moreton and Oxley.

In essence, Mr Gunter claimed that the general election for the entire House of Representatives and half of the Senate, held on 10 November 2001, was invalid by reason that the Governor-General and the Governor of Queensland lacked the requisite legal power to initiate such an election. The petition alleged that the office of Governor-General had failed to properly discharge the functions of that office since the time of federation with the consequent effect that '... the intent of the Constitution has never really been met.' Mr Gunter further alleged that the payment of a nomination deposit by parliamentary candidates was ineffective as such deposits were paid in the form of 'paper money' which was not 'legal tender' in Australia.

This petition was supported by the fifth and sixth respondents. The seventh and eighth respondents, claiming to appear as citizens of the Independent Sovereign State of Australia, also supported the petition, with the eighth respondent claiming to be the Chief Justice of the Supreme Court of the Independent Sovereign State of Australia and seeking to appear in that capacity.

The Commission sought to have the petition dismissed on the grounds that:

- the Court of Disputed Returns has no jurisdiction where it is claimed that the entirety of a general election is void
- the petition failed to set out any facts which would invalidate the election.

Mr Gunter and the respondents in support of the petition disputed the contention that a petition must be limited to one electorate only, and submitted that section 353(1) of the *Commonwealth Electoral Act 1918* ("the Act") permits the entirety of a general election to be challenged as invalid in a single petition to the Court of Disputed Returns.

After applying Part XXII of the Act and considering the decision of Brennan ACJ in *Muldorney v Australian Electoral Commission*, Justice Cooper found in relation to the first ground that:

[T]he Court of Disputed Returns only has jurisdiction to hear and determine a petition from the petitioner limited to disputing the validity of the election or return for the member for the Division of Blair in the House of Representatives election and for the Senators in the election of Senators for the State of Queensland....

A person who was not entitled to vote at the election the subject of the petition has no right to appear on the petition and be made a party to it... Thus the fifth, sixth, seventh, eighth and ninth respondents could not, by entering an appearance, individually challenge the elections in the Divisions of Ryan, Moreton or Oxley. Nor were they qualified to enter an appearance in so far as the petition related, if it did, solely to the election in the Division of Blair.

In relation to the second ground, his Honour found that the petition did not set out the facts relied on to invalidate the election as required by section 355(a) of the Act, and concluded that there were no facts alleged which would entitle Mr Gunter to the relief claimed even if the prayer for relief could be read down to bring the petition within the jurisdiction of the Court of Disputed Returns.

Further, his Honour found that the argument questioning the legality of Australian tender had previously been totally rejected as wrong in law.

Having found that the petition was incorrectly brought on both grounds pleaded by the Commission, his Honour dismissed the petition pursuant to the power conferred by section 360(1)(viii) of the Act.

(2) Administrative Law – Judicial review of a decision to grant a licence to construct a nuclear reactor

Greenpeace Australia Pacific v Chief Executive Officer of the Australian Radiation Protection Authority & Nuclear Safety Agency
(13 September 2002, Justice Beaumont)

In May 2001, the Chief Executive Officer (“the CEO”) of the Australian Radiation Protection and Nuclear Safety Agency, received an application from the Australian Nuclear Science and Technology Organisation to construct a nuclear reactor facility at Lucas Heights, in Sydney’s southern suburbs. The application concerned a proposal to build a new research reactor to replace the existing facility in that area. The CEO proceeded to accept public submissions on the proposal and in April 2002 made a decision in favour of issuing the licence.

Under the *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) (“the Act”), the CEO was empowered to issue licences in relation to nuclear facilities, including for the construction of such a facility. The stated purpose of the Act was “to protect the health and safety of people, and to protect the environment, from the harmful effects of radiation”. When considering whether to grant a licence, the CEO was required by s 32(3) of the Act to “take into account international best practice in relation to radiation protection and nuclear safety”.

Greenpeace, a well known environmental interest group, sought judicial review of the CEO’s decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). They submitted that the CEO, in reaching his decision, failed both to consider the management,

handling, transport, processing and storage of spent nuclear fuel and radioactive waste, and, to ascertain and take account of international best practice in these areas. Greenpeace applied to set the decision aside claiming that as a result of these omissions:

- there was a failure to observe the procedures required by law, and/or
- there was an improper exercise of the power conferred by the Act in that the CEO failed to take into account a relevant consideration, and/or
- the decision involved an error of law.

His Honour held that, in respect of the allegation that there was a failure to observe the procedures required by law, Greenpeace needed to demonstrate a procedural irregularity or defect on the CEO's decision-making. He found that Greenpeace had not been able to point to any such irregularity or defect.

In relation to the claim that the CEO had failed to take into account a relevant consideration, Justice Beaumont held that the matters which were required to be taken into account by the CEO when making a decision under the Act were dependent upon the nature of the application in respect of which a decision was being made. In this case, the Act provided that an application to *construct* a reactor required the CEO to consider different factors than would be required upon an application to *operate* such a facility. The safety and protection factors involved in the management of reactor waste and spent fuel, and the international best practice standards in this area, were not specifically required to be taken into account when considering the construction proposal. Accordingly the CEO had not failed to take into account a relevant consideration. In any event, Justice Beaumont held that the written decision of the CEO indicated that he had properly considered many of these issues and addressed the concerns raised in a number of public submissions.

Finally, his Honour held that no error of law had been demonstrated; let alone an error that may have had a material effect upon the outcome of the CEO's decision.

The application was dismissed.

(3) Administrative law – Judicial Review of appointment of Chief Magistrate of Northern Territory

North Australian Aboriginal Legal Service Inc v Bradley

(27 September 2002, Chief Justice Black, Justices Drummond and Hely)

The North Australian Aboriginal Legal Service Inc (“NAALAS”) sought a declaration that the appointment of Hugh Bradley as Chief Magistrate of the Northern Territory was invalid. NAALAS commenced the proceeding in the Supreme Court of the Northern Territory. Justice Olney, sitting as a judge of the Supreme Court of the Northern Territory, gave summary judgment in favour of the Northern Territory. NAALAS succeeded in an appeal from that decision and the judgment was set aside. The High Court refused special leave, indicating that any consideration of the Northern Territory's arguments should be postponed until after relevant findings of fact had been made at trial. Justice Olney then ordered that the proceeding be cross-vested from the Supreme Court to the Federal Court.

On 7 December 2001, Justice Weinberg dismissed NAALAS' application. NAALAS then appealed to the Full Court of the Federal Court.

The primary judge found that the former Chief Magistrate resigned on 20 November 1997, in part at least as a result of his dissatisfaction with the mandatory sentencing regime in the Northern Territory. After extensive negotiations, Mr Bradley was appointed as Chief Magistrate by the Administrator, on the advice of the Executive Council. On appointment, Mr Bradley received a special remuneration package of two years duration.

Concurrently with Mr Bradley's appointment, the Government had been considering the introduction of contract or fixed term appointments for magistrates, but this plan was ultimately not pursued. The primary judge found that Mr Bradley's remuneration package resulted from an assumption that he would be appointed under this new fixed term arrangement and the fact that he had indicated that he would only remain in the position for a couple of years. When the concept of fixed term appointments was abandoned, the Attorney General and some of his departmental officers, failed to appreciate that this made the special remuneration package inappropriate.

On appeal, NAALAS argued that the primary judge should have found that Mr Bradley had been appointed for an improper or extraneous purpose. It contended that the inevitable consequence of the special remuneration package was that Mr Bradley would be forced to renegotiate the terms and conditions of his continued appointment if he chose not to resign after two years and that this was a consequence known to and intended by those advising the Administrator of the Northern Territory.

NAALAS also contended that Mr Bradley's appointment as Chief Magistrate was *ultra vires* the power of appointment in the Magistrates' Act because the power of appointment was limited to appointment to an office for which there was in force a valid remuneration determination. NAALAS argued that the special remuneration package negotiated with Mr Bradley was not a valid remuneration determination, because it applied for a period of two years only, was limited to expire before Mr Bradley reached the age of 65, and made no provision for remuneration and allowances at the end of that two-year period. NAALAS alleged that this subverted the implicit requirement in the *Magistrates Act 1977* (NT) ("the Magistrates Act") that judicial independence be protected.

Finally, NAALAS argued that if, contrary to its allegations of improper and extraneous purpose and its claim of *ultra vires*, the Magistrates Act purported to authorise Mr Bradley's appointment, some sections in the Act violated the protection afforded to the principles of judicial independence by Chapter III of the Constitution and, therefore, had to be read down.

Chief Justice Black and Justice Hely (Justice Drummond dissenting) dealt firstly with the *ultra vires* claim. They found that the Magistrates Act evinced a legislative intention to secure an independent and impartial magistracy, but held that there was nothing in the terms of the relevant sections of the Magistrates Act that made the appointment of a magistrate conditional on the existence of a valid remuneration determination. Further, they held that there was nothing in the section relating to the making of remuneration determinations that prevented the making of fixed term remuneration determination. Therefore, Mr Bradley's appointment was not *ultra vires* and his remuneration was validly determined by the special remuneration package.

The Full Court further held that as successive short term remuneration determinations were permitted under the Magistrates Act, Mr Bradley's appointment on the basis of a short term

remuneration package fell within the scope of the Act and that there was, therefore, no improper purpose.

Finally, the Full Court held that the primary judge was correct in finding that he was bound by existing authority to find that the provisions of the Magistrates Act were not unconstitutional. They held that the courts of the Northern Territory were not “federal courts” and did not exercise the judicial power of the Commonwealth. Therefore, the requirements of undiminished remuneration contained in section 72 of the Constitution did not apply. Rather, it was for the Northern Territory to determine matters relating to the appointment, tenure and remuneration of Territory judges and magistrates.

(4) Trade practices - Whether an advertising agency could be liable for misleading or deceptive representations as a principal rather than via accessory liability.

Cassidy v NRMA Health

(3 October 2002, Justice Jacobson)

The applicants (“ACCC and ASIC”) sought declaratory and injunctive relief in respect of an alleged breach by the fifth respondent (“Saatchi”) of section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (“ASIC Act”) (which corresponds to section 52(1) of the *Trade Practices Act 1974* (Cth) (“TPA”). The principal issue was whether Saatchi, an advertising agency, was liable for making misleading statements contained in an advertisement it prepared for its client, NRMA. The substance of the advertisement, which was admitted by Saatchi to be misleading, was that pregnant women who purchased a new NRMA health insurance product would be able to have their babies delivered without making any payment for the related hospitalisation and medical expenses. Saatchi prepared the advertisement after obtaining NRMA’s approval of an “ideas brief”. The final draft of the advertisement prepared by Saatchi was approved by NRMA’s legal counsel after which NRMA engaged a third party to place the advertisement in various publications. Saatchi’s name and key number appeared in small type at the bottom of the advertisements.

Counsel for ACCC and ASIC argued that Saatchi made the representation in contravention of section 12DA because it prepared the advertisements knowing and intending that the advertisements would be published in various publications. Counsel argued that Saatchi’s liability should be determined in accordance with the defamation law principle that all persons who are accessories to the publication of a libel are considered to be principals in the act of publication. It was argued that Saatchi had published the advertisements in conjunction with NRMA and thereby made the misleading representations contained therein, and that support for these submissions could be found in the fact that the name “Saatchi” appeared on the advertisements.

Counsel for Saatchi contended that the advertisement could not be read as an advertisement for Saatchi and was clearly an advertisement for NRMA companies. Counsel relied upon the structure of the ASIC Act which distinguishes between principal and accessory liability, and upon authorities dealing with the meaning of “representation” under section 53 of the TPA. Counsel submitted that the effect of those authorities was that it was necessary to separate the roles of the parties involved in the publication to determine who actually made the representation.

Justice Jacobson dismissed the application. He found that the misleading representation was, as a factual matter, made by NRMA. There was nothing in the advertisement that could

convey to the relevant section of the public that the representation was made by Saatchi. Although Saatchi's name appeared on the advertisement, the size of the print and its position in the advertisement was insufficient for it to indicate that Saatchi had made the representation or was party to a joint representation.

Justice Jacobson also held that there is no scope for the application of defamation principles to the ASIC Act or TPA. The statutory schemes of the ASIC Act and TPA distinguish between principal and accessorial liability, and are inconsistent with common law liability and defences in the law of defamation. The fact that section 12DA, like section 52 of the TPA, is of wide import does not allow a further widening of liability by reference to principles under the common law.

This case is the subject of an appeal to the Full Court of the Federal Court.

(5) Administrative Law – Royal Commissions – Role of the Court in reviewing the conduct of Royal Commission
Ferguson v Cole
(20 November 2002, Justice Branson)

In 2001 a Royal Commission (“the Commission”) was established to inquire into and report on certain matters in relation to the building and construction industry. During the inquiry an application was made to the Court effectively seeking that the Royal Commissioner (“the Commissioner”) be disqualified from making certain findings, or any reports or recommendations in relation to New South Wales which may have had an adverse impact on the applicants. This followed an unsuccessful application to the Commissioner himself seeking the same disqualification. Each of the applicants was a member or official, or ex-member or ex-official, of the Construction, Forestry, Mining and Energy Union, Construction and General Division, New South Wales Branch.

The Commissioner was appointed by Letters Patent, requiring him to conduct his inquiry ‘as expeditiously as possible’. After 126 days of taking evidence and hearing from 445 witnesses, the Commissioner furnished to the Governor-General a document entitled ‘First Report’.

The First Report stated that Commissioner was satisfied that material he had received evidenced certain practices and conduct which exhibited inappropriate and unlawful conduct which he listed in general terms. This list was premised by a statement that it was not appropriate for him to address specific evidence, material or submissions and that detailed findings of fact would be made in his final report.

The applicants claimed that the Commissioner had shown actual bias on the basis of prejudgment towards them or, alternatively, by his conduct had given rise to a reasonable apprehension of bias towards them. They also asserted denials of procedural fairness by reason of the process of inquiry adopted by the Commissioner.

Procedural Fairness

At the heart of the claim of procedural unfairness were two complaints. One was the applicants’ dissatisfaction with the procedures outlined in a particular practice note, which

provided for notice to be given, if practicable, to a person who would be the subject of adverse evidence before the tribunal. It also set out when the Commission would authorise people to appear before it and the procedure for calling witnesses and the manner in which examination and cross-examination were to take place. The applicants contended that the practice note allowed for a process to be adopted by the Commissioner which was unfair.

Further, the applicants contended that the issuing of the First Report and the findings therein before the conclusion of the applicants' evidence was a breach of "the hearing rule", being the rule that any person represented at an inquiry who might be affected adversely by a finding should know of the risk of such a finding being made and be given an opportunity to present additional material that might deter the Commissioner from making that finding.

Justice Branson concluded that the Commissioner was under no duty to afford the applicants, or any of them, an opportunity to adduce additional material that might have deterred the Commissioner from making the findings and recommendations set out in the First Report because, whilst the rules of natural justice imposed obligations on the Commissioner, it had not been demonstrated that the Commissioner's findings affected the interest of any applicant or the applicants as a group "in a sufficiently individual, direct and immediate way" so as to require that an applicant, or the applicants generally, be afforded an opportunity to adduce additional material in the manner required by the hearing rule.

The other key complaint was the applicants' dissatisfaction with the scope and nature of the task committed to the Commissioner by the Letters Patent. The applicants argued that the reference therein to an inquiry into 'the nature, extent, and effect of any unlawful or otherwise inappropriate workplace practice or conduct' did not authorise the Commissioner to inquire into particular conduct and determine for himself whether that conduct was unlawful.

Justice Branson rejected the contention that the First Report made findings that the applicants had engaged in criminal conduct, nor did she accept that these findings adversely affected the interests of the applicants. Justice Branson found that, although a Commission's determination of guilt had no legal consequences, the Executive Government had the power to appoint a Commissioner to inquire into and report on whether any person had been guilty of a crime.

Bias

The issuing of the First Report before the conclusion of the applicants' evidence and before the hearing of the applicants' submissions was central to the applicants' claims of actual and apprehended bias. The applicants asserted that the First Report contained a number of conclusions about the conduct of the applicants which were a prejudgment of the issues and demonstrated actual bias. Justice Branson noted that the publication of the First Report might well have generated an expectation that the Commissioner's final report would make findings and recommendations of a particular kind. However, her Honour concluded that the Commissioner had not, in the First Report, made any detailed findings of fact, nor had he committed to any conclusion already formed so as to be incapable of altering it, whatever additional material might have been later presented. Accordingly there had been no prejudgment of the issues.

She also found that neither the contents of the First Report nor the circumstances surrounding its publication had been such as to cause the applicants or the public a reasonable apprehension that the Commissioner might have been so prejudiced in favour of a conclusion or conclusions already formed that he would not have been able to alter that conclusion or those conclusions irrespective of the evidence of the applicants or the submissions advanced on their behalves. Thus the applicants had not been able to demonstrate apprehended bias.

The application was dismissed.

- (6) Native Title – Inconsistency between state legislation and the right to negotiate in the *Native Title Act 1993* (Cth)**
Queensland v Central Queensland Land Council Aboriginal Corporation
Attorney-General (Cth) v Central Queensland Land Council Aboriginal Corporation
(27 November 2002, Justices Beaumont, Lee and Kiefel)

The *Native Title Act 1993* (Cth) ("the NTA") establishes a process to be followed where future acts, such as the conferral of mining leases, will affect Native Title interests. Where a future act is proposed, various interested parties have a statutory right to negotiate in accordance with the scheme created by Subdivision P of Part 2 of the NTA.

To the extent that it affects Native Title interests, a future act will be invalid where there has not been compliance with Subdivision P. However, section 43 of the NTA provides that if:

- a State or Territory law contains alternative provisions to the negotiation scheme in Subdivision P; and
- the Commonwealth Minister determines that these alternative provisions comply with the requirements expressed in the NTA.

then, while the determination is in force, the alternative provisions have effect instead of the scheme in Subdivision P.

In 1998 and 1999 the Queensland Parliament enacted two acts amending the *Mineral Resources Act 1989* (Qld) ("the State Amendments"). The State Amendments removed the right to negotiate and substituted provisions providing for consultation, mediation and hearing of applications by the Queensland Land and Resources Tribunal.

The State Amendments received royal assent on 27 November 1998 and 29 July 1999 respectively, but the substantive provisions of the State Amendments did not come into force until 18 September 2000. On 31 May 2000 the Commonwealth Attorney-General made determinations under section 43 of the NTA to the effect that the State Amendments (enacted but not at that time in force) were valid alternative provisions. These determinations also came into force on 18 September 2000 upon notification in the *Gazette*.

Upon the application of the Central Queensland Land Council Aboriginal Corporation (“CQLCAC”), the primary Judge held the Attorney-General’s declarations were invalid. It was held that, under section 43 of the NTA, before the Attorney-General could validly make a declaration, the alternative provisions of the State legislation must be enacted and in force. The State and the Commonwealth Attorneys-General appealed this decision.

The Full Court unanimously upheld the appeal. Justice Beaumont found that the effect of legislation that has been enacted but has not commenced operation depends upon the context in which it is considered. While such legislation may not establish rights under private law, it may nevertheless have legal relevance. Justice Beaumont held that, in this case, once the State Amendments were enacted they were ‘a law’ for the purposes of section 43. Upon enactment, the substance of the alternative provisions proposed by Queensland was clear and the Attorney-General could validly determine whether the requirements of section 43 were satisfied. The date that the State Amendments came into force was a procedural consideration that was not relevant to the Commonwealth Attorney-General’s inquiry, nor was it within his power to control.

Justice Lee held that section 43 ‘disengaged’ section 109 of the Commonwealth Constitution, which renders State laws ineffective where they are inconsistent with Commonwealth laws. Thus, although the State Amendments were inconsistent with the right to negotiate in the NTA, they could still have effect provided the Attorney-General’s determination was valid. Justice Lee held that, upon the enactment of the State Amendments, the Attorney-General could both form an opinion as to whether the requirements of section 43 were satisfied and make a determination to that effect. However, his Honour held that a requirement of certainty meant that the determinations could not come into force until after the State Amendments had commenced operation. In this case, although the Attorney-General’s determinations had been made before the commencement of the State Amendments, the determinations did not take effect until notification in the *Gazette* on 18 September 2000, by which time the State Amendments had become operative.

Justice Kiefel adopted a purposive approach. The intent of section 43 of the NTA was to allow the States to create alternatives to the Commonwealth scheme. Her Honour inferred from the circumstances that the Commonwealth and Queensland Governments were cooperating to establish such an alternative scheme. Justice Kiefel held that, for the alternative scheme to have any operation, both State Amendments and the Commonwealth determinations must be in force. However there was no requirement that the determinations be made after the commencement of the State Amendments. It was sufficient that the determinations were made after the State Amendments were enacted.

Justice Kiefel also considered CQLCAC’s cross-appeal. CQLCAC argued that the State Amendments, by removing the right to negotiate, constituted future acts that placed native title holders in a more disadvantageous position than ordinary title holders. It was further

claimed that this outcome invalidated the State Amendments because it was inconsistent with the NTA and the *Racial Discrimination Act 1975* (Cth) (“the RDA”).

Justice Kiefel, with whom Justices Beaumont and Lee agreed, rejected the cross-appeal on the basis that:

- as it is the determinations by the Attorney-General under section 43 of the NTA, and not the State Amendments, that remove the right to negotiate, this was not a case of a State law being inconsistent with a Commonwealth Law.
- in any event, the State Amendments (or the Attorney-General’s determinations) were not inconsistent with the RDA. While the NTA is to be construed with regard to the RDA and any powers exercised under the provisions of the NTA are subject to the RDA, the RDA does not operate to alter the procedures developed by the NTA to give effect to Native Title, even if those procedures treat Native Title holders and ordinary title holders differently.
- finally, the State Amendments were not future acts as defined by the NTA. The Amendments only affected procedural rights and did not interfere with Native Title interests.

(7) Constitutional Law – Whether claims not justiciable or enforceable as requiring for their determination the adjudication of acts of State or the validity, meaning and effect of the transactions of foreign sovereign States

Petrotimor Companhia de Petroles S.A.R.L v Commonwealth of Australia

(3 February 2003, Chief Justice Black, Justices Beaumont and Hill)

This case involved questions about the Timor Gap Treaty between Australia and Indonesia and the extent to which a Court may consider the transactions of foreign States.

The applicant companies, Petrotimor Companhia de Petroles and Oceanic Exploration Company, claimed to have been granted exploration and exploitation rights over a part of the continental shelf, under a 1974 Concession Agreement with the Government of Portugal (on behalf of Portuguese Timor). At the time the concession agreement was entered into, Australia and Portugal both claimed, under international law, sovereignty over the continental shelf in the concession area. Australia’s claim to sovereignty was formalised in 1989 when Australia and Indonesia entered into the Timor Gap Treaty and in 1990 when Australia enacted the *Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990* (Cth). The Treaty and the Act purported to govern access to natural resources (through a Joint Authority) in a Zone of Cooperation, which included the concession area. Production sharing agreements covering the concession area were entered into with the Phillips Companies (related petroleum exploration and exploitation companies) pursuant to the Treaty and the Act.

The applicants brought this action against the Commonwealth of Australia, the Joint Authority (established under the 1989 Timor Gap Treaty between Australia and Indonesia) and the Phillips companies, claiming that their actions had resulted in the unlawful expropriation of the applicants’ rights to prospect, investigate, develop and exploit hydrocarbons in the Concession Area. They sought compensation.

The Chief Justice determined that a Full Court should consider, as a separate question, whether the Federal Court had jurisdiction to consider the applicants’ claim, given that it required the Court to adjudicate upon the Executive’s exercise of the prerogative in relation to foreign affairs (defining the territorial boundaries of Australia), an Act of State of a foreign

government (the grant of a concession by Portugal to the applicants) and the validity, meaning and effect of transactions of foreign states.

The Full Court held, relying on well-established common law principles, that the Court had no jurisdiction to determine the validity of the grant of the concessions to the applicants by the Portuguese government. The Court held that domestic courts generally do not have jurisdiction to adjudicate upon the validity of, or to enforce, rights granted by a foreign sovereign. The Full Court also held that the applicants' claim did not give rise to a justiciable 'matter' because assessing the legitimacy of acts of a foreign state did not fall within any of the areas of jurisdiction conferred upon the Court.

The Full Court held that, in any case, judicial restraint was required because any court decision in this area had the potential to compromise Australia's foreign relations, particularly in light of the negotiations then in progress between Australian and East Timor about the future exploitation of the Timor Gap.

(8) Trade Practices – Domain names and cybersquatting – Misleading and deceptive conduct

CSR Limited v Resource Capital Australia Pty Ltd

(4 April 2003, Justice Hill)

Resource Capital Australia Pty Ltd ("RCA"), the sole director of which was a man named Marcus Boland, had registered the business names "CSR Sugar Supply" and "Combined Sugar Retailers Sugar Supply". The domain names "csrsugar.com" and "csrsugar.com.au" were subsequently registered on the basis of those business names.

RCA approached CSR Limited ("CSR") offering to transfer the domain names to it for a fee, shares or consultancy work in a manner that significantly exceeded the registration costs of the names. RCA claimed that it had registered the domain names to protect CSR by ensuring that the domain names (as valuable intellectual property) were proactively managed to maximise benefits to the shareholders of CSR.

CSR brought an action against RCA and Boland alleging breaches of sections 52 and 53 of the *Trade Practices Act 1974* (Cth) ("TPA"), passing off and a breach of section 120 of the *Trade Marks Act 1995* (Cth) ("Trade Marks Act") and asking the Court to restrain the respondents from using the letters or names "csr" or "csrsugar" as part of a domain name or otherwise.

Justice Hill found that RCA's and Boland's intentions were not altruistic but motivated by the expectation of profitable fees for the transfers of the domain name, or through pressuring CSR to engage Mr Boland's services as an intellectual property consultant. There was evidence before the Court suggesting that RCA had made the same offers to other companies in similar circumstances, which in at least one case had resulted in a World Intellectual Property Organisation Panel finding that RCA had engaged in cybersquatting.

Justice Hill held that obtaining the registration of both domain names, "csrsugar.com" and "csrsugar.com.au" implied that the domain name belonged to CSR or that RCA was in some way connected with CSR, and that a person seeing the domain names would make those assumptions. It alternatively constituted a representation that CSR and RCA were affiliated.

Consequently, the act of obtaining registration of both domain names constituted conduct that was misleading and deceptive or was likely to mislead and deceive persons and amounted to a breach of section 52 of the TPA.

Justice Hill also found that there was difficulty in granting relief under the Trade Marks Act. It could not be said that section 120 of the Trade Marks Act (which relates to infringement of trade marks) had been breached, as RCA had never seriously intended to engage in the sugar trade, or even to use the domain names as trade marks in relation to either goods or services.

Justice Hill ordered that the “csrsugar.com” domain name be transferred to CSR and granted injunctions restraining RCA or Mr Boland from using “CSR” or “CSR Sugar” or any similar name as part of any domain or other name.

Justice Hill also directed that a copy of the judgment be provided to the domain name Registrar Melbourne IT Limited:

... with the suggestion that when dealing with RCA or Mr Boland or any company in which Mr Boland is a director, it require from him a statutory declaration both that at the time he seeks registration he is unaware of any trade mark or business or company name identical with or substantially similar to the domain name he seeks to register and does not hope or intend to transfer or agree to transfer that domain name to another person.

(9) Migration – Mandatory detention of unlawful non-citizen pending removal – whether continued detention is authorised when there is no real likelihood or prospect of removal in the reasonably foreseeable future

Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri
(15 April 2003, Chief Justice Black, Justices Sundberg and Weinberg)

In this case the issue for the Full Court of the Federal Court was whether the *Migration Act 1958* (‘the Act’) authorised indefinite detention of an unlawful non-citizen in circumstances where there was no real likelihood or prospect of removal in the reasonably foreseeable future.

The respondent, Mr Al Masri, was a Palestinian from the Gaza Strip. He arrived in Australia in June 2001 as an unlawful non-citizen and soon after his arrival was placed in detention. He lodged an application for a protection visa, claiming to be a refugee. A delegate of the Minister for Immigration and Multicultural and Indigenous Affairs refused the application and the Refugee Review Tribunal affirmed the decision of the delegate. Mr Al Masri then made a request in writing, under the provisions of the Act, to be removed to the Gaza Strip. The Department was unable to obtain permission from Israel for his entry. Attempts to obtain permission from Egypt or Jordan for Mr Al Masri to transit those countries to return to the Gaza Strip were unsuccessful. Permission for the removal of Mr Al Masri to Syria was also refused. At the time of the hearing before the trial judge there was no indication of a real likelihood or prospect of Israel agreeing to alter its refusal to permit Mr Al Masri to return.

Mr Al Masri commenced a proceeding in the Federal Court, seeking an order in the nature of habeas corpus for his release from immigration detention. On 15 August 2002, having heard

the case urgently, Justice Merkel made orders for Mr Al Masri's immediate release from detention. His Honour found that the power under the Act to detain an unlawful non-citizen pending removal was impliedly limited to such time as the Minister was taking all reasonable steps to secure the person's removal as soon as is reasonably practicable, and the removal of the person is "reasonably practicable" in the sense that there must be a real likelihood or prospect of removal in the reasonably foreseeable future.

The Minister applied for a stay of the Judge's orders pending an appeal but that application was refused on 15 August 2002. Soon afterwards, the Department was able to finalise arrangements for Mr Al Masri's return to the Gaza Strip and Mr Al Masri surrendered himself into immigration detention on 9 September 2002 and was subsequently removed from Australia.

The Full Court considered that, although Mr Al Masri had been removed from Australia prior to the hearing of the appeal, the outstanding practical issue as to costs and the important questions of principle raised by the appeal were sufficient to justify the appeal being heard.

The Full Court held, relying on the well-established common law principle that an intention on the part of the legislature to abrogate a fundamental right must be clearly manifested by unmistakable and unambiguous language, that the Act did not authorise detention pending removal in circumstances where there was no real likelihood or prospect of removal in the reasonably foreseeable future. This conclusion was supported by reference to the principle that a legislative provision should, as far as its language permits, be interpreted and applied in a manner consistent with established rules of international law and in a manner which accords with Australia's treaty obligations. The Full Court referred to analogous cases in England and the United States, as indicative of the approach taken by courts in the common law tradition to the construction of statutes providing for administrative detention.

The Full Court also considered the submission that the power to detain must be read down by reference to constitutional limitations flowing from s 51(xix) and Chapter III of the Constitution. Although the Court considered that constitutional considerations pointed to a limitation on the power to detain, it was unnecessary to consider whether, without such a limitation, the provisions would be offensive to the Constitution, as the central issue in the appeal could be determined on the point of statutory construction.

The appeal was dismissed with costs.

(10) Administrative law – Whether alleged denial of procedural fairness by Tribunal a question of law – Whether evidence admissible to establish denial of procedural fairness

Clements v Independent Indigenous Advisory Committee
(27 June 2003, Gray ACJ, North and Gyles JJ)

This case concerned the conduct of the 2002 elections for the Tasmanian Regional Council of the Aboriginal and Torres Strait Islander Commission. Regulations enacted for the purpose of the elections established the Independent Indigenous Advisory Committee ("the Committee"), a body which could determine a person's entitlement to vote and thus their eligibility to stand as a candidate for election. A person's entitlement to vote depended upon whether they were an Aboriginal person or a Torres Strait Islander. By means of a process of

self-nomination and community objection, it was the Committee's task to consider objections to a person's inclusion on the electoral roll.

The Committee upheld a number of objections to the inclusion of certain people on the electoral roll. One hundred and twenty-eight persons, including the applicant in this case, then appealed to the Administrative Appeals Tribunal ("the Tribunal").

Although he applied to the Tribunal for review of the Committee's decision, the applicant did not appear at the Tribunal hearing. The Tribunal was unaware that the applicant had not received written notice of the hearing and proceeded to deal with his case on the basis of documents submitted with his application for review, ultimately affirming the decision upholding the objection to the inclusion of the applicant's name on the electoral roll.

The Court first discussed whether an alleged denial of procedural fairness by the Tribunal was a question of law for the purposes of section 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act"), or whether the proceeding ought more properly be brought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("ADJR Act"). Acting Chief Justice Gray and Justice North concluded that, in light of the authorities, a denial of procedural fairness raised a question of law. Justice Gyles on the other hand, considered that questions of natural justice more sensibly fell within the purview of the ADJR Act than the special and limited provisions of section 44 of the AAT Act. This view was, his Honour said, reinforced by the constitutional backdrop against which the legislation is to be viewed.

It was also necessary for the Court to decide whether to accept into evidence an affidavit which the applicant alleged would establish the denial of procedural fairness. This required consideration of whether the *Federal Court of Australia Act 1976* (Cth) ("Federal Court Act") allowed the Court to admit evidence which was not before the Tribunal where the right to appeal from a decision of the Tribunal is limited to questions of law. The majority held that, as an appeal from a decision of the Tribunal is an exercise of the Court's original and not appellate jurisdiction (pursuant to section 19 of the Federal Court Act), evidence could be admitted. Justice Gyles noted that there was conflicting authority on this point.

The majority held that the absence of the applicant from the Tribunal's hearing did constitute a denial of procedural fairness, following authorities that hold that it is not necessary that a decision-maker be aware of the reason for an applicant's absence in order to constitute a denial of procedural fairness: unintentional conduct or negligence is sufficient.

The majority applied the principles identified by the High Court in *Minister for Immigration & Multicultural Affairs v Bhardwaj* to hold that this denial of procedural fairness constituted a jurisdictional error on the part of the Tribunal. But this reference to *Bhardwaj* then raised a question as to whether the Court had jurisdiction to deal with the case at all – that is, was the AAT Act intended to cover decisions tainted by jurisdictional error which were thus totally lacking in legal effect. The majority found that it did, noting that previous Full Courts have held that a decision referred to in section 25 of the AAT Act includes a decision made in purported exercise of powers conferred by the relevant statute.

The majority held that the applicant was entitled to have the Tribunal's decision set aside as he had been deprived of a chance of a successful outcome. However, the Court declined to remit the matter to the Tribunal to be heard and decided again, in view of the fact that there

was no longer any decision-making function for the Tribunal to perform in relation to the roll, the elections for which it was brought into existence having been completed.

(11) Income tax – Whether an elite athlete was required to pay income tax on prize monies, grants, sponsorship and attendance fees

Stone v Commissioner of Taxation

(27 June 2003, Justices Heerey, Emmett and Hely)

The appellant, Ms Stone, was one of the world's leading javelin throwers. She argued that prize money for international and local sporting events, a medal scheme, monies for involvement with the Academy of Sport, monies for appearances, and monies for scholarships were not assessable income for the purposes of the *Income Tax Assessment Act 1997* (Cth). In the relevant tax year Ms Stone had claimed that her only assessable income was her salary as a full time senior constable in the Queensland Police Force.

The primary Judge had held that Ms Stone was carrying on the business of a professional athlete and therefore all receipts incidental to that business were income according to ordinary concepts. Ms Stone appealed to the Full Federal Court and the appeal was allowed in part.

The Full Court held that appearance monies were in the same category as sponsorship payments, that is, a reward for services, and therefore assessable as income.

As for prize monies, however, the evidence of Ms Stone, accepted by the primary Judge, was that her selection of competitions was not based on the availability or otherwise of prize money. The Full Court concluded that the fact that an athlete engages in training and competition outside working hours (such as Ms Stone's full time position as a police officer) is a practical indication that her or his purpose is likely to be the enjoyment of competition, the excitement of winning and the honour and glory that goes with it, rather than the carrying on of a business. In this case, as Ms Stone was not carrying on the business of a professional athlete, her prize money was not assessable income.

(12) Trade Practices – Whether Safeway had taken advantage of its power in the wholesale bread market for the purpose of damaging competitors in the retail market or of preventing each of the bread manufacturers engaging in competitive conduct in contravention of the *Trade Practices Act 1974* (Cth)

Australian Competition & Consumer Commission v Australian

Safeway Stores Pty Limited

(30 June 2003, Justices Heerey, Sackville and Emmett)

The Full Court of the Federal Court heard an appeal from a 2001 decision concerning allegations by the ACCC that Safeway Store Pty Limited ('Safeways') had contravened sections 45, 46, 47 and 48 of the *Trade Practices Act 1974* (Cth) ("TPA"). The trial had run for ninety days.

Safeway operated 130 stores throughout Victoria. The case involved ten incidents. In nine of those incidents an independent store competing with a Safeway supermarket had been selling bread at a discounted price. Safeway then approached the baker who had supplied the bread to the retailer and requested a similar discount on the cost of that baker's supplies of bread to Safeway. When this was refused, Safeway stopped purchasing virtually all that baker's bread

products (and not just bread comparable to that which the independent had been discounting). The remaining incident concerned an allegation that Safeway and Tip Top had entered into an arrangement to fix the price of bread sold by Tip Top at a retail outlet at the Preston Market.

The primary Judge found that in two of the nine incidents, Safeway's purpose was to punish the bakers concerned and to deter them from continuing to sell bread to the independent retailer at a discounted price. However, while Safeway had a substantial degree of power in the Victorian wholesale bread market, His Honour held that it had not taken advantage of its power for a proscribed purpose (namely, deterring the bakers concerned from engaging in competitive conduct) because there was no necessary connection between Safeway's market power and the conduct in which it had engaged. The primary Judge accordingly dismissed the case of the ACCC.

The Full Court by a majority (Justices Heerey and Sackville, Justice Emmett dissenting) upheld the primary Judge's finding that Safeway had a substantial degree of power in the Victorian wholesale bread market. The majority also found that in four of the nine incidents Safeway had taken advantage of that power for the purpose of deterring the bakers and the independent stores from engaging in competitive conduct.

As to the allegation of price fixing, the Full Court unanimously upheld the appeal of the ACCC and found that Safeway and Tip Top had contravened the TPA.

The Full Court remitted the case to the primary Judge for the fixing of penalties and dealing with the costs of the trial.