APPENDIX 7

SUMMARY OF DECISIONS OF INTEREST

Trade practices – whether promotions misleading or deceptive

Australian Competition and Consumer Commission v Telstra Corporation Limited (30 July 2004, Justice Gyles)

Telstra Corporation Limited ('Telstra') is a large national telecommunications company and is the primary supplier of telephony services in Australia.

The dispute arose from Telstra's use of the expressions '$0*' and '$0 upfront' in connection with the sale of mobile telephone handsets together with mobile telephony services. The specific uses of those expressions that were challenged were, first, in a colour advertising brochure that Telstra caused to be distributed to consumers in June 2003, and secondly in a colour display advertisement that was published in the Daily Telegraph newspaper on 4 July 2003.

The issue was whether Telstra had engaged in misleading advertising so as to contravene certain consumer protection provisions in Part V of the *Trade Practices Act 1974* (Cth), specifically sections 52, 53(e) or 53(g), in regard to its representations as to the price, or other conditions, on which it was offering to supply mobile telephone handsets to the public.

The case raised the issue of so called 'free' offers. The advertised mobile telephone handsets could only be acquired together or bundled with a subscription to a Telstra mobile telephony service known as a mobile plan. The terms and conditions of the mobile plan to be taken in conjunction with the '$0*' mobile telephone handsets were not as favourable to the customer as comparable mobile plans subscribed to without the benefit of the '$0*' mobile telephone handset. For that reason, the advertisements were found to be misleading and injunctions to restrain similar advertisements were granted. It was found that the '$0 upfront' statements were not misleading as no initial payment for the phone was required.

Copyright – infringement – authorisation of infringement

Australasian Performing Right Association Limited v Metro on George Pty Limited (31 August 2004, Justice Bennett)

This application concerned the authorisation of infringement of copyright. In dispute was whether the respondents authorised or permitted performances within section 36(1) and/or section 39(1) of the *Copyright Act 1968* (Cth) in breach of the copyright of the applicant, Australasian Performing Right Association Limited ('APRA'), in a number of musical and literary works. The respondents were Metro on George Pty Limited ('Metro'), the registered proprietor of a place of public entertainment called "Metro on George" and two directors of Metro.

APRA either directly licences the promoter of a performance or licences the venue for all performances of music at the venue. Justice Bennett found that there was no venue licence in place when the alleged infringements occurred because it was terminated when APRA accepted Metro's repudiation of the licence. The respondents acknowledged that performers at the Metro on George needed to be licensed but contended that the promoters of performances had the responsibility for obtaining the licence. The respondents asserted that they had no control over the promoters and that they did not permit or countenance the infringing performances.

Her Honour agreed that mere facilitation of infringing conduct and knowledge that there is a likelihood that there will be infringing use are insufficient to constitute authorisation of the copyright infringement. She held that the element of control is necessary to constitute authorisation to infringe copyright. The likelihood of the occurrence of the infringing act, as well as evidence of the degree of indifference displayed, will be relevant to a determination of whether or not the infringement of copyright has been authorised.

Justice Bennett was of the view that Metro did have control and could have prevented an infringing performance. The relationship between Metro and the hirer was that of independent contractor and Metro had no direct relationship with the bands that perform at Metro on George. Yet, unlike the circumstances in *Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia* where the infringements did not take place on the vendor's premises, Metro was in control of the premises. Metro advertised the performances and operated the box office. Its Metro Theatre Hire and Box Office Contract, which formed the basis of the hiring of the premises, gave a measure of control over the use of the premises in circumstances where Metro had grounds to believe that unlicensed performances were to take place or were in fact taking place.

Her Honour found that there was infringement under both section 36(1) and section 39(1) of the Act. Metro permitted or countenanced the unlicensed performances. Metro was on notice that unlicensed performances had taken place but took no action, believing it was for APRA and the promoter to arrange the licensing of performances. Neither of those parties took any action, a matter which Metro ignored. The facts established infringement under section 36(1) of the Act and negate reliance by Metro on section 36(1A)(c). The same evidence established that Metro permitted Metro on George to be used for the eleven performances, where the public performance constituted infringement of copyright within section 39(1) of the Act. Metro did not take reasonable steps to prevent any of the eleven infringing performances. It relied upon the mere existence of a warranty in the Metro Theatre Hire and Box Office Contract as fulfilling its obligations. Metro permitted the unlicensed situation to continue for any promoter. Metro did not establish the application of section 39(2) of the Act.

One of Metro's directors, the third respondent, was held to be liable for the infringements. The third respondent was put on notice of the infringing performances and, acting on his belief that Metro should not be required to pay for a venue licence, directed the company on a course which led directly to it infringing APRA's copyright. His conduct satisfied the tests for liability of directors in intellectual property cases, as expressed by the Court in *Allen Manufacturing Co Pty Ltd v*

McCallum & Co Pty Ltd. The evidence did not establish that the second respondent was personally involved in, or that he authorised the infringements.

Constitutional Law – Fisheries power – Automatic forfeiture of foreign boats engaged in illegal fishing in Australian waters – Whether automatic upon the commission of offences – Whether within Commonwealth legislative power – Whether an invalid exercise of judicial power by Parliament

Olbers Co Ltd v Commonwealth
(16 September 2004, Chief Justice Black, Justices Emmett and Selway)

Olbers Co appealed to the Full Court against the dismissal of its action against the Commonwealth by which it had claimed the illegal seizure of the fishing vessel *Volga*. The *Volga* was intercepted by *HMAS Canberra* and boarded and seized in a remote part of the Southern Ocean near the Heard and McDonald Islands, which lie between Cape Town and Perth. Her catch, consisting of some 120 tonnes of Patagonian toothfish, was also seized.

The *Volga* had been observed fishing inside an Australian fishing zone ('AFZ') in January 2002, in contravention of the *Fisheries Management Act* 1991 (Cth), which prohibits the use and possession of a foreign boat for commercial fishing within the AFZ without a licence. On 7 February 2002, while the vessel was still within the AFZ, *HMAS Canberra* changed course to intercept her, but by the time *Canberra*'s helicopter approached within radar range of the vessel, she had left the AFZ and was in international waters. The *Volga* was nevertheless informed that she was about to be boarded. She did not acknowledge the signal and instead changed course and steamed directly away from the AFZ. She was pursued and subsequently boarded by RAN personnel, lowered from the helicopter. The boarding took place in international waters.

The Fisheries Management Act provides that a vessel used in an offence against the Act, together with its equipment and fish, are forfeited to the Commonwealth and the trial judge held that forfeiture had taken place when the offence was committed. As a consequence, at the time the Volga was boarded she had already become the property of the Commonwealth.

The decision of the trial judge was challenged on appeal to the Full Court, where various arguments were raised, which involved questions of international law and constitutional law.

The Full Court affirmed the constitutional validity of the provisions of the Fisheries Management Act that provide for the forfeiture of vessels to the Commonwealth, and concluded that the provision in question fell squarely within the power of the Commonwealth Parliament with respect to "fishing in Australian waters beyond territorial limits": section 51(x). The Court considered that the provision could also be supported by the external affairs power, the trade and commerce power, and perhaps by others. It held that the provision was not invalid as an exercise by the Parliament of the judicial power of the Commonwealth because the provisions simply provided that if an event occurred certain legal consequences, in this case forfeiture, followed.

The appeal of the former owner of the vessel was therefore dismissed.

Shipping and navigation – compulsory pilotage – negligent navigation by pilot – liability of shipowner – pilot employed by port corporation – entitlement to contribution from port corporation – no entitlement to contribution – statutory immunities operate to defeat contribution claim

Port Kembla Coal Terminal Ltd v Braverus Maritime Inc
(17 September 2004, Justice Hely)

The plaintiff was the lessee and operator of the Port Kembla Coal Loading Terminal. The defendant was the owner of a bulk carrier, the 'SA Fortius' ('the Fortius'). On 15 April 2002, while the Fortius was being manoeuvred within Port Kembla Harbour, its bow collided with a berth causing damage to a berth structure and a ship loader. The plaintiff claimed over $16 million in damages. At the time of the collision the Fortius was being piloted by an employee of the cross-defendant, the Port Kembla Port Corporation, in accordance with the *Ports Corporatisation and Waterways Management Act 1995* (NSW) ('the PCWM Act'). That PCWM Act provides for compulsory pilotage in Port Kembla.

The plaintiff alleged that both the master of the Fortius and the pilot had been negligent and that the defendant was vicariously liable for the negligence of both on the basis that they were its servants (the master by operation of the common law, the pilot by operation of section 410B(2) of the *Navigation Act 1912* (Cth) and section 85(2) of the PCWM Act).

The defendant denied that the master had been negligent and asserted that the pilot was solely responsible for the collision. Determination of this aspect of the case required the Court to consider the history of the legal regulation of the respective roles and responsibilities of a ship's master and pilot. A difficulty for the defendant was that section 410B(1) of the *Navigation Act* and section 85(1) of the PCWM Act explicitly provide that the master of a ship is not relieved from responsibility for the conduct and navigation of a ship merely because it is under pilotage. However, the defendant argued that the correct interpretation of section 410B(1), and hence the scope of the master's duty to third parties, was to be ascertained by considering earlier cases which established that the master was only under a duty to supersede the pilot in very limited circumstances – for example, where the pilot was intoxicated or "manifestly incompetent". The Court rejected this argument, finding that the master negligently failed to override the pilot's orders and that the defendant was vicariously liable for that negligence.

The defendant also denied that it was vicariously liable for the pilot's negligence. Under the common law, a shipowner is vicariously liable for the negligence of a pilot who is voluntarily employed by the shipowner. This rule does not apply to a pilot taken on board where pilotage was compulsory. However, section 410B(2) of the *Navigation Act* and section 85(2) of the PCWM Act make the owner of a ship under compulsory pilotage liable for any loss or damage caused by the ship in the same manner as if the pilotage were not compulsory. The defendant argued that section 410B(2) did not apply because, firstly, the Fortius was not engaged on "an overseas voyage" and, secondly, the pilot was unlicensed. The defendant also argued that even if section 410B did apply, it was nevertheless constitutionally invalid. The Court rejected each of the defendant's arguments in this regard.

Finally, the defendant contended that the Port Kembla Port Corporation was liable to it in contract, under section 52 of the *Trade Practices Act 1974* (Cth) and in tort. The Court held that there was no contract between the defendant and the Port Corporation and that section 52 of the *Trade Practices Act* did not apply. The Court also rejected each of the defendant's claims in tort holding that section 410B(2) of the *Navigation Act* not only operates to render a shipowner solely liable for damage suffered by third parties as a result of the pilot's negligence, but to defeat claims brought by the shipowner to recover for damage suffered while the ship was under compulsory pilotage. In addition, section 86(1) of the PCWM Act gives an immunity to the Port Corporation, as a 'pilotage service provider', in relation to liability for any loss or damage attributable to the negligence of any person employed as a pilot by the pilotage service provider while the person is acting as a pilot. Accordingly, the defendant's cross-claim was dismissed.

Extradition – whether Minister had power to surrender applicant to Singapore where Singapore gave undertaking that applicant would not be executed if found guilty of murder

McCrea v Minister for Customs & Justice
(6 October 2004, Justice North)

This case was about whether the Minister for Customs and Justice was entitled to determine to surrender Michael McCrea to Singapore.

Singapore alleged that Michael McCrea murdered his driver and his driver's girlfriend in Singapore in about January 2002. Mr McCrea fled to Australia, and Singapore requested his extradition so that he could be tried in Singapore for the murders. If convicted of murder in Singapore Mr McCrea faced a mandatory death sentence. The President of Singapore, however, has the power to commute the death sentence.

Australia has a policy that it will not extradite a fugitive offender to a country which has the death penalty unless that country undertakes that if the fugitive offender is convicted that person will not be executed. Section 22(3)(c) of the *Extradition Act 1988* (Cth) reflects this policy. It provides that the Attorney-General may not surrender a person unless the requesting country has provided an undertaking not to execute the fugitive offender if returned to the requesting country.

In light of this provision, Australia asked Singapore to give an assurance that, if Mr McCrea were returned to Singapore and convicted of murder, he would not be executed. Singapore gave such an undertaking. The Minister for Customs and Justice, acting as delegate of the Attorney-General, then determined to surrender Mr McCrea to Singapore.

Mr McCrea challenged that determination. He argued that, for various reasons under Singapore law, the assurance was not valid or enforceable.

Justice North referred to the principle that the Court will not adjudicate on the acts of another sovereign power within its territory and held that this principle applied to the interpretation of section 22(3)(c)(iii). If the Court had to determine whether the assurance was valid or enforceable, the Court would have to rule on an act of Singapore. For this, and other reasons, Justice North decided that the section simply required Singapore to give an undertaking in the terms specified. As Singapore had provided an undertaking in those terms the requirements of section 22(3)(c)(iii) had been met.

Under a separate provision the Attorney-General has an over-riding discretion whether to surrender a fugitive offender. Justice North held that the decision whether the undertaking should be accepted or not was a decision for the Attorney-General, and not for the Court. It was open to the Attorney-General to consider the validity or enforceability of the undertaking in the exercise of that general discretion. Mr McCrea had not challenged the exercise of that discretion.

Consequently Mr McCrea's challenge to the Minister's decision based on section 22(3)(c)(iii) failed and he could be extradited to Singapore.

Income tax – whether expenditure on transport and accommodation or food, drink and recreation fell within the exception under section 51AE(5) *Income Tax Assessment Act 1936 (Cth)*

Commissioner of Taxation v Amway of Australia Limited
(12 October 2004, Justices Hill, Sundberg and Kenny)

This case concerned the application of section 51AE of the *Income Tax Assessment Act 1936* (Cth) introduced in 1985 and repealed and replaced by new provisions within Division 32 of the *Income Tax Assessment Act 1997* (Cth). The points of principle were decided by reference to expenditure by Amway Limited of Australia ('Amway') in connection with the Australian Leadership Seminar ('ALS') held in Bangkok in 1993. The parties agreed that the decision would apply to all years in dispute (the years ending 31 August 1989 to 31 August 1996).

The Full Court considered whether the provision of food, drink and entertainment by Amway to its distributors attending an Australian Leadership Seminar in Bangkok in 1993 constituted "entertainment" for the purposes of section 512AE(3); whether the distributors' accommodation and travel costs were provided 'in connection with, or for the purpose of facilitating, entertainment' by way of food, or entertainment; and whether the provision of entertainment by Amway fell within section 51AE(5)(g). Furthermore, if the deductions were allowable, whether section 51AE(10) operated to exclude the deductions.

It was held that whether the provision of food or drink falls within the definition of the 'provision of entertainment' is not to be determined by reference to subjective matters. What would be considered was the 'essential character of what is provided' and all the relevant circumstances. The Court agreed with the Justice Gyles that 'although held at a desirable holiday location, an ALS or Go Diamond seminar was primarily concerned with business matters'. The Court commented that it would be strange for food and drink provided at the seminar to be deductible and accommodation or travel to be excluded. Therefore the whole amount expended for meals, including drink, other than the gala dinner expenditure, and the amounts expended for accommodation or travel in respect of the seminar were deductible under section 51(1) and not precluded by section 51AE(4).

Income Tax – legality of search and seizure executed by the ATO

JMA Accounting Pty Ltd v Michael Carmody, Commissioner of Taxation
(14 October 2004, Justices Spender, Madgwick and Finkelstein)

The Australian Taxation Office ('ATO') visited two offices of an accounting practice, JMA, seeking access to documents and other records. It had information that JMA were involved in an arrangement designed to provided false evidence of non-existent tax deductions.

Section 263 of the *Income Tax Assessment Act 1936* (Cth) authorised entry without notice and access to source and non-source documents, but that access did not extend to communications that were genuinely the subject of legal professional privilege.

Two copies of all material scanned or copied onto disks were made, one of which was given to JMA and the other to the Australian Government Solicitor. An undertaking was offered that the Australian Government Solicitor would not access the information for a period of 14 days in order to allow any claim of legal professional privilege. At one office there was agreement with this procedure. The other office did not agree but the ATO continued with the proposed procedure regardless.

At one office, all email store folders were copied without any examination of their contents and all information on the computer server, regardless of its relevance, was downloaded in order to limit the time spent. At the other office, a brief search of the documents on the hard drive of each desktop computer was made and copies were taken of only those files that appeared relevant from their titles. A detailed search of the server was made and only directories that were considered relevant were downloaded.

On appeal, the appellant contended that it was denied any real opportunity to claim legal professional privilege (in part because the documents were examined before the applicant could make its claim); and that there was no proper consideration by the ATO as to whether all the documents copied were required for the purposes of the income tax legislation.

The Full Court upheld the appeal in part.

It decided that the proposal of the ATO for dealing with any claim for privilege was adequate for achieving the stated purpose. There was no requirement to reach an accommodation with JMA. The only obligation on the officers was to conduct the search in a reasonable fashion in the circumstances.

Further, the mere seizure of a document without its being read will not infringe legal professional privilege. A document should not be looked at closely; merely enough to enable the officer to decide whether or not the document may be copied. The officers were not permitted to copy documents in relation to which there was only a remote chance that they were relevant.

A brief examination of the documents to determine relevance was reasonable in the circumstances. However, copying of all information in the email store folders and on the server at the first office was insufficient as no reasonable effort was made to distinguish between relevant and irrelevant documents. The ATO was ordered to deliver up the email folders and copies of all documents downloaded from the server.

Environment – civil penalties

Minister for the Environment & Heritage v Greentree (No 2) and *Minister for the Environment & Heritage v Greentree (No 3)*
(11 June 2004 and 14 October 2004, Justice Sackville)

Australia is a party to the Ramsar Convention. The terms of the Convention require contracting parties to designate wetlands within their territory for inclusion in a List of Wetlands of International Importance ('the List').

In June 1999 the Commonwealth nominated the Ramsar Gwydir Wetlands for inclusion in the List. The Ramsar Gwydir Wetlands cover an area of 823 hectares in the north-west of New South Wales. The area plays an important part in the biological and ecological functioning of the Murray-Darling Basin, especially as a migratory bird breeding habitat. The Windella Ramsar site is an area of around 100 hectares that forms one component of the Ramsar Gwydir Wetlands. It is located wholly within a property called Windella.

The Windella property was farmed by a partnership called Greentree Farming. Mr Greentree was the director and manager of the partnership. He was also the principal shareholder of Auen Grain Pty Ltd ('Auen'), which had a majority interest in Greentree Farming. Between June 2002 and July 2003, Mr Greentree gave instructions for the clearing, ploughing and sowing of virtually the whole of the Windella Ramsar site. Prior to these instructions being given the environmental character of the site had been degraded to some extent by natural events.

The Minister for the Environment and Heritage instituted legal proceedings against Mr Greentree and Auen (amongst others) under section 16(1) of the *Environment Protection and Biodiversity Conversation Act 1999* (Cth) ('the EPBC Act'). Section 16(1) provides that a person must not take an action that will have a significant impact on the ecological character of a declared Ramsar wetland. A person who takes such action is liable to a pecuniary penalty.

The respondents made three arguments in their defence. First, they claimed that their actions did not affect a 'declared Ramsar wetland' because the Windella Ramsar site had not been properly designated under the Ramsar Convention. Parties to the Convention had been urged by the Secretariat to define precisely the boundaries of any wetland designated for inclusion in the List. Nonetheless, the description provided by the Minister in support of the listing under the Convention did not contain the exact geographic co-ordinates for the Windella Ramsar site. The Court held that the EPBC Act did not require a precise description of the boundaries of a wetland as a pre-condition for its inclusion in the List. Indeed, the Convention itself did not require such a description, as evidenced by the practices followed by the Secretariat.

The respondents' second argument was that section 16(1) of the EPBC Act did not apply due to an exception for actions which were 'specially authorised under a law of a State' and for which 'no further environmental authorisation' was necessary. The respondents said that under the local planning law applicable to the Windella Ramsar site, the land could be developed for agricultural purposes without the need for development consent. The Court held, however, that the *Native Vegetation Conservation Act 1997* (NSW) required development consent before land could be cleared of native vegetation. Thus the exception did not apply.

The final argument made by the respondents was that their actions had not had a significant impact on the Windella Ramsar Site. The impact of their actions was to be assessed by reference to the ecological character of the site immediately before their activities had taken place. The Court agreed that the condition of the site before the clearing had to be taken into account. But it held that the clearing, ploughing and sowing of virtually the entire site had had a significant impact on its ecological character. Hence a contravention of section 16(1) had been established.

The Court found Mr Greentree and his company, Auen, responsible for the conduct and therefore liable to pecuniary penalties. It ordered Mr Greentree to pay $150,000 and Auen to pay $300,000.

Extradition – whether surrender to Republic of South Africa would be unjust, oppressive or incompatible with humanitarian considerations for the purpose of reg 5(4) of the Extradition (Republic of South Africa) Regulations

de Bruyn v Minister for Justice & Customs
(22 December 2004, Justices Spender, Kiefel and Emmett)

This case concerned an extradition request made by the Republic of South Africa to the Minister for Justice and Customs. Mr de Bruyn was a citizen of South Africa who was to be charged with defrauding the First National Bank of South Africa.

Under regulation 5(4) of the Extradition (Republic of South Africa) Regulations then in force, the Attorney-General could decline if, in the circumstances, it would be 'unjust, oppressive or incompatible with humanitarian considerations' to surrender the person.

The question before the Court was whether representations as to the terrible conditions in South African prisons – specifically that prisoners were at a high risk of being gang raped and of contracting HIV – contained in articles and reports tendered to the Minister and accepted by him as true, were such that it would be 'unjust, oppressive or incompatible with humanitarian considerations' to surrender Mr de Bruyn.

The Full Court held that the Minister's decision had involved an incorrect understanding of what may amount to humanitarian considerations.

The words 'circumstances of the case' include the personal circumstances of the person the subject of the extradition request and there is no limit on the factors that might arise following the surrender of the person. The exposure to the risk of contracting HIV may amount to a threat to the life and wellbeing of a person and such a threat, arising from prison conditions, may be viewed as associated with the punishment a person would receive if surrendered.

The Minister did not address the question that he was required to address, namely whether, in the circumstances of the case, it would be oppressive or incompatible with humanitarian considerations to surrender Mr de Bruyn to South Africa when there is a risk of contracting HIV/ AIDS considerably greater than if he is not surrendered.

Corporations – Whether members of a company in administration who also wish to make claims in damages against the company are entitled to be treated as creditors

Crosbie; In the matter of Media World Communications Ltd (Administrator Appointed) (31 January 2005, Justice Finkelstein)

Media World Communications Ltd was a publicly listed company. It had issued a prospectus in connection with an offer to raise capital. Some months later, however, the directors, fearing that the company was insolvent, had appointed an administrator. By the time of the hearing, a deed of company arrangement had been proposed.

Several members of the company who had subscribed for shares had since initiated claims for damages in tort and under statute against the company in relation to allegedly false or misleading statements contained in the prospectus. The question for determination was whether those members of the company were entitled to be treated as creditors for the purposes of the administration.

For the purposes of the administration of a company with a view to the execution of a deed of company arrangement, a creditor is a person who has a debt or claim which, if the company were in liquidation, would be admitted to proof under the winding-up provisions of the Act. This would include persons who had claims for damages against the company: section 553(1) of the *Corporations Act 2001* (Cth). However under the winding-up provisions, a person with a debt or claim who is also a member of the company must have their claim postponed until the claims of creditors who are not members have been satisfied: section 563A.

Justice Finkelstein held that, while in an administration the term 'creditor' is to be accorded the same meaning that word has in a winding-up (and therefore members who could pursue claims in damages were entitled to be treated as creditors), there is no justification for also importing the 'prioritisation of claims' scheme of section 563A that is applicable in a winding-up, which is inapposite to the circumstances of an administration. He held that any subordination of claims in an administration to the claims of others is to be resolved by the creditors through the deed of company arrangement, not by operation of section 563A.

However the remaining issue was whether these members did in fact have claims that were capable of succeeding against the company. Justice Finkelstein held that the rule in *Houldsworth v City of Glasgow Bank and Liquidators* prevented a subscribing shareholder from recovering damages against a company on the grounds that they were induced to subscribe by fraud or misrepresentation if they had not renounced the contract by which they had acquired those shares. He noted that this rule had been confirmed by the High Court in *Webb Distributors (Aust) Pty Ltd v State of Victoria* as a bar to both common law and statutory claims, unless the statute itself overrode the rule. It followed that these subscribing shareholders would only be able to maintain their claims in damages if they rescinded the contracts by which they acquired their shareholdings. However once the company was in administration, it was only possible for them to rescind by obtaining a court order: section 437F. The members were thus effectively statutorily barred against rescinding their contracts and pursuing their claims in damages, and were therefore not entitled to be treated as creditors for the purposes of this administration.

Justice Finkelstein mentioned two other matters by way of *obiter*. Firstly, he noted that the rule in *Houldsworth* might not apply if the subscribing shareholders were able to obtain an order under section 158 of the *Fair Trading Act 1999* (Vic) that their contracts were void *ab initio*. Secondly, he considered the position of shareholders who had purchased their shares not by subscription to the initial public offer, but rather in the course of trading on the open market, but who would nonetheless claim that they had been induced to purchase the shares on the basis of the allegedly false or misleading prospectus. Justice Finkelstein was of the opinion that such transferee shareholders would not be similarly barred by the rule in *Houldsworth*, as generally they were unable to renounce their shareholdings, irrespective of whether the company was in administration or not.

Practice and procedure – whether decision of a single judge of the Federal Court not exercising appellate jurisdiction binding on Federal Magistrates

Minister for Immigration and Multicultural and Indigenous Affairs v SZANS
(17 March 2005, Justices Weinberg, Jacobson and Lander)

The background to the case was that a Federal Magistrate, having found that the Refugee Review Tribunal ('RRT') failed to consider an integer of the respondent's claim, had to consider whether the application should nonetheless be dismissed because of the RRT's finding that there was no Convention nexus.

The Magistrate stated that he was not bound to follow a decision of Justice Madgwick in *MMM v Minister for Immigration and Multicultural and Indigenous Affairs*, which provided clear support for the approach taken by the RRT; that is, that pressure was not exerted 'for reason of' membership of a particular social group.

The Full Court acknowledged that the doctrine of *stare decisis* generally adopted in Australia suggested that a court lower in a particular judicial hierarchy was bound to follow a decision of a court higher in that hierarchy only where that higher court was exercising appellate jurisdiction.

The Full Court observed that this limitation on the doctrine of *stare decisis* could lead to odd results. It noted that if Justice Madgwick J had been sitting on an appeal from a Federal Magistrate in *MMM*, his judgment would have been binding. However, because he was exercising original jurisdiction, a matter of sheer chance, at least in relation to migration matters, that was not the case here.

The Full Court held that even if the Federal Magistrate was correct in holding that the judgment was not strictly binding upon him, he was not correct in refusing to follow it, because the principle of judicial comity ought to apply, in the same way as between single judges of the court, and the judgment followed unless plainly wrong: *Cooper v Commission of Taxation*.

The Full Court observed that the principle of judicial comity contributed to the predictability of outcomes of proceedings, which was a necessary feature of the exercise of jurisdiction by all Chapter III courts.

The Full Court concluded that on the facts of the case, the Federal Magistrate could not properly have determined that the decision in *MMM* was plainly wrong, and ought therefore to have followed that decision. The appeal was allowed.

Tort – immigration detention – Commonwealth's duty to provide mental health care services

S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs
(5 May 2005, Justice Finn)

The two applicants, S and M, had each been in immigration detention for about five years. While detained in Baxter Detention Centre psychiatrists diagnosed both as suffering major depression.

The object of their applications was to compel their transfer to a mental health facility. Prior to the delivery of judgment, both S and M were transferred to Glenside Hospital.

The Court held that it was the Commonwealth's duty to ensure that a level of medical care was made available to S and M that was reasonably designed to meet their health care needs. These needs included psychiatric care.

Justice Finn found continuing failures on the part of the Commonwealth both to take appropriate steps to arrange psychiatric assessments after medical referrals and to implement adequately treatment plans that had been prescribed.

The Commonwealth received medical opinions from two outside psychiatrists to the effect that the conditions at Baxter were themselves a contributing cause of the mental illness of S and M; that Baxter was unable to provide the level of care now required by S and M given their conditions; and that Baxter was an inappropriate treatment environment for them. According to these psychiatrists the applicants needed to be transferred to a mental health facility straight away.

These opinions were not unreasonable and necessitated in the circumstances that independent advice be obtained. This was not done.
The Court would have granted injunctive relief against the Commonwealth, but the applicants' transfer to Glenside rendered this unnecessary. In light of this the Court ordered that the Commonwealth pay the applicants' costs.

Intellectual Property - copyright - infringement - television broadcast -whether substantial part taken - qualitative test - other factors to be considered

TCN Channel Nine Pty Limited v Network Ten Pty Limited (No 2)
(26 May 2005, Justices Sundberg, Finkelstein and Hely)

This case concerned the broadcast by Network Ten Pty Limited ("Ten") of segments of television programmes first broadcast by TCN Channel Nine Pty Ltd ("Nine"). Nine alleged that the broadcasts of those segments infringed its copyright in the programmes. At trial, a single Judge of the Federal Court dismissed Nine's claims for infringement, finding that Ten had not taken the whole or a substantial part of any of Nine's broadcasts. On appeal, the Full Court held that each visual image capable of being observed as a separate image on a television screen together with accompanying sounds was "a television broadcast" for the purposes of the *Copyright Act 1968* (Cth) ("the Act") and that Nine's copyright in the broadcasts had been infringed by Ten. A further appeal to the High Court by Ten on the issue of the correct interpretation of the term "a television broadcast" was successful. However, the High Court's decision did not resolve the entire dispute between the parties and the remaining issues were remitted to the Full Court for determination.

Ten's programme, "The Panel", had used 20 short segments (between eight and 42 seconds) from programmes previously broadcast by Nine. At trial and on appeal Ten made out the defence of fair dealing with respect to nine of the segments. The dispute still to be resolved was whether the remaining 11 segments that were copied and re-broadcast were "substantial" parts of the programmes from which they were taken. Only if they were found to be "substantial" parts would Nine's copyright be infringed.

The Act distinguishes between copyright in original literary, dramatic, musical and artistic works (Part III) and copyright in subject matter other than works (Part IV). In concluding that Ten had not taken the whole or a substantial part of any of Nine's broadcasts (protected under Part IV), the trial judge had applied a "primarily quantitative" test. This was a different test to the qualitative approach which had been developed in relation to Part III works. However, the High Court decided that, on the contrary, substantiality in the case of Part IV subject matter raised questions of quality as well as quantity.

Accordingly, in this case the Court was required, for the first time in Australia, to apply the traditional qualitative test to broadcast copyright. The majority held that this involves a visual comparison between the part taken and the copyright work in order to ascertain whether what has been taken is a "substantial part" of the copyright-owner's programme. Drawing on a number of American cases, the majority held that this might involve asking questions such as the following: Does what has been taken amount to "essentially the heart" of the copyrighted work? Is what has been taken "the essential part of the copyright work?" Is what has been taken "at least an important ingredient" of the copyright work? Have the best scenes been taken from the programme? Are the excerpts "highlights" from the programme? Are the excerpts central to the programme in which they appeared? Does the portion used "constitute the 'heart' - the most valuable and pertinent portion - of the copyright material?"

In circumstances where a visual comparison does not yield a result, it will be necessary to consider other factors such as the copyright-owner's financial interest, as well as the alleged infringer's purpose, to resolve the substantiality issue.

Upon application of the qualitative test to the segments taken from Nine's programmes, the majority found that Ten infringed Nine's copyright in six of the broadcasts. The majority found there was no infringement of copyright in the other broadcasts because the segments were insignificant in the context of the programme from which they were taken.

Practice and procedure – service out of the jurisdiction – discretionary considerations including the international political nature of the issues and the question of futility

Humane Society International Inc v Kyodo Senpaka Kaisha Ltd
(23 November 2004 and 27 May 2005, Justice Allsop)

In this case the applicant sought leave to serve initiating process in Japan in which it sought declarations and injunctions under the *Environment Protection and Biodiversity Conservation Act 1989* (Cth) ('the EPBC Act') concerning the killing of whales in the Australian Whale Sanctuary located in the Australian Antarctic Exclusive Economic Zone ('Antarctic EEZ'). The respondent to the proceeding held a permit from the Japanese Government to conduct whaling for scientific purposes. That conduct of the Japanese Government and the respondent was, on its face, in accordance with international law, in particular under the International Convention for the Regulation of Whaling.

The applicant proved a clear prima facie case that the respondent had for some time killed, and would continue killing, whales in the Sanctuary which conduct was, and would be, contrary to Australian law, that is, a number of provisions of the EPBC Act.

The Court invited submissions from the Commonwealth Attorney-General as to the request for leave by the applicant. After considering submissions from the applicant and the Attorney-General, the Court refused to exercise its discretion to grant leave. It did so on the basis that there was no material which would indicate that it was likely that the EPBC Act would be enforced. This likely futility was compounded by weighing the considerations put forward by the Attorney-General, which included the concerns for Australia's diplomatic and international interests. Only four countries (not including Japan) recognise Australia's claim to Antarctica. That claim is the foundation to entitle Australia to claim the Antarctic EEZ under the United Nations Convention on the Law of the Sea and thus to pass legislation such as the EPBC Act. Japan views Australia's claim to the Antarctic EEZ and the Whale Sanctuary as illegitimate and an attempt to legislate in respect of the high seas. Weighing these matters the Court refused to give leave in circumstances where it had not been shown that the local statute was likely to be enforced.