Appendix 7

Decisions of interest

ADMINISTRATIVE AND CONSTITUTIONAL LAW AND HUMAN RIGHTS NPA

Linfox Australia Pty Ltd v O'Loughlin [2018] FCAFC 173 (12 October 2018, Kenny, Moshinsky and Bromwich JJ)

Mr O'Loughlin was employed by Linfox as a petrol tank driver. In 2010, he sustained a serious injury in an altercation with a mechanic at a service station while he was in the process of delivering petrol to the service station for one of Linfox's customers. In 2014, Linfox decided to revoke a prior grant of workers' compensation to Mr O'Loughlin on the basis that it had never been liable because of the way in which Mr O'Loughlin's injury was sustained.

Section 5A of the *Safety, Rehabilitation and Compensation Act 1988* (the Act) defined an 'injury' to mean one 'arising out of, or in the course of' employment. Without limiting this definition, s 6 of the Act provided an extended meaning of the concept of an injury arising out of or in the course of employment, so that an injury was to be treated as having so arisen if relevantly to this case, it was sustained at the employee's place of work, unless the employee voluntarily and unreasonably submitted to an abnormal risk of injury.

The Tribunal had found that Mr O'Loughlin's injury arose in the course of his employment under s 5A(1)(b). The Tribunal had also found that the injury had been sustained at Mr O'Loughlin's place of work and that he had voluntarily and unreasonably submitted to an abnormal risk of injury. The Tribunal took the view that Mr O'Loughlin could not avoid the restriction in s 6 of the Act, regardless of the independent finding that his injury was sustained in the course of his employment under s 5A(1)(b). On that basis, the Tribunal held that the injury could not be treated as having arisen in the course of employment and was not compensable. The primary judge set aside the decision of the Tribunal, and found that Mr O'Loughlin was entitled to workers' compensation.

The Full Court agreed with the primary judge that an injury that arose in the course of employment so as to fall within s 5A(1)(b), without the need to resort to the extended meaning in s 6(1), was compensable even if the employee voluntarily and unreasonably submitted to an abnormal risk of injury. The Full Court found it was not mandatory to consider and apply the restriction in s 6 of the Act if an injury otherwise met the definition in s 5A of the Act. The legal effect of the opening phrase in s 6 of the Act, '[w]ithout limiting the circumstances in which an injury to an employee may be treated as having arisen out of, or in the course of, his or her employment', was central to the disposition of the appeal. Section 6 was facultative, not mandatory, in its application, containing its own limits on its operation. If s 6(1) did not need to be relied upon to give an extended meaning to an injury arising out of or in the course of employment, its limitations correspondingly did not apply.

On 20 March 2019, the High Court refused special leave to appeal on the papers: [2019] HCASL 83.

ADMINISTRATIVE AND CONSTITUTIONAL LAW AND HUMAN RIGHTS NPA

MZAOL v Minister for Immigration and Border Protection [2019] FCAFC 68 (29 April 2019, Bromberg, Farrell and Davies JJ)

The appellants are a mother and daughter whose protection visa applications had been refused by a delegate of the Minister. The Tribunal affirmed the refusal decision and an application for judicial review was dismissed by the Federal Circuit Court. The Full Court allowed the appeal, finding that the Tribunal had not considered and determined a claim that the appellant mother was at risk of, or in fear of, serious harm from forced sterilisation.

The mother came to Australia from China on a student visa in 2007, but this visa was cancelled before her daughter was born in Australia in 2012. One of the protection claims was that the child would face discrimination and harm in China, including because she would be considered a 'black child'. The relevant ground of appeal was that the mother also claimed to fear that she would be subjected to physical harm, including the possibility of forced sterilisation, because of her inability to pay the fine for breaching China's family planning laws, and that this claim was not addressed by the Tribunal.

The mother's statement in support of the visa application said she feared punishment under China's family planning law. The statement said her sister-in-law had suffered serious complications after she miscarried and had a sterilisation operation and that she feared this would also happen to her. A written submission to the Tribunal referred to the mother's inability to pay any fines imposed and included extracts from country information that referred to family planning laws being enforced, including by way of abortions or sterilisations.

The Full Court said that the Tribunal was required to deal with each claim expressly raised and also those that were apparent on the material before the Tribunal. The Full Court found it was tolerably clear from the statement and the submission that the appellant mother made a claim that she feared that should she be returned to China, the consequences of her non-compliance with China's family planning laws included the likelihood that she may be subjected to physical harm, including the possibility of forced sterilisation.

The Full Court found that the Tribunal had not properly appreciated that two feared consequences were claimed to arise from an inability to pay the likely fine under China's family planning law. The first for the daughter, as a 'black child', and the second for the mother herself. The Full Court found that the consequences for the daughter were extensively dealt with, but that nowhere in the reasons of the Tribunal was the asserted inability to pay the fine addressed by reference to the feared consequences of non-payment for the mother. The Full Court allowed the appeal on this ground, finding that the relevant claim arose and was not addressed.

ADMINISTRATIVE AND CONSTITUTIONAL LAW AND HUMAN RIGHTS NPA

Beni v Minister for Immigration and Border Protection [2018] FCAFC 228 (14 December 2018, McKerracher, Reeves and Thawley JJ)

In this case, the Full Court considered when a notice of decision sent by email was 'transmitted' and whether the Tribunal had the general power to extend time for the making of an application for review of a decision in proceedings in the Migration and Refugee Division.

The Tribunal held that it did not have jurisdiction to review a decision cancelling the appellant's temporary business entry visa because the application for review was not brought within the prescribed seven day period after the appellant was notified of the decision. An email giving notice of the decision was sent on the day the decision was made. The Tribunal was prepared to accept that the email was not actually received by the appellant on that day, but concluded that by virtue of sending the email, the email was 'transmitted' and notification was therefore deemed to have occurred. The Federal Circuit Court agreed with the approach of the Tribunal.

The Full Court considered whether a notice of decision was given to the appellant 'by transmitting [it by] email' in circumstances where the email was not received. The Full Court said the word 'transmitting' could require either sending or both sending and receiving. The word had to be read in the context in which it was used. The Full Court said in this case the regime was directed to the ability of the Minister to know the date of notification so it would be possible to know what to put on the notification document as the date by which any review must be sought. The Full Court considered the need for administrative certainty, including the considerable difficulty and high impracticability of proving receipt in order to establish transmission. The Full Court found that in this case 'transmitting' referred to sending, rather than sending and receiving. The word 'transmitting' was used instead of 'dispatching' because 'transmitting' was more commonly used in the context of electronic communications. The Full Court held that the Tribunal was correct in concluding that the review application was brought out of time.

The Full Court then considered whether the Tribunal had the power to extend time in this case. The starting point was a provision that rendered the general power to extend time inapplicable to Tribunal proceedings in the Migration and Refugee Division. This was subject to an exception authorising other enactments to provide for applications to be made to the Tribunal for review. If another enactment provided for applications to the Tribunal, that enactment could also include provisions adding to, excluding or modifying the operation of the general power to extend time, which would 'have effect subject to any provisions so included'. The Full Court found that this did not, in effect, resuscitate the general power to extend time in proceedings in the Migration and Refugee Division. The Full Court said it was clear, when looking at the legislative history and the surrounding secondary materials that there was no legislative intention to permit extensions of time. The Full Court concluded that the Tribunal was correct to find that the general power to extend time did not apply.

ADMIRALTY AND MARITIME NPA

Degroma Trading Inc v Viva Energy Australia Pty Ltd [2019] FCA 649 (13 May 2019, O'Callaghan J)

Degroma Trading Inc (Degroma) is the registered owner of the Panamanian-flagged oil and chemical tanker, the *Diamond-T*. Through its agent, it entered into a voyage charter with Viva Energy Australia Pty Ltd (Viva) for the carriage in October 2018 of a cargo of Viva's diesel and unleaded petroleum products from Geelong to Tasmania.

Through their respective agents, the parties were in correspondence regarding a draft bill of lading, which included an arbitration clause that gave either party the ability to elect to have any dispute arising out of the bill of lading to be referred to arbitration in London. At the same time, cargo loading operations had commenced in Geelong.

On 19 October 2018, there were reports of a potential problem with the condition of the cargo loaded onto the *Diamond-T* and Viva requested that the cargo already loaded on board the vessel be discharged back ashore. Further loadings and un-loadings of Viva's cargo continued until around 25 October 2018 and a dispute arose regarding alleged contamination of the cargo.

Viva commenced an arrest proceeding on 15 November 2018 and sought damages against Degroma for breach of its duty, as bailee, to properly clean its cargo tanks prior to loading. Degroma brought an application for a stay of the proceedings under s 7 *International Arbitration Act 1974* (Cth) on the basis it elected to exercise the arbitration clause.

Viva argued there was no binding arbitration agreement and, in any event, no final bill of lading that a dispute could 'arise out of'. Degroma submitted the arbitration clause constituted a separable agreement for the purposes of Article II of the Convention, irrespective of whether the whole bill of lading was binding on the parties, because there was an unambiguous exchange of letters or telegrams regarding the draft bill of lading that made it clear Degroma would not negotiate on the terms of the arbitration clause.

O'Callaghan J found the real issue was a practical one and concluded that if the Court heard the question of whether an arbitration agreement exists, that question would be bound up with the broader question of whether the parties are bound by a bill of lading, and if so, by what terms. O'Callaghan J stayed Viva's proceedings and referred the whole of the dispute to arbitration.

EMPLOYMENT AND INDUSTRIAL RELATIONS NPA

Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union [2019] FCAFC 84 (24 May 2019, Allsop CJ, Collier and Rangiah JJ)

Bluescope Steel (AIS) Pty Ltd's employees at its Port Kembla operations were covered by industrial instruments that required them to work 'additional hours', beyond the standard hours of 38 hours per week. The employees were regularly required to do so in order to meet business needs. The employees were paid annualised or aggregate salaries. They worked up to 43.5 hours per week (38 hours plus 5.5 'additional hours') and were rostered to work on public holidays. Their salaries included payment for not only the base salary, but also the additional hours and public holidays.

The Australian Workers' Union (AWU) commenced proceedings on behalf of the employees against Bluescope for contravention of s 50 of the *Fair Work Act 2009* by failing to make appropriate superannuation contributions. The key issues were whether the salary components for 'additional hours' and public holidays fell within s 6 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SG Act) so that Bluescope was required to pay superannuation contributions on them. The answer to those questions involved the construction of the words *'ordinary time earnings'* and *'ordinary hours of work'* under the SG Act.

The primary judge found that 'ordinary hours of work' refers to the hours that are actually worked by an employee on a regular, normal, customary or usual basis, so that the whole of the salary paid by Bluescope to its employees were ordinary time earnings.

The Full Court overturned this finding on appeal. In relation to the meaning of 'ordinary time earnings', Allsop CJ said 'the meaning that best reflects … the text, context, purpose and history of the provision is earnings in respects of ordinary or standard hours of work at ordinary rates of pay as provided for in a relevant industrial instrument, or contract of employment, but if such does not exist (and there is no distinction between ordinary or standard hours and other hours by reference to rates of pay) earnings in respect of the hours that the employee has agreed to work or, if different, the hours usually or ordinarily worked'.

The Full Court found that under the relevant industrial instruments, the ordinary hours of work were defined and 'additional hours' and public holidays were paid at higher rates than the ordinary base rate. It followed that they did not constitute 'ordinary time earnings' for the purpose of the SG Act and Bluescope was not required to pay superannuation contributions on them. Accordingly, the appeal was dismissed.

COMMERCIAL AND CORPORATIONS NPA | COMMERCIAL CONTRACTS, BANKING, FINANCE AND INSURANCE SUB-AREA

AIG Australia Limited v Kaboko Mining Limited [2019] FCAFC 96 (14 June 2019, Allsop CJ, Derrington and Colvin JJ)

This proceeding concerns the interpretation of an insolvency exclusion clause in a directors and officers (D&O) liability insurance policy.

Pursuant to agreements made in 2012, Noble Resources Limited (Noble) advanced to Kaboko Mining Limited (Kaboko) USD$6 million as prepayment for manganese ore from Zambian mines. In 2015, Noble claimed that Kaboko defaulted and demanded payment from Kaboko. Kakobo subsequently appointed administrators and then became subject to a deed of company arrangement. In 2016, Kaboko, by its administrators, initiated claims against four former directors, alleging breaches of their duties to act with due care and diligence in managing the company's affairs and to act in good faith in the best interests of the company. The directors sought indemnity under a D&O policy issued by AIG Australia Limited (AIG). AIG declined indemnity, on the basis that the directors' alleged contraventions led to the company's insolvency, so that accordingly, the insolvency exclusion applied. The exclusion provided that AIG was not liable to cover any loss 'in connection with any claim arising out of, based upon or attributable to the actual or alleged insolvency of the company or any actual or alleged inability of the company to pay any or all of its debts as and when they fall due'.

The primary judge determined that the insolvency exclusion did not operate to preclude the directors from being indemnified. It was accepted the alleged breaches ultimately led to Kaboko's insolvency. However, the primary judge concluded that the relevant loss did not arise out of Kaboko's insolvency, but was instead the loss of Kaboko's opportunity to exploit a commercial opportunity to develop its mining projects.

On appeal, the Full Court unanimously upheld the decision below. The Full Court considered that the question was whether it is the subject matter of the claim that must have the specified insolvency link, or whether the link is also established where, by reason of the circumstances that have led to the bringing of the claim, it can be said that the claim arises out of, is based upon or is attributable to the actual or alleged insolvency.

The Full Court found that, subject to the claim for the costs of the external controllers, Kaboko's claims against the directors were not founded upon any insolvency allegations, and each claim could be advanced, irrespective of whether Kaboko was in administration. Accordingly, the exclusion was not engaged, and AIG's appeal was dismissed.

COMMERCIAL AND CORPORATIONS NPA | COMMERCIAL CONTRACTS, BANKING, FINANCE AND INSURANCE SUB-AREA

Westpac Banking Corporation v Lenthall [2019] FCAFC 34 (1 March 2019, Allsop CJ, Middleton and Robertson JJ)

Mr Lenthall, with three other representative applicants, commenced proceedings on behalf of those who had purchased insurance issued by Westpac Life Insurance Services Ltd, on the advice of advisors at Westpac Banking Corporation (together 'Westpac'). It was alleged Westpac had breached fiduciary duties by failing to advise group members of insurance policies offered by third party insurers, where those policies were equivalent or better, and were available at a lower price.

The representative applicants had entered into a litigation funding agreement with JustKapital Litigation Pty Limited (JustKapital). The primary judge made common fund orders, concluding that the power to make such orders lay in the Court's general power to make orders thought appropriate to ensure justice is done, pursuant to s 33ZF of the *Federal Court of Australia Act 1976* (FCA Act). Consequently, all group members became liable for their proportionate share of JustKapital's commission, irrespective of whether they had signed a funding agreement directly with JustKapital. Westpac challenged the common fund orders, including on the basis that the power to make such orders involved the acquisition of property other than on just terms, contrary to s 51(xxxi) of the Constitution.

In a separate consumer product class action against BMW Australia, the New South Wales Court of Appeal was referred a similar question regarding the power to make common fund orders. As the issues in both matters 'overlapped considerably', the Chief Justice of the Federal Court, the Chief Justice of the Supreme Court of New South Wales, and the President of the Court of Appeal of New South Wales agreed to conduct an historic joint sitting to hear the matters at the same time in the same courtroom.

The Full Court dismissed Westpac's appeal, concluding that common fund orders were permitted under the FCA Act and the Constitution. The Full Court held that Parliament intended that s 33ZF of the FCA Act confer a wide power, enabling the Court to shape the procedures and principles applicable to class actions, against an assessment of all connected circumstances. The Full Court further rejected the argument that, as it did not involve the determination of pre-existing rights, the making of common fund orders was not a valid exercise of judicial power. The Full Court observed that the nature of judicial power is of a special kind, and the creation of rights and obligations is not necessarily foreign to the exercise of judicial power. Finally, the Full Court rejected the challenge that the common fund orders operated as acquisitions of property, otherwise than on just terms contrary to s 51(xxxi) of the Constitution, holding that the orders operated as a genuine adjustment of the competing rights and obligations of the group members and JustKapital.

Special leave to appeal was granted by the High Court of Australia, and the appeal was heard on 13 and 14 August 2019.

COMMERCIAL AND CORPORATIONS NPA | GENERAL AND PERSONAL INSOLVENCY SUB-AREA

Moss v Gunns Finance Pty Ltd (Receivers & Managers Appointed) (In liquidation) [2018] FCAFC 185 (29 October 2018, Gleeson, Lee, and Banks-Smith JJ)

Mr Moss defaulted on loans obtained from Gunns Finance Pty Ltd (Receivers & Managers Appointed) (in liquidation) (Gunns Finance) for timber and walnut investment schemes. Gunns Finance commenced two recovery proceedings in the District Court of New South Wales, and summary judgment was entered against Mr Moss in relation to his walnut schemes.

While the proceeding relating to Mr Moss' timber schemes was still on foot, Mr Moss appointed controlling trustees and proposed a Personal Insolvency Agreement (PIA) to his creditors at a creditors' meeting. The terms of the PIA required Mr Moss to pay $150k to creditors in full discharge of his debts, which totalled over $2.7m. The PIA was approved by a majority of creditors representing 75 per cent of the money owed to those taking part in the vote. Gunns Finance voted against the resolution but had only been admitted for part of its claim (being the amount obtained by summary judgment). Its proof of debt relating to the timber schemes (remaining claim) was admitted for only $1 for voting purposes.

Gunns Finance sought to have the PIA set aside, and for a sequestration order to be made against the estate of Mr Moss. The primary judge found that the remaining claim was wrongly admitted for only $1, and should have been admitted in full, and that the PIA vote was dominated by creditors who were not at arm's length. The primary judge also found that the terms of the PIA were unreasonable and were not calculated to benefit Mr Moss' creditors generally. The relief sought by Gunns Finance was granted.

On appeal, the Full Court found that no error was demonstrated in the primary judge's conclusion that the full debt should have been admitted, and therefore the decision to set aside the PIA had not been shown to be erroneous. The Full Court agreed with the primary judge's finding that the return to creditors under the PIA was negligible, and the conclusion that the terms of the PIA were therefore unreasonable. The appeal was dismissed.

COMMERCIAL AND CORPORATIONS NPA | ECONOMIC REGULATOR, COMPETITION AND ACCESS SUB-AREA

Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd [2019] FCAFC 83 (24 May 2019, Middleton, Perram and Bromwich JJ)

In 2009, the major producers of laundry detergent introduced new 'ultra-concentrate' versions of their existing standard concentrate products into supermarket retail chains, and ceased supplying their standard concentrate laundry powders. The ACCC brought proceedings against Colgate-Palmolive Pty Ltd (Colgate), one of its employees, PZ Cussons Australia Pty Ltd (Cussons) and Woolworths Limited (Woolworths), alleging that the simultaneous and almost uniform transition to ultra-concentrate detergent arose from a collusive arrangement made between Colgate, Cussons and Unilever Australia Limited (Unilever) that they would withhold ultra-concentrate detergent from the market until an agreed date in March 2009. While the other parties ultimately settled with the ACCC, Cussons proceeded to contest the matter.

At trial, the primary judge concluded that the ACCC had not established that Cussons had in fact arrived at such an arrangement with the other suppliers. The primary judge was satisfied that although Colgate, Cussons and Unilever were all conscious of the impending transition at approximately the same time, the evidence demonstrated that it was in fact Woolworths and Coles that had largely prompted the timing of the transition. The primary judge further accepted that Cussons was, for the most part, unaware of the activities of the other suppliers and retailers in the period prior to the transition.

The Full Court rejected the multiple grounds raised by the ACCC on appeal. Among other conclusions, the Full Court held that the primary judge did not impose an impermissible requirement that the ACCC identify with undue precision when the arrangement had been made, or by which of its officers. The Full Court also rejected that the primary judge had sought to impose an obligation on the ACCC to show the existence of an irrecoverable commitment by Cussons, when observing the absence of any commitment, obligation or moral or legal duty to the other suppliers in respect of the transition.

The Full Court also affirmed that parallel conduct, in insolation, is not generally sufficient to prove anti-competitive conduct in ordinary markets. The Full Court agreed with the primary judge's observation that the ACCC had failed to test under cross-examination of expert witnesses any of the economic grounds that explained the parallel conduct.

The Full Court dismissed the appeal with costs.

COMMERCIAL AND CORPORATIONS NPA | REGULATOR AND CONSUMER PROTECTION SUB-AREA

Australian Competition and Consumer Commission v Medibank Private Limited [2018] FCAFC 235 (20 December 2018, Perram, Murphy and Beach JJ)

Following the termination or phasing out by Medibank, and its subsidiary, of agreements with pathology and radiology service providers, Medibank no longer covered the gap between the Medicare Benefit Schedule fee and the amount charged by service providers. As a result, some Medibank members became exposed to a gap payment they did not previously have to pay.

The ACCC commenced proceedings against Medibank, claiming that it had engaged in misleading and deceptive conduct, contrary to the Australian Consumer Law (ACL), by representing to its members that they would not bear any out-of-pocket expenses for in-hospital pathology and radiology services (diagnostic cover representation). The ACCC also alleged that Medibank had misrepresented to its customers that it would not reduce their benefits under their policies (notice representation), and did so. Finally, the ACCC alleged that Medibank had acted unconscionably in terminating the agreements and making such representations, thereby contravening s 21 of the ACL.

The primary judge concluded that statements of the kind contained in Medibank's cover summary did not convey the diagnostic cover representation, noting that no reasonable consumer could understand the word 'cover' to mean complete indemnification for all costs incurred by members for in-hospital diagnostic services. It was found that the notice representation was not made out, because detrimental change notices were not required where there were no changes to the fund rules, only to hospital contracting arrangements. These conclusions were fatal to the ACCC's case on unconscionable conduct.

On appeal to the Full Court, Perram J observed that the 'Achilles' heel' of the ACCC's case was that Medibank's cover summary does not mention diagnostic services. His Honour agreed with the primary judge's conclusion regarding the reasonable consumer's interpretation of the word 'cover'. Perram J also concurred with the findings of the primary judge in relation to the notice representation. Murphy and Beach JJ agreed with Perram J's reasoning.

In relation to the alleged unconscionability, Beach J found (Perram and Murphy JJ agreeing) that although Medibank's conduct may have been harsh or unfair, this was not sufficient to establish statutory unconscionability under the ACL.

The Full Court dismissed the appeal with costs.

NATIVE TITLE NPA

Manado on behalf of the Bindunbur Native Title Claim Group v State of Western Australia [2018] FCAFC 238 (20 December 2018, Barker, Perry and Charlesworth JJ)

In 2013, applications were made by Jabirr Jabirr, Bindunbur and Goolarabooloo people, for determinations of native title to areas in the Mid Dampier Peninsula. The primary judge found that rights and interests arising from a rayi connection (a spiritual phenomenon that can lead to an attachment to a particular place or animal), were not native title rights and interests for the purposes of the *Native Title Act 1993* (Cth) (NTA). The primary judge also found that the functions and rights of persons who hold mythical or ritual knowledge and experience of an area are not native title rights or interests within the meaning of the NTA. A determination was made in favour of all parties except the Goolarabooloo people.

The primary judge also held that the confirmation of public access and enjoyment of waterways, beaches, etc. referred to in s 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) was a 'privilege' and therefore an 'interest' for the purposes of the NTA. Section 212 of the NTA allows states to enact confirmatory laws regarding existing rights. This access and enjoyment was included by the primary judge as 'other interests' under the determinations.

On appeal by the Goolarabooloo people, the Full Court agreed with the primary judge that the knowledge and status of a person as a ritual leader does not result in such a person being possessed of any rights or interests in relation to land or waters under Jabirr Jabirr law and custom. The Full Court recognised that while the rayi association may give rise to some limited personal rights and interests, they were not territorial or proprietary rights, and therefore did not give rise to rights or interests 'in relation to the land or waters' for the purposes of the NTA. The Goolarabooloo appeal was accordingly dismissed.

In considering separate appeals made by the Jabirr Jabirr and Bindunbur people, the Full Court considered whether the primary judge erred in including in the determinations, public access and enjoyment of beaches and other places as 'other interests' for the purposes of the NTA. The Full Court disagreed with the primary judge's construction of the NTA, finding that s 212 only has the capacity to confirm existing rights and not create new ones. The Full Court found that the creation of such a right, which would constrain the exercise of existing native title rights and interests, would require a clear and plain Parliamentary intent. The appeals of the Jabirr Jabirr and Bindunbur people were allowed and the determinations were amended to reflect these findings.

Applications for special leave to appeal filed by the State of Western Australia and the Commonwealth of Australia were granted by the High Court in relation to the Jabirr Jabirr and Bindunbur appeals, on 21 June 2019. The High Court appeals are yet to be determined.

NATIVE TITLE NPA

Northern Land Council v Quall [2019] FCAFC 77 (20 May 2019, Griffiths, Mortimer and White JJ)

The CEO of the Northern Land Council (NLC), purported to certify an application for registration of the Kenbi Indigenous Land Use Agreement relating to areas of land for which the NLC was the representative body under the *Native Title Act 1993* (the Act). The purported certification was made by the CEO following, and pursuant to, a resolution whereby the NLC delegated to the CEO, its power to assist Aboriginal people in its capacity as a representative body, in respect of its certification function under s 203B of the Act.

The respondents commenced proceedings, contending that the NLC's certification function under the Act was not delegable or was not validly delegated to the CEO, because at the time the NLC resolution was made, the relevant function had not yet been introduced into the Act. The primary judge found that the NLC's power extended to the delegation of the certification function to a staff member. It was concluded, however, that the NLC resolution did not constitute a valid delegation of the certification function, because a delegation does not extend to a power that comes into existence after it is made.

The NLC appealed the decision, and a cross-appeal was filed by the respondents regarding whether the certification function was delegable. Griffiths and White JJ found that while the NLC is able to obtain assistance from its staff in the performance of its certification function, it must perform that function itself. Griffiths and White JJ recognised the significance of representative bodies being designed so as to ensure satisfactory performance of their roles 'in the interests of the Aboriginal constituents whom they represent'. The language of the Act was found to support the view that there was no implied intention by Parliament that the certification function was to be performed by any person other than the NLC itself.

Mortimer J agreed with the reasons of Griffiths and White JJ, stating that the Act 'intends that control of the certification function remains with the body itself as the repository of the power'.

The cross-appeal was allowed and NLC's appeal dismissed. An application for special leave to appeal to the High Court of Australia was filed by the NLC on 16 July 2019.

FEDERAL CRIME AND RELATED NPA

Commonwealth Director of Public Prosecutions v Christian [2019] FCAFC 5 (29 January 2019, Besanko, Flick and Robertson JJ)

This matter arose from a criminal prosecution in the Supreme Court of Norfolk Island. Mr Christian pleaded guilty to five counts of the offence of sexual intercourse with a young person. The primary judge dismissed an application to revoke bail, and later sentenced Mr Christian. Reasons for both decisions were made available to the parties and online (the 'two judgments').

The Commonwealth Director of Public Prosecutions (CDPP) subsequently sought that the two judgments be recalled, and publication be thereafter restricted. The CDPP argued the two judgments tended to reveal the complainant's identity, so the publication of the two judgments contravened s 169 of the *Criminal Procedure Act 2007* (NI). At the time, s 169 provided that it was an offence to publish, in relation to a sexual offence proceeding, a reference or allusion from which the complainant's identity might reasonably be inferred. The primary judge ordered minor redactions to the two judgments, but otherwise dismissed the application.

The CDPP appealed, claiming non-publication orders were necessary to prevent prejudice to the administration of justice. Besanko and Robertson JJ found that the only source of power to make an order, prohibiting third parties from making available the two judgments on the internet, could be the inherent jurisdiction or implied power in limited circumstances to restrict the publication of proceedings conducted in open court. Besanko and Robertson JJ considered whether the exercise of the power was justified, having regard to the necessity of such orders in the interests of the administration of justice. Besanko and Robertson JJ rejected the contention that the primary judge failed to reach the conclusion that ought to be reached, namely that the complainant's age was a reference in the two judgments from which her identity might reasonably be inferred.

Flick J found it was unnecessary to resolve the question of the source of power to prohibit publication of judgments, but observed that to 'contemplate the making of such an order would seem to run contrary to the cherished objective of open justice'. Flick J found it remained questionable whether the common law or the inherent powers of a superior court 'extend to the making of an order restricting the further publication of a judgment and reasons once published in open court'. Flick J held the primary judge's findings dictated a conclusion that there was no error in refusing to make non-publication orders.

The Full Court dismissed the appeal.

INTELLECTUAL PROPERTY NPA | COPYRIGHT SUB-AREA

Phonographic Performance Company of Australia Limited v Copyright Tribunal of Australia [2019] FCAFC 95 (6 June 2019, Besanko, Middleton and Burley JJ)

The Phonographic Performance Company of Australia Limited (PPCA) is a copyright collecting society that represents the interests of record companies and Australian recording artists. It obtains the rights to grant licences of the copyright in sound recordings through input agreements with licensors.

PPCA sought judicial review of a decision of the Copyright Tribunal on a proposed licence scheme involving a non-exclusive licence to the subscription television industry, particularly Foxtel.

The Full Court noted the issues between the parties related principally, but not exclusively, to price. They found no error in the Tribunal's approach of rejecting the expert evidence advanced by both parties and moving to the process of judicial estimation after ruling out the market rate and national bargain rate methods. They rejected an argument that the Tribunal had fixated on an unsafe reference point by referring to a previous agreement (instead of a more relevant agreement) and took a 'percentage increase' approach, which strayed from its statutory task. Instead, the Full Court found there was no evidence that the Tribunal had not taken those matters into account and, in truth, the matters complained of went to the merits of the Tribunal's evaluation of the weight to be accorded to factors it was able, but not bound, to take into account.

In terms of the jurisdictional issue, the Tribunal had rejected PPCA's submission that the Tribunal had no power to impose non-price terms by means of schemes which were inconsistent with the terms under which PPCA was itself licensed by its own members. The Tribunal found the power to approve a scheme was not derived from the existence of a licence which a collecting society may hold from its members, but from the *Copyright Act 1968* (Cth), and under the scheme granted to Foxtel the on-demand offering right and audiovisual streaming right.

The Full Court overturned this finding on appeal and construed a 'licence scheme' as requiring to relate to classes of cases the subject of the licence that the licensor or owner is willing to grant. The Full Court remitted the matter back to the Tribunal for further consideration.

INTELLECTUAL PROPERTY NPA | PATENTS AND ASSOCIATED STATUTES SUB-AREA

Calidad Pty Ltd v Seiko Epson Corporation [2019] FCAFC 115 (5 July 2019, Greenwood, Jagot and Yates JJ)

Seiko Epson Corporation (Seiko) manufactures and sells printer cartridges world-wide under the trade mark 'Epson'. Each cartridge is compatible with its printers and is fitted with a memory chip so that once ink reaches a threshold level, the cartridge is no longer operative and cannot be refilled. Ninestar manufactures generic printer consumables. It obtains used original Epson cartridges from third parties and restores them to working condition via a series of steps. Calidad Pty Ltd (Calidad) imported cartridges from Ninestar into Australia and promoted them as 'remanufactured Epson cartridges'.

Seiko commenced proceedings against Calidad alleging that its importation and sale of the repurposed cartridges infringed its Australian patents. Calidad argued it had an implied licence to deal with the cartridges arising from Seiko's unrestricted sale of the original cartridge. Alternatively, Calidad argued the exhaustion of rights doctrine applies in Australia so that all of a patentee's rights in relation to a patent are exhausted at the point of first sale.

The primary judge found that Calidad had an implied licence authorising its conduct in respect of three of seven categories of remanufactured Epson cartridges where the modifications did not affect its essential features, but had infringed Seiko's patents in respect of the remaining four categories where the modifications were so significant they fell outside of the implied licence. Calidad lodged an appeal and Seiko lodged a cross-appeal.

The Full Court found the correct approach to determine the issue was first to consider the scope of the implied licence, rather than to consider the extent to which the modifications affected or extinguished it. The Full Court was unanimous on the result that all of the categories of remanufactured Epson cartridges fell outside the scope of the implied licence, but each judge had slightly different reasoning. Greenwood and Jagot JJ considered the steps taken by Ninestar to modify the cartridges amounted to the 'manufacture' of the patented invention, while Yates J found the implied licence did not extend to their remanufacture after the cartridges had been used. The Full Court rejected that the modifications amounted to a repair of the cartridges because there was no defect with them. The Full Court dismissed Calidad's appeal and allowed Seiko's cross-appeal.

Calidad have applied for special leave to appeal to the High Court.

INTELLECTUAL PROPERTY NPA | TRADE MARKS SUB-AREA

Vokes Ltd v Laminar Air Flow Pty Ltd [2018] FCAFC 109 (16 July 2018, Nicholas, Davies and Burley JJ)

This appeal concerns the application of s 81 of the *Trade Marks Act 1995* (Cth) (the Act), which provides that the Registrar of Trade Marks (Registrar) may, on his or her own initiative, correct any error or omission in entering in the Register any particular in respect of the registration of a trade mark.

The appellant (Vokes) was the owner of six trade marks until August 2001, at which time a change of name form (the form) was erroneously submitted to the Registrar by an agent of AES Environmental Pty Ltd (AES), and the Register was changed to reflect AES as the registered owner. Vokes had not actually changed its name.

In 2005, an assignment of the trade marks from AES to the first respondent (Laminar) was entered on the Register. In December 2014, Vokes sought 'correction' of the Register under s 81 of the Act, so that it showed Vokes as the registered owner. A delegate of the Registrar subsequently determined that there was power under s 81 to make the correction sought by Vokes and found it was appropriate to do so (delegate's decision). Laminar applied for judicial review of the delegate's decision, seeking to have it set aside.

The primary judge found that the change of the owner's name was not an error of the kind within s 81 of the Act, because the error was on the part of the person submitting the form, not the Registrar. Therefore, it was not open to the Registrar to correct the error. The primary judge also distinguished an earlier case called *Mediaquest Communications LLC v Registrar of Trade Marks* [2012] FCA 768 (*Mediaquest*), on the basis that a change of name was not a jurisdictional fact or a precondition to the exercise of the Registrar's power under the Act. The delegate's decision was set aside.

Vokes appealed the primary judge's decision to the Full Court. In agreeing with the findings of the primary judge, the Full Court found that the Registrar simply entered the change of name as described in the form, and there was therefore no error made *in entering* any particular in the Register, pursuant to s 81. The Full Court also found that the primary judge was not incorrect to distinguish *Mediaquest,* stating that the language of the relevant provision 'provides no basis upon which it may be concluded that the fact of a valid change of name is a jurisdictional fact'. The appeal was thereby dismissed.

OTHER FEDERAL JURISDICTION NPA

Sarina v Fairfax Media Publications Pty Ltd [2018] FCAFC 190 (31 October 2018, Rares, Markovic and Bromwich JJ)

Mr Sarina initiated defamation proceedings against Fairfax Media Publications Pty Ltd (Fairfax) in the District Court of New South Wales, in relation to a Sydney Morning Herald article published on 19 October 2010 with the headline 'McGurk's confidants have colourful past' (DC Proceedings). The case settled and a deed of release was later executed by the parties. In August 2017, Mr Sarina again initiated proceedings in the Federal Court against Fairfax, in connection with the publication of two other Sydney Morning Herald articles on 14 September 2009 (headlined 'The jockey, the boxer and the money men') and on 16 October 2010 headlined 'McGurk duo linked to $150 million loan fraud', (together, the 'other publications').

Mr Sarina alleged that as a result of the statements, he had been injured in his character, credit, business, personal and professional reputation and been brought into public hatred, ridicule and contempt. Fairfax filed an interlocutory application on 10 October 2017, seeking summary judgment on the basis that the deed of release released it from liability in respect of the other publications.

The primary judge found that the deed of release was drafted 'in such wide terms as would naturally embrace the matters complained of in the present proceeding'. The primary judge held that the deed of release released Fairfax from liability in respect of the other publications, and dismissed Mr Sarina's originating application.

The Full Court found that the words of the deed, having not referred to any other publication, did not appear to support the wide view taken by the primary judge, but instead confined the release solely to the releasee's liability to Mr Sarina in damages for defamation, arising from the publication of the article the subject of the DC proceedings. The Full Court observed that it would be 'most unusual' for a release in a deed dealing with one article to be read as releasing the publisher, or a party related to the publisher, from liability in respect of other publications, unless the wording of the deed was 'unmistakably clear' which, the Full Court found, the words of this deed were not. The Full Court allowed the appeal and set aside the orders of the primary judge.

TAXATION NPA

Harding v Commissioner of Taxation [2019] FCAFC 29 (22 February 2019, Logan, Davies and Steward JJ)

The Full Court considered whether Mr Harding was a resident of Australia in the 2011 income year and specifically whether Mr Harding had a 'permanent place of abode' outside of Australia in circumstances where he resided in temporary accommodation.

Mr Harding was born in Australia but left in his youth and got married in the United Kingdom in his twenties before moving to the Middle East for work. In 2004, his wife and children relocated to a home that the family built in Australia. Mr Harding followed in 2006 and worked in Australia for a few years before returning to work in the Middle East. Mr Harding deposed that he left Australia in 2009 with an intention to live and work in the Middle East indefinitely. He said that he expected his family would join him towards the end of 2011. He said he did not expect to ever live in his home in Australia again, so he sold or took with him most of his personal belongings. From 2009, Mr Harding lived and worked in the Middle East. During 2011, he lived in leased serviced apartments in Bahrain. When he visited Australia, he stayed at the family home. His marriage broke down at the end of 2011, so his family never joined him.

The primary judge found that Mr Harding was not a resident of Australia according to ordinary concepts in 2011 because he intended to depart Australia permanently in 2009. The primary judge then considered the statutory definition of a resident, being 'a person whose domicile is in Australia, unless … the person's permanent place of abode is outside Australia'. Mr Harding conceded that in the 2011 year of income he was domiciled in Australia. The primary judge found that Mr Harding did not have a permanent place of abode outside Australia because he was living in serviced apartments. The primary judge found this was temporary accommodation by its very nature and because Mr Harding's plan was to acquire a house once his family moved across to join him.

The Full Court agreed that Mr Harding was not a resident of Australia according to ordinary concepts in 2011. The key question was whether Mr Harding had a 'permanent place of abode' outside Australia. The Full Court found that the learned primary judge adopted a too narrow conception of what may constitute a 'permanent place of abode'. The Full Court concluded that a permanent place of abode when considering the residency of a taxpayer should be construed by reference to a geographic location, rather than by reference to the taxpayer's specific dwelling. The Full Court said the 'place' of abode, in the specific legislative context, referred to a town or a country. The Full Court found that Mr Harding's permanent place of abode in 2011 was Bahrain. That was the 'place' where he was living. For that reason, the Full Court found that Mr Harding was not a resident of Australia.