APPENDIX 7
SUMMARY OF DECISIONS OF INTEREST

CONSUMER LAW – Australian Consumer Law ss 18(1), 29(1)(a) and 33 – Misleading or deceptive conduct or conduct likely to mislead or deceive, false or misleading representations, conduct liable to mislead the public – Whether the use of the phrases 'baked today, sold today', 'freshly baked', 'baked fresh' and 'freshly baked in-store' is misleading where the complete baking process is not undertaken in-store on the day – Whether the relevant context for assessing misleading or deceptive conduct includes a cynical consumer culture

PRACTICE AND PROCEDURE – Admissibility of evidence – relevance – whether evidence of third party conduct is relevant – hearsay – whether statements made by third parties serve a non-hearsay purpose

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited [2014] FCA 634
(18 June 2014 - Chief Justice Allsop)

Protecting consumers from misleading advertising is one of the many important roles played by the Court. This case highlights the need for advertisers to take care when using broad language, particularly when it is deliberately chosen to affect the buying decisions of members of the public.

The ACCC alleged that Coles Supermarkets (Coles) had engaged in misleading and deceptive conduct by use of the expressions 'Baked Today, Sold Today', 'Freshly Baked', 'Baked Fresh', 'Freshly Baked In-Store' and 'Coles Bakery' to advertise its 'par-baked' bread products which had been partially baked off-site, snap frozen, stored, transported to Coles, and then baked to completion in-store at a Coles Supermarket.

After a factual analysis involving reference to meanings and connotations of general marketing expressions, the Court held (in [2014] FCA 634) that Coles had contravened ss 18(1), 29(1)(a) and 33 of the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (ACL) by advertising and representing that its par-baked bread had been 'Baked Today' when it was in fact partially or substantially baked previously by its supplier, and 'Freshly Baked' or 'Baked Fresh' when fresh dough was not baked, or the whole of the baking process was not done freshly. The phrase 'Coles Bakery', however, was not found to be misleading.

The Court (in [2015] FCA 330) subsequently imposed a penalty of $2.5 million on Coles, pursuant to s 224 for the four contravening courses of conduct under ss 29(1)(a) and 33, namely: packaging stating 'Baked Today, Sold Today'; packaging stating 'Freshly Baked In-Store'; packaging stating both 'Baked Today, Sold Today' and 'Freshly Baked In-Store'; and signage stating 'Freshly Baked' and 'Baked Fresh'. Undertaking an intuitive synthesis, that quantum was reached by taking account of the gravity of the offence and the 'earnings before interest and tax' of par-baked products in the relevant contravention period.

CONTRACT – breach of contract – contract for provision of financial services – implied warranties in s 12ED of *Australian Securities and Investments Commission Act 2001* (Cth) – damages for breach of contract

CORPORATIONS – financial products – breach of Australian financial services licence under s 912A of *Corporations Act 2001* (Cth) – meaning of derivative in s 761D(1) of *Corporations Act 2001* (Cth) – meaning of debenture in s 9 of *Corporations Act 2001* (Cth)

CORPORATIONS – misleading and deceptive statements – whether statements based on reasonable grounds and result of exercise of reasonable care and skill – effect of disclaimers – proportionate liability provisions

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CORPORATIONS – rescission – requirements of s 924A of *Corporations Act 2001* (Cth) – notice under s 925A of *Corporations Act 2001* (Cth) – whether notice given within a 'reasonable period'

DAMAGES – causation – remoteness – 'rule' in *Potts v Miller* [1940] HCA 43; (1940) 64 CLR 282 – contributory negligence – statutory damages – measure for damages – apportionment – proportionate liability

EQUITY – fiduciary obligations – informal advisory relationship arising from conduct – whether breach of fiduciary duty – equitable compensation – equitable contribution

INSURANCE – whether insured entity a party to contract of insurance – effect of s 48 of *Insurance Contracts Act 1984* (Cth) – duty of disclosure – construction of terms

PRACTICE AND PROCEDURE – entitlement to raise new matters on appeal

STATUTORY INTERPRETATION – whether investment permissible under s 625 of *Local Government Act 1993* (NSW) – whether product a security within the meaning of relevant Ministerial order

TORT – whether duty of care owed – negligent misstatement – indeterminate liability – vulnerability – causation – unlawful conduct – effect of disclaimers – contributory negligence

TRADE PRACTICES – misleading and deceptive conduct – whether conduct engaged in 'in this jurisdiction' – whether conduct in relation to financial product or financial services – 'mere conduit'

ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65
(6 June 2014 – Justices Jacobson, Gilmour and Gordon)

The Full Court's decision largely confirmed the decision of Jagot J at first instance *(Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200), which is believed to be the first occasion that judgment has been entered against a ratings agency for misleading or deceptive conduct and negligence.

ABN AMRO Bank NV (ABN Amro) marketed and sold financial instruments (Rembrandt notes) to an intermediary (LGFS) which on-sold these instruments to regional councils (the Councils). The instruments were assigned an AAA credit rating by ratings agency Standard & Poors (S&P). The Councils suffered loss on their investments due to spread widening on underlying credit indices.

The case embraced a considerable number of issues. The Full Court upheld the following findings, amongst others, made by the primary judge:

- S&P, in assigning a AAA credit rating to the Rembrandt notes, acted negligently and engaged in misleading or deceptive conduct in contravention of the *Corporations Act 2001* (Cth) (CA) s 1041H, and the *Australian Securities and Investment Commission Act 2001* (Cth) s 12DA;
- ABN Amro, in making representations concerning the Rembrandt notes, engaged in misleading or deceptive conduct in contravention of these provisions.

Proportionate liability
The Full Court considered the applicability of the CA s 1041L, which concerns apportionable claims. Their Honours concluded that s 1041L specifically requires the claim for damages under s 1041I to be caused by conduct in contravention only of s 1041H; only conduct of that kind which is the subject of the claim meets the statutory definition of an 'apportionable claim.'

The majority in a differently constituted Full Court concluded otherwise just one week prior: *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64. That decision was overturned by the High Court: *Selig v Wealthsure Pty Ltd* [2015] HCA 18. It reached the same conclusion as the Full Court in ABN AMRO: an 'apportionable claim' in this context is, relevantly, a claim based upon a contravention of s 1041H; it does not extend to claims based upon conduct of a different kind.

Meaning of 'debenture'

The Full Court held that the Rembrandt notes were not 'debentures' in assessing if LGFS' conduct fell within the scope of its financial services licence.

Their Honours construed the statutory definition of 'debenture' in light of a debenture's function in corporate fundraising and relevant regulatory provisions.

Their Honours reached this conclusion for a number of reasons, including that:

- a debt consisting of an obligation to redeem the Rembrandt notes contingent upon the performance of credit indices, rather than the operation of the business, is not a debt which is contemplated by the notion of a 'debenture'; and
- the condition that a 'debenture' be issued by the borrower company which undertakes to repay the debt was not satisfied; in substance ABN Amro issued and stood behind the notes, yet did not undertake the relevant debt obligations.

PRACTICE AND PROCEDURE – application for stay of proceedings – whether Australian proceedings should be stayed where various proceedings also underway in China – whether primary judge applied the 'natural and obvious forum' test rather than the 'clearly inappropriate forum' test – whether the primary judge adequately considered juridical advantage in assessing whether Australia is a clearly inappropriate forum – discussion of place of juridical advantage in the 'clearly inappropriate forum' test

ADMIRALTY – arrest of ship – collision occurring in a coastal state's exclusive economic zone – whether the governing law is the law of the coastal state under the regime created by the *United Nations Convention on the Law of the Sea*

ADMIRALTY – general maritime law – the source of general maritime law in domestic law systems

CMA CGM SA v Ship 'Chou Shan' [2014] FCAFC 90 (1 August 2014 - Chief Justice Allsop and Justices Besanko and Pagone)

The international nature of maritime law and commerce often gives rise to important jurisdictional and conflict of laws questions – particularly where one of the fora engaged provides a legitimate juridical advantage over another. In this case, the Court elucidated the applicable legal principles in dealing with the appellant's challenge to set aside orders staying proceedings instituted in Australia on *forum non conveniens* ground where parallel and competing proceedings had commenced in China.

'Chou Shan' and 'CMA CGM Florida' (Florida) collided in the East China Sea in the exclusive economic zone of China. Florida suffered damage from the collision causing oil and fuel leakage. Both ships immediately proceeded to ports in China. Subsequently, the Shanghai Maritime Safety Administration performed clean-up operations, and the respective owners of the ships were required to provide securities to Chinese authorities. On 9 April 2013, *in rem* proceedings were commenced in Australia by the owner and demise charterer of Florida against Chou Shan, claiming USD 60 million in damages plus incidentals from the collision. Meanwhile, the owner of Chou Shan (Rockwell), on 6 May 2013, applied to the Ningbo Maritime Court to establish a limitation fund in China (not a member state of any Limitation Conventions) which was subsequently accepted by that Court on 21 May 2013. On 22 May 2013, Chou Shan was arrested in Australia, and this court subsequently allowed Rockwell's stay application of the proceedings in Australia on *forum non conveniens* ground.

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On appeal, the Court held that as a matter of substance, the primary judge's examination of the suitability of the Chinese forum – the factors that connected the dispute with China – was both defensible and relevant to the assessment of whether Australia was the 'clearly inappropriate forum'. Although the primary judge may have discounted, perhaps heavily, the Florida interests' juridical advantage – the greater security or higher limitation available under the Australian law – in applying that test, a different conclusion was not warranted but for the importance of avoidance of multiple proceedings and the serious inconvenience arising from potentially inconsistent findings. The Court remarked, in *obiter*, that it may have preserved, contrary to recent UK decisions applying a different 'natural and obvious forum' test, the appellants' juridical advantage in Australia, subject to the conclusion of the Chinese proceedings had the appellants sought that recourse.

HUMAN RIGHTS – discrimination – sexual harassment – appeal against finding of sexual harassment by unwanted sexual intercourse – appellant challenged finding that sexual intercourse occurred – whether Judge failed to apply appropriately the standard of proof and to take account of the gravity of the finding – whether finding open on the facts found at trial

HUMAN RIGHTS – appellant challenged finding of sexual harassment occurring at a hotel and on a public street – consideration of the meaning of 'workplace' in s 28B(6) of the *Sex Discrimination Act 1984* (Cth)

DAMAGES – appeal against assessment of damages – whether Judge inappropriately had regard to punitive considerations in awarding damages

Vergara v Ewin [2014] FCAFC 100
(12 August 2014- Justices North, Pagone and White)

Ms Ewin was a chartered accountant employed by Living and Leisure Australia Ltd (LLA). In May 2009, Mr Vergara was contracted through a labour hire firm to work at LLA. The primary judge found that Mr Vergara had sexually harassed Ms Ewin in contravention of s 28B(6) of the *Sex Discrimination Act 1984* (Cth) and entered judgment against Mr Vergara for $210,563: *Ewin v Vergara* (No 3) [2013] FCA 1311. Mr Vergara appealed to the Full Court against aspects of the findings of sexual harassment and against the assessment of damages.

One of the findings of sexual harassment involved a finding that Mr Vergara had engaged in unwelcome sexual intercourse with Ms Ewin on 15 May 2009 when she was heavily intoxicated. Mr Vergara contended that the finding of sexual intercourse had not been open to the trial judge and alleged several deficiencies in the evidence. Justice White, with whom Justices North and Pagone agreed, rejected those contentions, concluding that the primary judge's findings were available and appropriate. The Court also rejected Mr Vergara's contentions that the trial judge had failed to take the parties' relationship into account, and that punishment had impermissibly been taken into account when assessing damages.

One ground of appeal related to three instances of harassment found to have occurred on 13 May 2009: the first at LLA's offices, the second at a nearby hotel, and the third on a public street. Section 28B(6) proscribed sexual harassment of one workplace participant by another at a place that was a workplace of both those persons. At the time, s 28B(7) defined 'workplace' as 'a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant.' The trial judge was satisfied in the circumstances that both the hotel and the public street were workplaces within the statutory definition, as Mr Vergara and Ms Ewin were both carrying out a workplace function in 'dealing with' the sexual harassment which began at the office. Justice White found that the hotel and street could not be considered workplaces, but would not have ordered any reassessment of damages in light of that finding. Justices North and Pagone upheld the trial judge's finding.

PATENTS – Patent including claims for isolated nucleic acid – whether claims to composition comprising isolated nucleic acid are for a manner of manufacture for purposes of s 18(1)(a) of *Patents Act 1990* (Cth).

D'Arcy v Myriad Genetics [2014] FCAFC 115 (5 September 2014 - Justices Kenny, Bennett and Nicholas)

Myriad Genetics Inc (Myriad) is the current owner of an Australian patent which contains claims to a nucleic acid sequence (DNA or RNA), known as the human breast or an ovarian cancer disposing gene (BRCA1) that has been 'isolated'.

Ms D'Arcy challenged the validity of the patent on the basis that the claims are not to a manner of manufacture and are not to subject matter that is properly the subject of a patent under s 18(1) of the *Patents Act 1990* (Cth) (the Act). Ms D'Arcy submitted that isolated nucleic acid is not materially different to cellular nucleic acid and that naturally occurring DNA and RNA, even in isolated form, are products of nature that cannot form the bases of a valid patent.

The primary judge upheld the validity of the claims.

The relevant principles applied by the Full Court were set out in *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252 and affirmed in *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 304 ALR 1.

The Full Court held that the analysis should focus on the differences in structure and function effected by the intervention of man and not on the similarities. The isolated nucleic acid, the subject of the claims, has resulted in an artificially created state of affairs of economic benefit and is properly the subject of letters patent. The claims are to an invention within the meaning of s 18(1) of the Act.

The Full Court noted that the Supreme Court of the United States came to a decision that an isolated naturally occurring DNA segment fell within a 'products of nature' exception *(Association for Molecular Pathology v Myriad Genetics Inc* 133 S Ct 2107 (2013)). The Full Court held this approach to be inapposite in an Australian patent law context and found the reasoning of the majority decision in the US Court of Appeals for the Federal Circuit persuasive and in accordance with the approach in NRDC *(Association for Molecular Pathology v United States Patent and Trademark Office and Myriad Genetics* Inc 689 F (3d) 1303 (2012)).

Accordingly, the Full Court did not accept the basis on which Ms D'Arcy argued that the patent is invalid.

INTELLECTUAL PROPERTY – applicants in business of selling and developing software for use in mining industry – first respondent a former employee of the first applicant – first respondent left employment with first applicant and commenced employment with competitor company in similar role – first respondent copied applicants' material including product source code to an external hard drive prior to resigning – material accessed by first respondent while employed by applicants' competitor – infringement of copyright – breach of duty of confidence – breach of employment contract – breach of s 183(1) *Corporations Act 2001* (Cth) – whether compensatory damages claim substantiated by applicants – s 115(2) *Copyright Act 1968* (Cth) – appropriate amount of additional damages justified in circumstances of case – s 115(4) *Copyright Act 1968* (Cth) – need to deter similar infringements – conduct of the first respondent after infringement– first respondent an individual rather than corporation – no demonstrable financial benefit to first respondent from infringement – no compensable loss demonstrated by applicants

PRACTICE AND PROCEDURE – applicants seeking order for return of applicants' material in possession or control of first respondent or his current or former legal representatives – whether order specifying return of material in possession of legal representatives necessary or appropriate – only applicable if material not in control of first respondent – ability of first respondent to comply with order if material not in his control

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Leica Geosystems Pty Ltd v Koudstaal [2014] FCA 1129
(23 October 2014 – Justice Collier)

The applicants were members of the Leica Geosystems Mining group ('Leica'), who were in the business of selling software products and providing services to the mining industry. The respondent, previously a software engineer, concluded employment with the first applicant on 3 November 2011, to then commence employment with a competitor company on 7 November 2011.

It appeared that over a period between 11 October 2011 and 1 November 2011, and over the course of several hours on 2 and 3 November 2011, the respondent deliberately copied a large volume of the applicants' material to an external hard drive ('the Taken Material') which he removed from the premises of Leica when he finally left their employment. The applicants pressed four causes of action against the respondent, namely:

1. Copyright infringement under the *Copyright Act 1968* (Cth) ('Copyright Act');
2. Breach by the respondent of the equitable obligation of confidence;
3. Breach of the terms of his employment contract with Leica Australia; and
4. Breach of his statutory duties under s 183(1) of the *Corporations Act 2001* (Cth).

The applicants sought compensatory damages, additional damages pursuant to s 115(4) of the Copyright Act, declaratory orders, injunctions and orders for the return of the confidential information.

The Court held that the applicants had substantiated their claims against the respondent in respect of all four grounds. The respondent had copied the Taken Material without licence, consent or authority for his own purposes and removed it from the applicants; the applicants owned the material which constituted original literary or artistic works under the Copyright Act; the sheer volume and complexity of the Taken Material was such that it negated any finding that it could be taken as part of the respondent's general knowledge; the Termination Checklist signed by the respondent was breached in that it included an acknowledgment that he 'did not have in [his] possession any property (… electronic media) belonging to Leica …'; and copying the Taken Material was undertaken for an improper purpose.

The applicants were granted orders in respect of declarations; restraint and delivery of property in the respondent's possession and control; compensatory damages in the nominal amount of $1.00 pursuant to s 115(2) of the Copyright Act; additional damages in the amount of $50,000 pursuant to s 115(4) of the Copyright Act; and costs to be taxed if not otherwise agreed.

COSTS – claim for indemnity costs based on letter of compromise – applicability of Federal Court Rules 1979 – whether circumstances to justify departure from presumption of entitlement to indemnity costs – effect of Full Court's reassessment of appropriate range of damages

PRACTICE AND PROCEDURE – application for pre-judgment interest

Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 139
(27 October 2014 - Justices Kenny, Besanko and Perram)

Mr Tucker sexually harassed Ms Richardson while they were both employed by Oracle. The primary judge found Oracle vicariously liable for Mr Tucker's unlawful conduct and ordered it to pay Ms Richardson $18,000 by way of damages as compensation, under the *Australian Human Rights Commission Act 1986* (Cth).

Key issues on appeal included whether the primary judged erred:

- in assessing general damages by way of compensation;
- by rejecting Ms Richardson's claim for economic loss resulting from her resignation from Oracle, and in calculating economic loss; and
- in relation to causation and indirect discrimination.

The Full Court upheld certain of Ms Richardson's grounds of appeal, and significantly increased the award of damages against Oracle to $130,000.

The chief reason for this increase was the Full Court's finding that general damages awarded by the primary judge were 'manifestly inadequate', even though the amount was not out of step with some past awards. Justice Kenny (with whom Justices Besanko and Perram agreed), held that whether the damages were manifestly inadequate was 'not to be determined here by reference to some previously accepted 'range' in sexual harassment cases'. Her Honour had regard to the nature and extent of Ms Richardson's injuries and prevailing community standards, including a greater value accorded to loss of enjoyment of life and compensation for pain and suffering, and fixed general damages at $100,000. This included compensation for injury caused to Ms Richardson's sexual relationship, which the primary judge had not allowed.

The Full Court also upheld Ms Richardson's claim for economic loss resulting from her resignation, finding that though Ms Richardson was not forced to leave, there was a sufficient causal link between Mr Tucker's unlawful conduct and Ms Richardson's economic loss (fixed at $30,000).

The Full Court rejected Ms Richardson's contention that by reason of the manner in which Oracle had conducted its investigation into her complaint, it had indirectly discriminated against her on the ground of her sex. The Full Court also rejected challenges to the primary judge's failure to award damages for psychological injury as a result of Oracle's investigation and the litigation, and to the principles applied by the primary judge in assessing damages under the relevant statutory provision.

MIGRATION – Involuntary removal of unlawful non-citizen from Australia – Where applicant had filed application for extension of time to appeal at time of removal – Where person holding applicant in immigration detention owes statutory duty under s 256 of the *Migration Act 1958* (Cth) to provide reasonable facilities for the obtaining of legal advice for applicant to bring legal proceedings for injunctive relief in order to prevent removal – Whether applicant had reasonable time and reasonable access to obtain legal advice

PRACTICE & PROCEDURE – Application for extension of time - Whether to grant applicant leave to file notice of appeal against orders of a judge of the Federal Circuit Court - Where applicant had no reasonable explanation for delay in filing notice of appeal

SZSPI v Minister for Immigration and Border Protection [2014] FCAFC 140
(28 October 2014 – Chief Justice Allsop and Justices Mansfield and Besanko)

The Applicant, a Tamil, arrived in Australia by boat from Sri Lanka. His Application for a Protection obligation evaluation was refused and an application to the Federal Circuit Court for judicial review of the decision of the independent protection assessor failed. When the Applicant's temporary safe haven visa expired, he lodged an Application for Extension of Time to Appeal to the Federal Court 20 days out of time. The Applicant was subsequently detained in immigration detention and removed from Australia following being given three working-days' notice that he would be deported, and before his application to the Federal Court was finalised. He could not be located following his return to Sri Lanka to appear in the hearing.

The central question the Full Court examined was whether the Department of Immigration and Border Protection (the Department) had breached its obligations under section 153 of the *Migration Act 1958* by removing the Applicant before he had the opportunity for his matter to be heard by the Court. This was considered by examining the Department's Procedures Advice Manual (PAM3: Act – Compliance and Case Resolution: Returns and Removals: Removal from Australia) which states that no removal is to occur if there is an unfinalised matter … or if the person was seeking judicial review. The

exception to this, which the Respondent successfully persuaded the Court applied in the circumstances of this case, was if the Litigation Branch advised the Department that it had reasonable prospects of defending an injunction application (to prevent removal).

In light of this, the Court also considered whether the Applicant had been given the full benefit of section 256 of the Migration Act. It provides that, as a minimum, a person in detention should be given reasonable time and the relevant facilities to make any relevant applications. Consideration was given to the Applicant's access to a migration agent and whist commenting that the case was not without its troubling aspects, the court was not satisfied that the Applicant was not given a reasonable opportunity to seek injunctive relief. The Court noted that determining what is 'reasonable' will always depend on the circumstances of the individual case, and held that, in the Applicant's absence from Australia, the application was moot and should be dismissed.

TRADE PRACTICES – challenge to validity of notices issued pursuant to s 155 of the *Competition and Consumer Act 2010* (Cth) – whether notices identify a matter that constitutes or may constitute a contravention of the Act – alleged anti-competitive contract, arrangement or understanding in contravention of s 45 – alleged cartel conduct under ss 44ZZRG or 44ZZRK – contract, arrangement or understanding entered into in context of the *Mining Act 1992* (NSW) – definition of 'services' under s 4(1) of the *Competition and Consumer Act 2010* (Cth) – nature of services specified in the s 155 notices

TRADE PRACTICES – definition of 'services' – whether identified services conducted in trade and commerce – competitive tender process

Obeid v Australian Competition and Consumer Commission [2014] FCAFC 155
(20 November 2014- Chief Justice Allsop and Justices Mansfield and Middleton)

The Full Court upheld the validity of examination notices issued by the Australian Competition and Consumer Commission (ACCC) under section 155 of the *Competition and Consumer Act 2010* (CC Act) in the course of an investigation by the ACCC of possible cartel conduct in contravention of the CC Act. That investigation followed the publication of a report by the New South Wales (NSW) Independent Commission Against Corruption (ICAC) into the conduct of a number of individuals, including the appellants, in regard to the award of mining exploration licences to companies which ICAC found were controlled by the appellants' family and their associates.

The appellants' argued, both on appeal and at first instance, that the 'services' specified in the examination notices were not 'in trade or commerce' but the exercise of a statutory power. As a consequence they argued that, as no cartel conduct could arise, valid examination notices could not be issued.

The Full Court found that, in the process adopted, the Minister on behalf of the State of NSW was engaging in trade or commerce in providing on a commercial basis the right to explore the State's coal reserves to maximise financial gain or revenue to the State. It also found that each of the appellants engaged in trade or commerce in seeking the consent of the Minister and an exploration licence. As a result it found that, within the meaning of the CC Act, the bids submitted in the tender process were in relation to the supply or acquisition of 'services'.

The Court also found that the appellant's argument that the relevant parts of the cartel provisions in the CC Act could apply only if the bid is made after a contract, arrangement or understanding came into existence could not be sustained. It noted that the operation of those parts must be read in context and that there was nothing in their text or context, or in their purpose or object, to restrict their operation in that way.

CONSTITUTIONAL LAW – whether Country Fire Authority, established by the *Country Fire Authority Act 1958* (Vic), a trading corporation within Commonwealth Constitution s 51(xx)

CONSTITUTIONAL LAW – whether *Fair Work Act 2009* (Cth) beyond the legislative power of the Commonwealth in its application to clauses 26, 27, 28 and 122 of the Country Fire Authority United Firefighters' Union of Australia Operational Staff Enterprise Agreement 2010 by reason of the principle in *Melbourne Corporation v The Commonwealth* [1947] HCA 26; (1947) 74 CLR 31 and *Re Australian Education Union, Ex parte Victoria* [1995] HCA 71; (1995) 184 CLR 188

INDUSTRIAL LAW – whether clauses 13, 14 and 16 of the Country Fire Authority/United Firefighters' Union of Australia Operational Staff Enterprise Agreement 2010 (Agreement) objectionable terms for the purposes of s 12 of the *Fair Work Act 2009* and by reason of ss 253(1)(b) and 356 of that Act of no effect – whether consultation clauses not 'consultation terms' as required by s 205 of the *Fair Work Act 2009* and of no effect so that the Model Consultation Term prescribed by the Fair Work Regulations 2009 (Cth) taken to be a term of the Agreement – whether subclauses 15.1.2 and 15.1.3 of the Agreement were invalid dispute resolution clauses and invalid and of no effect – whether subclause 38.3 of the Agreement invalid and of no effect

United Firefighters' Union of Australia v Country Fire Authority [2015] FCAFC 1
(8 January 2015 - Justices Perram, Robertson and Griffiths)

There were two major issues in this appeal. The first was whether the Country Fire Authority of Victoria (CFA) was a 'trading corporation'. The second was whether the *Fair Work Act 2009* (Cth) was beyond legislative power in its application to certain clauses of the CFA/United Firefighters' Union Operational Staff Enterprise Agreement 2010 by reason of the implied limitations on Commonwealth legislative powers in *Melbourne Corporation* (1947) 74 CLR 31 and *Re Australian Education Union* (1995) 184 CLR 188.

The Full Court held that the primary judge was correct to conclude that the CFA was a trading corporation. The issue was one of characterisation and was a matter of fact and degree. An important question was whether the corporation's trading activities formed a sufficiently significant proportion of its overall activities to merit its description as a trading corporation. Answering that question did not simply involve the application of a formula or equation nor the substitution of percentages or other measures of monetary value as between the activities found to be trading activities and the activities not so found.

As to the second issue, the Full Court held that the United Firefighters' Union's appeal succeeded on the basis that the implied limitation was not applicable to Commonwealth statutory provisions which operated by reference to the State or its agencies having voluntarily entered into an agreement which was then given statutory force, but only on condition that the parties had made the agreement which was subsequently approved by the then Fair Work Authority. The relevant legislative provisions did not single out any State or its agencies and the provisions did not impose a special disability or burden on the exercise of the powers and fulfilment of the functions of the state of Victoria or the CFA which curtailed the State's capacity to function as a government. There was no suggestion that the CFA had been compelled to enter into the Agreement by, for example, industrial action.

ADMINISTRATIVE LAW – Where special Australian Crime Commission investigation constituted under a determination made pursuant to the *Australian Crime Commission Act 2002* (Cth) – Where determination provides that other government agencies including officers of the Australian Taxation Office are participants in the special investigation – Where taxpayer summonsed for examination through exercise of compulsory powers under s 28

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of the *Australian Crime Commission Act 2002* (Cth) – Whether summons issued for improper purpose – Whether gathering of intelligence can form any part of the purpose of holding s 28 examination – Where purpose of summons is to ask questions about federally relevant criminal activity covered by special investigation determination – Where evidence of purpose of persons other than decision-maker irrelevant – Whether dissemination of information to other participants in the special investigation is an improper purpose - Whether decision to hold s 28 examination made under dictation

ADMINISTRATIVE LAW – Whether examination under s 28 of the *Australian Crime Commission Act 2002* (Cth) held 'in private' where officers from the Australian Taxation Office present – Whether requirement that taxpayer be entitled to an opportunity to comment on presence of officers from the Australian Taxation Office at the s 28 examination - Effect of failure to give an opportunity to comment on presence of persons who are not a 'member of the staff of the ACC' – Whether presence of officers from the Australian Taxation Office at the Australian Crime Commission examination was not authorised because they were associated with the possible prosecution of the examinee

TAXATION – Where Commissioner in process of assessing objections by taxpayer and associated entities – Whether power to issue notice under s 264 of the *Income Tax Assessment Act 1936* (Cth) after objection lodged – Whether s 14ZYA of the *Taxation Administration Act 1953* (Cth) confers exclusive power to gather information after taxation objection lodged – Whether s 264 notice limited to gathering information for raising assessments before objection

TAXATION – Where Australian Taxation Office conducting special operation auditing taxpayers transferring payments to or from tax havens endorsed by special Australian Crime Commission investigation – Where transcript of Australian Crime Commission examination of taxpayer disseminated to officers of the Australian Taxation Office under s 59(7) of the *Australian Crime Commission Act 2002* (Cth) – Whether requirement to afford the taxpayer an opportunity to be heard before dissemination of the examination transcript to the Australian Taxation Office – Whether use of examination transcript in deciding whether to issue notice under s 264 of the *Income Tax Assessment Act 1936* (Cth) or conducting s 264 interview authorised – Whether use of examination transcript in connection with s 264 interview contravenes non-publication directions made under the *Australian Crime Commission Act 2002* (Cth) – Whether non-publication direction ought to have precluded use in connection with s 264 interview in order to avoid prejudice to a fair trial if the taxpayer is charged

TAXATION – Whether power to restrain exercise of compulsive powers to require evidence on the subject-matter of offences applies only where the examinee has been charged – Whether decision-maker issuing s 264 notice bound to have regard to detriment suffered as a result of the exercise of the power in s 264 – Whether decision to hold s 264 interview unreasonable

LHRC v Deputy Commissioner of Taxation (No 3) [2015] FCA 52
(6 February 2015 - Justice Perry)

This decision considers the extent of cooperation that may lawfully be undertaken between the Australian Crime Commission (ACC) and Australian Taxation Office (ATO) in the context of a special investigation under the *Australian Crime Commission Act 2002*.

A director of an investment bank and trustees of his family trusts sought to insulate a tax audit of their affairs from an earlier examination of the director pursuant to compulsive powers as part of the ACC special investigation, Project Wickenby. The relief sought was intended to ensure that those conducting any interview of the director under s 264

of the *Income Tax Assessment Act 1936* did not have knowledge of the substance of the ACC examination. The applicants sought to achieve this by challenging the examination, the dissemination of transcript to the ATO, the examiner's non-publication directions, and the issue of the s 264 notice.

In dismissing the applicants' case, Perry J considered the purposes for which a summons may issue under s 28(1A) of the ACC Act finding that, while a special investigation is primarily concerned with ascertaining facts, that does not preclude the gathering of intelligence. The Court also held that the applicants' submissions were premised on a false dichotomy between the investigation of *'federally relevant criminal activity'* in the nature of tax fraud or evasion and the gathering of evidence on the receipt of undisclosed income for the issue of amended assessments.

The decision also explores the circumstances in which ATO and other officers may lawfully attend, and assist with, an ACC examination. Limitations sought to be placed upon the power to issue a s 264 notice, including that it did not apply to the determination of a taxation objection, were rejected on the ground that objections comprise part of the assessment process.

Finally, the Court held that the use of information provided at an examination in deciding whether to issue a s 264 notice did not, in the circumstances, including that the director had not been charged, interfere with the accusatorial system of criminal justice. The use of that information in connection with the s 264 interview was a lawful derivative use.

INDUSTRIAL LAW – appeal from the County Court of Victoria – employment terminated – whether primary judge erred in concluding that employee's misconduct (whether considered separately or cumulatively) did not justify summary dismissal – whether primary judge failed to give adequate weight to certain facts – whether primary judge's process of reasoning miscarried

CONTRACTS – employment contract – when termination of contract effective – whether contract terminated on payment in lieu of notice or whether terminated for cause – whether employer entitled to rely on serious misconduct as grounds for dismissal where such conduct not known to or raised by the employer at the time contract terminated

COSTS – consideration of the construction and application of s 570 of the *Fair Work Act 2009* (Cth) in circumstances where a plaintiff pursued claims in a state court under the Fair Work Act and common law in the same proceeding – whether offer of compromise unreasonably refused

Melbourne Stadiums v Sautner [2015] FCAFC 20 (26 February 2015 – Justices Tracey, Gilmour, Jagot, White and Beach)

This was an appeal from the County Court of Victoria. It concerned an employment contract between Mr Sautner and Melbourne Stadiums Limited (MSL) and the basis upon which that contract was terminated. The contract could be terminated on notice, immediately by providing remuneration in lieu of notice or immediately, without payment, for cause.

On 3 June 2013, MSL purported to immediately terminate the contract by informing Mr Sautner that he would be paid six months' remuneration in lieu of notice. MSL subsequently became aware that Mr Sautner had engaged in misconduct, including using MSL tickets to obtain goods and services for personal benefit. MSL asserted that it was entitled to terminate the contract for serious misconduct.

Mr Sautner argued that his conduct did not justify summary dismissal. Although finding in Mr Sautner's favour, the trial judge considered that if the conduct had justified summary dismissal MSL would have been entitled to terminate for cause under the principle articulated in *Shepherd v Felt & Textiles of Australia Limited* (1931) 45 CLR 359 that a servant's dismissal may be justified upon grounds upon which his master did not act and of which he was unaware when he discharged him.

On appeal, the Court held that the misconduct justified summary dismissal. The majority found that the purported termination on 3 June was ineffective as the specific wording of the clause required actual payment of remuneration in lieu of notice and this never occurred. Accordingly, MSL was entitled to summarily dismiss Mr Sautner as the contract was still on foot at the time the misconduct was discovered. The majority considered that if the contract had been terminated on 3 June, MSL would not have been entitled under the *Shepherd* principle to resuscitate a lawfully terminated agreement and to re-terminate it upon some ground not known at the time of termination.

Justice White held in dissent that MSL had repudiated the contract and that Mr Sautner had accepted the repudiation. His Honour considered that under the *Shepherd* principle MSL could have justified its failure to give effect to the contract by reliance on Mr Sautner's earlier breaches, even though MSL was unaware of that conduct at the time.

The Court held that, subject to s 570(2) of the *Fair Work Act 2009* (Cth), both the trial judge and this Court on appeal, were precluded, by s 570(1), from making any costs orders notwithstanding the fact that Mr Sautner had relied on causes of action in common law and under the Fair Work Act.

CORPORATIONS – basis of obligations to make continuous disclosure – whether first defendant breached obligations of continuous disclosure – whether first defendant obliged to disclose payment of dividends from capital – whether accounts gave a true and fair view – whether first defendant obliged to disclose if accounts did not – whether first defendant insolvent at specified date – whether first defendant obliged to disclose if it was – whether dividend funded from asset revaluation

Grant-Taylor v Babcock & Brown [2015] FCA 149 (4 March 2015 - Justice Perram)

The plaintiffs acquired shares in Babcock & Brown at various times prior to the suspension of trading in the company's stock and sued for alleged breaches of market disclosure obligations sourced in the *Corporations Act 2001* (Cth) and the ASX listing rules. These obligations necessitated disclosure of information if it was not generally available and was such that a reasonable person would expect it to have a material effect on the company's share price.

The alleged non-disclosure concerned:

(i) failure to reveal payment of dividends otherwise than from capital;
(ii) failure of the financial accounts to reflect a true and fair view of the company's position;
(iii) failure to reveal the company's insolvency; and
(iv) failure to reveal payment of dividends from borrowings following asset revaluations.

As to (i), this issue arose because of the Babcock & Brown group's corporate structure (in which the operating entity would declare dividends which were then passed through to the shareholders of the listed entity) and the timing of receipt of the monies by the listed entity from an accounting perspective. Thus the issue surrounding the dividend payments was the result of the application of accounting standards. Moreover, this information could be gleaned from the financial reports. Accordingly it was held that disclosure of this fact would not materially affect the price of the company's shares.

As to (ii), it was held that for accounts to give a 'true and fair' view they must be both free of incorrect facts or omissions of material facts ('true') and contain opinions which are reasonable in the context in which they appear ('fair'). Therefore the accounts were not 'true and fair' because they did not reflect the fact that there had been an unlawful capital reduction, yet, as above, this would not materially impact the share price.

As to (iii), the company could not disclose its insolvency as nobody within the company believed it to be insolvent at the time at which disclosure was said to be required.

As to (iv), there was no evidence of this, hence no obligation to disclose it could arise.

BANKING AND FINANCIAL INSTITUTIONS – CONSUMER PROTECTION – whether various stipulations for fees are penalties at law or equity, or genuine pre-estimate of damage or compensation – whether the relevant stipulations were for breach of term of contract, collateral or accessory in the nature of security for, and in terrorem of the primary stipulations, or for a further contractual right or accommodation – the relevance of the 'tests' in *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited* [1914] *UKHL 1*; [1915] AC 79 to the construction and characterisation of the provisions – whether the fees were extravagant or unconscionable – whether the charging of the fees constituted unconscionable conduct, unjust transactions or unfair contract terms under *Australian Securities and Investments Commission Act 2001* (Cth), *National Consumer Credit Protection Act 2009* (Cth), and *Fair Trading Act 1999* (Vic)

LIMITATION OF ACTIONS – whether recovery statute-barred – construction of s 27(c) of the *Limitation of Actions Act 1958* (Vic) – whether it applied to a mistake of law

Paciocco v Australia and New Zealand Banking Group Limited [2015] FCAFC 50
(8 April 2015 - Chief Justice Allsop and Justices Kenny and Besanko)

Following the High Court's restatement of the law of penalties in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205, Mr Paciocco and a company controlled by him, Speedy Development Group Pty Ltd (SDG), brought a representative proceeding under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) to set aside bank fees charged by the Australian and New Zealand Banking Group Limited (ANZ). Owing to the complex nature and the sheer magnitude of the dispute, this matter was of real public interest, and arguably, continues to be so.

The question before the court, broadly captured, was whether the various fees charged by ANZ (late payment fees, over limit fee and non-payment or dishonour fees) were penalties, or otherwise unconscionable or unfair under the *Australian Securities and Investments Commission Act 2001* (Cth), the National Credit Code under the *National Consumer Credit Protection Act 2009* (Cth), or the *Fair Trading Act 1999* (Vic). On 5 February 2014, the primary judge held that the credit card late payment fees were penalties at law and in Equity as they were payable upon breach or as security for or *in terrorem* of the satisfaction of the primary stipulation, and crucially, not a genuine pre-estimate of damage or loss as the fees were extravagant and unconscionable when compared with the actual loss suffered by ANZ. ANZ appealed this finding, and in turn, the applicants, cross-appealed on the finding by the primary judge that the other fees were otherwise legitimate.

The Full Court determined that the assessment of extravagance, exorbitance and unconscionability must be done as at the time of entry into the contract. The assessment is therefore forward looking or *ex ante*, as it is the prospective assessment of compensation commensurable with the interest of the obligee protected by the bargain. The Court held that the primary judge erred in assessing the greatest conceivable loss *ex post*, based on actual loss suffered by ANZ, as opposed to an assessment as at the date of the contract – albeit unbeknownst to the parties at the time. In assessing the greatest conceivable loss, the Court took into account costs arising as a result of non-payment, including costs for maintaining regulatory capital, costs related to running a collections department and provisioning costs. Proper assessment showed that the fees were not extravagant, exorbitant or unconscionable. The Court ultimately held that the late payment fee provisions could not be a penalty at law or in Equity.

As to the cross-appeal, the Court upheld the primary judge's finding that the remaining fees were not penalties as they were for additional services rendered by ANZ. In respect of the statutory grounds of unconscionability and unfairness, the Court affirmed the primary judge's reasoning for the decision where there was lack of any proven predation on the weak or poor; lack of real

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vulnerability requiring protection; lack of financial or personal compulsion or pressure to enter or maintain accounts; clarity of disclosure; the lack of secrecy, trickery or dishonesty; and the ability of people to avoid the fees or terminate the accounts. The Court discussed the proper approach as a matter of judicial technique to dealing with and evaluating value-laden expressions in the statutes such as unconscionable

ADMIRALTY – arrest of surrogate ship – general maritime claim by purchaser of vessel alleged to be defective against shipbuilder under s 4(3)(n) of *Admiralty Act 1988* (Admiralty Act) – whether purchaser could arrest nearly completed vessel in shipyard of shipbuilder – whether s 19(a) of Admiralty Act satisfied – surrogate vessel under construction not a 'ship' for purposes of s 19(a) – ship on delivery not owned by 'relevant person' – cause of action said to arise between launch and delivery of ship based on terms implied into construction contract for first vessel not reasonably arguable – upon striking out of that claim, no cause of action by purchaser against shipbuilder when shipbuilder owner of ship

Virtu Fast Ferries Ltd v The Ship 'Cape Leveque' [2015] FCAFC 58
(30 April 2015 – Chief Justice Allsop and Justices Mansfield and McKerracher)

This unique admiralty and maritime claim was dealt with by the Court at first instance and on appeal.

The Appellant, Virtu Fast Ferries Ltd (Virtu), filed a writ *in rem* under the *Admiralty Act 1988* (the Act) against the ship *Cape Leveque* when that ship was under construction in the shipyard of the second respondent, Austal Ships Pty Ltd (Austal), and about 96 per cent complete. *Cape Leveque* was being built for the Commonwealth of Australia (Commonwealth) under a multi-vessel ship building contract. Two-thirds of the total sum payable under that contract had been paid by the Commonwealth and the completed ship was due to be delivered, subject to resolution of the proceeding, 6 days after the hearing of the appeal.

Virtu's action for the arrest of the *Cape Leveque* as a surrogate for the ship *Jean de la Valette* was to provide security for a claim that the *Jean de la Valette*, which had been built by Austal and delivered to Virtu in 2010, was not properly constructed and had significant cracking. Virtu had commenced arbitration under the construction contract in London in 2013 and this was still proceeding.

Austal filed an interlocutory application seeking the strike out of the writ. Central to the determination of that application was whether Virtu could bring an action on a general maritime claim against *Cape Leveque* under section 19 of the Act. That section provides that a proceeding on such a claim may be commenced against a surrogate ship, only if:

(a) a relevant person in relation to the claim was, when the cause of action arose, the owner or charter of, or in possession or control of, a ship; and
(b) that person is, when the proceedings was commenced, the owner of the surrogate ship.

The primary judge (Rares J) dismissed the writ under subsection 19(b) deciding that the Commonwealth and not Austal was the owner of *Cape Leveque* at the time of the writ.

On appeal, the Full Court examined only Virtu's prospects of success of making out its assertions under subsection 19(a). Both parties accepted that prior to her launch *Jean de la Valette* was not a 'ship' as defined by the Act and that after her delivery to Virtu subsection 19(a) was not available to support the writ. The Full Court concluded that, consequentially, it was necessary to consider, firstly, if subsection 19(a) is available to support the arrest of a surrogate ship for a cause of action arising before her launch and, secondly, whether Virtu's claim against Austal properly includes a cause of action between her launch and her delivery to Virtu.

After considering the language used in subsection 19(a) and other relevant provisions of the Act, the Full Court found that it would be inconsistent to read the reference in subsection 19(a) to 'ship' to mean anything other than a 'ship' as defined. As a result the operation of the subsection did not extend to a vessel under construction when the cause of action arose.

The Full Court rejected the Appellant's contention that causes of action arose after launch and before delivery of the *Jean de la Valette* as Austal 'knew or ought to have known' that the ship had latent defects finding that there was no contractual or other obligation to make such disclosure and no evidentiary basis for the Appellant's assertions.

The appeal was dismissed. The Full Court noted the proceeding dealt only with the claim against the surrogate ship and the arbitration concerning *Jean de la Valette* would continue in London.

INDUSTRIAL LAW – *Building and Construction Industry Improvement Act 2005* (Cth) – unlawful industrial action – admitted contraventions – civil penalties – exercise of judicial discretion in sentencing – agreed penalties and submissions as to penalty – effect of *Barbaro v The Queen*

Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCAFC 59
(1 May 2015- Justices Dowsett, Greenwood and Wigney)

The Director, Fair Work Building Industry Inspectorate brought proceedings against the Construction, Forestry, Mining and Energy Union (CFMEU) and Communications, Electoral, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) alleging that they contravened the *Building and Construction Industry Improvement Act 2005* (Cth) by engaging in unlawful industrial action. CFMEU and CEPU both admitted to multiple contraventions.

The parties sought to adopt the practice, countenanced by earlier decisions of the Court, whereby the parties in civil penalty proceedings would make submissions as to penalty, often jointly, contending either for a particular figure or a range within which the penalty should fall. The question for the Court was whether the High Court's decision in *Barbaro v The Queen* [2014] HCA 2, 305 ALR 323 had the effect of forbidding that approach.

The Court held that the fixing of an appropriate penalty is a matter for the Court in the exercise of its discretion. Submissions as to penalty range or amount, agreed or otherwise, are impermissible expressions of opinion and are irrelevant to the process of instinctive synthesis involved in sentencing and in fixing such penalties, parties cannot, by agreement, bind or limit the Court's discretion in their imposition.

The High Court granted special leave to appeal on 18 June 2015.

ADMINISTRATIVE LAW – appeal from a decision of the Federal Court of Australia on application for judicial review of a declaration of unacceptable circumstances by the Takeovers Panel under s 675A of the *Corporations Act 2001* (Cth) – whether primary judge erred in finding that the Takeovers Panel provided adequate reasons in the declaration of unacceptable circumstances – whether primary judge erred in finding that the Takeovers Panel had sufficient evidence to make a declaration of unacceptable circumstances with respect to a subsequent shareholding acquisition.

CORPORATIONS – whether primary judge erred in construing 'unacceptable circumstances' under s 657A as ongoing – meaning of, and distinction between, 'circumstances' and 'effects' under s 675A – whether the primary judge erred in finding contravention of s 606 of the *Corporations Act 2001* (Cth) – meaning of 'voting power' under ss 606 and 610 – whether the deed poll and its covenant which limited the exercise of voting rights affects the statutory scheme.

Queensland North Australia Pty Ltd v Takeovers Panel [2015] FCAFC 68
(22 May 2015 - Justices Dowsett, Middleton and Gilmour)

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Queensland North Australia Pty Ltd (QNA) acquired shares, through a managed investment scheme, in The Presidents Club Limited ('TPC') which operates the now Palmer Coolum Resort. The Takeovers Panel found that the acquisitions contravened s 606 of the Corporations Act. The Panel also made a declaration of 'unacceptable circumstances' under s 657A. The primary judge affirmed the decision of the Panel. The Full Court allowed the appeal.

(i) *'Unacceptable Circumstances'*

The time within which an application for the declaration to be made, and when the Panel can make a declaration is limited to specified periods 'after the circumstances occur': ss 657B, 657C of the *Corporations Act 2001.* The question arose as to whether the application and declaration were out of time. TPC submitted that the relevant unacceptable circumstances were 'ongoing' so that neither limitation period had expired at any relevant time.

The Court drew a distinction between the 'circumstances' and their 'effects'. The 'effect' of the 'circumstances' rendered them 'unacceptable'. However, those 'effects' did not constitute part of the 'circumstances' which were capable of being declared 'unacceptable'. In this case, QNA's acquisition of shares was the relevant 'circumstance'; the 'effect' was a breach of s 606. That effect was 'continuing', but the 'circumstances' were not. Hence, the time period had expired and it was necessary to extend the time for making an application.

(ii) *'Voting Power'*

A deed poll and its covenant which limits the exercise of voting rights does not affect the meaning of 'voting power' under ss 606 and 610 of the Corporations Act. The Court held that 'voting power' is the number of votes controlled by reference to the constitution of the relevant company. The words 'votes attached' refer to the votes conferred under the company's constitution.

ADMINISTRATIVE LAW – appeal from the Administrative Appeals Tribunal (Tribunal) – scope of s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) – whether grounds of appeal to primary judge stated question or questions of law – whether appeal competent – whether question of law may include so-called mixed question of fact and law – whether in exercising its appellate jurisdiction on an appeal from a judge of the Court, the Court may deal with question or questions of law not previously raised before the primary judge

INCOME TAX – income tax assessments under ss 167(b), 167(c) and 170(1) of the *Income Tax Assessment Act 1936* (Cth) – appeal from the Administrative Appeals Tribunal (Tribunal) – whether amended notice of appeal raised questions of law – whether Tribunal's reasoning process was illogical, irrational or lacking a basis in findings or inferences of fact supported on logical grounds and thus made a decision it was not authorised to make – whether Tribunal misconstrued the burden of proof in *Taxation Administration Act 1953* (Cth), s 14ZZK – whether Tribunal erred in law in concluding that payments made to associates were ordinary income within *Income Tax Assessment Act 1997* (Cth) s 6.5 – whether Tribunal erred in law by applying Part III Division 7A as amended by the *Tax Laws Amendment (2010 Measures No 2) Act 2010* (Cth) where transitional provision provided that the amendments applied to payments made, loans made and debts forgiven on or after 1 July 2009

Haritos v Commissioner of Taxation [2015] FCAFC 92 (30 June 2015 – Chief Justice Allsop and Kenny, Besanko, Robertson and Mortimer)

A Full Court constituted by five judges considered whether an appeal on a 'question of law' under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) may include a so-called mixed question of fact and law, and whether a new question of law, not raised before the primary judge, may be raised on appeal to the Full Court. In summary it concluded:

(1) The subject-matter of the Court's jurisdiction under s 44 of the AAT Act is confined to a question or questions of law. The ambit of the appeal is confined to a question or questions of law.

(2) The statement of the question of law with sufficient precision is a matter of great importance to the efficient and effective hearing and determination of appeals from the Tribunal.

(3) The Court has jurisdiction to decide whether or not an appeal from the Tribunal is on a question of law. It also has power to grant a party leave to amend a notice of appeal from the Tribunal under s 44.

(4) Any requirements of drafting precision concerning the form of the question of law do not go to the existence of the jurisdiction conferred on the Court by s 44(3) to hear and determine appeals instituted in the Court in accordance with s 44(1), but to the exercise of that jurisdiction.

(5) In certain circumstances it may be preferable, as a matter of practice and procedure, to determine whether or not the appeal is on a question of law as part of the hearing of the appeal.

(6) Whether or not the appeal is on a question of law is to be approached as a matter of substance rather than form.

(7) A question of law within s 44 is not confined to jurisdictional error but extends to a non-jurisdictional question of law.

(8) The expression 'may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal' in s 44 should not be read as if the words 'pure' or 'only' qualified 'question of law'. Not all so-called 'mixed questions of fact and law' stand outside an appeal on a question of law.

(9) In certain circumstances, a new question of law may be raised on appeal to a Full Court.

(10) Earlier decisions of this Court to the extent to which they hold contrary to these conclusions, especially to conclusions (3), (4), (6) and (8), should not be followed to that extent and are overruled. Those cases include *Birdseye v Australian Securities and Investments Commission* [2003] FCA 232; 76 ALD 321, *Australian Securities and Investments Commission v Saxby Bridge Financial Planning Pty Ltd* [2003] FCAFC 244, 133 FCR 290, *Etheridge, HBF Health Funds and Hussain v Minister for Foreign Affairs* [2008] FCAFC 128; 169 FCR 241.

In relation to whether a new question of law may be raised on appeal to the Full Court, the Full Court held that in an appropriate case the Court may permit amendment to the questions of law arising on appeal from a primary judge hearing an appeal under s 44. The Full Court considered the differences between how the questions of law were put before the primary judge and how they were put before the Full Court was not a matter of jurisdiction but a matter of discretion, including the discretion as to costs.