

## APPENDIX 8 – SUMMARY OF DECISIONS OF INTEREST

**NATIVE TITLE – ‘society’ – Torres Strait Island communities – 1, 4 or 13 societies – significance to be attributed to perceptible differences between particular laws and customs acknowledged and observed by the communities – sovereignty acquired over different geographical areas at differing times commencing in 1872 – whether sovereignty is over an area or over a person as well – whether new native title rights and interests can be acquired after 1872 in respect of areas not then subject to British sovereignty – whether ‘sovereign rights’ under *Seas and Submerged Lands Act 1973* (Cth) to be distinguished from ‘sovereignty’ for Native Title Act purposes.**

**INTERNATIONAL LAW – status of Exclusive Economic Zone – sovereign rights – whether native title in EEZ able to be recognised.**

*Akiba v State of Queensland (No 2)*  
(2 July 2010, Justice Finn)

The application was made on behalf of Torres Strait Islanders who are descendants of an extensive list of named ancestors who were themselves Torres Strait Islanders. To prevent further delay in the hearing of the application, the original claim area was divided into Parts A and B. The reasons relate only to Part A. It encompasses the greater part of the original claim area.

The principal respondents in this Part were the State of Queensland, the Commonwealth of Australia, a large group of people and companies collectively described as The Commercial Fishing Parties and a small number of parties from Papua New Guinea.

For *Native Title Act 1993* (Cth) (NT Act) purposes, Torres Strait and the Torres Strait Islanders are distinctive in many respects. That this is so, and the consequences of it, are markedly apparent in Justice Finn’s reasons.

The subject matter of the proceeding was itself distinctive. It sought a determination of native title rights and interests in a major part of the sea area of Torres Strait. The sea in turn is the integral presence in the lives and livelihoods of the Islander communities. It has rightly been said that their occupation of the region has had ‘an essentially maritime character’.

Unlike in native title claims in Aboriginal Australia, the laws and customs advanced by the communities do not reflect an overarching spiritual connection with the waters. There is no creation story. Yet there are still some, for the most part minor, traditional spiritual beliefs revealed in the evidence. In consequence, the laws and customs of concern were informed in quite some degree by considerations of utility and practicality. This had unusual ramifications in the application of accepted NT Act jurisprudence. No more was this so than in relation to the ‘connection’ requirement of s 223(1)(b) of the NT Act.

The Applicant’s evidence was likewise distinctive. British and then Australian sovereignty over the islands of Torres Strait was acquired for the most part in progressive steps taken, first, in 1872 and then in 1879. By these dates the grandparents of some of the indigenous witnesses were alive and were directly, or via the witness’ parents, the sources of oral traditions recounted by those witnesses. From the time of Luis Baez de Torres’ passage through the Strait in 1606, Islander contact with Europeans was the subject of recorded account and observation. Notable amongst these after Cook’s rediscovery of Torres Strait were the writings of British naval officers and other mariners.

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In 1864 a joint Imperial-colonial outpost was established at Somerset on the eastern tip of Cape York. At much the same time colonial occupation commenced in the Strait. It related initially to the establishment of bêche-de-mer shore fishing stations. In 1868 the pearl shell industry commenced. In 1871 the evangelisation of the Strait began with the advent of the London Missionary Society. In consequence a significant pre- and early sovereignty literature was generated and is in evidence. The most significant body of works in this are the six volumes of reports of the Cambridge Anthropological Expedition to Torres Strait. These were based largely on observations made in the Strait in 1898 by A.C. Haddon (a former zoologist) and six others. The main purpose of the Expedition was to assemble a picture of life before colonisation from the memories of the older men.

Unlike so much of Aboriginal Australia, the acquisition of sovereignty over the islands of the Strait did not lead to the Islanders being dispossessed of their lands or sea domains, or deprived of their traditional means of livelihood. Their continuing presence in the Strait is self-evident as are their detailed knowledge of, and exploitation of the marine resources of, the Strait.

As is now well known, native title was first accepted and recognised in relation to the Murray Islands in Torres Strait in the decision of *Mabo v Queensland [No 2]* (1992) 175 CLR 1. That decision and the twenty-two Consent Determinations since made under the subsequently enacted NT Act have resulted in the recognition of native title in all of the presently inhabited islands of interest in this proceeding and in most of the uninhabited islands. Characteristically the native title holders in these Determinations were found to be members of single island communities. In several instances, though, the title is shared by members of several island communities.

Though the land Determinations were of some contextual importance in this proceeding, it is to be emphasised that this application relates to sea water areas.

Because of its present importance, Justice Finn emphasised that the NT Act defines ‘waters’ to include not only ‘sea ... a tidal inlet, a bay, an estuary’ but also ‘the bed or subsoil under ... any waters’ and ‘the shore, or subsoil under ... the shore, between high water and low water’: s 253. The term is used with this meaning in his reasons. It also required emphasis that, to the Islanders, land and sea are seamlessly and culturally associated: there is no ‘sea-land dichotomy’.

Justice Finn concluded that the Applicant, for the most part, established its claim. There is a single Torres Strait Islander society to which the native title claim group belongs. Under that society’s traditional laws acknowledged and traditional customs observed, the claim group in aggregate holds native title rights and interests in the waters of Torres Strait with which Justice Finn was concerned, save in those parts specified in these his reasons. As this proceeding does not involve the entirety of the native title claim area, it was inappropriate that he made a finding that the claim group alone constitutes the relevant society. It may be the case – and His Honour expressed no view on this – that when the balance of the claim is heard and determined in relation to those areas where it overlaps other claims, the evidence may establish that one or both of the Kaurareg and Gudang peoples also belongs to the society for NT Act purposes.

Justice Finn rejected the State of Queensland’s contention that there were multiple societies (thirteen in number) each constituted by the Islanders of an inhabited island. He likewise rejected the Commonwealth’s contention that there were four societies each of which was made up of a regional cluster group of islands, e.g. the Eastern Islands. There was an irony in all of this. The issue of authorisation apart, the answer to the question of native title rights and interests in the waters of Torres Strait – which is, after all, the concern of the present application and of the NT Act – would in all probability have been largely, if not exactly, the same whether his conclusion had been one, or four, or thirteen, societies.

Justice Finn rejected the Applicant's claim insofar as it asserted that what it called reciprocity based rights and interests constitute native title for the purposes of s 223(1) of the NT Act. Put inexactly, those are rights based upon reciprocal personal relationships with persons who have native title rights in their own land and marine territories. The native title rights he found were the non-exclusive rights of the group members of the respective inhabited island communities first, to access, to remain in and to use their own marine territories or territories shared with another, or other, communities; and, secondly; to access resources and to take for any purpose resources in those territories. In exercising these rights the group members are expected to respect their marine territories and what is in them.

Importantly, and this requires emphasis, none of these rights confer possession, occupation, or use of the waters to the exclusion of others. Nor do they confer any right to control the conduct of others.

The rights will be recognised by the common law beyond Australia's territorial seas in its Exclusive Economic Zone. The possibility that native title might exist in such an area was contemplated by the Australian Parliament in s 6 of the NT Act. In the northern part of the claim area known colloquially as the 'Top Hat', the native title rights are qualified by the provisions of Australia's Treaty with Papua New Guinea which came into effect in 1985. It settled the Seabed Boundary Lines between the two countries and provided for Australian 'fisheries jurisdiction' in the 'Top Hat'.

Justice Finn found that the right to take resources included the right to take marine resources for trading or commercial purposes and that such use of them would be recognised by the common law. His Honour rejected the contentions of the State and of the Commonwealth that the ever expanding regulatory controls placed upon commercial fishing by legislation extinguished any native title right to take fish for commercial purposes. Those legislative controls were not directed at the underlying rights of the native title holders who were obliged to comply with the regulatory measures imposed on them if they were to enjoy their native title rights. The various Acts severally or together did not evince a clear and plain intention to extinguish native title rights to take fish for commercial purposes in the Part A Claim Area. Having said this, Justice Finn emphasised that, to the extent that those legislative regimes regulate the manner in which, and the conditions subject to which, commercial fishing can be conducted in a fishery in the native title holders' marine estates, or prohibit qualifiedly or absolutely particular activities in relation to commercial fishing in the fishery in those estates, the native title holders must, in enjoying their native title rights, observe the law of the land. This is their obligation as Australian citizens. Complying with those regimes provides them with the opportunity – qualified it may be – to exercise their native title rights.

A distinct part of the judge's reasons dealt with the extent to which the construction, operation and maintenance by the Australian Maritime Safety Authority under Commonwealth legislation of aids to navigation in Torres Strait waters have extinguished or otherwise affected the enjoyment of native title in the areas of, or adjacent to, such aids. His conclusions on these matters are contained in his reasons. All that need be noted here is that, while he reached conclusions in relation to ten of these aids, he has not in relation to another four. In consequence he gave the parties liberty to apply for the purposes of establishing the boundaries of the areas at each of the four sites where native title has been extinguished.

While Justice Finn found that the Application made in this matter was not in fact authorised as required by the NT Act, he was satisfied that, for the purposes of s 84D of the NT Act, it was in the interests of justice that the Application be determined despite the defect in authorisation.

Finally, there were seven PNG parties to this proceeding. In the case of five of them, Justice Finn ordered that they cease to continue as parties to the proceedings. In relation to the remaining two, His Honour declared that they were not members of the native title claim group.

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### **SHIPPING AND NAVIGATION – Carriage of goods by sea – In refrigerated container supplied by carrier – controller on container becoming stuck in defrost mode due to incompatible software – Whether goods properly and carefully carried, kept, cared for and discharged – Exception of latent defect – Whether malfunctioning of container not discoverable by due diligence – Hague-Visby Rules Arts III rr (1) and (2) and IV rr (1) and (2)(p)**

*Seafood Imports Pty Ltd v ANL Singapore Pte Ltd*  
(5 July 2010, Justice Ryan)

The plaintiff claimed damages for the deterioration of frozen seafood ('the goods') carried from Yokohama, Japan, to Melbourne. The goods had been received on board the CSCL Yantal ('the ship') pursuant to a bill of lading endorsed 'Shipment in a Reefer Container at a temperature of Minus 18 Celsius or Lower'.

The goods had been kept for three days in a cold store at Yokohama and then despatched for loading onto the ship. The temperature of the container was recorded by various means including a 'sensor' log, an 'events' log and a running 'reefer' log. According to the reefer log, for the whole of November 2005, except from 3 to 9 November, the container had maintained a temperature between -18° and -20°C. Information for some of the missing days indicated a temperature of -5° before returning to a consistent -20° from 5 to 6 November, presumably after power had been reconnected. The events log from 4 to 6 November recorded an apparently normal range of temperatures as the container alternated between operating ('cool') and defrost mode. On 6 November, the same log recorded the activation of alarms with no return to normal cool or defrost mode.

After power was disconnected for discharge at P & O Ports' Melbourne terminal, the only recorded abnormality was on 5 December when the container was continuously in defrost mode for over twelve hours. On 6 December, it was collected from the terminal and delivered to the plaintiff's premises. On out-turn the goods were revealed to have deteriorated after having thawed for an extended period before being refrozen.

Although the issue was not foreclosed by the bill of lading's notation that the goods were shipped on board 'in apparent good order and condition', Justice Ryan found that the goods had not deteriorated when stuffed into the container and delivered to the ship. Rather, his Honour inferred, there had been a breach of Art III, r 2 of the Hague-Visby Rules which provides:

*'Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.'*

The main breach by the defendant was a failure adequately to monitor the temperature and functioning of the container. The crew should also have rectified the abnormality of the container's being stuck in defrost mode which proper monitoring would have revealed. That abnormality, his Honour considered, was due to an incompatibility between the container's controller and its software which was not a 'latent defect nor discoverable by due diligence' within the exception in Art IV r 2(p) of the Hague-Visby Rules. An argument that the Hague-Visby Rules had no application outside the 'tackle to tackle' period from loading to discharge was held to be unavailable on the facts.

**TAXATION – Goods and Services Tax – entitlement of government entity to input tax credits in respect of payments to taxi-cab operators under program for transport of individuals with disabilities – whether government entity made a ‘creditable acquisition’ of transport of disabled passengers**

*Commissioner of Taxation v Secretary to the Department of Transport (Victoria)*  
(9 July 2010, Justices Kenny, Jessup and Dodds-Streeton)

In this appeal from a judgment of a single judge of the Court, the question was whether the Victorian Department of Transport was entitled to input tax credits under the A New Tax system (Goods and Services Tax) Act 1999 (Cth) (the Act) in respect of the tax component of payments it had made to taxi operators pursuant to its multi-purpose taxi program, under which it paid one-half of the taxi fares of qualifying disabled persons who, at the point of hiring taxis, presented the card which entitled them to be carried under such arrangements.

By majority decision, the Full Court held that, on each such occasion, the Department made a ‘creditable acquisition’ within the meaning of s 11-5 of the Act. It acquired a service constituted by the transport of the disabled person. The supply of that service was a ‘supply’ within the meaning of s 9-10 of the Act. The fact that, when a taxi was hired, a service was provided to the disabled person did not mean that there was not, at the same time, also a service supplied to the Department, being the transport of that person. That was the case in the facts upon which the appeal was based. Accordingly, agreeing with the primary judge, the Full Court held that the Department was entitled to the input tax credits which it claimed.

**REAL PROPERTY – Torrens title – consideration of exceptions to indefeasibility in s 42(2) *Transfer of Land Act 1958* (Vic) – whether tenants were ‘tenants in possession’ within the meaning of s 42(2)(e) – whether lease for life void for uncertainty of duration – whether mortgagee’s registered interest over leased properties had priority over unregistered interest of tenants for life – whether vendor’s equitable lien had priority over registered mortgage**

**MORTGAGES – mortgage over tenanted properties – whether mortgagee had notice of tenants in possession – constructive notice – whether tenants engaged in postponing conduct by failing to caveat**

**EQUITY – priority of interests – general principles for determining priority of equitable interests – relevance of time of creation of interest – whether mortgage created before lease where contract for sale giving entitlement to lease and mortgage completed on same day**

*Perpetual Trustee Co Ltd v Smith & Ors*  
(21 July 2010, Justices Moore, Dowsett and Stone)

This case involved a scheme operated by Money for Living (Australia) Pty Ltd and Money for Living Property Holdings Pty Ltd (MFLPH) under which retirees sold their homes to MFLPH in return for a lump sum, an annuity for a fixed period and a life tenancy over the property. Perpetual made a number of loans to MFLPH entities to finance the purchase of the retirees’ properties and took first registered mortgages over these properties.

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Representative proceedings were commenced on behalf of retirees against nineteen respondents seeking to protect their leasehold interest in properties that had been sold. The majority of claims were settled, however, the dispute between Perpetual and a number of retirees was the subject of this case.

The retirees claimed that the registered mortgages held by Perpetual were subject to their interest as lessees. Perpetual claimed that upon registration of the mortgages it obtained indefeasible title as an innocent mortgagee pursuant to the *Transfer of Land Act 1958* (Vic) (the TL Act).

The primary Judge found that the interests of the retirees came into existence prior to the creation and registration of the mortgages and the interest of Perpetual was therefore subject to the interest of the retirees as tenants in possession for the purposes of s 42(2)(e) of the TL Act. His Honour also found that each retiree held an equitable vendor's lien in respect of the unpaid balance of the purchase price; however, Perpetual's mortgages ranked in priority to those liens.

Perpetual challenged the finding that its mortgages were subject to the interests of the retirees, and the retirees, by cross-appeal, challenged the finding that the mortgages ranked in priority to their equitable liens.

The first issue for the Full Court to consider was whether the retirees were 'tenants in possession' for the purposes of the exception in s 42(2)(e) of the TL Act. Justices Moore and Stone, with whom Dowsett J agreed, found that the retirees were tenants in possession for the purposes of the Act. The contract between MFLPH and the retirees was determinative of the parties' obligations and it was the intention of the parties that the right of MFLPH, as owner of the land, was subject to the right of the retirees as tenants in possession. An implied tenancy at common law was also brought into existence by occupation under the agreement to lease.

The Court rejected Perpetual's argument that the lease was void because its duration was uncertain. It found the lease was valid as it was for the duration of the retirees' lives.

Justices Moore and Stone also considered whether the retirees were tenants in possession before the appellant acquired its mortgages, in circumstances where completion of the sale and completion of the mortgage occurred on the same day. The only logical way to view the chronology was that the sale was completed immediately before the mortgage; otherwise no entitlement to register the mortgage would have arisen. Any tenancy created on completion of the contract of sale was therefore created before the mortgage. Justice Dowsett disagreed and commented that registration could not affect the time at which any relevant equitable interest arose for the purpose of determining priority. His Honour considered that the matter should be remitted to the primary Judge for reconsideration of the issue of priorities and expressed no final view concerning the issue.

The second issue for consideration was whether the tenancies took priority over the subsequent mortgages. Justices Moore and Stone considered whether Perpetual had any prior notice of the retirees' interest, despite Perpetual's failure to raise the question of notice. Their Honours found that in the absence of any evidence to the contrary, Perpetual did have notice of the retirees' interests. While the very name of the company which gave the mortgages, Money for Living Property Holdings Pty Ltd, should have alerted Perpetual to the need to make further enquiries, the fact that the retirees occupied their homes was constructive notice of their interest. In the absence of an obligation to caveat, there was no postponing conduct on the part of the retirees, and their interest ranked in priority.

Justice Dowsett took issue with this view because, as far as his Honour could ascertain, the primary Judge did not proceed on the basis that Perpetual took with notice of any prior equity, but rather limited his enquiry to whether the competing equities were such as to displace the priority otherwise attaching to each of the retirees' equities. His Honour observed that had the retirees established that Perpetual took with notice, it would not have been necessary for the respective merits of competing equities to be considered. On the issue of postponing conduct and the retirees' failure to caveat, his Honour commented that consideration had to be given to the issue of the retirees' conduct in equipping MFLPH with the indicia of title and memorandum of transfer. In his Honour's view, the two points were inextricably connected and the primary Judge had failed to address the true significance of this failure to caveat.

In respect of the third issue for determination, namely, whether the vendors' liens ranked in priority to Perpetual's mortgages, Justices Moore and Stone considered that as the liens were unregistered interests and no exception to indefeasibility applied, the registered mortgages prevailed.

The appeal and cross-appeal were dismissed.

**COPYRIGHT – whether reproduction of headlines constitutes copyright infringement – whether copyright subsists in individual newspaper headlines, in an article with its headline, in the compilation of all the articles and headlines in a newspaper edition and in the compilation of the edition as a whole**

**ESTOPPEL – whether applicant estopped from asserting copyright infringement by respondent – whether respondent relied on an assumption that the applicant will not assert copyright infringement by reproduction by headlines – whether applicant created or encouraged the assumption – detriment – whether unconscionable to depart from assumption**

*Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd*  
(7 September 2010, Justice Bennett)

The applicant (Fairfax) is the publisher of the Australian Financial Review (AFR). The respondent (Reed) delivers a service known as ABIX, which provides subscribers with abstracts of AFR articles for the payment of a fee. The abstracts include the article's headline and by-line without alteration, along with a summary of the article written by a Reed employee. ABIX does not reproduce the look and feel of the words, photographs, advertisements or other elements of the AFR's layout.

Fairfax alleged that Reed's conduct infringed its copyright in four different works:

- each individual AFR headline;
- each AFR article, including the headline and by-line;
- the compilation of all AFR articles, headlines and by-lines in an AFR edition; and
- each AFR edition in its entirety.

The Court held that, like titles, headlines are generally too insubstantial and too short to qualify for copyright protection as literary works under the *Copyright Act 1968* (Cth). Although the Court recognised that the use of devices such as puns in newspaper headlines may be clever, this was of itself insufficient to accord copyright protection. The Court observed that headlines act as a way of identifying the work. Providing them with copyright protection would 'tip the balance too far against the interest of the public in the freedom to refer to articles by their headline'.

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In relation to each AFR article, the Court found that on the evidence available the article/headline combination was not a copyright work of joint authorship because the contribution of the headline's author and the article's author was separate.

Although the Court found that the AFR article compilation and each AFR edition were copyright works, the Court held that in presenting its abstracts to subscribers Reed had not infringed the copyright in these works as it had not reproduced their arrangement.

The Court noted that even if Fairfax had established that Reed had infringed copyright in the AFR's headlines, Reed could have relied upon the defence of 'fair dealing' under the Copyright Act because the provision of the ABIX service is for the purpose of, or is associated with, the reporting of news. However, the Court would not have accepted Reed's defence that Fairfax was estopped from asserting that Reed's reproduction and communication of AFR headlines constituted infringement of its copyright.

### **STATUTORY INTERPRETATION – citizenship and migration – whether the word 'parent' in s 16(2) of the Australian Citizenship Act 2007 (Cth) means only a biological parent or whether it has the meaning it bears in ordinary contemporary English usage.**

*H v Minister for Immigration and Citizenship*  
(15 September 2010, Justices Moore, Kenny and Tracey)

This appeal concerned two applications against decisions of the Administrative Appeals Tribunal (*NWH v Minister for Immigration and Citizenship* [2009] AAT 833 and *Re McMullen and Minister for Immigration and Citizenship* (2009) 111 ALD 475) involving the construction of s 16(2) of the *Australian Citizenship Act 2007* (Cth) (AC Act). They were heard together by the Full Court in its original jurisdiction.

Proceeding NSD 1320 of 2009 (NWH) was an appeal by NWH (an infant) against a decision of the Tribunal on 28 October 2009 to refuse his application for Australian citizenship. The President held that because the child did not have a biological parent who was an Australian citizen at the time of his birth, he was not eligible to become an Australian citizen under s 16 of the AC Act.

Proceeding VID 705 of 2009 (McMullen) was an appeal by the Minister for Immigration and Citizenship against the decision of the Tribunal that held on 27 August 2009 that the word 'parent' in s 16(2) was not limited to a biological parent. Ms McMullen, a citizen and resident of Fiji whose mother was also a citizen of Fiji had applied for Australian citizenship under s 16(1) of the AC Act naming Mr McMullen, an Australian citizen by birth, as her father. The Tribunal concluded that Ms McMullen's relationship with Mr McMullen satisfied s 16(2)(a) of the AC Act because of their 'father/daughter relationship' and at the time of birth she had a citizen parent. Mr McMullen had believed on reasonable grounds he was Ms McMullen's father and had assumed that role over an extended period of time.

The Full Court found that there is nothing in the legislative object, the legislative text, or the legislative structure of the AC Act that requires the court to conclude that, in the specific context of s 16(2), the word 'parent' only can mean biological parent. The word has the meaning it bears in ordinary contemporary English usage and is expressive of status and relationship to another, including social, legal and biological factors. There is a narrow time requirement. The claimant must demonstrate that at the time of birth, he or she had a citizen parent. This approach was considered to be in keeping with the development of citizenship legislation and the 'spirit and intendment of the current Citizenship

Act'. The ordinary meaning of the word 'parent' is a question of fact to be determined by the Tribunal after consideration of the evidence, including the supposed parent's conduct before and at the time of birth and possibly also conduct after the birth which may confirm parentage at the time of birth.

The appeal in NSD 1320 of 2009 was allowed, the decision of the Tribunal set aside and the matter remitted to a differently constituted Tribunal to be heard and determined according to law. The decision in VID 705 of 2009 was dismissed.

**INDUSTRIAL LAW – occupational health and safety – determination of quantity of pecuniary penalty – two employees and three members of the public died at sea when vessel commissioned by respondent sank in the Torres Strait – breaches of s 16(1) and s 17 of the Occupational Health and Safety Act 1991 (Cth) admitted by respondent – principles in *Comcare v Commonwealth of Australia* (2007) 163 FCR 207 relevant to determining quantity of pecuniary penalty – seriousness of breach – consideration of mitigating factors**

*Comcare v Commonwealth of Australia*  
(2 December 2010, Justice Collier)

Proceedings in this case arose from the sinking of a vessel, the *Malu Sara*, on 15 October 2005. On that date the vessel, operated by the Department of Immigration and Citizenship (DIAC), sank on a voyage from Saibai Island to Badu Island in Torres Strait. All five people on board were cast into the water. Two persons on board were employees of the respondent, and the remaining three persons (including a child) were members of the public. Only one body was ever recovered.

The application in this matter was brought by Comcare, seeking declarations and pecuniary penalties against the respondent. Comcare claimed that the respondent contravened subclause 2(1)(a) and subclause 2(1)(b) of Part 1 of Schedule 2 of the *Occupational Health & Safety (Commonwealth Employment) Act 1991* (Cth) (the Act) by breaching s 16(1) and s 17 in relation to the manufacture and supply of the *Malu Sara*.

DIAC was, and remains, charged with the responsibility for managing immigration and border control throughout the Torres Strait. In 2004, DIAC decided to replace existing immigration response vessels operating in that area. A third party was contracted for the supply of the vessels. The contract with the third party contained descriptions of vessels and required the vessels to meet both international and Australian standards. A prototype vessel did not meet these requirements; however this omission was not disclosed at the time of sea trials of vessels including the *Malu Sara*.

The applicant claimed that the sinking of the vessel occurred as a result of structural and design defects of the vessel. The respondent subsequently admitted the breaches of the Act. The hearing was confined to determining the quantum of penalty under the Act.

The Judge held that the circumstances warranted imposition of the maximum statutory penalty under the Act. Although in determining penalty Courts commonly take into consideration acknowledgement of fault by a respondent and co-operation with the applicant, in light of the systematic failures in this case which had led to the events, and the gravity of the consequences, no reduction in the maximum penalty was warranted.

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**INCOME TAX – exemption – whether taxpayer was a society or association established for the purpose of promoting the development of Australian agricultural resources – whether the taxpayer was carried on for the profit or gain of its individual members – taxpayer engages in wide range of activities which must be viewed as a whole – taxpayer is established for the development of the Australian grain industry and is not carried on for the profit or gain of its individual members.**

*Commissioner of Taxation v Cooperative Bulk Handling Ltd*  
(17 December 2010, Justices Mansfield, Siopis and McKerracher)

The question for determination was whether Co-operative Bulk Handling Limited (CBH) was established for the purpose of promoting the development of Australian agricultural resources so as to qualify for exemption from income tax. CBH was incorporated in 1933 to establish and conduct systems for the handling of wheat and grain in bulk. Prior to that time, most wheat harvested was bagged at the farm. A Royal Commission into the bulk handling of wheat was conducted in Western Australia in 1935 and concluded that the handling of wheat in bulk by CBH had been of advantage to the wheat growing industry in Western Australia.

CBH now derives substantial income which for many years has been tax exempt. More recent amendments to CBH's Constitution and state legislation resulted in mandating that CBH income or property may only be reapplied towards its objectives and not be distributed to its members.

The Commissioner argued that regardless of these changes and whatever the history may have been, CBH now operates for a 'purely commercial purpose' because of the significant commercial growth in business activities since it was established. It was also argued that the gains of better service and reduced rates received by members breached its not-for-profit requirement. The Court at first instance (Gilmour J) held that CBH was entitled to maintain its income tax exempt status. The Commissioner appealed to the Full Court.

The Full Court (Justices Mansfield and McKerracher, Justice Siopis dissenting) dismissed the appeal. The majority considered 'the totality of the discrete activities' to be directed to promoting the development of the grain growing industry, although operating in a commercially efficient and profitable business manner. The making of a surplus or profit and commercial nature of the business did not prevent an entity from having the requisite purpose. The majority accepted that members benefitted from the activities of CBH but this was not because of their individual membership. The word 'individual' in the tax legislation was emphasised. It was held that the objectives of CBH and legislative requirements imposed on it were to promote agricultural resources for the broader community, not just for its members. CBH services and facilities were available to grain producers irrespective of membership and benefits were obtained by all the industry. Incidental gains or benefits by members did not breach the not-for-profit requirement.

Therefore, the majority held that CBH was entitled to exemption from income tax as it was a society or association established for the purpose of promoting the development of Australian agricultural resources and did not carry on activities for the profit or gain of its individual members.

The Commissioner did not seek special leave to appeal to the High Court of Australia.

**CONTRACTS** – construction of margin lending loan and security agreement – whether margin calls validly made pursuant to agreement – whether failure to comply with margin calls constituted an event of default – whether sale of borrower’s securities by lender valid under the agreement – whether sale constituted unconscionable conduct within the meaning of s 12BC of the *Australian Securities and Investments Commission Act 2001* (Cth)

**BANKING AND FINANCIAL INSTITUTIONS** – margin lending facility – whether agreement validly novated from one lender to another – whether agreement validly assigned from one lender to another – whether rights capable of assignment

**EVIDENCE** – whether primary judge’s factual conclusion was erroneous – *Fox v Percy* (2003) 214 CLR 118 – presumption article sent by pre-paid post received under s 160 *Evidence Act 1995* (Cth) – primary judge’s preference for demeanour evidence

*Leveraged Equities Ltd v Goodridge and Anor*  
(18 January 2011, Justices Finkelstein, Stone and Jacobson)

This case concerned a Margin Lending Loan and Security Agreement (LSA) entered into between Mr Goodridge and Macquarie Bank Limited (Macquarie) on 12 May 2003. Under the terms of the agreement, Macquarie Bank was permitted to make margin calls on Mr Goodridge on short notice and was authorised to sell Mr Goodridge’s securities if he failed to satisfy the margin call within the time period specified.

In January 2009 Macquarie sold its margin loan book, comprising about 18,500 margin loans, including Mr Goodridge’s loan, to Leveraged Equities Limited (Leveraged Equities). Leveraged Equities made a margin call on Mr Goodridge on 5 February 2009 and two margin calls on 23 February 2009. To satisfy these later two calls, Leveraged Equities sold all of Mr Goodridge’s units in Macquarie Country Wide Trust. This sale had the effect of leaving Mr Goodridge with a shortfall on the balance outstanding on his loan. Mr Goodridge commenced legal proceedings against Macquarie and Leveraged Equities.

On appeal the Full Court reversed the decision of the primary judge and found in favour of Macquarie and Leveraged Equities.

The issues for determination fell into two groups: the margin call case; and the transaction case. Justice Jacobson wrote the leading judgment and Justices Finkelstein and Stone agreed.

The issues on the margin call case related to construction of the LSA, namely; whether the LSA conferred a discretion upon Leveraged Equities to shorten the period within which Mr Goodridge was required to comply with a margin call to less than three days, and whether the LSA conferred upon Leveraged Equities an independent power to sell Mr Goodridge’s security to satisfy the amount by which the total loan balance exceeded the market base limit, even if no margin call was made.

Justice Jacobson, with whom Justices Finkelstein and Stone agreed, found that while the LSA imposed a limit on the ability of the lender to shorten the period within which Mr Goodridge had to satisfy the margin calls, Leveraged Equities was entitled to require the margin calls to be satisfied by no earlier than one day following the call: this was shorter than the three day period provided for in the LSA. The

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Full Court found that under the terms of the LSA, Leveraged Equities was not only entitled to sell Mr Goodridge's security if he failed to comply with a margin call, which constituted an event of default, it also had an independent power to sell where no margin call was made but the total loan balance exceeded the market base limit.

In relation to the transaction case, the issues were whether the Transaction Documents, under which Macquarie had sold its margin loan book to Leveraged Equities, were effective to novate or assign the LSA to Leveraged Equities, and whether Mr Goodridge, by signing the LSA, had given prospective consent to the introduction of a new lender.

The Full Court determined that the margin loan book had been effectively novated to Leveraged Equities by the Transaction Documents. While there was no clear distinction between 'assignment' and 'novation' in the LSA, their Honours took the view that it was sufficiently clear that the borrower had given prospective consent to all elements required to give effect to novation of the LSA to any third party who was prepared to assume the obligations of lender. Further, the Court found that the express terms of the LSA made it abundantly clear that Macquarie's rights under the LSA were capable of assignment and were effectively assigned to Leveraged Equities.

Justice Jacobson, with whom the other members of the Full Court agreed, found that the primary judge's conclusion that Mr Goodridge had not received actual notice of the assignment in accordance with s 12 of the Conveyancing Act 1919 (NSW) was based upon demeanour evidence. This finding was erroneous and set aside by the Full Court.

As to whether Leveraged Equities had engaged in unconscionable conduct within the meaning of s 12BC of the *Australian Securities and Investments Commission Act 2001* (Cth), Mr Goodridge acknowledged that the funds received under the LSA would be applied wholly or predominately for business or investment purposes, not for personal, domestic or household use as required by the Act. Moreover, Justice Jacobson found that there was nothing unconscionable in a margin lender enforcing its legal rights to protect itself against a fall in the value of its security.

### **CORPORATIONS LAW – continuous disclosure – misleading and deceptive conduct**

*Australian Securities and Investments Commission v Fortescue Metals Group Ltd*  
(18 February 2011, Chief Justice Keane, Justices Emmett and Finkelstein)

This appeal concerned Fortescue Metals Group Ltd (FMG), a publicly listed company on the Australian Stock Exchange (ASX) and, Mr John Andrew Henry Forrest (Forrest), the chairman and chief executive officer of FMG. He is also a substantial shareholder.

In early 2004, FMG commenced negotiations with three Chinese companies in relation to a mining project in Western Australia known as the Pilbara Infrastructure Project (the Project). These negotiations led to the execution of three agreements, referred to as the 'framework agreements'.

In August and November 2004, FMG released a series of announcements to the market and statements to investors indicating that the framework agreements were legally binding arrangements to build, finance and transfer the Project infrastructure. In March 2005 an article was published in the Australian Financial Review asserting that the framework agreements did not impose any legally binding obligations upon the Chinese entities.

In March 2006, the Australian Securities and Investments Commission (ASIC) commenced proceedings alleging that FMG had engaged in misleading and deceptive conduct in breach of s 1041H of the Corporations Act 2001 (Cth) (the Act), and s 52 of the Trade Practices Act 1974 (Cth) (the TP Act). Further, ASIC alleged that FMG had contravened s 674(2) of the Act by failing to disclose the true meaning or terms of the agreements or, that FMG had breached its continuous disclosure obligations in failing to correct earlier mis-statements as to the terms of the agreements.

ASIC alleged that Forrest was personally involved in FMG's contravention of s 1041H of the TPA and s 674(2) of the Act. It was further asserted that Forrest was in breach of his director's duties under s 180(1) of the Act.

At trial ASIC's case was comprehensively dismissed with the trial judge finding that the statements about the agreements were honestly held expressions of opinion. ASIC's case against FMG was rejected, meaning that the case against Forrest also failed.

Keane CJ (Justices Emmett and Finkelstein agreeing) allowed ASIC's appeal. It was held that the agreements could not accurately be described as binding agreements to build, finance, and transfer the infrastructure for the Project, and that FMG's announcements contravened s 1041H of the Act.

Once it was accepted that FMG contravened s 1041H of the Act, having made misleading statements to the ASX, it was obliged pursuant to s 674(2) to correct the position, which it had failed to do. This failure constituted a contravention of s 674 of the Act.

Forrest was held to be in breach of s 79(c) of the Act by virtue of his involvement in the negotiations for the framework agreements and authorisation or approval of the relevant announcements.

Additionally, as Forrest was involved in FMG's contravention of their continuous disclosure obligations, he personally breached s 674(2A). No defence was available under s 674(2B) of the Act in that Forrest was not able to point to any steps he took to ensure the framework agreements were, in law, binding agreements to the extent represented by FMG. Further, his own communications evidenced a belief inconsistent with the view that FMG had made a binding agreement for the construction of the infrastructure of the Project.

Finally, as Forrest had exposed FMG to pecuniary penalty, he was held to be in breach of his duty of care and diligence to the company under s 180(1). The business judgment rule did not apply. The decision not to disclose the true effect of the agreements could not properly be described as a 'business judgment', but rather a decision related to compliance with the obligations imposed by the Act.

## **COPYRIGHT – authorisation of infringement – whether internet service provider sanctioned, approved or countenanced its network users' acts of primary infringement**

*Roadshow Films Pty Ltd v iiNet Ltd*  
(24 February 2011, Justices Emmett, Jagot and Nicholas)

The appellants in this landmark copyright case were owners or exclusive licensees of the copyright in commercial films and television shows. They claimed that the respondent, internet service provider iiNet, had infringed copyright in their cinematographic films by authorising its customers' acts of primary infringement. The primary infringements involved iiNet users communicating the appellants' films to the public via the BitTorrent file sharing system.

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An organisation known as the Australian Federation Against Copyright Theft (AFACT) sent notices to iiNet which alleged specific acts of infringement of the copyright in the appellants' films by iiNet users and required iiNet to take certain action. iiNet's subsequent action (or inaction) was said by the appellants to amount to authorisation of infringement within the meaning of s 101 of the *Copyright Act 1968* (Cth).

The trial judge found that iiNet users had infringed copyright in the films by communicating them to the public but that such infringement was not authorised by iiNet. Accordingly, his Honour found that iiNet had not infringed copyright in the appellants' films. A fundamental consideration which led to the trial judge's conclusion was that it was the BitTorrent system, rather than iiNet, that provided the 'means' of infringement; thus, iiNet could not be taken to have authorised the infringement which occurred.

On appeal, the critical question for the Full Court to decide was whether the trial judge erred in finding that iiNet had not authorised acts of copyright infringement. That is, did iiNet sanction, approve or countenance the acts of primary infringement?

It was accepted that primary infringement had occurred. As to the extent of primary infringement, the Court found that individual iiNet users had made the appellants' entire films available online on multiple occasions, not just once as the trial judge had found. However, again contrary to the trial judge's conclusion, the Court found that it was not established on the evidence that the whole or a substantial part of any of the appellants' films had been electronically transmitted by any one iiNet user.

On the question of authorisation, the Court considered the prescribed matters in s 101(1A) of the Copyright Act which, in summary, consisted of: (a) iiNet's power to prevent the acts of primary infringement; (b) the nature of the relationship between iiNet and the people who infringed; and (c) whether iiNet took reasonable steps to prevent or avoid infringement. Other factors which the Court took into account were knowledge of, encouragement of, and inactivity or indifference to infringement.

Justices Jagot and Nicholas found that the trial judge had erred in his approach to determining authorisation by focusing on whether or not iiNet provided the 'means' of infringement. However, the Court (Justice Jagot dissenting) ultimately found that iiNet had not authorised acts of infringement and dismissed the appeal. Justices Emmett and Nicholas each concluded that the AFACT notices did not provide iiNet with enough information that iiNet could reasonably have been expected to take steps such as issuing warnings or suspending or terminating users' accounts. However, their Honours made it plain that this did not mean that an internet service provider could not be liable for authorising its users' acts of primary infringement in other circumstances. Justice Emmett even outlined a set of circumstances under which it may have been reasonable to expect iiNet to take the abovementioned steps.

The Court also decided that if iiNet had been found to have authorised infringement, it would not have been protected by s 112E or the 'safe harbour' provisions of the Copyright Act. Similarly the *Telecommunications Act 1997* (Cth), which iiNet invoked as preventing it from complying with the AFACT notices, was a defence that was held to be unavailable.

**CONTRACT – whether restraint of trade clause harsh or unfair – application of *Independent Contractors Act 2006 (Cth)* to contracts terminated before application filed – restraint of trade – enforceability – legitimate interest – customer connexion – opportunistic disintermediation – legitimate interest for labour hire firm – employer interest in staff or contractor connexion**

*Informax International Pty Ltd v Clarius Group Limited*  
(4 March 2011, Justice Perram)

Clarius, a labour hire firm, had contracted an information technology project manager through her corporate vehicle, Informax, to Woolworths. The contract between Informax and Clarius was extended several times. After a period of fifteen months, Informax ceased contracting with Clarius and entered into a contract directly with Woolworths. Informax's contract with Clarius had contained a clause that it would not contract directly with one of Clarius' clients for a period of six months after the contract ceased; and Clarius' agreement with Woolworths contained a clause to the effect that Woolworths would not directly employ or engage a contractor for a period of twelve months after the cessation of their contract with Clarius.

Clarius uncovered, by chance, that Informax had contracted directly with Woolworths and indicated to Woolworths that this might be in breach of the surviving conditions of Informax's contract with Clarius. Woolworths immediately asked the contractor to leave.

Informax brought proceedings seeking damages from Clarius, on the basis that the restraint of trade clauses in either the contract between Informax and Clarius, or between Woolworths and Clarius, are invalid; and that the restraint of trade clause and/or the entire contract between Informax and Clarius was 'unfair' under the *Independent Contractors Act 2006 (Cth)*.

Clarius attempted to defend the restraint of trade clauses on the basis that it had a legitimate interest in maintaining a customer connexion with its clients or opportunistic disintermediation; that is, the middle-man's risk of being cut out. The Court recognised, for the first time in Australia, that a labour hire firm has a legitimate interest in protecting itself against the perils of opportunistic disintermediation. However, as the extent of disintermediation interest was not proved by Clarius, this legitimate interest could not be found to support either of the clauses in question.

The Court held that customer connexion could not be applied to the contract between Clarius and Woolworths, where it would operate as a covenant by the client not to be poached. The Court found that customer connexion had not been sufficiently proved to constitute a legitimate interest supporting the restraint of trade clause between Clarius and Informax.

As the restraint of trade clauses were not supported by a legitimate interest, the Court found that it was unfair, within the meaning of the *Independent Contractors Act*, for Clarius to seek to persuade Woolworths to break up the relationship between Woolworths and Informax when it had no legal entitlement to stop either from working with the other. The Court also held that relief under the Act could be granted for a contract which had already been terminated.

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**PRACTICE AND PROCEDURE – courts and judges – apprehended bias – application for leave to appeal against order by primary judge, refusing to disqualify himself – whether a party’s unilateral communication with a judge’s associate could found or contribute to a reasonable apprehension of bias, where no direct evidence that it involved any discussion of merits or substance – no impropriety in a party’s unilateral communication with chambers in relation to procedural, administrative or practical matters – unilateral communication does not per se constitute a ground sufficient to warrant disqualification of judge – primary judge understood and properly applied the correct test – application for leave to appeal refused**

*John Holland Rail Pty Ltd & Anor v Comcare*  
(11 March 2011, Justices North, Kenny and Dodds-Streeton)

This decision concerned the questions of whether, and in what circumstances, unilateral communication between a party or practitioner and judge’s chambers could give rise to a reasonable apprehension of bias in the judge.

The respondent, Comcare, had made an application for declarations and penalties against the appellants (collectively ‘John Holland’) under the *Occupational Health and Safety Act 1991* (Cth). A solicitor for Comcare contacted the associate to the docket judge, Justice Bromberg, to indicate that his client may require a directions hearing to be listed and to ascertain his Honour’s availability. Another similar communication followed. While the number and content of the communications were in dispute, it was apparent that their purpose was to request available dates for directions and not to discuss substantive issues in the litigation. John Holland was not aware of the communications at the time they were made.

John Holland made application to Justice Bromberg seeking that his Honour disqualify himself from the further conduct of the proceeding, on the basis that the unilateral communication between his associate and the solicitor for Comcare gave rise to a reasonable apprehension of bias. Justice Bromberg refused to disqualify himself and John Holland applied for leave to appeal against his Honour’s decision.

The Full Court unanimously refused leave to appeal. The Court held that there is no impropriety in a party’s unilateral communication with chambers in relation to procedural, administrative or practical matters, unless it is a sustained sequence of communications (which could, at some point, become unprofessional or improper). Conversely, in certain circumstances, unilateral communication in relation to the substantive issues in the litigation could found or contribute to a reasonable apprehension of bias or lack of procedural fairness. The latter type of communication should generally be circulated or made in the presence of the other parties unless the other parties have consented to its unilateral provision to chambers.

Contrary to John Holland’s submission, the Court held that no presumption of impropriety arises from unilateral communication with chambers, and indeed such communication is sometimes unavoidable. Further, their Honours held that to establish a reasonable apprehension of bias, ordinarily it would be necessary to demonstrate not just that improper communication was made with chambers but also that the impugned communication was conveyed to the judge personally. In the circumstances of this case, no legitimate basis was established for a reasonable apprehension of bias.

**NATIVE TITLE – Aboriginals – Native title – Issue estoppel – Application to native title claims – Overlapping claims – Claims consolidated to extent of overlap – Finding that claimant not a traditional native title group that had existed since sovereignty – Claimant brought subsequent claim in relation to remainder of original area (excluding the overlap) – Claim dismissed as abuse of process – Issue estoppel unlikely to apply to native title claims, as determinations are in effect judgments in rem – Native Title Act 1993 (Cth), ss 61(1), 67(2)**

*Dale v State of Western Australia*  
(31 March 2011, Justices Moore, North and Mansfield)

The appellants as applicants for the Wong-goo-tt-oo Peoples initially claimed native title rights and interest over an area in Western Australian pursuant to s 61(1) of the *Native Title Act 1993* (Cth) (NT Act). As that claim area overlapped substantially with competing claims by other groups including the Ngarlum Peoples and the Yinjibarndi Peoples, the Court consolidated those claims to the extent of the area of the overlap pursuant to s 67(2) of the NT Act and O 29 r 5 of the Federal Court Rules. In the resultant consolidated proceeding, the Court found that the appellants were not a traditional native title group that had existed since sovereignty nor had they maintained the necessary connection to the claim area since that time: *Daniel v Western Australia* [2003] FCA 666 (*Daniel*). Final orders were made in 2005: *Daniel v Western Australia* [2005] FCA 536.

The appellants subsequently pursued their claim in relation to the remainder of the original claim area, excluding the overlap. The trial judge found however that the group was estopped from pursuing the claim, given the findings in the consolidated proceeding that the appellants were not, and had never been, a ‘society’ for purposes of the NT Act: *Dale v Western Australia* (2009) 261 ALR 21.

The Full Court dismissed the appellants’ appeal from that judgment. The Court held that the appellants in seeking to agitate the same issue as had been determined in *Daniel* constituted an abuse of process, such that the trial judge was correct to dismiss it. The evidence in the consolidated claim related to whether the appellants were a cognatic kin group with ongoing native title rights and interests generally in the broader area, rather than merely in relation to the consolidated claim area such that the relevant issue had already been determined.

Their Honours entertained real doubt as to the applicability of issue estoppel in native title determinations, given the statutory framework and the character of any determination made. Section 67(2) of the NT Act requires overlapping applications to be heard together. Any determination made as to the native title holders is then in effect a judgment in rem which will bind persons beyond parties to the proceedings. As such it operates outside the usual field of the principle of issue estoppel (which requires that the same parties were parties in the proceeding in which the issue was earlier determined).

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### **INTELLECTUAL PROPERTY – infringement of copyright in musical works – whether recordings of a musical work infringed copyright in an earlier musical work by reproducing in material form a substantial part of the earlier work**

*EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited*  
(31 March 2011, Justices Emmett, Jagot and Nicholas)

This appeal required the Full Court to consider whether commercial recordings of Men at Work's landmark Australian song *Down Under* infringed copyright in the equally iconic *Kookaburra Sits In The Old Gum Tree*. It was common ground that, in five of *Down Under*'s 93 bars, its flute riff quoted *Kookaburra*'s first two melodic phrases; the dispute concerned whether this quotation constituted a reproduction of a substantial part of *Kookaburra*. The Full Court was taken to several matters relating to the appropriate judicial approach to resolving that question in the context of musical works.

A primary issue was the correctness of sequentially and separately determining two matters: (i) the existence of objective similarity between the works, and (ii) whether the part reproduced was a substantial part of the copyright work. Justice Jagot, with whom Justice Nicholas substantially agreed, found such an approach to be wholly orthodox and consistent with established authority. Justice Emmett, in determining *de novo* the question of infringement, adopted a more holistic approach, eventually concluding, albeit with some reluctance in light of the competing public interests intended to be balanced by copyright law, that infringement was made out. Accordingly, the appeal was dismissed unanimously.

The case raised numerous points of interest and, on several issues, Australian authority in a musical context was at best scant. The difficulty of giving precise content to the expression 'musical work', an essentially aesthetic term left undefined in the Copyright Act, was clearly revealed. The appellants argued that, since infringement requires that the part of the copyright work taken be original, and the only evidence adduced of *Kookaburra*'s originality lay in its composition as a four-part 'round', the absence of the features of a round in the *Down Under* quotation told decisively in their favour. Dealing with this argument involved some consideration of the degree to which a musical work is coterminous with a single notated rendering or a particular performance. Justice Emmett considered that reproduction of the constituent phrases, even without any round context, would constitute reproduction of the results of an application of skill, and therefore of that which makes *Kookaburra* original. Justices Jagot and Nicholas did not consider this issue in as much detail, as their Honours took the view that *Kookaburra*'s originality extended beyond its composition as a round.

Three further issues call for mention. First, the appellants contended that, in determining the question of objective similarity between the works according to the test of the ordinary, reasonably experienced listener, it is inappropriate to overly sensitise oneself to the works' similarities and to have regard to expert evidence. All three appellate judges considered that neither repeat exposure nor expert guidance violated the requirements of the test. Secondly, by reason of the appellants' reliance on observations of the High Court in the *IceTV* decision, especially as to *animus furandi*, the general applicability of the strain of authority known as the 'compilation cases' arose. Justice Jagot led the Full Court in declining to expand the scope of these cases. Lastly, the Full Court reaffirmed that, in order to make out infringement, it is not necessary to establish that the part taken constitutes a substantial part of the *infringing work* – a point not well taken in media glosses of the decision, which tended to be as inaccurate as they were enthusiastic.

**PRACTICE AND PROCEDURE – application pursuant to ss 21 and 23 of the *Federal Court of Australia Act 1976 (Cth)*, O 21 rr 1 and 2 and O 35 r 1 of the *Federal Court Rules* to have respondent declared a vexatious litigant – whether proceedings vexatious – whether proceedings instituted ‘habitually, persistently and without reasonable grounds’**

*Soden v Kowalski*

(7 April 2011, Justice Stone)

This case concerned two proceedings brought, respectively, by the Registrar of the Federal Court and by Mitsubishi Motors Australia Ltd, MMAL Staff Superannuation Fund Pty Ltd and AMP Superannuation Ltd to have the respondent, Mr Kazmir Kowalski, declared a vexatious litigant. The applicants also sought consequential orders preventing the respondent from instituting further proceedings without leave of the Court.

In support of their applications, the applicants identified a number of proceedings which were commenced by Mr Kowalski in the Federal Court and which had given rise to thirty-four judgments delivered by the Court. Mr Kowalski’s history of litigation began with his employment with Mitsubishi Motors in 1964. He claimed that during his employment with Mitsubishi or as a result of it he suffered various injuries and illnesses.

Justice Stone accepted that all but four of the proceedings identified by the applicants were vexatious. In making that determination her Honour considered that vexatiousness is a quality of the proceeding and not of the respondent’s intention. The test is whether a proceeding is so obviously untenable or manifestly groundless as to be utterly hopeless.

Her Honour found that Mr Kowalski had instituted the proceedings habitually and persistently; almost as a matter of course and persisted in pressing his claims when they had already been determined. He was not deterred by findings that his applications were unsustainable or groundless.

On the issue of whether discretion should nonetheless be exercised in granting the relief sought, her Honour considered that while the relief was extreme it was not absolute. The Federal Court Rules seek to strike a balance between the interests of a vexatious litigant and the countervailing need to protect the Court, potential respondents and the community in general from the consequences of frequent, habitual and groundless litigation. In this case the balance was in favour of restricting Mr Kowalski’s right to commence proceedings by requiring him first to obtain leave.

Her Honour granted the relief sought and made an additional order that Mr Kowalski not continue any proceeding instituted prior to the order without leave of the Court.

**TRADE PRACTICES – Access to Services – *Trade Practices Act 1974 (Cth)* – Part IIIA – s 44H(4)**

**COMPETITION – role of Tribunal – function to resolve difficult and complex matters of judgment – Court’s role to ensure decision accords with the law – Court’s role not to reconsider merits of the case**

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### EVIDENCE – role of expert evidence

*Pilbara Infrastructure Pty Ltd v ACCC*

(4 May 2011, Chief Justice Keane and Justices Mansfield and Middleton)

This important decision clarified the scope of the declaration provisions under Part IIIA of the *Trade Practices Act 1974* (the Act). Part IIIA provides for a two stage process to enable third parties to obtain access to ‘essential facilities’. Under stage one the National Competition Council must recommend, and the Treasurer must accept, that the declaration would satisfy each of the criteria in s 44H(4) of the Act. Under stage two an access dispute may be referred to the Australian Competition and Consumer Commission (ACCC) if negotiation cannot be reached.

The appellant, the Pilbara Infrastructure Pty Ltd, a wholly owned subsidiary of Fortescue Metals Group Ltd (collectively referred to as Fortescue), sought to invoke Pt IIIA of the Act in order to obtain access to four railways in the Pilbara region of Western Australia and all associated infrastructure necessary to allow trains and rolling stock to provide transport services of its own.

Only two lines were in issue on appeal, the Hamersley line and the Robe line, both operated by Rio Tinto Iron Ore (Rio Tinto). The Treasurer had decided to declare both lines for twenty years. Pursuant to s 44K of the Act Rio Tinto applied to the Australian Competition Tribunal (the Tribunal) for review of the Hamersley and Robe declarations.

On 30 June 2010 the Tribunal made determinations setting aside the declaration of the Hamersley line and varying the decision in relation to the Robe line so that it expired in ten, rather than twenty, years. Fortescue applied for judicial review of the Tribunal’s decision, challenging the Tribunal’s finding to set aside the Treasurers’ decision to declare the Hamersley line, and to vary the expiration date in relation to the Robe line. Rio Tinto brought a cross-appeal challenging the decision of the Tribunal not to completely set aside the Treasurers’ declaration in relation to the Robe line.

There were three key legal arguments before the Full Federal Court:

- whether s 44H(4)(b) in requiring ‘that it would be uneconomical for anyone to develop another facility to provide the service’, erects a test of private economic feasibility or productive efficiency from the viewpoint of society as a whole;
- whether the requirement of s 44(4)(f) that ‘access (or increased access) to the service would not be contrary to public interest’ involves a consideration of the costs of access which would be expected to be addressed by the ACCC under s 44V and s 44X at the second stage of the Pt IIIA process; and
- whether Rio Tinto’s communications with the Tribunal after the conclusion of the hearing, in relation to the likelihood that Fortescue would construct an additional railway, the Dixon line, by 2013/2014, raised an issue as to procedural fairness.

It was held by the Full Court, Chief Justice Keane and Justices Mansfield and Middleton all agreeing, that the declaration of the Hamersley line be set aside, and that Rio Tinto’s application seeking the Robe line not be declared in its entirety be granted.

As to s 44(4)(H)(b) the Court did not apply the ‘natural monopoly test’ adopted by the Tribunal and the ‘net social benefit test’ applied by the Tribunal in previous cases such as *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 at [64] and *Re Sydney International Airport* [2000] ACompT 1 at [204]-[206] (*Sydney Airport No 1*).

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The Court at [86] preferred the narrower test of

*‘whether “anyone” can be identified for whom the development of an alternative facility is economically feasible...[i]f an examination of the facts shows that there is such a person, whoever that might be, and whatever that person’s circumstances, then regulatory interference in the interplay of market forces is not warranted...’.*

Further, in conformity with the view reached in the Tribunal in *Sydney Airport No 1*, the Court found that the reference to ‘anyone’ in s 44H(4)(b) **does not** include the incumbent owner.

As to the application of s 44H(4)(f) the Full Court accepted the approach taken by the Tribunal at [1172] of their reasons. The Court found that it was open to the Minister or Tribunal to consider the consequences likely to arise as a result of access. Accordingly, costs associated with the incumbent in providing access, negotiations about access to infrastructure, delays in expansions, or inefficiencies in technological development may all be taken into account. The Minister and the ACCC may have to consider the same evidence in relation to the costs of negotiation and arbitration at stage two but the perspective of the decision maker at each stage will be different.

In dealing with the procedural fairness argument the Court held that it is undesirable that any party engage in unsolicited correspondence with a Court or Tribunal after engagement has concluded and the decision reserved. The Tribunal was found to have relied upon the material erroneously provided to it by Rio Tinto. This material informed the Tribunals’ conclusions adverse to Fortescue in respect of s 44H(4)(f). However, as the procedural fairness complaints did not bear upon the Tribunal’s findings of fact in relation to s 44H(4)(b), upon which Fortescue was bound to fail, there was no prejudice to Fortescue by reason of Rio Tinto’s conduct.