APPENDIX 7
SUMMARY OF DECISIONS OF INTEREST

ADMINISTRATIVE LAW – jurisdictional error – challenge to the first respondent Minister's decision to approve proposed action by the second respondent to develop and operate a mine in north-west Tasmania – whether Minister failed to 'have regard to' the 'Approved Conservation Advice for the Tasmanian Devil' – text, structure and purpose of the *EPBC Act* considered – mandatory consideration – whether the Minister's decision would have been materially affected by failure to have regard to the document itself – whether the Minister was entitled to attach certain conditions to the approval – whether decision irrational or unreasonable – whether relief should be refused on discretionary grounds.

Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities [2013] FCA 694 (17 July 2013, Justice Marshall)

The Federal Court of Australia declared the decision of the respondent Minister to approve the development and operation of an iron ore mine in north-west Tasmania invalid on the ground that the Minister failed to consider the text of the Approved Conservation Advice for the Tasmanian Devil (the ACA) as required by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act).

In December 2012, the Minister approved the taking of a proposed action by Shree Minerals (Shree) to develop and operate the mine subject to several conditions, including the condition that Shree donate money to the Save the Tasmanian Devil Programme Appeal (the programme).

Prior to the Minister's decision, an Environmental Impact Statement (EIS) was prepared to assess the impacts of the proposed action. The EIS was provided to the Minister for consideration.

The Tarkine National Coalition applied for review of the Minister's decision. The critical issues for determination were:

- whether the Minister had regard to the ACA when making his decision
- whether the Minister was entitled to attach conditions to the approval.

Having regard to the objects of the EPBC Act, the Court found that the ACA was an important document which was intended to inform the Minister's decision-making.

The Court also observed the mandatory language of s 139(2) of the EPBC Act requires that 'the Minister *must* have regard to any approved conservation advice for species' [emphasis in original].

When considering whether the Minister 'had regard to' the ACA, the Court noted that in his statement of reasons, the Minister stated that he took into account '*any* relevant conservation advice' in making his decision [emphasis added]. The Court concluded that the Minister's failure to have regard to the document for the purpose of making his decision was 'fatal to its validity'.

Applying the decision in *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14, the Court concluded that the plain words of the provision and purpose and objects of the EPBC Act revealed a legislative intention that any decision made without proper regard to the ACA would be invalid.

APPENDIX 7
SUMMARY OF DECISIONS OF INTEREST

CONSUMER LAW – unconscionability – entry into consumers' homes by ruse – sale of vacuum cleaners – breaches of State and Commonwealth consumer protection legislation – whether unconscionable.

Australian Competition and Consumer Commission v Lux Distributors Pty Ltd [2013] FCAFC 90 (15 August 2013, Chief Justice Allsop and Justices Jacobson and Gordon)

In this matter, the Australian Competition and Consumer Commission sought relief against Lux Distributors in respect of the sale of vacuum cleaners by its door-to-door salesmen to three elderly women in their homes. The Commission claimed that the salesmen's conduct had been unconscionable. The Full Court agreed. It reversed the decision of the trial judge, making declarations of unconscionable conduct under s 51AB of the *Trade Practices Act 1974* (Cth) and s 21 of the *Australian Consumer Law*, and otherwise remitting the matter.

Lux's method was to call potential purchasers and make an appointment for what purported to be a free 'maintenance check' on their existing vacuum cleaner. The Court found that this was a deceptive ruse designed ultimately to lead to a vacuum cleaner sale. The three elderly women here agreed to an appointment. The salesmen attended their homes and carried out cursory checks on their existing vacuum cleaners. These appeared to demonstrate the need to purchase a new machine. After lengthy stays by the salesmen, each woman agreed to purchase a new Lux cleaner.

In two cases, in breach of Commonwealth and State consumer protection legislation, the salesman in question failed to inform the woman of the real purpose of the visit or of her rights. In one instance, the salesman overstayed the State statutory time limit beyond which written consent from the house occupant was required but never received. In another, the salesman accepted a cheque in breach of State law.

The Court observed that State and Commonwealth legislative requirements applicable to door-to-door selling, which had been infringed, were designed to redress the power imbalance and consumer vulnerability inherent in that mode of salesmanship. According to the Court, the values, norms and community expectations underpinning the determination whether conduct is unconscionable is informed by such statutory provisions.

In this light and in all the circumstances, the relevant conduct was unconscionable. The Court emphasised the deceptive means by which access to the ladies' homes was gained, the resulting power imbalance, and the salesmen's contraventions of consumer protection obligations.

TAXATION – *Taxation Administration Act 1953* (Cth) – Div 290 – civil penalty regime – whether entity is a promoter of tax exploitation scheme – whether entity has implemented a scheme otherwise than in accordance with its product ruling – time limits on commencement of actions in respect of an entity's involvement in a tax exploitation scheme.

STATUTORY INTERPRETATION – meaning of 'scheme benefit' – whether there is requirement of alternative postulate – meaning of 'markets the scheme or otherwise encourages the growth of the scheme or interest in it' – meaning of consideration received 'in respect of' marketing or encouragement.

Commissioner of Taxation v Ludekens
[2013] FCAFC 100
(29 August 2013, Chief Justice Allsop and Justices Gilmour and Gordon)

The Commissioner sought imposition of penalties on the respondents under tax exploitation scheme provisions of s 290-50 of Sch 1 of the *Taxation Administration Act 1953* (Cth). On appeal, the question was whether the respondents had engaged in conduct that resulted in either:

(a) promotion of a tax exploitation scheme (s 290-50(1)), or

(b) implementation of a scheme, promoted on the basis of its conformity with a product ruling, in a manner different from that described in the ruling (s 290-50(2)).

The Court concluded that the respondents had done the former but not the latter.

The respondents formulated a plan involving acquisition of woodlots in a Gunns managed investment scheme. Woodlot investors incurred fees that a product ruling by the Commissioner held to be tax-deductible. Debts incurred through woodlot acquisition would be paid with profits obtained from a trading business into which would be invested commissions from Gunns and GST refunds from the woodlot acquisitions, along with funds from on-selling the woodlots to secondary investors. Profits from the trading business were otherwise to be retained. Secondary investors would seek tax deductions and refunds in respect of their woodlot acquisitions, promising to pay the refunds to the respondents.

As to whether this was a tax exploitation scheme, the Commissioner submitted that it was reasonable to conclude that an entity had the purpose of having a tax-related liability that was, or could reasonably be expected to be, less than it would be apart from the scheme. The Court agreed: the Commissioner was not required to plead or prove what the tax-related liability of the relevant entity would have been without the scheme.

Further, obtaining the GST and other tax refunds was the respondents' dominant purpose, despite the ulterior aim of profiting from the trading business.

The respondents had engaged in promotion: they marketed and encouraged growth of the scheme by procuring third parties' involvement in it. They received consideration via Gunns commissions and GST refunds.

However, the respondents did not breach s 290-50(2): the Commissioner's product ruling related to the Gunns scheme, not the respondents' secondary investment scheme.

An application to the High Court for special leave to appeal was refused on 11 April 2014.

APPENDIX 7
SUMMARY OF DECISIONS OF INTEREST

COMPETITION LAW – whether a corporation in entering into a contract for the acquisition of flyash from a power station in South-East Queensland contravened s 46 of the *Trade Practices Act 1974* (Cth) – consideration of the features and sources of the corporation's contended market power – whether uncertainty in the renewal of the corporation's principal contract, due to public sector tendering processes, had the effect of extinguishing any substantial degree of market power enjoyed by the company prior to the commencement of the tender process – whether in entering into the contract the corporation took advantage of any subsisting market power or whether its conduct was referable to legitimate business reasons – consideration of the notion of legitimate business reasons – whether the contended conduct was conduct a corporation in a workably competitive market could have engaged in – consideration of the purposes actuating the conduct of particular individuals – consideration of the relevant markets – consideration of the boundaries of the upstream and downstream markets – consideration of the scope and field of rivalry – whether the performance of a contractual obligation involved taking advantage of market power – consideration of the features of taking advantage of market power.

Australian Competition and Consumer Commission v Cement Australia Pty Ltd [2013] FCA 909 (10 September 2013, Justice Greenwood)

The claims and principles in these lengthy and complex proceedings, put simply and using abbreviated terms, can be reduced to the following:

CLAIM 1

On 30 September 2002 Pozzolanic Enterprises (PE), after a tender process, entered into a six-year contract to acquire flyash from Millmerran Power Station. Flyash is ash liberated from the mineral matter in coal during combustion at a power station. It is carried in exhaust gases called flue gases from the combustion chamber, collected, sometimes classified, and used as a partial substitute for cement in making concrete. Cement producers seek it out. Two markets were found to exist. First, a south-east Queensland (SEQ) 'unprocessed' flyash market (an 'upstream market') and, second, a SEQ 'fine grade' flyash market for use as a partial substitute for cement (a 'downstream market'). PE was found to enjoy a substantial degree of market power in both markets leading up to entry into the Millmerran contract.

PE's source of market power was its longstanding control of all flyash sources in SEQ and, in particular, its contractual control of flyash from SEQ's primary source of proximate flyash from the Tarong Power Station. That contract with PE was also subject to tender and was ultimately won by PE on 26 February 2003. PE contended, supported by expert evidence from Professor Hay, that uncertainty surrounding the renewal of the Tarong rights meant PE had no market power at 30 September 2002. The Court found otherwise holding that the relationship between uncertainty in the Tarong rights and market power was not a question of kind but of degree, on the facts. The Commission contended that, in contravention of s 46 of the *Trade Practices Act 1974* (Cth), PE 'took advantage' of its market power for a prescribed purpose of, put simply, foreclosing new entrant competition by entering into the Millmerran contract.

The Court found that entry was not a use of market power but rather something that any corporation in a workably competitive market could have done to risk manage a loss of the Tarong tender resulting in a loss of Tarong flyash to PE.

CLAIM 2

On 28 and 30 July 2004, the Millmerran contract was affirmed by PE and amended by PE and Millmerran. By then, PE had won the Tarong contract. The Commission contended that Cement Australia by causing PE to go on with the contract rather than bring it to an end as it could have done, took advantage of its market power to foreclose new entrant competition in each market by denying third party access to Millmerran flyash under the amended arrangements. The Court found no taking advantage of market power, on the facts, but rather an election by PE, supported by Millmerran, to further evaluate the compromised quality of the ash as a product, during the extended period and terms of the contract.

CLAIM 3

On 18 March 2005, PE elected to deploy capital at Millmerran to construct processing facilities. The Commission contended that since PE did not need Millmerran flyash and no demand for it had been identified, PE's election to deploy the capital under the contract and make the investment was the expression of taking advantage of market power to foreclose third party access to Millmerran flyash. The Court found no taking advantage of market power but rather an election to perform and discharge contractual 'obligations' cast upon PE that could not properly be unilaterally repudiated by it.

CLAIM 4

Identified provisions of the Millmerran contract were said by the Commission to have been included for a purpose of substantially lessening competition and the provisions were said to have the effect and likely effect of doing so: s 45(2)(a)(ii). Other entities in the Cement Australia group (including PE) were said to have given effect to the provisions: s 45(2)(b)(ii). Some entities were said to be knowingly concerned in the contraventions. The Court so found in respect of PE and some other entities. However, the effect and likely effect of the provisions was exhausted due to the compromised quality of the flyash, by 31 December 2003.

CLAIM 5

Identified provisions of the Tarong contract were said to have been included for a purpose of substantially lessening competition and those provisions were said to have the effect and likely effect of doing so. Other entities in the Cement Australia group (including PE) were said to have given effect to the provisions. Some entities were said to be knowingly concerned in the contraventions. The Court so found in respect of PE and some other entities.

CLAIM 6

This claim was concerned with whether individuals were knowingly concerned in the contraventions on the part of entities within the Cement Australia group. The Court so found in relation to one individual.

PRINCIPLES

The judgment considers all of these matters within a complex factual matrix. The judgment discusses the principles governing each of the integers of s 46 and the assessment of the expert evidence concerning market power factors (Pts 28, 29, 30, 31 and 41 of the judgment). It considers the integers of s 45 on purpose, effects, likely effects and the tests for determining 'inclusion' of provisions in a contract for the purposes of s 45 (Pts 42, 43, 44, 45, 46 and 47). It considers the circumstances when *Jones v Dunkel* (1959) 101 CLR 298 inferences might be drawn from the failure of a party to call evidence from particular persons.

A penalty hearing on the s 45 contraventions is set down for hearing for December 2014.

APPENDIX 7
SUMMARY OF DECISIONS OF INTEREST

ADMINISTRATIVE LAW – delegated legislation – legislative instrument – *Guide to the Assessment of the Degree of Permanent Impairment* – whether prescribed criteria of impairment fix objective standards that can be applied with certainty – whether prescribed criteria of impairment invalid – whether medical evidence not based on clinical testing relevant to assessment.

STATUTORY INTERPRETATION – 'unable' – whether 'unable' should be construed as requiring an activity to be impossible for a person to complete or perform – *Leeder v Mayor of Ballarat East* [1908] VLR 214.

PRACTICE AND PROCEDURE – application to amend Notice of Contention made without notice at hearing of appeal – interests of the administration of justice – leave to amend refused on most grounds – costs of appeal apportioned

Comcare v Lilley [2013] FCAFC 121
(1 November 2013, Justices Kerr, Farrell and Mortimer)

Mr Lilley was a firefighter who developed pain in his legs after performing strenuous exercise. His general practitioner diagnosed him as suffering from bilateral compartment syndrome, probably caused by his work in the fire brigade. Mr Lilley made a claim for compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth).

The amount of compensation payable for permanent impairment is calculated by reference to a percentage expressing the employee's degree of impairment. This percentage is determined under the provisions of the *Guide to the Assessment of the Degree of Permanent Impairment*. Criteria in Table 9.7 of the Guide indicating a 5% or 10% impairment include whether an employee can negotiate three or more stairs or a ramp without assistance, and how easily an employee can negotiate uneven ground.

The Administrative Appeals Tribunal found that clinical testing is required for a valid assessment, and that Mr Lilley's compartment syndrome injury did not meet the 10% minimum threshold for compensation. On appeal to the Federal Court, the primary judge found that clinical testing was not required for a valid assessment (other than in respect of determining 'manifest' difficulty), and that the criteria for 5% and 10% impairment in Table 9.7 were invalid as they failed to fix an objective standard and left an unfettered power to the decision-maker.

On appeal, the Full Court held that the criteria in Table 9.7 were not invalid. Uncertainty will only invalidate if one can derive from the statute an intention by Parliament that the power be confined in a way which requires a high level of certainty or precision. Viewed as a whole and in context, the Guide was directed to medical assessments and practical activities not necessarily susceptible to high levels of precision. The focus of the Guide is on what a person can and cannot do in going about the activities of daily living. A person is 'unable' to perform an activity where the level of pain experienced by a person or the level of effort required to do so is such that the person cannot be reasonably expected to perform the activity. Read in context, a 'stair' or 'ramp' in the Guide is of the kind found in daily life.

The Full Court agreed with the primary judge that clinical testing was not required to satisfy the criteria in Table 9.7.

CONSTITUTIONAL LAW – powers of the Commonwealth Parliament – taxation – Superannuation contributions surcharge – State parliamentary pensions – implied limitations on Commonwealth legislative power – discrimination against the States – laws imposing taxation – whether law discriminates against State of Victoria – whether tax significantly impairs State's capacity to exercise its powers to remunerate its parliamentarians

Parliamentary Trustee of the Parliamentary Contribution Superannuation Fund v Commissioner of Taxation [2013] FCAFC 127
(14 November 2013, Justices Kenny, Perram and Robertson)

The trustee of the Parliamentary Contributory Superannuation Fund (the appellant), challenged the validity of two Acts which together required it to pay the Commonwealth a surcharge on superannuation contributions made to the defined benefits superannuation scheme that it provided to members of the Victorian Parliament. Between 1999 and 2009 the Commissioner of Taxation had issued assessments to the appellant for a superannuation contributions surcharge in respect of the parliamentarians who were members of the Fund. The effect of the surcharge was to require increased payments from the Victorian Consolidated Fund to cover the surcharge liability. To counteract this, the Victorian Parliament had enacted legislation that made individual parliamentarians liable for their portion of the superannuation surcharge.

The appellant lodged a notice of objection to the assessments on the basis that the Acts that imposed the surcharge, the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (Cth) and the *Superannuation Contributions Tax Imposition Act 1997* (Cth) (the Surcharge Acts), were invalid. Before the Commissioner, the primary judge and the Full Court, the appellant submitted that the Surcharge Acts were invalid because they impaired the capacity of the State of Victoria to exercise its powers with respect to the remuneration of the members of its Parliament, contrary to the Melbourne Corporation doctrine and the requirements articulated by the High Court in *Clarke* v *Federal Commissioner of Taxation* (2009) 240 CLR 272 and *Austin v The Commonwealth* (2003) 215 CLR 185.

The primary judge found that the Surcharge Acts were valid and dismissed the application. On appeal, the Full Court distinguished the legislation under consideration from that in *Clarke* and *Austin*, where legislation had imposed a taxation surcharge on individual State officials as opposed to the entity operating the superannuation fund. The Court found that the Victorian Parliament had passed on liability for the surcharge to individual members in order to relieve pressure on the Consolidated Fund and not in order to relieve State officials from a taxation burden that encouraged them to retire early and interfered with the terms of their remuneration, as was the case in *Austin*. The Court found that there was nothing discriminatory in the Surcharge Acts and nothing that restricted or burdened the States in the exercise of their constitutional powers. Accordingly the Full Court found the legislation to be valid and dismissed the appeal.

APPENDIX 7
SUMMARY OF DECISIONS OF INTEREST

TRADE PRACTICES – anti-competitive arrangements – whether the respondent travel agent attempted to induce specified airlines to make collusive arrangements lessening or likely to lessen competition in the market – application of s 45 and s 45A of the *Trade Practices Act 1974* (Cth), now the *Competition and Consumer Act 2010* (Cth) – six alleged contraventions – consideration of the relevant 'market' in intermediary services provided by travel agents – whether respondent and airlines truly in competition – consideration of the relevant service being supplied – *Castlemaine Tooheys Ltd v Williams and Hodgson Transport Pty Ltd* (1986) 162 CLR 395 distinguished

Australian Competition and Consumer Commission v Flight Centre Limited (No 2) [2013] FCA 1313 (6 December 2013, Justice Logan)

The Australian Competition and Consumer Commission alleged that, on six occasions between August 2005 and March 2009, contrary to s 76 of the *Trade Practices Act 1974* (Cth), Flight Centre Limited attempted to induce specified international airlines to make collusive arrangements with it in relation to retail air fares for international air travel. The Commission alleged that the arrangements would have lessened or were likely to have lessened competition in the market for the distribution and booking and retail sale of international air travel from Australia (or a market having at least one of these features), thereby contravening s 45 of that Act, as construed and applied in light of s 45A.

Flight Centre's travel agency business included acting as agent for each of the airlines under annual 'preferred airline agreements'. Under these it had an entitlement to receive an additional commission payment if nominated air travel sales targets were achieved. Central to Flight Centre's business model was a 'Price Beat Guarantee' policy by which it undertook to better the price of any other airfare in the market shown to it by a customer. Each of the airlines commenced offering airfares directly to the public at fares that were lower than those made available, via an existing global distribution system, to Flight Centre for it to offer to retail customers. Internally, Flight Centre identified a threat of what it termed 'disintermediation' (cutting out the middle man).

The Court concluded that Flight Centre did not compete with the airlines in the provision of international air travel but that it did in relation to the booking and distribution of such travel, because the direct retail air fare sales by the airlines were a substitute for the service offered by Flight Centre. It also concluded that it had attempted to induce the airlines to enter into arrangements by which lower air fares would no longer be offered directly by them. Penalties totalling $11 million were imposed. The Commission's claim for higher penalties was rejected on the basis that it had not pleaded the aggravating circumstance of derivation of a benefit from the alleged conduct.

An appeal and a cross appeal to the Full Court were filed in April 2014.

INTELLECTUAL PROPERTY – trade marks – whether infringement – whether trade mark deceptively similar – relevance of context – surrounding circumstances – whether use of name 'in good faith' – survey and expert evidence

Australian Postal Corporation v Digital Post Australia
[2013] FCAFC 153
(6 December 2013, Justices North, Middleton and Barker)

This case was an appeal from the decision of the primary judge in *Australian Postal Corporation v Digital Post Australia Pty Ltd (No 2)* [2012] FCA 862.

The primary judge decided that 'DIGITAL POST AUSTRALIA' was not deceptively similar to 'AUSTRALIA POST' within the meaning of s 120(1) of the *Trade Marks Act 1995* (Cth) (the TM Act), the domain names adopted by Digital Post Australia Pty Ltd (DPA) did not infringe the 'AUSTRALIA POST' trademarks, and the adoption of the name 'DIGITAL POST AUSTRALIA' did not constitute misleading or deceptive conduct pursuant to the Australian Consumer Law. Furthermore, the primary judge held that DPA used its name in good faith, and as such, in the event that he had found 'DIGITAL POST AUSTRALIA' and 'AUSTRALIA POST' to be deceptively similar, DPA would have had a defence to the infringement claim under s 122(1) of the TM Act.

Australia Post only challenged the primary judge's findings in respect of the TM Act.

On the appeal, Australia Post relied on a marketing expert's opinion that a significant proportion of consumers would associate the services offered by DPA with Australia Post. The Court did not find the report persuasive because the main focus of the expert's evidence was irrelevant with respect to trademarks infringement. The law requires that the marks be compared. Australia Post's relevant marks were 'AUSTRALIA POST' for the services so registered. However, the expert considered 'POST', Australia Post's 'master brand' logo, and the colour red and the colour scheme or combination of red and white, which are either constituent elements of the marks, or marks not the subject of the claim. Furthermore, Australia Post relied on two consumer surveys which the Court held were unreliable on the basis of concerns with the recruitment of participants.

The Court then considered the primary judge's analysis of the purported infringement and the good faith defence, and upheld his findings. The Court held that 'DIGITAL POST AUSTRALIA' did not infringe Australia Post's marks. Strictly, this meant that the Court did not need to decide if the good faith defence was made out. However, for the sake of completeness it looked at the evidence surrounding the launch of 'DIGITAL POST AUSTRALIA', and decided that the defence would have been made out in any event.

Consequently, the appeal was dismissed.

INDUSTRIAL LAW – union alleged to have engaged in industrial action at construction site – application under s 418 of the *Fair Work Act 2009* (Cth) for an order that industrial action stop or not be organised – whether union denied procedural fairness at first instance hearing before Fair Work Commission – whether failure of Fair Work Commission to grant adjournment constituted a denial of procedural fairness – whether any jurisdictional error addressed or cured by appeal – whether jurisdictional error by Full Bench on appeal

ADMINISTRATIVE LAW – application for constitutional writs – whether denial of request for an adjournment amounted to a denial of procedural fairness – whether denial of procedural fairness at first instance hearing cured by appeal – character of appeal – whether jurisdictional error committed by Full Bench of Commission on appeal – orders whether certiorari should be granted

Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Unions v Abigroup Contractors Pty Ltd
[2013] FCAFC 148
(6 December 2013, Justices Buchanan, Katzmann and Rangiah)

APPENDIX 7
SUMMARY OF DECISIONS OF INTEREST

This was an application for judicial review of a decision of the Fair Work Commission (FWC) heard by a Full Court in the original jurisdiction of the Court. The applicant (the CEPU) sought to impugn the decision on the basis that it had been denied procedural fairness during a hearing of an application by the first respondent (Abigroup) under s 418 of the *Fair Work Act 2009* (Cth). Abigroup made the application on 3 September 2012, seeking to restrain the CEPU and another union (the CFMEU) from taking industrial action at a construction site in Brisbane. The application was served on the CEPU that day, with supporting statutory declarations. The application was also heard that day. At the beginning of the hearing, the CEPU and the CFMEU sought an adjournment for two days, but their application was refused. The unions appealed to the Full Bench of the FWC (Full Bench), but their appeal was dismissed.

Justice Buchanan was prepared to accept that the refusal of an adjournment until at least the following day prima facie represented a denial of procedural fairness. But his Honour declined to grant relief on the ground that any procedural unfairness was cured by the appeal to the Full Bench.

The majority (Justices Katzmann and Rangiah) found that the CEPU had been denied procedural fairness, but considered that this had not been cured by the appeal because the Full Bench's decision was affected by jurisdictional error. Their Honours found that the Full Bench had held that there was no denial of procedural fairness because an adjournment would not have made a difference to the outcome. Their Honours held that the Full Bench had applied the wrong test (by asking whether the evidence would, rather than could, have made a difference to the outcome). They also held that whether there could have been a difference to the outcome was only relevant to the discretion to grant relief, not to the question of whether the CEPU had had a reasonable opportunity to present its case. On this basis, their Honours allowed the appeal.

NATIVE TITLE – where perpetual leases under *Crown Lands Act 1929* (SA) were transferred to Indigenous Land Corporation and then to an Aboriginal corporation – where perpetual leases held by an Aboriginal corporation were surrendered and freehold titles issued to that Aboriginal corporation – whether perpetual leasehold and freehold land were areas to which s 47A of the *Native Title Act 1993* (Cth) apply – consideration of meaning of 'grant' and 'vested' in s 47A(1)(b)(i) – consideration of circumstances in which an Aboriginal corporation expressly holds land on trust etc within meaning of s 47A(1)(b)(ii)

Adnyamathanha People No 3 Native Title Claim v State of South Australia [2014] FCA 101 (19 February 2014, Justice Mansfield)

This native title matter involved parcels of land subjected to freehold and leasehold interests within the claim area. The historic grant of perpetual leases over those parcels of land under the *Crown Lands Act 1929* (SA) being transferred from the Indigenous Land Corporation to an Aboriginal corporation extinguished native title over the claim area.

The Court considered whether s 47A of the *Native Title Act 1993* (Cth) (the NT Act) nevertheless applies so that all freehold, leasehold estates and any other interests created prior to the native title application are to be disregarded for all purposes under the NT Act in relation to the applicant. The evident purpose of s 47A is to create a statutory exception to provisions which preclude native title being claimed over land which had been the subject of past extinguishment.

Section 47A(1)(b)(i) and (ii) identifies two broad categories of land grant capable of enlivening the statutory exception. The Court considered the legislative context and a textual analysis of s 47A(1)(b)(i), particularly on the words 'grant' and 'vested'. It was decided that the specific technical conveyancing meaning applied to 'grant'. Further, a strict interpretation of 'grant' complements the term 'vested' or 'vesting', as a state of affairs additional to freehold and leases as provided for in s 47A(1)(b)(i). Ultimately, it was found that the freehold estate did not fall under the exception under s 47A(1)(b)(i) because those proprietary interests were not granted by or took place under the relevant legislation. However, the exception captured the leasehold interest which did take place under the relevant legislation.

The Court considered that both leasehold and freehold estates fell within the second statutory exception provided for in s 47A(1)(b)(ii), in circumstances where the area was held on trust for the benefit of Aboriginal people. The Court accorded weight to obligations imposed to the Aboriginal corporation when the proprietary interests were transferred. Such obligations preclude it from changing its status and oblige it to hold and use land only for particular purposes consistent with those terms.

INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) (FW Act) – authorisation of protected industrial action by protected action ballot – meaning of the words 'extended' and 'extend' in s 459 of the FW Act – whether the Fair Work Commission has the power under s 459(3) of the FW Act to extend the 30-day period for the commencement of protected action authorised by a ballot, after that period has expired

COURTS AND TRIBUNALS – jurisdiction – whether grant of jurisdiction in FW Act limits power of the Federal Court to grant certiorari

Energy Australia Yallourn Pty Ltd v Construction, Forestry, Mining and Energy Union [2014] FCAFC 8 (19 February 2014, Justices North, Dowsett and Bromberg)

This case was a review of a decision of the Full Bench of the Fair Work Commission (the Commission).

Under provisions of the *Fair Work Act 2009* (Cth), industrial action taken by employees in relation to enterprise bargaining will be 'protected' where such action is authorised by a secret ballot. 'Protection' in this context is a qualified immunity from civil liability. Section 459(1)(d) of the Act provides that an action will be authorised where the action commences 30 days from the date the results of the ballot are declared, or during such other period as extended by the Commission. Section 459(3) provides that the Commission may extend the 30-day period by up to 30 days.

The Commission found that it was empowered to extend the 30-day period for an action to commence, at a time after that 30-day period had expired. The case turned on the construction of the word 'extend' in this context. The applicant also contended that the Court did not have jurisdiction to grant the relief sought by the respondent.

Justices North and Bromberg held that the word 'extend' can have different meanings. Where there are different meanings available, the purpose and policy of the provision becomes important. Their Honours held that the purpose of the 30-day limitation period is to ensure that the authorisation via ballot is current. Where employee support plainly continues beyond the 30 days, the Commission has discretion to extend the period to avoid additional costs in going through the ballot process again. Their Honours said it was unlikely that the power to extend would be limited to exercise during the 30-day period, and that there was little policy reason for such an interpretation. However, their Honours held that that construction would only permit extension in accordance with the temporal limit in the provision; the 30-day extension is to be calculated from the declaration of the results of the ballot and not from the date of any extension. Further, the provision would not operate retrospectively to authorise action taken prior to the extension order. Their Honours held that the challenge to jurisdiction should be rejected.

Justice Dowsett held in dissent that the Full Bench erred in its decision. His Honour found that the policy behind the provision was to strike a balance between advantages of taking industrial action, and the notice and certainty, to employers, of the action. His Honour took the view that the power to extend the 30-day period could only be exercised during that period. His Honour held that the Court had power to issue a writ of certiorari and of mandamus in the case, and that they should be granted.

APPENDIX 7
SUMMARY OF DECISIONS OF INTEREST

NATIVE TITLE – statutory interpretation – defence and war – special case stated – extinguishment of native title – legislative intention – inconsistency test – construction of *National Security Act 1939* (Cth) s 51(1) and National Security (General) Regulations regs 54 – whether military orders made under the National Security Regulations purported to effect an acquisition of property otherwise than on just terms contrary to s 51(xxxi) of the Constitution – acquisition of property and requirement of physical occupation – whether National Security Regulations 'past acts' under *Native Title Act 1993* (Cth) – whether in making the military orders all native title rights wholly extinguished

Congoo on behalf of the Bar-Barrum People #4 v State of Queensland [2014] FCAFC 9 (21 February 2014, Justices North, Logan and Jagot)

This matter was referred to a Full Court in the form of a special case pursuant to r 38.01 of the Federal Court Rules 2011.

War-time military orders (the orders) were made between 1943 and 1945, pursuant to the *National Security Act 1939* (Cth) and regulations, in relation to land over which the Bar-Barrum People claimed native title interests (the land). The legislative scheme gave extensive powers to the Executive. It empowered the Commonwealth to take possession of any land if necessary or expedient in the interests of public safety, the defence of the Commonwealth, or the efficient prosecution of the war. The Commonwealth, by the orders, took possession of the land and was entitled to do anything in relation to the land as if it were the owner in fee-simple. The Commonwealth physically occupied only some of the land and ceased that occupation in August 1945.

The primary issues were:

- whether the orders or occupation of the land extinguished the native title rights and interests of the Bar-Barrum People
- whether the orders effected an acquisition of property otherwise than on just terms
- whether the orders, regulations or occupation of the land were past acts validated under the *Native Title Act 1993* (Cth).

Justices North and Jagot held that the objective intention of the legislation was to prevent the exercise of, but to not otherwise affect, the native title rights for the duration of the orders. Inconsistency of rights is a tool enabling legislative intent to be ascertained. There was no inconsistency of rights and the native title rights were not extinguished, but simply could not be exercised during the period that the Commonwealth held a right of temporary possession over the land. Further, their Honours held that only the land which was physically occupied by the Commonwealth was 'possessed' by it. Then, their Honours held that the Commonwealth did acquire the land, but that such acquisition was on just terms. It was not necessary to decide the third issue.

Justice Logan in dissent held first, that physical occupation of the land was not required for possession to have been taken by the Commonwealth, and that the orders alone effected possession. Second, his Honour found that the orders extinguished native title, as the rights of the Commonwealth were inconsistent with the native title rights claimed. Finally, Justice Logan found that as the native title rights were extinguished, there was no acquisition of property.

An application to the High Court for special leave to appeal was filed in March 2014.

ADMIRALTY – ARREST – arrest of a surrogate vessel – interlocutory application for release of vessel – meaning of the expression 'the owner' in s 19(b) of the *Admiralty Act 1988* (Cth) – quality and significance of evidence required to demonstrate ownership of surrogate vessel under s 19(b) of the *Admiralty Act 1988* (Cth) where respective owners of vessels are related entities

Shagang Shipping Co Ltd v Ship 'BULK PEACE' as surrogate for the Ship 'DONG-A ASTREA'
[2014] FCAFC 48
(22 March 2014, Chief Justice Allsop and Justices Rares and McKerracher)

This case concerned the correct application of *Admiralty Act 1988* (Cth) provisions dealing with the arrest of surrogate ships. Clarity and certainty for in rem arrest powers is extremely important, as they significantly impact the substantial commercial and trading interests that dominate contemporary seafaring.

Briefly, the facts of this case are as follows: the ship *Dong-A Astrea* was chartered under a charterparty between owner Shagang Shipping Co Ltd (Shagang) and charterer Grand China Shipping Co Limited (GCS) with HNA Group Co Limited (HNA) as guarantor. When GCS failed to make required payments and HNA failed to perform those obligations, Shagang commenced proceedings in various jurisdictions, and an arbitral award was calculated. After application by Shagang, a Marshal of the Federal Court of Australia arrested *Bulk Peace* as a surrogate for *Dong-A Astrea* pursuant to s 19 of the Admiralty Act, which provides powers to arrest a surrogate ship in circumstances where the first ship was owned, chartered, possessed or controlled by a person who also owned the surrogate ship at the time the cause of action arose. The alleged owner in this case was HNA.

Bulk Peace applied for release on the basis that it is not a surrogate ship under s 19 because its owners did not own, charter, possess or control *Dong-A Astrea*. The Court first considered whether HNA 'controlled' *Dong-A Astrea*. Under the charter, HNA could control the commercial disposition of *Dong-A Astrea* from the date of default. Although it did not in fact do so, this power indicated that HNA nevertheless controlled her in the relevant legal sense. In assessing whether HNA owned *Bulk Peace*, the Court considered whether HNA had ultimate title and exercised rights of dominion (including control of use, proceeds and sale) over her. Affidavit evidence suggested that HNA exercised significant influence over companies within its group, including the owners of *Bulk Peace*. This evidence established HNA's substantial control over *Bulk Peace*, but was insufficient to satisfy the explicit ownership-based requirement of s 19(b). Consequently, *Bulk Peace* could not be considered a surrogate for *Dong-A Astrea* and orders were made for her release.

APPENDIX 7
SUMMARY OF DECISIONS OF INTEREST

DOUBLE TAXATION TREATIES – United States Double Taxation Convention – taxation of gains derived from disposition of shares in a company owning real property (mining tenements) situated in Australia by a limited partnership formed outside both Australia and the United States but comprised of limited partners being predominantly United States residents – whether gain derived by limited partnership or limited partners for the purpose of the Convention

INCOME TAX – Div 855 of Pt 4-5 of *Income Tax Assessment Act 1997* (Cth) – whether capital gains derived by a foreign resident to be disregarded – whether 'principal asset test' in s 855-30 passed – consideration of what is to be valued and compared as the criterion for passing the test

Commissioner of Taxation v Resource Capital Fund III LP [2014] FCAFC 37
(3 April 2014, Justices Middleton, Robertson and Davies)

The issue in this appeal was whether the primary judge was correct to find the respondent (RCF), a non-resident limited partnership, not taxable on the capital gain that it made on the sale of shares that it held in an Australian mining company, St Barbara Mines Ltd (SBM). The primary judge held that RCF was not taxable on the gain because:

- the provisions of the *Income Tax Assessment Act 1997* (Cth) (the 1997 Act) which imposed the liability for the tax on the gain on RCF as the relevant taxable entity were inconsistent with the provisions of the Double Tax Agreement between Australia and the United States (the DTA) which treated the gain not as derived by RCF but as derived by the partners of RCF, and that the assessment of RCF was therefore precluded by s 4(2) of the *International Tax Agreements Act 1953* (Cth) (the Agreements Act) (the first issue)
- (if it were necessary to decide) RCF's membership interest in SBM did not pass the 'principal interest test' in s 855-30 of the 1997 Act because the market values of SBM's non 'taxable Australian real property' (TARP) assets exceeded the market values of SBM's TARP assets, and therefore the shares were not 'taxable Australian property' (the second issue).

The Full Court disagreed with both the conclusions of the primary judge. The Full Court held that the correct analysis on the first issue was that the inconsistency resides in the difference between Australia and the United States (US) in the tax treatment of partnerships, not in the terms of the DTA. Whereas Australia recognises certain limited partnerships as taxable entities, the US treats partnerships as transparent entities and taxes the partners so that the application of the DTA by the Source State (Australia) is different from the application of the DTA by the Residence State (the US). Therefore, the Full Court disagreed that s 4(2) of the Agreements Act precluded Australia from taxing RCF on the gain.

The Full Court went on to observe that RCF was an independent taxable entity in Australia and liable to tax on Australian sourced income and the DTA did not gainsay RCF's liability to tax. There was no inconsistency between the DTA and the provisions of the *Income Tax Assessment Act* 1936 or the 1997 Act with respect to the taxation of the gain in the hands of RCF. The inconsistency was between US tax law and Australian tax law with respect to the tax treatment of RCF. The inconsistency related to the imposition of the liability for the tax on the gain, with the consequence that the provisions of the DTA applied differently between Australia as the source country and the US as the place of residence of many of RCF's partners.

Whilst US tax law treated RCF as a transparent entity for tax purposes and taxed the partners of RCF on their individual shares of RCF's income, under Australian tax law RCF was not transparent for tax purposes but was a separate taxable entity taxed as a company and, in Australia, the gain was taxable in RCF's hands. Though US law attributed to the partners the liability for any tax payable on the gain made by RCF, Australia attributed the liability for any tax payable to RCF.

As to the second issue, the Full Court disagreed with the primary judge's construction of s 855-30 of the 1997 Act and consequently with the valuation hypothesis adopted by the primary judge in determining the market values of SBM's assets.

The question raised was whether the market value of each asset was to be determined under s 855-30(2) as if each asset was the only asset offered for sale or on the basis of an assumed simultaneous sale of SBM's assets to the same hypothetical purchaser.

In light of the statutory context and purpose, the Full Court decided that it was implicit that to determine where the underlying value resides in SBM's bundle of assets, the market values of the individual assets making up that bundle are to be ascertained as if they were offered for sale as a bundle, not as if they were offered for sale on a stand-alone basis.

It followed that the assets should be valued on the basis of an assumed simultaneous sale of SBM's assets to the same hypothetical purchaser, not as stand-alone separate sales.

An application to the High Court for special leave to appeal was filed in May 2014.

INCOME TAX – whether outgoings deductible under general provisions of s 8-1 of the *Income Tax Assessment Act 1997* (Cth) – outgoings in the form of imposts imposed under s 163AA of the *Electricity Industry Act 1993* (Vic) over three years – appellant agreed to pay the imposts on purchase of transmission licence – whether outgoings to be characterised as part of cost of acquiring assets and therefore on capital account or as a working expense on revenue account

SPI PowerNet Pty Ltd v Commissioner of Taxation
[2014] FCAFC 36
(7 April 2014, Justice Edmonds, McKerracher and Davies)

The appellant in this case sought to deduct imposts it agreed to pay to the State of Victoria pursuant to the *Electricity Industry Act 1993* (Vic) upon its acquisition of electricity transmission licences. The imposts were payable over three years and the issues were whether they were deductible under s 8-1(1) as outlays incurred in gaining or producing assessable income or in carrying on a business for that purpose or whether they were outgoings of capital or a capital nature and so not deductible by reason of s 8-1(2).

The primary judge made two findings in the alternative: first, that the imposts were not a cost of SPI deriving its income because they were payments out of SPI's profits after the calculation of SPI's taxable income; second, that the imposts were outgoings of a capital nature.

On the first question, the primary judge relied on the judgment of Justice Lockhart in *United Energy Ltd v Commission of Taxation* (1997) 78 FCR 169 (United Energy) to conclude that the payments were distributions of profits. On appeal, the Court disagreed with the primary judge's findings. Justices Edmonds and McKerracher held that the joint judgment of Justices Sundberg and Merkel in United Energy was to be preferred.

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SUMMARY OF DECISIONS OF INTEREST

On the second question, Justice Edmonds held that the imposts were part of the cost to SPI of acquiring the transmission licence, an asset of the business, even though the imposts did not form part of the purchase price under asset sale deed. His Honour therefore held that they were outgoings of capital or of a capital nature. In doing so, his Honour followed *Colonial Mutual Life Assurance Society Ltd v Federal Commissioner of Taxation* (1953) 89 CLR 428 and distinguished *Cliffs International Inc v Federal Commissioner of Taxation* (1978-1979) 142 CLR 140. Justice McKerracher returned to first principles, beginning chronologically with *Vallambrosa Rubber Co Ltd v Farmer* (1910) SC 519 and ending with *CityLink Melbourne Ltd v Commissioner of Taxation* (2006) 228 CLR 1 to conclude that the fact that the imposts did not form part of the purchase price was not determinative of their true characterisation. His Honour held that the imposts were on capital account because they were part of the cost of acquiring the transmission licence.

Justice Davies held that the imposts were to be characterised as working expenses, and therefore not of a capital nature. By majority, the appeal was therefore dismissed.

An application to the High Court for special leave to appeal was filed in May 2014.

MIGRATION **– refugees – Unlawful non-citizens – refusal to grant a protection (class XA) visa – person assessed as satisfying definition of refugee – indefinite immigration detention – no realistic prospect of removal from Australia in reasonably foreseeable future – scope of Minister's discretion under s 501(1) of the *Migration Act 1958* (Cth) – whether the Minister's exercise of power was affected by jurisdictional error – whether the Minister was obliged to consider individual circumstances of the applicant – whether it is permissible for general deterrence to be a central consideration in making the decision – whether the Minister was obliged to consider legal consequences for the applicant of visa refusal – whether the Minister was obliged to consider the legal framework within which the discretion is exercised**

CONSTITUTIONAL LAW **– constitutional validity of s 501(6)(aa) of the *Migration Act 1958* (Cth) – whether the character test in s 501(6)(aa) allowing the Minister to refuse a visa on the basis that an applicant has committed a crime is supported by s 51(xix) of the Constitution**

ADMINISTRATIVE LAW **– judicial review – procedural fairness – whether the Minister was required to inform applicant that general deterrence would be a relevant or central consideration – whether procedural fairness is denied even where the applicant has not tendered evidence as to the submissions it would have made in response**

NBNB v Minister for Immigration and Border Protection [2014] FCAFC 39
(9 April 2014, Chief Justice Allsop and Justices Buchanan and Katzmann)

This set of five applications challenged the exercise of Ministerial discretion under s 501 of the *Mirgration Act 1958* (Cth) to refuse protection visas to applicants who were assessed to be refugees within the meaning of the Convention Relating to the Status of Refugees, but failed the character test, having been convicted of offences relating to disturbances at immigration detention facilities. The applicants could not be released within Australia, nor refouled to their home countries, nor removed to a third country. Consequently, the applicants faced indefinite detention. This issue was not mentioned in the Minister's reasons for refusal.

A central question before the Court was whether the Minister was required to consider this consequence of indefinite detention. The Court examined the structure of the Migration Act and its accompanying directions, as well as Australia's international obligation of non-refoulment. When s 501 interacts with Australia's non-refoulment obligation, it may, as in these cases, produce the result that an applicant cannot be removed from detention. The Court concluded that each exercise of s 501 discretion must have regard to the legal framework within which it operates, and the consequences of decisions resulting from that framework, as an integral part of exercising that power. The Minister's failure to do this was thus a jurisdictional error.

The Court also considered whether the discretion could be exercised to deter others from committing offences in immigration detention. On this issue, the Court found that a decision based only on general deterrence principles would not consider the merits of a particular case, and would therefore be affected by jurisdictional error. Additionally, not indicating that general deterrence would be a material factor in the Minister's decision (as it was in these cases) denied the applicants natural justice.

A final question was whether the Minister adequately considered the applicants' serious mental health issues, and was obliged to obtain further information. The Court noted the references to mental health in the Minister's reasons, and determined that the argument was actually directed to whether appropriate weight had been given to the mental health issues and thus did not illuminate jurisdictional error.

TRADE MARKS – whether respondent's trade mark is capable of distinguishing the respondent's goods and services – whether and to what extent the respondent's trade mark is inherently adapted to distinguish the respondent's goods and services – whether the respondent's trade mark is descriptive – whether other traders acting without improper motive would wish to use the respondent's trade mark – the relevance of international usage of trade indicia – the relevance of post-lodgment date use of the respondent's trade mark – whether use of trade indicia constitutes use as a trade mark – whether the applicants' or respondent's trade marks are deceptively similar to prior trade marks – whether registration should be refused because the respondent had no intention to use the trade mark – the threshold for use or intended use of a trade mark – whether the suffix '.com.au' in a trade mark is a distinguishing feature – whether the use of the applicant's trade mark is honest concurrent use

Phone Directories Company Australia v Telstra Corporation Limited [2014] FCA 373
(11 April 2014, Justice Murphy)

This proceeding comprised two appeals against decisions of delegates of the Registrar of Trade Marks. The main appeal concerned Telstra's application in 2003 to register the word 'yellow' as a trade mark (the Yellow mark) in respect of broad classes of goods and services including print and online business directories. From 1975 Telstra had distributed and extensively marketed its business directories around Australia under various Yellow Pages trade marks, using the colour and word yellow in doing so. Two rival directory producers appealed against registration of the mark pursuant to ss 41, 44 and 59 of the *Trade Marks Act 1995* (Cth) (the Act).

Justice Murphy refused registration of the Yellow mark. His Honour held that yellow was a colour commonly used by Telstra and other traders in Australia (and overseas) in respect of business directories, which is likely to have formed or strengthened a desire by other traders in Australia to innocently use the word 'yellow'. He considered the Yellow mark descriptive rather than distinctive, not dislocated from or inappropriate to the designated products, descriptive of a colour commonly used on directories, and that there was to an extent a commercial imperative for other traders to use it. Pursuant to s 41(3) of the Act his Honour held that the word yellow has no inherent adaptability to distinguish the designated products.

Although Telstra's pre-lodgment date use of the colour and word yellow was extensive his Honour held that it did not use the word yellow, standing alone, and considered that it was not trade mark use. Under s 41(6) the mark did not in fact distinguish the designated products. Registration of the mark was refused.

Although His Honour found it was unnecessary to decide this, he also noted that, pursuant to s 41(5), if it was accepted that the Yellow mark has some inherent adaptability to distinguish it must be slight, the pre-lodgment date use of the mark was non-existent or light, and that together with other circumstances this meant that the mark does not or will not in fact distinguish the designated products. The extensive post-lodgment date use of the mark could not be determinative.

CONSUMER LAW – injunction sought to restrain alleged misleading or deceptive conduct – s 18 and s 232 Australian Consumer Law – promotional flyer published by franchisor of newsagent franchise – online blog article critical of flyer – online blog authored by director and co-owner of rival franchise group – whether article was conduct in trade or commerce – whether flyer was misleading or deceptive – class of consumers likely to be misled – whether article made imputations claimed by applicant – whether imputations misleading or deceptive or likely to mislead or deceive – whether Court's discretion should be exercised in favour of granting injunction – whether Court should order retraction of article or apology

Nextra Australia Pty Limited v Fletcher [2014] FCA 399 (24 April 2014, Justice Collier)

Mark Fletcher was a director and fifty per cent shareholder of the 'NewsXpress' newsagency franchise system. He also operated an online publication known as the 'Australian Newsagency Blog'. While the blog predominately concerned topics of general interest to newsagents, it had also been used to promote Mr Fletcher's commercial interests. Mr Fletcher had previously, for example, published articles about the benefits of membership with NewsXpress and endorsing point-of-sales software sold by another company which Mr Fletcher owned.

On 27 April 2011 Mr Fletcher published an article entitled *Nasty campaign from Nextra misleads newsagents*. The subject of the article was a flyer which had been sent out to newsagents by Nextra and the applicants alleged, among other things, that it incorrectly imputed that Nextra had sought to mislead people in the newsagency industry, thus itself being misleading. Mr Fletcher disclosed at the end of the article that he was a director of NewsXpress and in evidence admitted to having not seen the flyer first-hand. The applicant sought an injunction requiring Mr Fletcher to remove the blog, as well as restraining him from publishing it in any other form. A court-ordered apology and corrective advertising were also sought.

It was held that the publishing of the blog was in trade or commerce as the blog has been used at least in part for commercial purposes and the publishing of the article in question was an instance of where this was so. The article was held to be misleading or deceptive as it contained a number of incorrect imputations about Nextra's advertising practices that would be likely to lead readers into error.

The applicant was granted the injunction it sought; however, it was held that an apology would serve little purpose and that corrective advertising at that stage would likely be counterproductive and could contribute to further confusion.

An appeal to the Full Court was filed in June 2014.

INSOLVENCY **– international cross-border insolvency – company incorporated in Cayman Islands said to have made a taxable capital profit in Australia – company wound up in Cayman Islands, its centre of main interests for the purpose of the UNCITRAL Model Law on Cross-Border Insolvency as incorporated into Australian law by the *Cross-Border Insolvency Act 2008* (Cth) – company not a registered foreign company and not amenable to being wound up in Australia – Cayman Islands winding up recognised as the foreign main proceedings – joint foreign liquidators sought transfer of funds in Australia to Cayman Islands free of any claim of the Deputy Commissioner of Taxation (DCT) – whether DCT should be permitted to proceed against the funds in Australia through such proceedings as may be available, subject to equal treatment of other creditors – meaning of 'adequate protection' in the Model Law – hotchpot and equality.**

Akers as a joint foreign representative of SAAD Investments Company Limited (in Official Liquidation) v Deputy Commissioner of Taxation [2014] FCAFC 57 (14 May 2014, Chief Justice Allsop and Justices Robertson and Griffiths)

Cross-border insolvency often produces competing priorities and circumstances not governed clearly by existing rules. Addressing these areas of uncertainty is challenging but vital to developing clear jurisprudence for liquidators and creditors.

Saad Investments Company Limited (Saad) was registered in the Cayman Islands. It held shares in an Australian company, the sale of which attracted capital gains tax liability. Saad was wound up in the Cayman Islands; this Court recognised those proceedings as main foreign proceedings. The consequence of such recognition under Art 21 of the Model Law on Cross-Border Insolvency (Model Law) is to freeze other dealings with respect to that company. The Court later modified its recognition orders, preventing remittal of assets to the Cayman Islands and granting leave to the Deputy Commissioner of Taxation (DCT) to proceed against Saad.

In this appeal, the Court considered whether the *Cross-Border Insolvency Act 2008* (Cth) (CBI Act) and Model Law permitted such orders in circumstances where DCT could not claim (a foreign revenue claim) in the Cayman Islands liquidation. A key concern was how equal and fair participation in funds was best achieved.

The Court concluded that nothing in the CBI Act, Model Law or any other relevant legislation prevented the DCT from seeking leave to proceed, or enforcing rights under the *Taxation Administration Act 1953* (Cth) where those rights will be lost if assets are remitted. The Court observed that in an Australian ancillary winding up, all creditors rank equally. Significantly however, the DCT's participation would be limited to the Australian proceedings while foreign creditors could make claims elsewhere. As in the nature of ancillary liquidations, to determine the disposition of assets on an equitable basis, the Australian liquidator could require foreign creditors to declare the value of their participation in the company's other assets before they obtained any Australian assets.

The Court considered that a liquidation configured in this hotchpot arrangement embraces the maxim that equity is equality, and resolves disposition difficulties in a fair, efficient manner, thus giving appropriate effect to domestic and international cross-border insolvency rules. Ultimately, therefore, the modification orders were effective and the appeal dismissed.