

## APPENDIX 7

### SUMMARY OF DECISIONS OF INTEREST

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#### **Trade Marks – opposition – substantially identically – deceptively similar**

*Torpedoes Sportswear Pty Limited v Thorpedo Enterprises Pty Limited & Anor*  
(27 August 2003, Justice Bennett)

Mr Ian Thorpe is a prominent Australian swimmer. The first occasion on which Mr Thorpe was called ‘Thorpedo’ was apparently on 17 March 1997 in a newspaper article. Since then, on numerous occasions the media has used the word ‘Thorpedo’ in connection with Mr Thorpe. In early 1998 Mr Thorpe instructed his financial adviser to incorporate a company to enter into commercial arrangements on his behalf to be called Thorpedo Enterprises Pty Ltd (‘Enterprises’).

On 17 March 1999, Enterprises applied to register the trade mark ‘THORPEDO’ (the ‘THORPEDO mark’). Torpedoes Sportswear Pty Ltd (‘Sportswear’) filed a notice of opposition to the registration of the THORPEDO mark. The Delegate of the Registrar of Trade Marks accepted the application for registration in 2002. Sportswear appealed from that decision to the Federal Court pursuant to section 56 of the *Trade Marks Act 1995* (‘the Act’).

Sportswear owned two marks which it claimed were similar to the ‘THORPEDO’ mark: the word ‘Torpedoes’ (with a large stylised ‘T’ preceding it), which was first registered as a trade mark in 1998; and ‘PARADISE LEGENDS TORPEDOES’, which was registered as a trade mark in 1992. Since 1992, the Sportswear marks had been applied to various kinds of sporting attire.

The issue was whether the THORPEDO mark was substantially identical with or deceptively similar to Sportswear’s marks.

An appeal under section 56 of the Act is heard by way of rehearing and the onus of establishing a ground of opposition is on the opponent. Justice Bennett held that the opposition should be upheld only if the Court is satisfied that the trade mark should clearly not be registered.

With regard to the ‘deceptive similarity’ and ‘substantial identity’ claims, her Honour identified the relevant test as being whether the normal use of the THORPEDO mark would be likely to cause deception and confusion in the face of Sportswear’s normal use of its marks. Her Honour characterised this question as one of impression based on the consumer’s recollection of the mark. In finding that the marks were not deceptively similar or substantially identical her Honour considered the visual and aural impression of the marks, the possibility of confusion as to the origin of the goods, the issue of imperfect recollection, and the idea behind the two marks.

In relation to the applicant’s claim under section 60 of the Act, the evidence in this case did not lead her Honour to the conclusion that, because of the reputation of ‘Torpedoes’, the use of the THORPEDO mark would be likely to deceive or confuse.

As Sportswear's marks were found not to be substantially identical with the THORPEDO mark, her Honour held that Sportswear could not claim ownership of that mark under section 58 of the Act.

Accordingly, her Honour dismissed Sportswear's application.

**Judicial review – whether a decision by the Reserve Bank designating various credit card schemes as ‘payment systems’ (with the result that aspects of the schemes were liable to regulation by the Reserve Bank) was valid.**

*Visa International Service Association v Reserve Bank of Australia*  
(19 September 2003, Justice Tamberlin)

There was significant public interest in a challenge mounted by two major credit card companies, Visa and MasterCard, to the Reserve Bank of Australia's new regulations on interchange fees. Interchange fees are the fees that are charged by a bank that issues a credit card to a card-holder to the bank that pays the provider of goods or services when they are paid for by credit card. The Reserve Bank had estimated that its new regulations could reduce interchange fees in the order of several hundred millions of dollars per annum.

The Reserve Bank imposed these measures pursuant to legislative changes that came into effect in July 1998, which allowed it to impose an Access Regime and Standards upon participants in a ‘designated payment system’. The Reserve Bank determined that the three credit card schemes, Visa, MasterCard and Bankcard, were each a ‘designated payment system’, and decided to regulate several aspects of these schemes. Visa and MasterCard challenged the designation by the Reserve Bank and the Standards that were subsequently determined concerning the interchange fee, and also the no surcharge rule that was imposed on merchants participating in the schemes. These challenges were brought by way of application for judicial review of the decisions made by the Reserve Bank.

The first issue raised by Visa and MasterCard was that their respective credit card schemes, considered as a whole, could not properly be described as a ‘payment system’ within the meaning of the 1998 legislation, and therefore were not the type of systems that the Reserve Bank was empowered to regulate under that legislation. The Court did not accept this submission, on the basis that Visa and MasterCard had adopted a far too narrow interpretation of the words ‘payment system’ under the legislation, which is described in broad terms.

The second issue raised by Visa and MasterCard was that the controls imposed by the Reserve Bank could not properly be described as a ‘standard’ under the legislation, and were therefore invalid. The Court considered, in light of cited authorities, that the provisions contained in the Reserve Bank's regulations did proscribe standards. It was submitted that the Access Regime described by the Reserve Bank was too extensive, and effectively regulated matters not going to access. The Court did not accept this submission. It was submitted that, by permitting the interchange fee to be fixed by reference to a figure set by an independent expert, the criteria for determining that fee were so uncertain as to invalidate the controls. The Court rejected this submission on the basis of evidence provided by expert accountants, and with reference to the cited

authorities. It was further submitted that in determining the Interchange Standard, the power of the Reserve Bank had been unlawfully delegated to the independent expert. The Court did not accept this, principally because it found that the task of the expert was not to fix a price, but to play a role in the review and calculation process.

The other major group of submissions going to invalidity concerned the decision-making process itself. The basic case was that the Reserve Bank had not carried out the necessary processes or obtained the necessary information or adopted the necessary methodology for it to lawfully make the decisions in question. Particular reliance was placed on the evidence of expert economists. A great deal of evidence was called from international experts, who were not able to provide a consensus on the propositions contended for by Visa and MasterCard.

There was a great deal of material presented to the Court. There were close to 1,700 pages of transcript, over 1,000 pages of written submissions, and over 10,500 documents had been discovered, some of which were over 400 pages in length. The parties were represented by 13 Counsel. Eight expert witnesses were called to give evidence, including economists and accountants. There were a number of other non-expert witnesses. However, due to advanced courtroom technology and the pragmatic, cooperative approach taken by the legal advisers, the hearing time, which could have extended over several months, was reduced to the relatively short period of six weeks.

Having considered the extensive material presented, the Court was not persuaded that the Reserve Bank has failed to engage in a proper decision-making process or that it failed to take into account relevant considerations or that it took into account any irrelevant considerations or that it misunderstood or misapplied the legislation or otherwise fell into error. The challenges to the decisions therefore failed, and the applications made by Visa and MasterCard were dismissed.

**Native title – whether native title was extinguished by the construction of public works such as a windmill, a dam, a sewerage system, a school and residential houses**

*Erubam Le (Darnley Islanders) No. 1 v State of Queensland*

(14 October 2003, Chief Justice Black and Justices French and Cooper)

In this case the Full Court had to consider the effects of the complex ‘extinguishment’ provisions of the Native Title Act and to determine whether they had the effect that the construction of various ‘public works’ had extinguished native title rights and interests over the land portion of the island of Erub (also known as Darnley Island) in the east Torres Strait.

The pieces of land in question were subject to a Deed of Grant in Trust granting fee simple to the local council to be held on trust for the benefit of the indigenous inhabitants. The grant had been made in 1985 but between 1977 and 2002, various works had been constructed on the land that was subject to the native title claim. The works included a windmill-driven pump, a new windmill structure, an earth dam storage, a fibreglass reservoir and reticulation pipes; and a State School.

The Full Court held that public works that had been constructed before 23 December 1996 did effectively extinguish native title but that the works constructed after that date did not.

This was a consequence of the fact that Part 2 of the Native Title Act draws distinctions between the effects of acts, depending upon when the acts were done.

The applicants' argument that section 23B of the Native Title Act should overcome the extinguishing effect of the pre-23 December 1996 public works failed. Section 23B provides that the granting or vesting of anything for the benefit of, or to a person to hold on trust for the benefit of, Aboriginal people or Torres Strait Islanders will not be a 'previous exclusive possession act' that extinguishes native title. However, the court held that the construction or establishment of public works could not be characterised as either 'granting' or 'vesting'. Therefore, section 23B did not apply.

For similar reasons, section 47A of the Native Title Act (which provides for certain extinguishing acts to be disregarded if land is subject to a grant for the benefit of indigenous people) did not operate to nullify the extinguishment. The court also held that the public works could not be construed as fitting within the 'creation of a prior interest' in the land which paragraph 47A(2)(b) allows as a ground for disregarding extinguishment.

### **Corporations – registration of company charge**

*Hewlett Packard Australia Pty Ltd v GE Capital Finance Pty Ltd*  
(23 November 2003, Justices Whitlam, Branson and Allsop)

This appeal dealt with the important issue as to whether a court has power to extend time for the lodgement of a notice in respect of a charge under section 266 of the *Corporations Act 2001* (Cth) after winding up occurs or after an administrator is appointed or after a company executes a deed of company arrangement being the events identified in paragraphs 266(1)(a),(b) and (ba) of the Corporations Act.

The Full Court expressed the view that in the light of the history of the registration of charges the proper construction of the Corporations Act was that the Court has no power to extend time after those events have occurred. However, a majority of the Full Court was of the view that the course of intermediate appellate authority was such as to require that view not to be given effect to. The Full Court also examined the circumstances required to be shown for the power to be exercised when the events identified in paragraphs 266(1)(a), (b) and (ba) had occurred. In particular, it was made clear that winding up crystallises rights of creditors and the circumstances said to support an extension of time when winding up has intervened have to be such as to warrant the *ex post facto* destruction of such rights in the nature of property before any such extension can be given.

### **Income tax**

*Spassked Pty Limited v Commissioner of Taxation*  
(8 December 2003, Justices Hill, Gyles and Lander)

The taxpayer Spassked Pty Ltd was a wholly owned subsidiary of Industrial Equity Ltd ('IEL'). It was one of a number of IEL subsidiaries that claimed to be entitled to

carry forward losses resulting from their long incurred interest on monies borrowed from Industrial Equity Finance Limited ('IEF'). The Commissioner of Taxation disallowed those deductions under subsection 51(1) of the *Income Tax Assessment Act 1936 (Cth)*, because the interest was not incurred in gaining or producing assessable income or necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income. Before the Full Court, the appellants appealed from the judgment of a single judge of the Federal Court dismissing their appeals against the Commissioner's disallowance of the claimed deductions.

The funds which Spassked borrowed from IEF, on which interest was payable, were used to subscribe for A class shares in GIH, which entitled it to franked and unfranked dividends. GIH utilised these funds to subscribe for shares in other companies: for the present purposes Spassked was typical of other taxpayer companies in the IEL group. IEL, which owned both IEF and Spassked, also owned shares in GIH, although its shares were B class shares that entitled it to franked dividends only. Ultimately, GIH paid franked dividends to IEL, and paid virtually no dividends to Spassked. At first instance, the primary judge found that there was no expectation, intention or purpose that Spassked would receive, or was likely to receive, dividends from GIH, and as a result, the interest it incurred had not been incurred in the gaining or producing of assessable income. This conclusion was formed having regard to his Honour's finding that the subjective motivation for this corporate structure was the elimination of 'dividend traps'.

Dividend traps resulted when either dividend tax rebates (for years before 30 June 1987) or franking credits were lost. In the case of dividend rebates, shareholder companies were entitled to a rebate of the tax paid on dividend income. Since the expenses incurred in earning such dividends (including interest on borrowed funds used to purchase the relevant shares) were to be offset against the dividend income, this meant that if the interest incurred was equal to or exceeded the dividend, there would be no tax payable and thus no rebate allowable to the taxpayer company. Similarly, in the case of franked dividends, since a dividend could lawfully only be paid out of profits, a company could not declare a dividend when the interest equalled or exceeded the dividend received. Thus, if the dividends were franked, the franking credit was lost.

Before the Full Court, the appellants argued that the primary judge had erred by considering the subjective motivation of IEL and its directors. It was also argued that his Honour erred by not having regard to the fact that Spassked was an intermediate holding company formed to serve the ends of the IEL group. Finally, the primary judge's factual findings were also challenged with the suggestion that his Honour, on the evidence, should have held that the Spassked structure was established with a view to future gain through the receipt of dividends.

In determining whether it was the taxpayer's objective or subjective purpose that relevant to deductibility, the joint judgment of Justices Hill and Lander noted that in *Ronpibon Tin NL & Tongkah Compund NL v Federal Commissioner of Taxation*, the High Court had suggested that a deduction would be available where the taxpayer derived assessable income in a case where the outgoing could be expected to produce assessable income. To this end, their Honours held that subjective purpose could often

be relevant to the objective characterisation of an expense as being incurred in the gaining or production of assessable income.

Although interest on funds borrowed to finance the purchase of shares will ordinarily be deductible without reference to subjective matters, Justices Hill and Lander said that the objects and advantages which the taxpayer had in mind when borrowing could be relevant where year after year there were no dividends paid on the shares acquired. Similarly, Justice Gyles said that where the arrangement was within a company group, the requisite connection between the outgoing and the earning of income must be positively established. This required a consideration of subjective purpose. Accordingly, it was held by all members of the Court that the primary judge did not err in considering subjective purpose.

As to the primary judge's factual findings, Justices Hill and Lander (with whom Justice Gyles agreed on this point) said that while the Court on appeal had power to reverse them, and could receive fresh evidence to this end, its power was 'not untrammelled'. The appellate court was subject to the natural disadvantage of not seeing the evidence-giving process or having the opportunity to evaluate the credibility of the witnesses. The Court held that the findings of the primary judge were entitled to respect, because his Honour had the advantage of hearing and seeing the evidence. Moreover, it was also held that the transcript clearly justified the view taken by the primary judge of both the evidence and the credibility of the appellants' witnesses. Accordingly, the primary judge's findings were not to be disturbed, because it was clear that Spassked had borrowed funds at interest to finance shares that would not for the foreseeable future produce anything but nominal income. The interest was therefore not deductible.

The Full Court dismissed the appeal.

**Trade practices – whether a scheme involving the marketing and sale of residential units at the Gold Coast was misleading and deceptive – whether solicitors involved in the scheme were accessories to misleading or deceptive conduct – whether a bank that lent money for the purchase of a unit through the scheme had acted unconscionably.**

*Australian Competition & Consumer Commission v Oceana Commercial Pty Ltd*  
(18 December 2003, Justice Kiefel)

These proceedings concerned the sale of residential units at the Gold Coast in 1997 and 1998. The principal respondents were Coral Reef (now called Oceana Commercial Pty Ltd) and Investlend (now called Markfair Pty Ltd). Coral Reef engaged a company called NAPC to market the properties and Investlend was used to provide financial advice to prospective purchasers. Mr Bilborough, the fifth respondent was associated with both companies and Mr Quinlivan, the sixth respondent, with Investlend. The Court found that these companies through Mr Bilborough and Mr Quinlivan acted in concert to carry out what has been called the 'NAPC Scheme'.

The ACCC alleged that the conduct of the scheme as a whole was misleading and deceptive conduct within the meaning of section 52 of the Trade Practices Act. That aspect of the case was not established.

It was possible that purchasers may have been misled about two matters by the representatives of NAPC and Investlend. They were told that the purchase price was the unit's market value and they were told that the unit would increase in value at the rate of 8 per cent per annum over the following ten years.

To establish that the representation about market value was misleading or deceptive it was necessary for the ACCC to prove that the units were sold at a price substantially greater than their true value. The ACCC's evidence did not establish that fact.

The representation about the rate of capital growth which was made by the Investlend representative in the process of undertaking what was called a 'property investment analysis' for purchasers was found to be misleading. That was because it was not shown that the companies in question and Mr Bilborough and Mr Quinlivan had any reasonable basis for a belief that the rates were a reliable guide to value.

Another aspect of the case involved particular purchasers, Mr and Mrs Gleeson. The Court found that the companies misled them as to the rate of capital growth they could expect and also as to the true role of the Investlend advisor. They were told that that person was a 'qualified financial advisor', implying that they were quasi-professional people who were giving advice to the Gleesons which would be in their interests. The impression conveyed was that they were separate from the marketer NAPC. In fact they were engaged in the process of selling properties with NAPC. There is no suggestion that the advisors were qualified. They were simply trained to present their 'analysis' and apply pressure.

Coral Reef and Investlend were found liable for breach of section 52. Some but not all of the other respondents were found liable as accessories to the contravention of section 52.

Two solicitors had been joined to the proceedings because they were on a 'panel' of solicitors to whom Investlend referred prospective purchasers at a point when the contract was to be signed. It was alleged that they were guilty of being accessories to misleading conduct because they did not alert their clients to a number of matters, including the relationship between NAPC and Investlend. It was also alleged that they knew most of the details of the NAPC scheme. The Court found that these allegations were not established.

Mr and Mrs Gleeson had sought a loan from a bank to enable them to conclude the purchase. The bank's valuer had advised the bank that they may have paid too much for the property and that they may not have understood local market conditions. The ACCC alleged, on various bases, that the bank was obliged to provide them with the content of the valuation or alert them in some way so that they might seek their own advice. To succeed the ACCC needed to establish that the Gleesons were in a position such that their ability to make a judgment as to their best interests was seriously affected, or that the bank behaved unconscionably. The Court found that, having regard to all the circumstances pertaining to the Gleesons and the bank, neither proposition could be established.

The Court also noted that, in the publicity attending the proceeding, reference had been made to 'two tier marketing'. It was said that this involved the sale of units at one price to people who were familiar with the Gold Coast property market and at a much higher figure to people drawn from places distant. The Court found there was no evidence tendered at the hearing of such a market.

**Trade practices – whether an advertising agency which creates and prepares an advertisement for a client, using its skill to convey a representation that when made will be misleading, contravenes section 12DA of the *Australian Securities & Investments Commission Act 2001* (Cth) as a principal, when its client has final approval of the form of the advertisement and its client arranges for the publication of the advertisement.**

*Cassidy v Saatchi & Saatchi Australia Pty Ltd*

(25 January 2004, Justices Moore, Mansfield and Stone)

This was an appeal by the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission ('the appellants'). The appeal dealt with the question of whether the advertising agency which created and prepared advertisements for a client, using its skill to convey a representation that when made will be misleading, contravened subsection 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ('the ASIC Act') as principal, when its client had final approval of the form of the advertisements and its client arranged for the publication of the advertisement. No claim of accessorial liability was made. Central to the proceedings was the issue of whether the advertising agency itself engaged in misleading and deceptive conduct.

Saatchi & Saatchi Pty Ltd ('Saatchi'), an advertising agency, created and developed an advertisement for NRMA Health Pty Limited and NRMA Insurance Limited ('NRMA') under an agency agreement entered into in September 1998. Saatchi prepared and designed draft advertisements in accordance with a brief received from NRMA. The marketing personnel and in-house solicitor for NRMA approved the final draft advertisements submitted by Saatchi and the final series of advertisements were published in newspapers between July and August 2001.

The substance of the advertisement was that pregnant women would be able to have their babies delivered without making any payment for hospitalisation or medical expenses and that NRMA would make every payment for its fund member irrespective of how advanced the pregnancy was at the time the pregnant woman joined the fund. There were provisos in small font on the advertisements that qualified this by stating that a pregnant woman was only covered after payment of any policy excess or 'co-payment'. It was not in dispute that the advertisements were misleading.

The primary judge found, as a matter of fact, that the misleading representation was made by NRMA and Saatchi was not liable as principal and had not contravened subsection 12DA(1).

The appellants contended that Saatchi made the false representations either because it was the natural and probable consequence of the creation and development of the advertisements that they knew would be published, or because it provided the advertisements to NRMA so that NRMA would publish them and that by reason of

those factual matters, Saatchi engaged in conduct that was misleading and deceptive in trade or commerce in relation to financial services and in contravention of subsection 12DA(1) of the ASIC Act. Saatchi admitted that the advertisements were misleading but denied that the representations in the advertising were made by it.

Having regard to the facts found by the primary judge, the Full Court held that the trial judge did not err in finding that Saatchi had not made the representations.

**Human rights – whether publication of a newspaper cartoon which the Human Rights and Equal Opportunity Commission had found was reasonably likely to offend, insult, humiliate or intimidate Aboriginal persons was done reasonably and in good faith.**

*Bropho v Human Rights & Equal Opportunity Commission*  
(6 February 2004, Justices French, Lee and Carr)

On 6 September 1997, *The West Australian Newspaper* published a cartoon strip entitled 'Alas Poor Yagan'. The cartoon lampooned the involvement of Aboriginal persons, including the appellant, in connection with the return from the United Kingdom of the skull of Yagan, a prominent Aboriginal figure in the history of the colonial settlement in the state after 1829.

Under subsection 18C(1) of the *Racial Discrimination Act 1975* (Cth) ('the Act') any act is rendered unlawful which meets the following conditions:

- (a) it is done otherwise than in private;
- (b) it is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people;
- (c) it is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group.

Subsections (2) and (3) specify circumstances in which an act is taken not to be done in private. Section 18D places certain acts, including exhibition and distribution of artistic works outside of the reach of section 18C if done reasonably and in good faith.

The cartoons led to a complaint to the Human Rights and Equal Opportunity Commission. It alleged the cartoon constituted conduct reasonably likely to offend, insult, humiliate or intimidate Nyoongar people and was done on account of their race and so was unlawful by virtue of section 18C of the Act. A commissioner applying the 'artistic works' exemption under section 18D of the Act dismissed the complaint. A single judge in the Federal Court dismissed a challenge to the commissioner's decision.

The appeal to the Full Court raised the question of the appropriate balance in the Act between the prohibition of racial vilification and the protection of freedom of expression, in particular, the requirement under section 18D of reasonableness and good faith in the exercise of that freedom.

The Full Court by majority (Justices French and Carr, Justice Lee dissenting) dismissed the appeal. Justice French first discussed the international law background to sections 18C and 18D. He noted that Article 4 of the Convention on the Elimination of all Forms of Racial Discrimination, which underpins these sections, allows states to strike a balance between the need to prohibit the evil of racial

vilification and hatred and the need to protect freedom of speech and association. He found that the proscriptions of section 18C create an exception to the general principle that people should enjoy freedom of speech and expression. Consequently, section 18D should be construed broadly for it defines the limits of the proscription in section 18C rather than operating as a free speech exception to it.

On the issue of ‘reasonableness’ under section 18D he found that an act is done reasonably if it bears a rational relationship to the activity and is not disproportionate to what is necessary to carry it out. He then proceeded to give examples of reasonable and unreasonable conduct for the purpose of showing that the notion is circumstance specific. In considering the good faith requirement under section 18D Justice French found that regard must be had to both subjective and objective tests. Whilst want of subjective good faith may be enough to forfeit the protection afforded by section 18D, a conscientious approach to honouring the values asserted by the Act was also required and this was to be assessed objectively.

Justice Lee found the Act itself to be a statement that acts done because of race promote a significant harm which requires legislative intervention and that unless good cause is shown, it is in the greater public interest that the right of free expression is controlled by removing the offending behaviour. He found that the publication of the cartoon was at the serious end of the spectrum and thus there existed a corresponding onus on the respondents to show that in those circumstances the act had been done reasonably and in good faith. The reasonableness of the publication could only be judged against the harm it may cause. Good faith will not be met by a mere assertion that there is an absence of evidence of bad faith, dishonesty or malice as the respondent had contended. In assessing whether an act is done in good faith, regard may be had to the subjective intent, however overall an objective assessment is required. He found that the commission failed to properly address these issues and sought to have the matter remitted to the commission for determination according to law.

Justice Carr found that the newspaper had the onus of establishing the section 18D exemption and that this onus was discharged. He also found that the commission made no error in dealing with reasonableness and good faith as a composite expression. He agreed with the primary judge that the focus of the inquiry for section 18D purposes is an objective consideration of all the evidence, but that evidence of a person’s state of mind may also be relevant. Justice Carr also considered that in finding that the cartoon was published for a genuine purpose in the public interest, the commission clearly took into account the negative aspects of the publication of the cartoon, namely that it was offensive, insulting, humiliating or intimidating.

**Industrial law – redundancy – whether former employees of the Bank who resigned from their employment when the information technology services of the Bank were outsourced had effectively been made redundant with the result that they should be entitled to severance pay.**

*Finance Sector Union of Australia v Commonwealth Bank of Australia*  
(18 March 2004, Justice Moore)

This judgment concerned a preliminary question in a representative proceeding brought on behalf of former employees (‘the group members’) of the Bank who

resigned from their employment when the information technology services of the Bank were outsourced and provided to the Bank by a third party. Amongst other things, it was alleged that the Bank had breached the *Commonwealth Bank Officers Award 1990* ('the Award') by failing to pay the group members severance payments on the basis that they had been made redundant.

In 1997 the Bank entered an agreement with EDS (Australia) Pty Ltd ('EDSA') for the provision of technology services by EDSA (through a wholly owned subsidiary ('EDSS')) to the Bank. The Bank required EDSA to ensure that an offer of employment was made to identified persons working in the Information Services Department of the Bank.

Offers were subsequently made to the group members and other employees in the Bank's Information Services Department to resign their employment with the Bank and to take up employment with EDSS. The offer of employment to each group member was conditional on the Bank and EDSA finalising the agreement to provide technology services, and each group member resigning his or her employment with the Bank. Each group member accepted this offer and became an employee of EDSS on 10 October 1997. Those employees who did not accept the offer continued to be employed by the Bank and were directed by the Bank to work in the organisation and at the directions of EDSS.

Justice Moore considered whether the circumstances of the group members on 10 October 1997 satisfied the definition of 'redundancy' in the relevant provision of the Award and whether there had then been a 'termination through retrenchment' as provided in the Award.

The meaning of these provisions had been considered previously by the Industrial Relations Court of Australia in *Hawkins and Another v Commonwealth Bank of Australia (No 1)*, the Full Court of the Industrial Relations Court in *Hawkins and Another v Commonwealth Bank of Australia (No 2)* and the Full Court of the Federal Court in *Commonwealth Bank of Australia v Finance Sector Union of Australia and Another* ('the Macey matter').

The Industrial Relations Court had held that the word 'retrenchment' in the Award meant termination by the employer of the employment of an officer as the result of redundancy. The same construction was adopted by the Full Court of the Federal Court in the *Macey* matter.

Justice Moore found that, in the circumstances of the present case, the employment of each of the group members was terminated by their own act of resignation at the point in time when the Bank might otherwise have redeployed or retrenched them. There was no termination by the Bank and accordingly (by applying the reasoning in *Hawkins (No 1)* and *Hawkins (No 2)*) there was no 'termination through retrenchment' for the purposes of the Award.

Justice Moore also found that, even if the redundancy provisions were intended to apply (by creating an obligation on the Bank to retrench and/or an entitlement to severance payments) in circumstances where an employee was given no effective choice but to resign at a time when their position became redundant, it was not open

on the agreed facts in the case to conclude that all or any of the group members were in that position.

His Honour considered that it was not open to him, having regard to the reasoning of the Full Court in the *Macey* matter, to adopt an approach analogous to that adopted in *Hawkins (No 2)* which determined Mr Hawkins was entitled to severance payments even though he resigned. This was because *Hawkins (No 2)* concerned a resignation occurring at a time after the Bank was obliged to retrench Hawkins and pay him severance pay.

Justice Moore also found that, even if he had approached the decision in *Hawkins (No 2)* too narrowly, it would not alter the result in this case. This was because, on the basis of the reasoning of the Full Court in the *Macey* matter, none of the employees of the Bank's Information Services Department were, on or immediately before the 10 October 1997, in a redundancy situation. His Honour could not see how he could reason (in the face of the Full Court's conclusion in the *Macey* matter) that even though the Bank employees who remained in the employment of the Bank had not been in a redundancy situation on or immediately before 10 October 1997, Bank employees who did not remain in the employment of the Bank (because they resigned) had been in a redundancy situation on or immediately before 10 October 1997. Each group was in the same situation, but responded differently.

Justice Moore held that the group members were not entitled to severance payments in accordance with the Award and ordered that the application be dismissed.

**Legal professional privilege – whether communications for the purpose of seeking or receiving foreign legal advice are entitled to legal professional privilege in an Australian proceeding.**

*Kennedy v Wallace*

(25 March 2004, Justice Gyles)

On 13 November 2003 a search warrant issued pursuant to the *Crimes Act 1914* (Cth) was executed at the home of the applicant Mr Trevor Kennedy (Kennedy) by officers of the Australia Federal Police assisted by officers of Australian Securities and Investments Commission. Amongst the things seized were:

1. A sheet of notepaper of the Ritz Hotel, London with handwritten notes on it.
2. A sheet of notepaper of the Florhof Hotel, Zurich with handwritten notes on it.
3. A notepad of the Ritz Hotel, London with no visible handwriting on it.

Kennedy applied to the Court to recover those things and for consequential orders. He claimed:

1. That each sheet of notepaper was wrongly seized as it was the subject of legal professional privilege.
2. That the notepad was not the kind of document described in the warrant as liable to seizure.

The Court found that:

1. Neither sheet of notepaper with handwritten notes was the subject of legal professional privilege.
2. The notepad was wrongly seized as it was not described in the warrant.

There were two reasons for rejecting the claim of legal professional privilege for the sheets of notepaper with handwritten notes. The first is that Kennedy did not establish that the dominant purpose for making the notes was to obtain legal advice. The second is that Kennedy did not establish that any legal advice that might have been related to the handwritten notes had any connection with the administration of justice or the proper functioning of the legal system in Australia that provides the basis for a claim of legal professional privilege for communications concerning seeking or obtaining legal advice. Any such advice would have related to the taking advantage of Swiss laws in order to keep assets and transactions secret from Australian authorities.

**Income tax – test case involving applicant as individual shareholder in listed public company – announcement of buy back by listed public company of 5% of its issued share capital – sell back rights issued to shareholders – existing holding of shares not to include her sell back rights in ASX listing – at conclusion of limited period of trading applicant entitled to share in proceeds of sale of sell back rights according to pre-existing formula – whether share of proceeds of sale of sell back rights income according to ordinary concepts in shareholder’s hands**

*McNeil v Commissioner of Taxation*

(14 April 2004, Justice Conti)

The proceedings relate to an application for review by the applicant taxpayer of the Commissioner of Taxation’s decision, made on 31 October 2002, to disallow the taxpayer’s objection to the Commissioner’s notice of assessment of income tax in respect of the fiscal year ended 30 June 2001. The applicant objected to the inclusion in her assessable income of an amount of \$576.64, derived on 16 February 2001 from the disposal of 272 so-called ‘sell back rights’ granted by St George Bank Limited (‘St George’), and subsequently exercised on her behalf. The applicant did not object to the inclusion in her assessable income of part of that amount, namely \$62.64, as a capital gain by reason of CGT Event A1 (section 104-10 of the *Income Tax Assessment Act 1997* (Cth)) (‘the Tax Act’). However the Commissioner sought to maintain that the total sum of \$576.14 was assessable income in her hands, and not just the amount of \$514.00 (calculated at the rate of \$1.89 per sell back right).

The applicant’s circumstances were isolated as a test case for St George shareholders involved in the St George capital buy-back, who could not rightly be characterised as traders or dealers in public company shares. The sell back rights were allocated by St George to the applicant as an accretion to her holding of 5450 ordinary shares in St George, being shares already listed for quotation on the Australian Stock Exchange (‘ASX’). Allocations of sell back rights were made to all ordinary shareholders in St George as part of the first step in so-called ‘capital management activities’, comprising in substance St George’s buy-back of five per cent of its issued ordinary share capital, having an approximate stock market value of \$375 million.

The sell back rights themselves were issued to a corporate trustee, being St George Custodial Pty Ltd (‘SGC’), to hold on separate trusts respectively for each non-excluded shareholder (all shareholders except employees of St George and those with registered addresses outside Australia and New Zealand), and those rights became listed on the ASX, and were able to be traded on the ASX for a period of two weeks from 27 February 2001 to 13 March 2001. Each non-excluded and excluded

shareholder was entitled to one sell back right for every twenty St George shares held at 5:00 pm on the record date, being 23 January 2001. The juridical nature of the sell back rights was that of a put option exercisable at a purchase price of \$16.50 per share. This represented a 18.9 per cent premium to the ASX share price of \$13.88 obtained on 10 January 2001, and a 17 per cent premium over the historically high share price prevailing of \$14.10. The volume weighted net selling price for the sell back rights on 19 February 2001, being the day St George issued 22,788,461 sell back rights to SGC as trustee appointed to the scheme, and when trading in sell back rights commenced, was \$1.89 per sell back right.

The issue of sell back rights was designed to give all St George shareholders an equal opportunity to participate in the benefits of the buy-back. Shareholders not wishing to sell their shares in St George could either sell their share back rights on ASX or have their sell back rights sold to Credit Suisse First Boston Australia Equities Limited ('CSFB') and receive the net proceeds (if any) of their sale on the ASX, or exercise the rights under the sale mechanism.

Four issues were framed by the applicant for resolution by the Court:

- (i) As to the grant by St George of the sell back rights to SGC on 19 February 2001, whether the amount of \$514.00 was to be included in the assessable income of the applicant for the year of income ended 30 June 2001 pursuant to section 6-5 of the 1997 Tax Act;
- (ii) As to the grant by St George of the sell back rights to SGC on 19 February 2001, whether in the alternative, the amount of \$514.00 was to be included in the assessable income of the applicant for the year of income ended 30 June 2001 under the capital gains tax (CGT) provisions pursuant to section 104-155 of the 1997 Tax Act;
- (iii) As to the sale by SGC of the sell back rights to CSFB in February-March 2001, whether in the alternative, the amount of \$576.64, being the amount paid to the applicant on 2 April 2001, was to be included in the assessable income of the applicant for the year of income ended 30 June 2001 pursuant to section 6-5 of the 1997 Tax Act; and
- (iv) As to the sale by SGC of the sell back rights to CSFB in February-March 2001, whether in the event the amount of \$576.64 was to be included in the assessable income of the applicant for the year of income ended 30 June 2001 pursuant to section 6-5 of the 1997 Tax Act, the capital gain of \$62.00, pursuant to CGT Event A1 (section 104-10 of the Tax Act), was to be reduced to zero pursuant to section 118-20 of the 1997 Tax Act.

In relation to the section 6-5 issues (see (i) and (iii) above), the Commissioner contended that the sum of \$514, which represented the market value of the applicant's sell back rights (that is, the date of commencement of trading in sell back rights on the ASX), was ordinary income, or income according to ordinary concepts as often described in judicial precedents, and as now described in section 6-5. In the alternative, the Commissioner contended the sum of \$576.64, which was received by the applicant on 2 April 2001, constituted income of that description.

Justice Conti held that unlike a dividend payment, which is assessable to income tax because it is derived from a company by a shareholder, being a payment or other detachment out of the profits of a company, the proceeds of a buy-back of shares, or

an adjusting payment related or incidental thereto, cannot be characterised as income according to ordinary concepts. While neither the applicant or the Commissioner was able to distil any judicial precedent which bore directly upon the characterisation of the respective sums of \$514 and \$576.64 for income tax purposes, his Honour, like the majority of the High Court in *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639, noted that the question as to what is income cannot be answered by resorting simply to the statutory definition (now section 6-5 of the 1997 Tax Act), which focuses upon the non-exclusive notion of ‘income according to ordinary concepts’. In finding in favour of the applicant on the section 6-5 issues, his Honour stated:

*Once it is seen that the derivation by the applicant of either sum is referable entirely to her existing shareholding in [St George], the applicant’s submission to the effect that the absence of a fund or source of profits within [St George], out of which the alleged earlier accrual and the later payment originated, bears decisively in her favour upon the exclusion of either amount from the scope of operation of section 6-5.*

As to the alternative claim to the case for the derivation by the applicant of income according to ordinary precepts, the Commissioner contended that a capital gain arose in relation to the applicant as a result of the establishment and implementation of the St George buy-back scheme in respect of the entirety of the sum of \$514, that sum representing the value of the applicant’s unrealised sell back rights as at the first or initial ASX listing date in respect thereof, namely 19 February 2001. Pursuant to the capital gains provisions of section 104-155 of the 1997 Tax Act, upon which the Commissioner placed reliance, CGT event H2 crystallises upon an act, transaction or event if the act, transaction or event occurs in relation to a CGT asset, and the act transaction or event does not result in an adjustment being made to the cost base or the reduced cost base of that asset.

The applicant sought to exclude the operation of section 104-155 largely on the footing of the expression ‘an act, transaction or event in relation to a CGT asset that you own’ appearing in par (a) of subsection (1) thereof. His Honour agreed with this submission stating:

*I would venture to suggest that the Legislature would not have reasonably contemplated the operation adversely to a taxpayer of circumstances in which a passive investor, such as the applicant, would become exposed to capital gains tax, merely by reason of having decided not to take up, or having omitted to take up, the opportunity of trading in sell back rights by way of sale on the ASX.*

In finding for the applicant and thus setting aside the assessment of the Commissioner, Justice Conti concluded:

*Moreover there is commercial unreality involved in the description of the imputed figure of \$514 as ‘capital proceeds’ within subsection 104-155, in relation to the circumstances of the applicant as an investor and not a share trader, that sum reflecting nothing more than the initial day’s average trading transactions on the ASX in the sell back rights. Her status relevantly*

*was that of a so-called 'non-directing or remaining shareholder'. In those circumstances, it is I think unrealistic and unjustified to postulate that trading in sell back rights on the ASX during the first listing day could have constituted an act, transaction or event occurring in relation to sell back rights the subject of the applicant's ownership, within the scope of para (a) of subsection (1).*

**Judicial review – whether a decision by a Commonwealth Minister to acquire land in South Australia for the purpose of constructing a low level nuclear waste facility was valid**

*State of South Australia v Honourable Peter Slipper MP*  
(24 June 2004, Justices Branson, Finn and Finkelstein)

On 9 May 2003 the Commonwealth Minister for Science announced that the national repository for the safe disposal of Australia's low level radioactive waste would be located at a site 20 kilometres east of Woomera in South Australia ('the Site'). The State of South Australia opposed the location of the national repository on the Site as did Mr McKenzie, a registered native title claimant in respect of the Site.

On 20 June 2003 the South Australian Minister for Environment and Conservation gave notice of a proposal to introduce into the South Australian parliament the Public Park Bill 2003 with the intention of placing the Site within a public park. Section 42 of the *Lands Acquisition Act 1989* (Cth) has the effect that land in a public park may not be acquired by the Commonwealth without the consent of the State or Territory in which the land is situated. The Commonwealth moved to acquire the Site before the South Australian Parliament could give consideration to enacting the Public Park Bill 2003.

These appeals involved challenges to the legality of the process whereby the Commonwealth sought to acquire the Site. The issues required to be determined on the appeals concerned the proper interpretation of two Acts of the Commonwealth Parliament, the *Lands Acquisition Act* and the *Native Title Act*. The merits of the decision to locate a national repository in the central-north region of South Australia was not open to be reviewed by the Federal Court. Nor was the Court required to consider whether, had the South Australian Parliament enacted the Public Park Bill 2003, the Commonwealth would have been unable to acquire the Site without the consent of South Australia.

The site was purportedly acquired by the Commonwealth by compulsory process in reliance on a provision of the *Lands Acquisition Act* that allows the ordinary notification and review procedures for which the Act provides to be avoided where the relevant Commonwealth Minister is satisfied that:

*There is an urgent necessity for the acquisition and it would be contrary to the public interest for the acquisition to be delayed by the need for the making, and the possible reconsideration and review of, a pre-acquisition declaration.*

The 'urgent necessity' on which the Commonwealth Minister relied was that if the acquisition of the relevant land did not proceed immediately the land was likely to

become a public park. The Commonwealth Minister was satisfied that it would be contrary to the public interest for the acquisition to be delayed to allow normal pre-acquisition procedures to be followed as, in effect, there had been public disclosure of the Commonwealth's intentions and the primary concern of the South Australian Government in seeking to have the relevant land declared a public park was to frustrate the Commonwealth's radioactive waste disposal policy.

The Full Court unanimously took the view that, on the proper construction of the Lands Acquisition Act, it was not open to the Minister to be satisfied that there was 'an urgent necessity for the acquisition' or that 'it would be contrary to the public interest' for the acquisition to be delayed by reason of the making, and the possible reconsideration and review of, a pre-acquisition declaration.

The Full Court concluded that the Commonwealth Minister's desire to avoid the operation of section 42 of the Lands Acquisition Act was not a factor which the Lands Acquisition Act intended could constitute an 'urgent necessity' for an acquisition. The Full Court further concluded that the Lands Acquisition Act does not disclose an intention that the Commonwealth Minister could be satisfied that 'it would be contrary to the public interest' for section 42 of that Act to operate according to its terms. The power of acquisition granted to the Commonwealth by the Lands Acquisition Act is part of a statutory scheme that includes section 42. The Full Court stated that if the Commonwealth Minister takes the view that section 42 gives rise to opportunities for legitimate Commonwealth initiatives to be frustrated, he should invite the Commonwealth Parliament to amend or repeal section 42.

Had the Full Court not concluded that the acquisition failed for the reasons outlined above, it would in any event have concluded that the acquisition failed because of denials of procedural fairness to the appellants.

The orders of the Full Court had the effect of setting aside the compulsory acquisition of the Site.