APPENDIX 7

DECISIONS OF INTEREST

ADMINISTRATIVE AND CONSTITUTIONAL LAW AND HUMAN RIGHTS NPA

Wotton v State of Queensland (No 5) 2016 FCA 1457

(5 December 2016, Mortimer J)

On 19 November 2004, a 36-year old Aboriginal man named Cameron Doomadgee (known posthumously as Mulrunji), died in police custody on Palm Island. The investigation of Mulrunji's death and the police response to community unrest in its aftermath was the subject of this racial discrimination class action brought by Lex Wotton, his wife Cecilia and his mother Agnes on behalf of the Aboriginal community living on Palm Island.

It was claimed the Queensland Police Service ('**QPS**') conducted themselves differently because they were dealing with an Aboriginal community and the death of an Aboriginal man. It was alleged that the QPS, in its investigation, management of community concerns and tensions in the week following the death, and response to subsequent protests and fires, engaged in unlawful racial discrimination contrary to the *Racial Discrimination Act 1975*. The allegations were denied by the State of Queensland and the Commissioner of the Police Service on behalf of the QPS.

Following a contested trial, Mortimer J determined that most of the claims should succeed. In particular, Mortimer J found that QPS failed to communicate effectively with the Palm Island community and defuse tensions within that community relating to the death in custody of Mulrunji, and the subsequent police investigation. Mortimer J also found that the use of Special Emergency Response Teams to search for suspects and arrest them, and the way in which the searches and entries into houses were conducted, was disproportionate and unnecessary, and constituted acts involving distinctions and restrictions based on race.

Mortimer J made a number of declarations of contraventions of s 9(1) of the *Racial Discrimination Act 1975*, a declaration concerning the application of s 18A of that Act and orders for compensation by way of damages. Damages of $220,000 were awarded to the three lead applicants. An appeal from Mortimer J's decision was filed, but discontinued prior to the first listing.

ADMINISTRATIVE AND CONSTITUTIONAL LAW AND HUMAN RIGHTS NPA

Prior v Wood 2017 FCA 193

(3 March 2017, Dowsett J)

It was alleged that three students at the Queensland University of Technology infringed s 18C of the *Racial Discrimination Act 1975* by posting offensive comments on a Facebook page after being asked to leave an Indigenous computer lab. One of the students denied involvement, while the other two students admitted that they made the posts, but denied that the posts were reasonably likely to offend, insult, humiliate or intimidate. The proceeding was dismissed summarily by the Federal Circuit Court.

In the Federal Court, Dowsett J dismissed an application for extension of time in which to apply for leave to appeal against the summary dismissal. Dowsett J said that in order to determine whether conduct infringes s 18C, one must ask, pursuant to s 18C(1)(a), whether the action in question is reasonably likely, in all the circumstances to offend, insult, humiliate or intimidate an identified person or group of people. One must then ask, pursuant to s 18C(1)(b) whether the act was done because of the race, colour or national or ethnic origin of the person or group.

The student who admitted making the first Facebook post wrote: 'Just got kicked out of the unsigned Indigenous computer room. QUT stopping segregation with segregation?'. Dowsett J said this post addressed the separation of different racial groups, not whether special arrangements of any kind were appropriate for the benefit of Indigenous people. Further, there was no basis for reading this post 'cumulatively' with the posts that followed it because s 18C imposed liability upon a person for his or her conduct, and not for the conduct of others.

The other student who admitted making Facebook posts made references to white supremacism. Dowsett J said there could be little doubt that to people who do not identify as 'white', such a philosophy is offensive. However, Dowsett J found that the student was not suggesting that a group of white supremacists should be given some sort of benefit, but was rather seeking to employ the rhetorical device of irony. A reasonable person may have considered this to be inappropriate, given the nature of the topic, but, was unlikely to be offended, insulted, humiliated, or intimidated.

Dowsett J also saw no arguable error in the conclusion concerning the student who denied authorship of the Facebook post attributed to him. Once the student, by his affidavit, denied authorship and offered some evidence as to his investigation of the matter, Dowsett J said it was necessary to adduce some evidence of authorship to show that there was a matter in issue between the parties. It was not sufficient to rely on a mere assertion in a pleading to resist an application for summary judgment.

ADMINISTRATIVE AND CONSTITUTIONAL LAW AND HUMAN RIGHTS NPA

Minister for Immigration and Border Protection v Singh 2016 FCAFC 183

(19 December 2016, Kenny, Perram and Mortimer JJ)

Mr Singh's application for a skilled visa was rejected by a delegate of the Minister for Immigration and Border Protection and he sought a review of that decision in the Administrative Appeals Tribunal. While the review was pending, another delegate of the Minister issued a certificate under s 375A of the *Migration Act 1958* to the Tribunal. The effect of the certificate was to place limits on what the Tribunal could disclose to Mr Singh during the course of the review proceeding. Neither the existence of this certificate, nor the legal limitations to which it gave rise, were disclosed to him. In due course, Mr Singh's review application was rejected by the Tribunal.

Mr Singh's application for judicial review of the Tribunal's decision succeeded in the Federal Circuit Court and the Tribunal's decision was set aside and remitted to be determined according to law. The basis of the Federal Circuit Court decision was that the Tribunal had failed to afford Mr Singh procedural fairness, because it had not disclosed to him the existence of the certificate.

The certificate limited the disclosure of certain electronic files containing 'third party details' which were said not to be relevant, although no submission was made to the Full Court that the material subject to the certificate was irrelevant to the issues under review. The material the subject of the certificate was not before the Federal Circuit Court or before the Full Court.

The Full Court preferred a narrower reading of s 357A(2) of the *Migration Act 1958*, finding that it was not an impediment to Mr Singh's argument that general law notions of procedural fairness might require the disclosure of the certificate. The Full Court found that participation in review proceedings is circumscribed by the existence of a s 375A certificate which, even with particulars, denies access to relevant material. In that sense, the certificate has the immediate effect of diminishing an applicant's entitlement to participate fully in the review process. The Full Court found that to be a sufficient interest to enliven an obligation to afford Mr Singh procedural fairness upon the issue of the certificate. That obligation required the Tribunal to disclose to Mr Singh the certificate which had been issued. The Full Court dismissed the Minister's appeal.

ADMIRALTY AND MARITIME NPA

The Ship "Sam Hawk" v Reiter Petroleum Inc 2016 FCAFC 26

(28 September 2016, Allsop CJ, Kenny, Rares, Besanko and Edelman JJ)

Reiter Petroleum entered into a contract with the time charterers of *Sam Hawk* to procure the supply of bunkers (fuel) to the ship. The owner's agent gave a 'no liability' notice explaining that *Sam Hawk* and her owner did not accept any liability under the contract. However, the terms of the contract purported to permit Reiter Petroleum to assert a maritime lien against the owner wherever the ship was found and provided that the law of the United States of America would apply to determine the existence of the lien. Reiter Petroleum was not paid and submitted that it had a proceeding *in rem* on a maritime lien according to Canadian or United States law even though the time charterer had no interest in the ship and the owner was not a party to the contract.

The Full Court unanimously set aside an arrest warrant in respect of the ship *Sam Hawk*, finding that the Court did not have jurisdiction to entertain an action *in rem* on a maritime lien under s 15 of the *Admiralty Act 1988*. It was assumed for the purposes of the appeal that under Canadian or United States law Reiter Petroleum had rights *in rem* based on a maritime lien against *Sam Hawk*. The Full Court decided, however, that the question of whether a maritime lien attached to the ship could not be resolved by reference to an agreement between parties having no interest in the ship. Accordingly, the *lex causae* was not Canadian or United States law, but rather the law of Hong Kong (where *Sam Hawk* was flagged and registered), the law of Turkey (where the bunkers were supplied) or the law of Australia (where the ship was arrested). As there was no evidence of the law of Hong Kong or Turkey, it was presumed that it was the same as the *lex fori* and Australian law does not recognise a maritime lien arising from the supply of necessaries, including bunkers, to a ship.

The majority of the Court said that the same outcome would be arrived at even if Canadian or United States law did apply as the *lex causae*. The majority of the Court followed the long established English approach of first identifying the foreign law right by reference to its *lex causae* and of then classifying and characterising that right by reference to the *lex fori*. Accordingly, a foreign right could only be characterised for the purposes of s 15 of the *Admiralty Act 1988* as a 'maritime lien' if it was, or was closely analogous to, a maritime lien which would be recognised by Australian law.

COMMERCIAL AND CORPORATIONS NPA/ CORPORATIONS AND CORPORATE INSOLVENCY SUB-AREA

Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited 2016 FCAFC 148

(26 October 2016, Murphy, Gleeson and Beach JJ)

For the first time in Australia, common fund orders were made in a class action, without the consent of the respondent, and with the litigation funder's commission to be set at a later stage, subject to court approval.

The class action was brought against QBE Insurance Group Ltd ('**QBE**') on behalf of an open class of persons who acquired QBE shares in the months before their price dropped following an announcement of an expected loss in the 2013 financial year. By the time of the hearing, there were approximately 1290 'funded' class members who had entered into litigation funding agreements with International Litigation Funding Partners Pte Ltd (the '**Funder**').

APPENDIX 7

Under the funding agreements, the Funder agreed to meet legal costs, adverse costs orders and security for costs, in consideration for a percentage commission of 32.5 per cent to 35 per cent on top of reimbursement of the legal costs paid by the funder. The Full Court considered an application under s 33ZF of the *Federal Court of Australia Act 1976*, seeking to apply litigation funding terms to all class members, including those who had not entered into an agreement with the Funder ('**common fund orders**'). The proposal involved a reduction of the Funder's commission to 30%, but with all class members required to contribute to the legal and litigation funding costs.

The Full Court considered that it had the power to make the common fund orders and that it was appropriate to made orders requiring all class members to pay the same pro rata share of legal costs and funding commission from any settlement or judgment. The Full Court did not set the funding commission at 30 per cent, as proposed. Instead, court approval of a reasonable rate was left to a later stage, such as the time of settlement approval or the distribution of damages.

The fact that class members' interests would be protected by judicial oversight of the funding commission was central to the Full Court's decision. There was also a 'floor condition' that no class member could be worse off under the common fund orders. Any class members concerned about the orders could opt out of the proceeding.

The Full Court observed that a common fund approach may be said to enhance access to justice by encouraging open class representative proceedings whilst inhibiting competing class actions and reducing the potential for conflicts of interest. The Full Court said that commercially realistic funding commission rates should avoid excessive charges to class members whilst recognising the important role of litigation funding in providing access to justice.

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

Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited 2016 FCA 1516

(14 December 2016, Wigney J)

These proceedings concerned attempted cartel conduct by Australia and New Zealand Banking Group Limited ('**ANZ**') and by Macquarie Bank Ltd ('**Macquarie**') in contravention of s 44ZZRJ of the *Competition and Consumer Act 2010*.

The Australian Competition and Consumer Commission commenced proceedings against ANZ and Macquarie which effectively settled on the basis that the contraventions would be admitted and the matter would proceed on the basis of agreed facts. ANZ conceded that on ten occasions during 2011, its traders engaged in discussions with traders employed by other banks about the submissions that would be made concerning the Malaysian ringgit benchmark rate. Macquarie conceded that on eight occasions during 2011, its traders engaged in the same sorts of discussions, though Macquarie was not itself a submitting bank. The traders employed by ANZ and Macquarie attempted to get the traders employed by other banks to make either high submissions, or low submissions, as the case may be, and thereby manipulate the setting of the Malaysian ringgit benchmark rate. In so doing, they attempted to make arrangements which indirectly provided for the fixing of the price for Malaysian ringgit forward contracts.

The parties agreed on the amount of the pecuniary penalties that they would jointly propose to the Court. The agreed penalty in relation to each of ANZ's attempted contraventions was $900,000, resulting in a total agreed penalty of $9 million. The agreed penalty in relation to each of Macquarie's attempted contraventions was $750,000, resulting in an agreed total penalty of $6 million. The Court was not bound to impose the penalties agreed between the parties, but if the Court was satisfied

that the penalties were within the permissible range of appropriate penalties, in practice public policy and other considerations effectively compelled the Court to accept and impose the agreed penalties.

Wigney J noted that the attempted contraventions by ANZ and Macquarie were 'very serious', as cartel conduct had the capacity to significantly undermine the integrity and efficacy of the market in Malaysian ringgit forward contracts. The conduct of the traders employed by the banks was deliberate, systematic and covert. The banks bore corporate responsibility for this conduct because they failed to establish satisfactory training, compliance and surveillance systems in their Singapore offices. Wigney J found that the agreed penalties were towards the very bottom of the permissible range of appropriate penalties. Once it was accepted, however, that the agreed penalties were within the permissible range, it was consistent with both established and authoritative principle and practice to accept and impose the agreed penalties.

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

Australian Energy Regulator v Australian Competition Tribunal (No 2) 2017 FCAFC 79

Australian Energy Regulator v Australian Competition Tribunal (No 3) 2017 FCAFC 80

(24 May 2017, Besanko, Yates and Robertson JJ)

The Australian Energy Regulator ('**AER**') sought judicial review of determinations of the Australian Competition Tribunal. The Tribunal set aside decisions made by the AER in 2015 in relation to the revenue that Ausgrid, Endeavour Energy, Essential Energy, ActewAGL and Jemena Gas Networks (NSW) (together, the '**providers**') could collect by way of network charges between 2014 and 2019. The network charges are a portion of the electricity and gas bills paid by consumers in New South Wales and the Australian Capital Territory. The AER set lower revenues than proposed by the providers, in part because it concluded that costs above efficient levels should be funded by the providers and not by customers.

Judicial review was sought principally on the grounds that the Tribunal:

- failed to undertake its review function lawfully by failing to properly construe and apply the grounds of review under s 71C of the *National Electricity Law* and s 246 of the *National Gas Law*
- allowed the providers to raise matters not previously raised before the AER
- erred in its construction of new provisions in the *National Electricity Rules* and the *National Gas Rules* relating to the determination of the rate of return on capital, the value of imputation credits (gamma) and the operating expenditure criteria
- adopted reasoning that was irrational, unreasonable and/or uncertain, and
- purported to review a decision of a type that did not and could not fall within its jurisdiction in one matter involving Jemena Gas Networks.

The Full Court upheld the AER's applications for judicial review in relation to the value of imputation credits, but otherwise dismissed the AER's applications for judicial review. That means the AER will need to reconsider the allowance for operating expenditure and return on debt, and vary its final decision to the extent appropriate.

APPENDIX 7

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

Compton v Ramsay Health Care Australia Pty Ltd 2016 FCAFC 106

(17 August 2016, Siopis, Katzmann and Moshinsky JJ)

The respondent sought a sequestration order against the estate of Mr Compton, relying on his failure to comply with a bankruptcy notice. The bankruptcy notice sought payment of a debt arising from a judgment of the Supreme Court of New South Wales in relation to a guarantee provided by Mr Compton. In the Supreme Court proceedings, Mr Compton did not dispute the quantum of the debt. At first instance, the primary judge refused an application to 'go behind' the judgment to question whether there was in fact a debt owing. The primary judge determined that the discretion to go behind the judgment was not enlivened, on the basis that:

- Mr Compton had been represented by counsel during the Supreme Court proceedings
- there was evidence available in that court addressing the quantum owed, and
- there was a forensic decision made to restrict the issues to enforcement of the guarantee only, and not the quantum of liability.

The Full Court considered that the primary judge placed excessive weight on the conduct of the Supreme Court proceedings, rather than dealing with the central issue of whether any reason was shown for questioning whether there was in fact a debt outstanding. Although it is appropriate for parties to be held to the way in which they conduct the litigation in which the judgment is delivered, the Full Court stressed the need for all requirements set out in s 52 of the *Bankruptcy Act 1966* to be met. Specifically, s 52(1)(c) requires the Court to be satisfied that the debt is owing. The Court should look behind the judgment debt at the application of a party in circumstances where it can be shown that there is sufficient reason not to accept the judgment as conclusive proof of a debt that is, in truth and reality, due to the creditor.

The decision of the primary judge was set aside by the Full Court, and it was held that the question of whether the Court should 'go behind' the Supreme Court's judgment ought to be answered in the affirmative. An appeal to the High Court of Australia was dismissed.

COMMERCIAL AND CORPORATIONS NPA /INTERNATIONAL COMMERCIAL ARBITRATION SUB-AREA

In the Matter of Hydrox Holdings Pty Ltd 2016 FCA 1164

(27 September 2016, Foster J)

In 2009, Lowes and Woolworths formed a joint venture for the purpose of establishing and operating a chain of home improvement and hardware stores in Australia and New Zealand known as 'Masters'. Lowes held a one-third interest and Woolworths held a two-thirds interest in Hydrox Holdings Pty Ltd ('**Hydrox**'), the company through which the Masters joint venture was conducted. The Masters business was not successful and had always operated at a loss. As a result, disputes arose between Lowes and Woolworths. In the proceeding before Foster J, Lowes sought a declaration of oppressive conduct and claimed that Hydrox should be wound up compulsorily by the Court.

Woolworths sought a stay of the proceeding on the basis that under the joint venture agreement between the parties, disputes were required to be determined by arbitration if they were not otherwise resolved in accordance with the provisions of the agreement. Woolworths relied on s 7(2) of the *International Arbitration Act 1974*, article 8(1) of the *UNCITRAL Model Law on International Commercial Arbitration*, s 23 of the *Federal Court of Australia Act 1976* or the implied powers of the Court.

In considering whether to grant a stay, Foster J said that the Court must first identify the 'matter or matters' to be determined in the proceeding before asking whether those matters fall within the scope of the arbitration agreement and, if so, whether they are arbitrable. It was common ground that matters to be determined fell within the scope of the arbitration agreement.

Lowes argued that there was in substance only one matter involved in the proceeding, namely whether Hydrox should be wound up, and that matter was not arbitrable. Foster J disagreed, finding that there were several matters involved in the proceeding, including alleged deficiencies in the information provided to Lowes nominated directors, wrongful voting at Hydrox board meetings and wrongful termination of the joint venture agreement.

Foster J found that the dispute was, in substance, one between the shareholders of Hydrox and involved no substantial public interest element, nor any suggestion that Hydrox was insolvent. Foster J found that the mere fact that a winding up order was sought did not alter the characterisation of the real controversy between the parties as being an inter partes dispute. Accordingly, Foster J made orders staying the whole of the proceeding, save for the ultimate question of whether a winding up order should be made, pending arbitration.

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

Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd 2016 FCAFC 181

(16 December 2016, Jagot, Yates and Bromwich JJ)

The Australian Competition and Consumer Commission ('**ACCC**') commenced proceedings for contraventions of the *Australian Consumer Law* ('**ACL**') against Reckitt Benckiser, who marketed and sold products including four Nurofen Specific Pain Relief products. At first instance, Edelman J made orders including declarations that Reckitt Benckiser engaged in conduct that was misleading or deceptive in breach of s 18 of the ACL and in conduct liable to mislead the public as to the nature, the characteristics or the suitability for their purpose of the products within the meaning of s 33 of the ACL. Reckitt Benckiser conceded that through its website and packaging it had represented that each of the four Nurofen Specific Pain Relief products was specifically designed to treat back pain, period pain, migraine pain and tension headaches, when in fact each product contained the same active ingredient and had the same formulation. In addition to ordering that all Nurofen Specific Pain Relief products be removed from retail sale and corrective notices be published, it was ordered that Reckitt Benckiser pay pecuniary penalties of $1.7 million for its contraventions of s 33 of the ACL.

The Full Court allowed an appeal brought by the ACCC against the quantum of the penalty imposed on Reckitt Benckiser. The Full Court accepted the ACCC's submissions that the initial penalty was manifestly inadequate, having regard to the importance of the need for deterrence (both specific and general) and the substantial loss to consumers as a result of the contraventions. It was also found that Reckitt Benckiser's conduct caused the loss or serious distortion of genuine consumer choice and it had 'courted the risk of contraventions'. Although the Full Court considered it open to impose an even greater penalty, it ultimately ordered a revised penalty of $6 million. This amount represents the highest ever corporate penalty to date for misleading conduct in contravention of the ACL.

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

Director of Consumer Affairs Victoria v Hocking Stuart (Richmond) Pty Ltd 2016 FCA 1184

(6 October 2016, Middleton J)

This proceeding was commenced by the Director of Consumer Affairs Victoria ('**Consumer Affairs**') against Hocking Stuart (Richmond) Pty Ltd ('**Hocking Stuart**'), a small real estate franchise business operating in Victoria.

APPENDIX 7

Consumer Affairs alleged that Hocking Stuart engaged in misleading or deceptive conduct and conduct involving making false and misleading representations, in connection with the supply of services regarding the sale of 11 residential properties in Richmond and Kew during 2014 and 2015. In particular, Consumer Affairs asserted that Hocking Stuart underquoted the price range for each of the 11 properties in its marketing and advertising material. This occurred both in online advertisements and in the publication of the Redbook, a real estate magazine of current properties for sale distributed to the general public.

Following mediation between the parties, Hocking Stuart admitted all allegations made by Consumer Affairs and consented to proposed orders including declarations, a non-punitive publication order, an adverse publicity order, a compliance program and costs. Middleton J was asked to determine the remaining dispute between the parties, namely whether a pecuniary penalty should be imposed, and if so, the amount of that penalty.

Middleton J ordered an aggregate penalty of $330,000, taking into account a number of factors, including the nature, size and financial resources of Hocking Stuart. The notional maximum penalty was calculated at $12.1 million; however, having regard to the fact that Hocking Stuart was a small local business, Middleton J found that the maximum penalty would be excessive and 'well beyond what any court would impose'. It was accepted that the adverse publicity garnered by the matter was sufficient to meet the goal of specific deterrence. Middleton J agreed that the misconduct should 'not be treated lightly', imposing a penalty of $11,000 for each of the 11 contraventions, which exceeded the commissions earned by Hocking Stuart.

EMPLOYMENT AND INDUSTRIAL RELATIONS NPA

Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner 2016 FCAFC 184

(21 December 2016, Allsop CJ, North and Jessup JJ)

The Construction, Forestry, Mining and Energy Union ('**CFMEU**') and its employee and officeholder, Mr Myles, were found to have contravened s 348 of the *Fair Work Act 2009* (the '**Act**') by organising a blockade of the main entrance to a Regional Rail Project site in Victoria, preventing deliveries of concrete to the site. Pursuant to s 546 of the Act, the CFMEU and Mr Myles were ordered to pay pecuniary penalties of $60,000 and $18,000, respectively. The primary judge made orders prohibiting the CFMEU from paying, either directly or indirectly, the pecuniary penalties imposed on Mr Myles. In doing so, the primary judge relied on s 545(1) of the Act, which allows for the making of 'any order the court considers appropriate'.

The Full Court considered whether the Court had the power to prohibit another person from indemnifying a contravener against the obligation to pay a penalty imposed under s 546 of the Act. The Full Court found that s 545(1) of the Act did not contain a power for the Court to make an indemnity prohibition order in the terms made by the primary judge. Allsop CJ said that 'such an imposition on the freedom of a person or organisation to conduct his, her or its own affairs, being intimately bound up with the penalty itself, should find its source of power in clear and express words of the statute'.

The Full Court also accepted that there had been a denial of procedural fairness because the primary judge saw as materially relevant to the penalty decision the partially public nature of the funds available to the CFMEU, but did not raise this consideration with the parties. Allsop CJ concluded that this had no more than a nominal effect on the primary judge's decision-making. The Full Court declined to set aside the primary judge's orders as to the quantum of penalties. Allsop CJ said those penalties were 'entirely appropriate', given the seriousness of the conduct of the CFMEU and Mr Myles.

The High Court of Australia has granted special leave to appeal.

FEDERAL CRIME AND RELATED PROCEEDINGS NPA

Lobban v Minister for Justice 2016 FCAFC 109

(22 August 2016, Siopis, Barker and Charlesworth JJ)

In 2011, Mr Lobban, a dual Australian-Canadian citizen, was arrested on a warrant issued under the *Extradition Act 1988* (the '**Act**'). In 2014, the Minister for Justice made a determination under s 22 of the Act to surrender Mr Lobban to the United States of America on the basis that Mr Lobban had committed extraditable offences. It was alleged that Mr Lobban had committed sexual offences from his home in Perth over the internet, contrary to the laws of Florida. Mr Lobban sought judicial review of the Minister's surrender determination and applied for an order quashing the determination and a writ of mandamus for his release from custody. The application for judicial review was dismissed at first instance by McKerracher J.

On appeal before the Full Court, Mr Lobban was granted leave to rely on new grounds. The Full Court rejected Mr Lobban's submission that, on the proper construction of Article V of the *Treaty on Extradition between Australia and the United States of America* (the '**Treaty**'), in the context of s 22(3)(e) and s 22(3)(f) of the Act, the fact that he was an Australian national required the Minister to refuse the extradition request unless the Minister came to a positive decision not to do so. It was found that Article V does not confer 'stand alone importance' to Mr Lobban's Australian nationality.

Mr Lobban further contended that, because the United States had failed, by the date specified, to provide additional information requested by the Minister under Article XIII, he had become entitled to be released from custody and that the Minister lacked jurisdiction to determine the surrender under s 22(2) of the Act. In their joint judgment, Siopis and Barker JJ (Charlesworth J dissenting) noted that although s 22(2) of the Act calls for a surrender determination to be made 'as soon as is reasonably practicable, having regard to the circumstances', s 22 does not provide for the release of the eligible person from custody where the determination is delayed. Additionally, the failure to make a determination as soon as reasonably practicable does not deprive the decision-maker of jurisdiction to make that determination after the expiry of that time period.

The appeal was dismissed. A subsequent application for special leave to the High Court of Australia was refused with costs.

INTELLECTUAL PROPERTY NPA/COPYRIGHT AND INDUSTRIAL DESIGNS SUB-AREA

Roadshow Films Pty Ltd v Telstra Corporation Ltd 2016 FCA 1503

(15 December 2016, Nicholas J)

Australian internet companies were for the first time ordered to take reasonable steps to disable access to certain overseas websites facilitating copyright infringement, including SolarMovie, The Pirate Bay, Torrentz, TorrentHound and IsoHunt. The orders were sought by copyright owners, including various film companies and Foxtel. Operators of the relevant websites chose not to participate in the proceedings and the internet companies neither consented to nor opposed the grant of injunctive relief.

APPENDIX 7

This was the first decision on the application of the recently introduced s 115A of the *Copyright Act 1968*. Nicholas J said that s 115A provided a 'no fault' remedy against internet companies, applied only to online locations outside Australia and could apply even where it was impossible to identify those responsible for operating an online location. Nicholas J said that copyright infringement could be facilitated merely by making it easier for users to ascertain the existence or whereabouts of other online locations that themselves infringed or facilitated the infringement of copyright.

An application for special leave to appeal has been filed in the High Court of Australia.

The primary purpose of a relevant online location had to be copyright infringement or the facilitation of copyright infringement. Nicholas J was not satisfied that certain 'inactive sites' satisfied this requirement as there was no evidence to show that those particular sites had ever infringed or facilitated the infringement of copyright. Relief was granted, however, in respect of inactive websites that were shown to have previously facilitated copyright infringement. Nicholas J reasoned that taking a website off-line temporarily should not allow a website operator to avoid the operation of s 115A.

Nicholas J was satisfied that it was appropriate to grant injunctive relief. As a consequence, internet users who attempt to access the disabled websites will be redirected to a 'landing page' that will inform them that access to the website has been disabled because the Court determined that it infringes or facilitates the infringement of copyright. Nicholas J did not allow the internet companies to recoup their set-up costs from the applicants, but did allow an amount of $50 per domain name in compliance costs. In the event that the applicants wanted to have additional online locations disabled in the future, Nicholas J said that an application would need to be made to the Court. The list of disabled websites could not be added to by the copyright owners giving written notice to the internet companies without any further order of the Court.

INTELLECTUAL PROPERTY NPA/TRADE MARKS SUB-AREA

Accor Australia & New Zealand Hospitality Pty Ltd v Liv Pty Ltd 2017 FCAFC 56

(7 April 2017, Greenwood, Besanko and Katzmann JJ)

This matter is of interest as it deals with trade mark infringement in the context of evolving technology. The Full Court decided that the use of registered trade marks as keywords in a website's source data without prior authority can constitute trade mark infringement, despite the fact that the source data is unlikely to be visible to the average consumer or internet user.

The first appellant ('**Accor**') acted as an on-site letting agent for apartment owners in the 'Harbour Lights' apartment complex in Cairns, operating its letting business as a '4½ star hotel'. Apartment owners who wanted to let their Harbour Lights apartments were not obliged to use Accor and could use another letting agent or arrange the letting themselves. Liv Pty Ltd ('**Liv**'), was an off-site letting agent for apartments in the same complex and a competitor of Accor. By way of licence, Accor was granted exclusive rights to use the trade mark 'HARBOUR LIGHTS' for accommodation letting and rental services.

At first instance, it was alleged that Liv engaged in multiple instances of trade mark infringement by using 'HARBOUR LIGHTS' in connection with its letting services. One allegation of infringement related to words embedded in the source data of a website controlled by Liv. The source data said: 'Harbour Lights Apartments in Cairns offer luxury private waterfront apartment accommodation for holiday letting and short-term rental'. The primary judge found that the source data was 'visible to those who know what to look for' and used the words 'Harbour Lights Apartments' as a badge of origin to distinguish Liv's services from others. As a matter of inference, the primary judge found that those words must have been included in the source data to optimise search engine results for Liv's benefit.

On appeal, the Full Court accepted that infringement could occur even if the source data was not likely to be viewed by the general public. The Full Court noted that source data 'is not displayed on the screen but is used by a search engine … to determine the search results to be listed'. The Full Court declined to disturb the findings made at first instance, agreeing that Liv used the words 'Harbour Lights Apartments' as a business name in the source data.

An application for special leave to appeal has been filed in the High Court of Australia.

NATIVE TITLE NPA

McGlade v Native Title Registrar 2017 FCAFC 10

(2 February 2017, North, Barker and Mortimer JJ)

This decision is of significant interest to numerous stakeholders, including government, resources and pastoral bodies party to Indigenous Land Use Agreements ('**ILUAs**'). The key question before the Full Court was whether an ILUA is valid and capable of being registered by the National Native Title Tribunal ('**NNTT**') where it is signed by some, but not all, members of the registered claimant group.

The State of Western Australia and the Noongar People had negotiated various ILUAs in relation to existing and future native title claims. However, the registration of those ILUAs with the NNTT was opposed by some members comprising the registered claimants. The applicants, being various members of the registered claimants who did not sign the ILUAs, argued the proposed ILUAs did not meet the requirements for registration under the *Native Title Act 1993* (the '**Act**'). The pre-existing position was considered by the Full Court. In *QGC Pty Limited v Bygrave (No 2*) 2010 FCA 1019 the Court found that s 24CD of the Act did not require all individuals comprising the registered claimant to sign the ILUA, as long as the registered claimant was authorised by the claim group to sign. This practice was in force for numerous years, and the NNTT registered agreements in accordance with this approach.

The Full Court decided to overturn *Bygrave* because under s 24CD(1) of the Act, all persons in the native title group must be parties to the agreement. Under s 24CD(2)(a), the 'native title group' consists of all registered native title claimants. The Full Court had regard to the definition of 'registered native title claimants' set out in s 253 of the Act being persons whose 'names appear … as the applicant in relation to a claim to hold native title'. The Full Court concluded that on a proper construction of the Act all individual members of the registered claimants were required to sign in order for the ILUA to be capable of registration.

The *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* received royal assent on 22 June 2017. This Act aims to resolve the uncertainty regarding the validity of ILUAs registered with NNTT without the signature of all members of the registered claimants.

TAXATION NPA

Chevron Australia Holdings Pty Ltd v Commissioner of Taxation 2017 FCAFC 62

(21 April 2017, Allsop CJ, Perram and Pagone JJ)

This decision is the first Full Court guidance on the application of the new cross-border transfer pricing provisions. Chevron Australia Holdings Pty Ltd ('**CAHPL**') sought to establish that the income tax and penalty assessments issued to it for the 2004 to 2008 income years were excessive. The assessments reduced the allowable interest deductions that CAHPL could claim in respect of a cross-border loan from its US subsidiary on the basis that the interest paid by CAHPL exceeded the arm's length consideration. To support the assessments, the Commissioner relied on the transfer pricing provisions in Subdivision 815-A of the *Income Tax Assessment Act 1997*, those formerly found in Division 13 of Part III of the *Income Tax Assessment Act 1936*, and on Article 9 of the *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*.

APPENDIX 7

The Full Court found that CAHPL was precluded from challenging the validity of the assessments, including on the basis that the person who purported to make the underlying determinations lacked the authority to do so. The Full Court also found that CAHPL had not shown the assessments to be excessive.

In coming to this conclusion, Allsop CJ said that the ascertainment of arm's length consideration under Division 13 contemplates a company in the position of CAHPL with its attributes, including membership of the Chevron group, dealing at arm's length with an independent lender. Meanwhile, Subdivision 815-A allows for the adjustment of conditions to reflect the conditions which the parties would have attained had the transaction been structured in accordance with commercial reality. Allsop CJ considered Chevron group policy of borrowing at the lowest rate and with a parent company guarantee in finding that there would have been a borrowing cost conformable with Chevron Corporation's AA rating and not with the lower credit rating of CAHPL.

Pagone J found that the task of ascertaining the arm's length consideration was fundamentally a factual inquiry into what might reasonably be expected if the actual agreement had been unaffected by the lack of independence and the lack of arm's length dealing. The words 'might reasonably be expected' in Division 13 called for a prediction based upon evidence, like the prediction contemplated by the general anti-avoidance provisions. Subdivision 815-A required a comparison between the actual conditions and those expected to operate between 'independent enterprises'. It was reasonable to conclude that CAHPL's borrowing would have been supported by security, such as a parent company guarantee, but there was insufficient evidence in relation to any fee that might have been payable by CAHPL for such a guarantee.