APPENDIX 8

SUMMARY OF DECISIONS OF INTEREST

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(1) Aboriginals – Prevention of construction works to protect a significant Aboriginal area

Chapman& Others v Luminis Pty Ltd & Others
(21 August 2001, Justice von Doussa)

In these proceedings, the applicants sought to recover losses allegedly suffered by a developer of a marina complex on Hindmarsh Island in South Australia, Binalong Pty Ltd ("Binalong"), as the result of a declaration made by the then Minister for Aboriginal and Torres Strait Islander Affairs, Mr Robert Tickner, under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ("the Act"). The declaration banned the construction of a bridge between the mainland and Hindmarsh Island on the ground that the area was of profound spiritual and cultural importance to Ngarrindjeri women.

The Act required the Minister, before making a declaration, to obtain a report as to the significance of the area to aboriginals. Mr Tickner appointed Professor Saunders to prepare that report. Professor Saunders considered a number of submissions, one of which was supported by a report prepared by an anthropologist, Dr Fergie (whose services had been engaged through a consultancy company, Luminis Pty Ltd ("Luminis"), by the Aboriginal Legal Rights Movement). Both Dr Fergie and Professor Saunders, who had made her own enquiries, reported that the cultural and spiritual significance of the area to Ngarrindjeri women was founded on restricted traditional knowledge, which could not be disclosed publicly or to men.

Mr Tickner's decision was challenged, and ultimately set aside, in proceedings under the *Administrative Decisions (Judicial Review) Act 1977*. However, before these proceedings were completed the South Australian Government appointed a Royal Commission to inquire into and report on allegations that the "women's business" referred to by Professor Saunders and Dr Fergie had been fabricated. The Royal Commission concluded that fabrication had occurred for the purpose of preventing the construction of the bridge. Notwithstanding the outcome of the litigation and the Royal Commission, some members of the Ngarrindjeri community continued to assert the spiritual significance of the area and no construction work was undertaken on the bridge until 1999 after enabling Commonwealth legislation was passed. In the meantime, Binalong had gone into liquidation.

The applicants sued as assignees of Binalong, alleging that the declaration, and consequent delays, had de-valued the marina development. The applicants contended that if Mr Tickner, Professor Saunders, Luminis and Dr Fergie had carried out their respective tasks properly, the declaration would not have been made and Binalong would not have suffered loss. It was alleged that:

- Professor Saunders, Luminis and Dr Fergie were liable to pay damages under statutory remedies for conduct in trade or commerce that was misleading or deceptive because representations about “women’s business” made in the reports of Professor Saunders and Dr Fergie were not correct;

- these respondents and Mr Tickner had been negligent; and
- Professor Saunders and Mr Tickner breached their statutory duty under the Act, and were guilty of misfeasance in public office.

An additional claim was made against the Commonwealth on the ground that the declaration constituted an unjust acquisition of property.

Extensive evidence was led at trial from aboriginal people and from anthropologists. The applicants contended that female gender specific restricted knowledge was not a feature of traditional Ngarrindjeri culture, and it was a central plank of their case that fabrication had occurred.

The trial Judge, Justice von Doussa, happened to be male. One difficulty confronted by the Court was how the Judge should receive evidence about the restricted knowledge, which by tradition should not be disclosed to men. As the judicial power of the Commonwealth is vested in the Court, it was an inevitable part of the exercise of that power that the male Judge would have to hear the evidence. However, orders were made to exclude all other men, including male barristers, and general publication of the evidence was prohibited.

The Court held that it was not satisfied that the restricted women’s knowledge was fabricated or that it was not part of aboriginal tradition. The evidence received during the trial was significantly different to that before the Royal Commission. In particular, witnesses who elected not to give evidence before the Royal Commission chose to do so in the Court proceedings. In addition, the Court had the benefit of anthropological evidence that was not available to the Royal Commission.

The Court held that it was essential to the success of the applicant’s claim based on misleading and deceptive conduct that they established that the restricted women’s knowledge was fabricated. As they had failed to do so, the claims based on misleading or deceptive conduct failed for that reason and because the conduct of Professor Saunders and Dr Fergie was not in trade or commerce.

The negligence claims against the respondents also failed. The Court held that Mr Tickner and Professor Saunders did not owe a common law duty of care to Binalong whilst exercising the statutory functions under the Act, nor did Luminis or Dr Fergie owe a duty of care to Binalong as such a duty would be inconsistent with their contractual obligations to the Aboriginal Legal Rights Movement to whom they were contracted. Further, the Court held that even if a duty of care had arisen, the claims would still have failed either because the alleged breaches of the duty had not been established or the conduct of the respondents did not cause a loss.

The claims for breach of statutory duty against Professor Saunders and Mr Tickner were dismissed on the ground that the Act did not create a private right of action in favour of a person aggrieved by a failure to fulfil the requirements of the Act. The claims for misfeasance in public office also failed as the Court rejected completely allegations that Mr Tickner and Professor Saunders knew that they were acting beyond power or were reckless as to their power.

The claim against the Commonwealth for acquisition of property other than on just terms also failed as the Court held that the setting aside of the declaration in the judicial review proceedings had the effect that the declaration never occurred and so no property could have been acquired.

Finally, the Court considered whether Binalong had suffered loss of the kind alleged. The Court found on the evidence that the marina development was worth at least as much in September 1997, when it had been sold by the liquidator of Binalong, as it had been at the date of the declaration, and accordingly no loss had been established.

The applicants' claim therefore failed in its entirety.

The decision is the subject of an appeal to the Full Court of the Federal Court.

(2) Aborigines – Removal of part-Aboriginal children

Cubillo v Commonwealth
(31 August 2001, Justices Sackville, Weinberg and Hely)

This was an appeal in what has become known, somewhat misleadingly, as the "Stolen Generation Case". The proceedings were brought by Lorna Cubillo and Peter Gunner against the Commonwealth. They appealed against the decision given by a Judge of the Court on 11 August 2000 dismissing their claims.

Mrs Cubillo was aged eight when she was taken, along with fifteen other part-Aboriginal children, from the Phillip Creek Settlement, about forty kilometres north of Tennant Creek in the Northern Territory, in 1947. She was taken to the Retta Dixon Home in Darwin and remained there until October 1956. Mr Gunner was aged seven when he was removed from Utopia Station and taken to St Mary's Hostel, south of Alice Springs, in May 1956. He remained there until 1963. The Retta Dixon Home was conducted by the Aborigines Inland Mission of Australia, while St Mary's Hostel was run by the Australian Board of Missions.

Mrs Cubillo and Mr Gunner ("the appellants") claimed that their removal had taken place in consequence of a policy, endorsed by successive Commonwealth governments, whereby part-Aboriginal children were taken from their families and placed in missions or institutions. They said that their removal and detention had caused them pain and suffering, loss of enjoyment of life and loss of cultural heritage. They said that the Commonwealth was legally responsible for the wrongs done to them and thereby liable to compensate them in damages.

The appellants each relied on four causes of action to support their action for damages:

(i) wrongful imprisonment and deprivation of liberty;

(ii) a breach of the statutory duty allegedly owed to them by the Director of Native Affairs, in failing to provide for their custody, maintenance and education, for which breach the Commonwealth was said to be vicariously responsible;

(iii) a breach of the duty of care allegedly owed to them by the Commonwealth; and

(iv) a breach of the Commonwealth's fiduciary duty.

The trial Judge rejected the appellants' claims against the Commonwealth, essentially for two reasons.

First, on the evidence, his Honour found that the appellants had failed to establish any of the causes of action on which they had relied. In particular, his Honour found that on the evidence before him:

- at the relevant times, there was no general policy in force in the Northern Territory supporting the indiscriminate removal and detention of part-Aboriginal children, irrespective of the personal circumstances of each child;
- Mrs Cubillo had failed to establish that, at the time of her removal, she was in the care of an adult Aboriginal person whose consent to her removal had not been obtained;
- Mr Gunner's mother, Topsy Kundrilba, had given her informed consent to her son's removal from Utopia Station to St Mary's Hostel; and
- the Commonwealth had not actively promoted or caused the appellants' detention.

Secondly, the primary Judge refused to grant an extension of time to the appellants in which to institute proceedings in respect of their common law causes of action (wrongful imprisonment and breach of duty). Such an extension of time was necessary because the causes of action had become barred under Northern Territory legislation by reason of the very long delay in commencing proceedings. The trial Judge found that the Commonwealth had suffered "irremediable prejudice" in defending the proceedings since it had been unable to bring forward the evidence of potential witnesses who had died or were unavailable because of ill-health.

The issues on appeal were considerably narrower than those raised at the trial. The appellants, for example, no longer pressed their claim founded on breach of statutory duty. Nor did they challenge the major factual findings, adverse to their case, made by the trial Judge. They also accepted that the Commonwealth had sustained significant prejudice in defending the case, by reason of the delay in the appellants commencing the proceedings.

In certain respects, the appellants attempted to change their case on appeal. The Full Court took the view that it would be unfair to the Commonwealth to allow them to do that at such a late stage of the proceedings.

The Full Court held that the trial Judge had been correct in rejecting the false imprisonment claims. In particular, the unchallenged findings of fact were very difficult for the appellants to overcome. Whatever rights the appellants might have had against persons who had not been joined as parties to the proceedings, they had not made out a case against the Commonwealth. The Full Court also held that the trial Judge had been correct in rejecting the claim on alleged breach of fiduciary duty.

The Full Court further decided that, in view of the irremediable prejudice occasioned to the Commonwealth by reason of the delay in instituting the proceedings, it was open to the trial Judge to have concluded that no extension of time should be granted to the appellants.

Accordingly, the appeal was dismissed.

(3) Constitutional law – Whether exclusion of aliens from Australian territory was a valid exercise of executive power

Ruddock v Vadarlis
(18 September 2001, Chief Justice Black, Justices Beaumont and French)

This case concerned the asylum seekers who were rescued by the captain and crew of the MV Tampa when the wooden fishing boat on which they had left Indonesia sank in the Indian Ocean about 140 kilometres north of Christmas Island in late August 2001. The case raised an important constitutional question about the relationship between the regime for "border control" enacted in the *Migration Act 1958* (Cth) ("Migration Act") and the Government's executive power to prevent unlawful non-citizens from gaining entry to Australian territory. The question was whether the Migration Act had purported to regulate the entire area of border control, so that any residual executive power was subject to that regulation.

While the case involved important constitutional question, it also arose in highly unusual and urgent circumstances. When the captain and crew of the MV Tampa picked up the "rescuees" on or about 26 August 2001, they started to head towards Indonesia. However, upon the objection of some of the rescuees, the MV Tampa changed course and headed towards Christmas Island. When the MV Tampa was approximately 13.5 nautical miles off Christmas Island, the Christmas Island port was closed by the Administrator, on request of the Australian Cabinet Office, and the captain of the MV Tampa was formally requested not to enter Australian territorial waters. Two days later, due to mounting concerns that some of the rescuees were very sick, the captain took the MV Tampa into Australian territorial waters and stopped about 4 nautical miles off Christmas Island. Two hours later, 45 Australian troops boarded the MV Tampa to secure it and to provide humanitarian aid. The next day, the Norwegian Ambassador went onto the vessel, and received a letter signed by "Afghan Refugees now off the coast of Christmas Island", requesting permission to enter Australia, and not to be deprived of "rights of refugees according to International Convention (1951)".

Following unsuccessful attempts to communicate with the rescuees, who remained on the MV Tampa in Australian waters, Mr Vadarlis, a solicitor seeking to offer legal assistance to the rescuees on a pro bono basis, and the Victorian Council of Civil Liberties Inc. ("VCCL") filed separate applications in the Federal Court in Melbourne against the Commonwealth, three of its Ministers, and a departmental officer seeking, amongst other things, orders for the release of the rescuees and to require the Minister to perform the duty they argued was imposed by the Migration Act to bring the rescuees into immigration detention in Australia, so that their claims for asylum could be processed.

Because the two applications raised the same issues, they were listed for urgent hearing together before the Court's duty judge at the time the applications were filed, Justice North. The applications were filed ex parte on Friday evening, and the proceedings were soon converted to a full and final hearing before the Court, which sat over the weekend. On the first day of the hearing, it was announced that the Australian Government had arranged for the rescuees to be transferred to New Zealand and Nauru for initial processing and determination as to whether they were entitled to protection as refugees.

After hearing argument for six days, Justice North reserved his judgment, which he then delivered within a week. His Honour held that Mr Vadarlis and the VCCL did not have standing to bring an application to enforce a public duty, such as the duty that the applicants said fell on the Minister under the Migration Act. That is, Justice North was not satisfied that the applicants had the special interest that the law requires in order for a member of the public to bring proceedings to enforce a public duty. His Honour also held that the rescuees were detained aboard the vessel by the Government's acts, without lawful authority, and made orders for the release of the rescuees onto the Australian mainland (where they would be taken into immigration detention). The orders were stayed until the determination of any appeal by the Full Court, and were not to apply in respect of any of the rescuees who indicated they did not wish to be released and be brought ashore to a place on the mainland of Australia.

Within two days of judgment being handed down, a Full Court was convened to hear an appeal by the Government respondents against the orders for the release of the rescuees. The Government argued that Justice North erred in holding that the executive power of the Commonwealth did not authorise and support the expulsion from Australia of the rescuees and their detention for that purpose, and that the rescuees were not relevantly detained. Mr Vadarlis and the VCCL cross-appealed against the judgment that they lacked standing to enforce the public duties that they alleged were not being fulfilled.

The main issues on appeal were first, whether the Commonwealth's executive power under section 61 of the Constitution allowed the steps that the Commonwealth took to prevent the landing of the rescuees; and second, whether the executive power existed despite the enactment of a scheme for border protection in the Migration Act.

Section 61 of the Constitution vests the executive power of the Commonwealth in the Queen, and provides that the power is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. Under the Constitution, the Parliament is 'sovereign', so that where the Parliament has made a law that regulates the area of operation of the executive power, that law prevails over the executive power.

Section 51(xxvii) of the Constitution provides that the Parliament has power to make laws for the peace, order and good government of the Commonwealth with respect to immigration and emigration. Pursuant to this power, the Parliament enacted the Migration Act, which regulates the entry of non-citizens into Australia by providing for visas to be issued by the Minister for Immigration and his or her Department according to prescribed criteria, and by providing for the mandatory detention of unlawful non-citizens in Australia's 'migration zone'. One category of visa provided for under the Act is a protection visa, which is issued to persons to whom, in the opinion of the Minister, Australia has protection obligations under the United Nations 1951 Refugees Convention.

In the Full Court, a majority (Justices Beaumont and French; Chief Justice Black dissenting) allowed the appeal. The Court unanimously dismissed the cross-appeal.

The majority concluded that the Commonwealth was acting within its executive power under section 61 of the Constitution in the steps it took to prevent the landing of the rescuees. The closure of the Christmas Island port was done under a statutory authority which was not challenged. The majority held that the Migration Act did not abrogate that executive power – the Act's object was to control entry to Australia and (subject to certain, specific provisions, such as those relating to the grant of protection visas) not to confer rights upon non-citizens seeking entry to Australia. Also, nothing done by the Commonwealth, on the face of it, amounted to a breach of Australia's obligations under international law (including Australia's obligations in respect of non-refoulment under Article 33 of the Refugee Convention). Having neither right nor freedom to travel to Australia, the rescuees were not detained, and their freedom was not restricted, by the Commonwealth.

Justice Beaumont added that the Court did not have the power to issue a writ of habeas corpus, although it may make an order "in the nature of habeas corpus". The distinction was important because the solicitor acting for the rescuees, Mr Vadarlis, would need to have standing to obtain such an order, and standing had not been recognised by the Court. However, since the appeal was urgent, Justice Beaumont was prepared to assume (without deciding) that all the essential elements but one (namely, the existence of a relevant substantive cause of action) were established and that it was appropriate for Justice North to order as he did. Justice Beaumont noted that the claim by Mr Vadarlis and the VCCL was aimed at the provisions of the Migration Act but did not, and, in his Honour's view, could not, assert that the rescuees had a legal right at common law to enter Australia. The absence of that claim was, in his Honour's opinion, fatal to the rescuees' case for relief, and no foundation existed for the grant of the common law prerogative writ of habeas corpus compelling the entry of the rescuees into Australia.

Chief Justice Black would have dismissed the appeal. His Honour took the view that whilst the power of a nation state to expel people entering illegally was undoubted, it was a power that derived only from laws made by the Parliament. There was no non-statutory executive power or prerogative authority for the detention of the rescuees, and no source of statutory authority was put forward as justifying any such detention. He would have held that the rescuees were detained by the Commonwealth in a real and practical sense.

Mr Vadarlis' subsequent application for special leave to appeal to the High Court was refused 27 November 2001, on the basis that, the rescuees having been removed to Nauru and New Zealand, there was no longer any present basis for an order for release, or an order that alleged duties under the Migration Act be performed.

(4) Copyright – Whether New South Wales Local Court has jurisdiction to convict and impose penalties under Copyright Act 1968 (Cth)

Ly v Jenkins
(26 November 2001, Justices Moore, Sackville and Kiefel)

This was an appeal from the Local Court of New South Wales. The Local Court had convicted the appellants under section 132(6A) of the *Copyright Act 1968* (Cth) ("Copyright Act") of possessing, for the purposes of sale, a large number of pirated video compact discs. Under section 132(2A) of the Copyright Act, it is an offence for a person to possess, for the purposes of sale, an article if the person knows, or ought reasonably to know, the article is an unlawful copy of a work in which another person has the copyright.

The appellants appealed against the convictions, penalties and costs orders imposed by the Local Court on the grounds that:

- section 132(6A) of the Copyright Act was invalid on the ground that it contravenes section 80 of the Constitution;
- the Local Court lacked jurisdiction to deal with offences against section 132(2A) of the Copyright Act because neither section 39(2) nor section 68(2) of the *Judiciary Act 1903* (Cth) ("Judiciary Act") confer federal jurisdiction on the Local Court to hear and determine a summary prosecution for an offence carrying a maximum term of imprisonment of five years because Local Courts cannot, under State law, impose sentences exceeding two years in respect of summary offences; and
- the orders in respect of costs and expenses (including the preparation of affidavits in the United States) were not authorised by the *Justices Act 1900* (NSW) ("Justices Act") or, in the alternative, the Magistrate's exercise of the discretion conferred by section 81 of that Act had miscarried.

Justice Kiefel, with whom Justices Moore and Sackville agreed, dealt with the appellants' contention that section 132(6A) of the Copyright Act was invalid for contravention of section 80 of the Constitution. They had argued that section 80 provides a guarantee that any offence against a law of the Commonwealth which may be characterised as "serious" is to be tried before a jury, and that section 132(6A) of the Copyright Act was such an offence. Her Honour concluded that, as trial by indictment is not specified by the Copyright Act, section 80 is not brought into operation in this case.

In relation to the second ground of appeal, Justice Sackville, with whom Justices Moore and Kiefel agreed, held that the Local Court had jurisdiction to hear and determine the prosecutions against the appellants for contravening section 132(2A) of the Copyright Act. In reaching this conclusion, his Honour found that:

- the Commonwealth (subject to section 80 of the Constitution) has constitutional power to invest a Local Court with federal jurisdiction in respect of a summary offence created by Commonwealth law, even if the maximum sentence provided by that law exceeds the maximum permitted under state law and even if the latter is to be regarded as a limit on the jurisdiction of the state court.

- section 39 of the Judiciary Act invests "the several Courts of the States" with federal jurisdiction "within the limits of their several jurisdictions, whether such limits are as to locality, subject matter or otherwise". A similar limitation applies to the federal jurisdiction invested in state courts by section 68 of the Judiciary Act.
- whether any relevant limitation in a state court's jurisdiction exists is to be determined by reference to state law. In the present case, there were no New South Wales law or laws which could be said expressly or impliedly to mark out the limits of the jurisdiction of a Local Court to impose a sentence of imprisonment on a person convicted of a summary offence.

The Full Court found that the magistrate's discretion in relation to costs had miscarried as she made no finding as to whether the costs sought were just and reasonable as required by section 81 of the Justices Act.

Justice Moore, with whom Justice Sackville agreed, concluded that section 81 did confer power to make an order concerning the preparation of affidavits in the United States to prove the existence of the intellectual property rights to which the proceedings related, and the costs associated with the investigation of the offences. However, notwithstanding the existence of this power, it was necessary for the magistrate to be satisfied that the award of such costs was just and reasonable.

The Full Court set aside the costs orders made by the magistrate, and dismissed the appeals against the conviction and penalty.

(5) Administrative law – Judicial review of appointment of Chief Magistrate of Northern Territory

North Australian Aboriginal Legal Aid Service Inc v Bradley
(7 December 2001, Justice Weinberg)

The North Australian Aboriginal Legal Aid Service Inc ("NAALAS") sought a declaration that the appointment of Hugh Bradley as Chief Magistrate of the Northern Territory was invalid. NAALAS commenced the proceeding in the Supreme Court of the Northern Territory in which Justice Olney gave summary judgment in favour of the Northern Territory. NAALAS succeeded in an appeal from that decision. The High Court refused special leave, indicating that any consideration of the Northern Territory's arguments should be postponed until after relevant findings of fact had been made at trial. Justice Olney then ordered that the proceeding be transferred from the Supreme Court to this Court.

On 7 December 2001, Justice Weinberg dismissed NAALAS' application on a number of grounds.

The former Chief Magistrate resigned on 20 November 1997, in part at least, as a result of his dissatisfaction with the mandatory sentencing regime in the Northern Territory. After extensive negotiations, Mr Bradley was appointed as Chief Magistrate by the Administrator, on the advice of the Executive Council. A large volume of documents relating to his appointment was produced on discovery by the Northern

Territory. It emerged that concurrently with that appointment, the Government had considered the introduction of contract or fixed term appointments for magistrates.

It became clear that those two processes had been conflated during negotiations with Mr Bradley over his remuneration and allowances. The proposal to introduce contract or fixed term appointments, and the belief that Mr Bradley would be appointed on that basis, attracted much criticism from within the legal community in Darwin and from other sources.

NAALAS directed its first allegation at the Northern Territory alone, in arguing that Mr Bradley had been appointed for one or more improper or extraneous purposes. It alleged that the Northern Territory had, by negotiating a two year Special Determination regarding Mr Bradley's remuneration and allowances, improperly secured what was in effect a fixed term appointment, thereby subverting the requirement in the *Magistrates Act 1977* (NT) ("the Magistrates Act*")* that magistrates be appointed to the age of 65 years. It contended that the appointment defeated an implicit requirement of that Act that judicial independence be protected. This put Mr Bradley in the position of being beholden to the Government for his future remuneration.

Secondly, NAALAS contended that the special remuneration package negotiated with Mr Bradley was *ultra vires* the powers conferred by the Magistrates Act, because it applied for a period of two years only, limited to expire before he reached the age of 65, and made no provision for his remuneration and allowances at the end of that two year period.

Thirdly, NAALAS argued that if, contrary to its allegations of improper and extraneous purpose, and its claim of *ultra vires*, the Magistrates Act nonetheless authorised Mr Bradley's appointment, a number of sections of that Act violated the protection afforded by Chapter III of the Constitution to the principles of judicial independence.

In addition to denying each allegation made by NAALAS, the Northern Territory challenged its standing to bring and maintain the proceeding, and both respondents contended that the allegations of improper or extraneous purpose were not justiciable.

Justice Weinberg concluded that, having regard to NAALAS' status, and to the functions which it performs, it had a sufficient connection with the subject matter of the litigation to amount to a "special interest". His Honour relied upon the evidence which disclosed that NAALAS represented approximately 2,000 indigenous people each year in courts of summary jurisdiction. It had responsibilities towards Aboriginal people, and the Aboriginal community generally, which extended beyond the provision of legal representation. He said that it occupied a pivotal role in the administration of justice in the Northern Territory.

Justice Weinberg also concluded that, given the nature and gravity of the allegations, and their potential to bring the administration of justice in the Northern Territory into disrepute, NAALAS' claims of improper or extraneous purpose were justiciable.
His Honour also held that the inference of improper or extraneous purpose for which NAALAS contended was open on the primary facts. That inference could more

readily be drawn because of the failure of the Northern Territory to call a number of persons with knowledge of the circumstances leading to Mr Bradley's appointment. However, it was held that NAALAS had failed to discharge the onus which rested upon it to prove the alleged purpose. His Honour said that the fact that an improper or extraneous purpose may have driven the Government's earlier proposals to introduce contract or fixed term appointments for magistrates, and possibly the initial negotiations regarding Mr Bradley's appointment as well, did not, on the evidence, lead to the conclusion that any such purpose subsisted, or that it operated upon the impugned decision.

Justice Weinberg determined that NAALAS' allegation that Mr Bradley's appointment was *ultra vires* failed. His Honour observed that the relevant provisions of the Magistrates Act had to be given their ordinary and natural meaning, and that those provisions did not demonstrate a legislative intent to secure judicial independence of the kind for which NAALAS contended.

Finally, Justice Weinberg observed that he was bound by the current authorities to find that the provisions of the Magistrates Act were not unconstitutional. His Honour held that the courts of the Northern Territory were not federal courts. Those courts did not exercise the judicial power of the Commonwealth. Therefore, the requirements of security of tenure and undiminished remuneration contained in section 72 of the Constitution did not apply to those courts. No implication could be drawn from Chapter III of the Constitution, or the Constitution taken as a whole, to support NAALAS' claim that the existence of the Special Determination, if authorised by the Magistrates Act, rendered certain of its provisions constitutionally invalid.

The decision was the subject of an appeal to the Full Court of the Federal Court, which reserved its decision on 29 May 2002.

(6) Discrimination – Refusal to register female applicant wishing to engage in boxing contest
Ferneley v Boxing Authority of NSW
(10 December 2001, Justice Wilcox)

The issue in this case was whether the New South Wales *Boxing and Wrestling Control Act 1986* ("Boxing Act") could prohibit female boxers from registering with the Boxing Authority, given the provisions of the Commonwealth *Sex Discrimination Act 1984* ("the Act"). Under section 109 of the Constitution, the provision of any State legislation is invalidated to the extent that it is inconsistent with a Commonwealth Act.

More specifically, the applicant sought relief, under section 22 of the Act, from the prohibition under the Boxing Act, and the decision by the Boxing Authority under section 8(1) of the Boxing Act to refuse her application for registration as a kickboxer. Section 8(1) provides that a "male person of or above the age of 18 years may make an application to the Authority to be registered as a boxer of a prescribed class".

On 2 August 2001, Ms Ferneley made a complaint to the President of the Human Rights and Equal Opportunity Commission against the State of New South Wales in relation to the terms of the Boxing Act, and against the Boxing Authority for its rejection of her application. The President's delegate rejected the complaint against the State of New South Wales on the ground that the making and existence of State legislation is not an area covered by the Act. The delegate rejected the complaint against the Boxing Authority on the basis that the Authority was acting in direct compliance with the Boxing Act when it refused to register the applicant as a boxer.

In her application to the Federal Court, the applicant alleged unlawful discrimination by the State of New South Wales and the Boxing Authority. She sought an order that section 8(1) of the Boxing Act is inoperative on the ground that it is inconsistent with section 22 of the Act.

Section 18 of the Act, which prohibits discrimination on the basis of sex for persons who provide goods or services or make facilities available, would have provided a basis for relief for Ms Ferneley, were it applicable to her case. However, section 18 applies only to the Crown in right of the Commonwealth, and not to the State equivalent, in this case, the NSW Boxing Authority. It was therefore not available to the applicant in these proceedings.

However, section 22 of the Act does apply to the Crown in right of a State. Counsel for the applicant submitted that this provision operated to prohibit discrimination in the provision of "services", which were widely defined in section 4 of the Act. It was submitted that the applicant contravened section 22 by failing to provide the "service" of considering the application on its merits.

Justice Wilcox accepted that the Boxing Authority's failure to consider the application did constitute a failure to provide a "service". However, he agreed with counsel for the respondent that section 22 had to be read in the context of the Act. As a matter of statutory interpretation, where there is inconsistency between the general provision of a statute and provisions dealing with a particular subject matter, the latter must prevail. In this case, section 18 is a special provision concerning sex discrimination by authorities empowered to confer an authorization or qualification needed for engaging in an occupation. The general words of section 22, which might otherwise have been thought wide enough to cover such a case, must therefore be read down to the extent necessary to exclude cases covered by section 18.

His Honour also made certain statements in respect of the operation of section 42 of the Act, which provided legal immunity from the operation of section 22 (among others) if the sport in question was an activity in which the strength, stamina or physique of competitors is relevant. Justice Wilcox agreed with the applicant's submission that section 42 concerned only mixed-sex sporting activities and, accordingly, would not have applied to the applicant's case, had it been successful under section 22.

In concluding, Justice Wilcox stressed that his decision did not turn on the desirability or undesirability of permitting female boxing contests, but only on the proper interpretation of the Act. In this regard, his Honour added that, if the result were thought to be unsatisfactory, it could be rectified by either the New South Wales Parliament amending section 8 of the Boxing Act, or the Commonwealth Parliament amending the Sex Discrimination Act to make section 18 bind the Crown in the right of a State.

(7) Trade Practices – Unconscionable conduct according to the unwritten law

Australian Competition and Consumer Commission v Samton Holdings
(6 February 2002, Justices Gray, French and Stone)

Section 51AA of the *Trade Practices Act 1974* (Cth) ("the Act") prohibits unconscionable conduct within the meaning of the common law. In this case the Australian Competition and Consumer Commission ("ACCC"), brought an action against a landlord alleging that the conduct of the landlord contravened section 51AA of the Act. The Full Court had to consider whether it was unconscionable to require the lessee, who had failed to exercise an option to extend the term of its lease, to pay $70,000 for the assignment of a lease for the same extended term.

Facts

On 26 February 1997, Executive Bloodstock Pty Ltd ("Executive Bloodstock") purchased a "lunch bar" business for $205,000. The lease of the business premises was due to expire on 2 June 1997 but the lease contained an option to renew for a further period of seven years. According to its terms the lessee was required to give written notice of the exercise of the option for renewal no later than 2 March 1997. However, the option to renew the lease was not exercised until 18 March 1997. The lessors then demanded payment of $70,000 in exchange for a new seven-year lease and Executive Bloodstock agreed to this arrangement. The business only had been purchased and the extension of the lease, for a seven-year term, would have cost nothing if the option had been exercised prior to 2 March 1997. The $70,000 payment had to be structured in such a way as to avoid contravention of key money legislation.

Justice Carr found that Executive Bloodstock were in a situation of special disadvantage, the question to be considered was whether the imposition of the payment for a new lease was unconscionable. His Honour regarded it as relevant that those who controlled Executive Bloodstock were commercially experienced and in the circumstances had merely negotiated a commercial settlement that was in the company's best interests. His Honour also counted it as relevant that it was Executive Bloodstock's own neglect, by not exercising the option, which brought about the situation.

Justice Carr held that while the conduct of the lessors was avaricious and opportunistic and they had struck a very hard bargain, it was not unconscionable and it fell short, though not far short, of being the sort of conduct which equity would regard as unconscionable.

The grounds of appeal may be summarised as follows, His Honour should have considered or given more weight to certain factors and should not have taken into account irrelevant matters. These grounds questioned the evaluation made by the trial judge that the conduct of the lessor was not unconscionable within the meaning of section 51AA of the Act. From the outset the Full Court stated that it would give weight to the evaluative judgement of the trial judge, who had the benefit of being closely apprised of the evidence.

The Full Court agreed with the trial judge that while fair-minded people would condemn the conduct of the lessors, it was not unconscionable.

Decision

The Full Court found that His Honour's approach to the content of the unwritten law was not erroneous, and that he appropriately took into account how payment of the money was structured when characterising the lessor's conduct. Further, the fact that Executive Bloodstock was in a position of special weakness because of its inaction was not a basis for a claim of unconscionable conduct.

The Full Court rejected the argument that Executive Bloodstock suffered a special disadvantage. The Court found that commercial vulnerability might be a serious disadvantage but it could not be characterised as a "special disadvantage". The Full Court noted that characterisation of a disadvantage as "special" involves recognition that it would be unconscionable knowingly to deal with the disadvantaged person without regard to the disability. The Full Court stated that it cannot be the case that a tenant, whose careless failure to exercise an option to renew a lease results in economic disadvantage, would be entitled to a renewal of the term.

What constitutes section 51AA unconscionable conduct?

The Full Court accepted that section 51AA of the Act may have the effect of invoking the equitable concept of unconscionability in commercial situations to which it had not previously been applied. Further, as the common law develops the concept of unconscionability via judicial decision-making, the operation of section 51AA of the Act may be expanded.

The Full Court approved four classes of case, which may be said to be unconscionable at common law: (i) exploitation of vulnerability or weakness; (ii) abuse of position of trust or confidence; (iii) insistence upon rights in circumstances which make that harsh or oppressive; and (iv) inequitable denial of legal obligations.

These classes are supported by three standards. (i) That those in positions of strength or influence should not take advantage of another's relative weakness. (ii) That people should not, by appeal to strict legal rights, cause hardship to others by violating their reasonable expectations. (iii) That those in fiduciary positions should act only in the interests of those to whom those fiduciary duties are owed.

Where the conduct is deemed unconscionable, equity will: (i) set aside a contract or disposition resulting from the knowing exploitation by one party of the special disadvantage of another; (ii) set aside as against third parties a transaction entered into as the result of the defective comprehension by a party to the transaction, the influence of another and the want of any independent explanation to the complaining party; (iii) prevent a party from exercising a legal right in a way that involves unconscionable departure from a representation relied upon by another to his or her detriment; (iv) relieve against forfeiture and penalty; and (v) rescind contracts entered into under the influence of unilateral mistake.

(8) Corporations – Whether appropriate for Court to give directions in respect of a purely commercial or business decision

In the matter of Ansett Australia Limited and Korda
(12 February 2002, Justice Goldberg)

The administrators of the Ansett group of companies sought an order under section 447D of the *Corporations Act 2001* (Cth) ("the Act") that the Court direct that the administrators could properly and justifiably continue to operate the Ansett mainline airline business ("the business") for a further period after 31 January 2002 ending no later than 28 February 2002.

At the time of the application, the sale of the business as a going concern to Tesna Holdings Pty Ltd ("Tesna"), which was intended to be completed by 31 January 2002, had not occurred because a number of conditions precedent to the sale agreement involving third parties had not yet been satisfied. The administrators decided to continue to operate the business for a further period of time than had previously been agreed in order to facilitate the sale. The administrators acknowledged that even with this extension there was no certainty that the sale would be finalised given the involvement of third parties in satisfying the conditions precedent to the sale agreement.

The administrators believed that it was in the interests of the creditors of the Ansett group that the sale to Tesna be completed, and they took the view that continuing to operate the business would help achieve that result. The administrators therefore made a commercial decision to continue operating the business for a period of up to 28 February 2002, notwithstanding the fact that during that period the Ansett group was estimated to incur losses in the order of $6 million per week.

Justice Goldberg concluded that, in substance, the direction sought by the administrators was a direction that the Court approve of their commercial decision. No issue as to the power of the administrators to make that decision was raised, it was clearly within their power to make the decision. No issue was raised as to the propriety or reasonableness of the decision, nor was any issue raised which required the Court to make a judgment on a legal issue. Justice Goldberg held that, as a matter of principle, it was not appropriate for a court to give a direction approving of a business decision made by administrators where no issue of power, or the propriety or reasonableness of the decision, or other legal issue requiring the Court to make a judgment, arose for consideration.

The Australian Securities and Investments Commission had submitted that it would be appropriate for the Court to give a direction pursuant to Part 5.3A of the Act that the administrators have power to decide whether or not to continue trading the business at a loss. Justice Goldberg declined to make such a direction given that the administrators' power to make the decision they made was not in issue. Part 5.3A of the Act gave the administrators the power to decide whether or not to continue trading the business at a loss.

The Court therefore declined to make the direction sought by the administrators, taking the view that to do so would be doing no more than giving the Court's imprimatur to a business decision made by the administrators in circumstances where no issue as to power, propriety, reasonableness, or requiring the exercise of judgment on a legal issue arose. The application by the administrators was dismissed.

(9) Administrative law – Operation of privative clause

NAAX v Minister for Immigration and Multicultural Affairs
(15 March 2002, Justice Gyles)

This was an application pursuant to section 39B of the Judiciary Act for review of a decision of the Refugee Review Tribunal ("RRT"). The application was made after the October 2001 amendments to the Migration Act which substantially altered the provisions for judicial review of decisions made under that Act.

Short Facts

The applicants, husband and wife, were Burmese citizens who arrived in Australia with their child in November 1995 on a valid visitors' visa. In early 1996, they each lodged applications for protection visas. These were refused by a delegate of the Minister for Immigration in April 1998, and applications were made to the RRT to review the decision of the delegate. After a lengthy delay, the Tribunal member delivered his decision on 2 October 2001, confirming the decision to refuse protection visas.

In forming an unfavourable opinion as to the credibility of the applicants, the Tribunal member took into account, adversely, certain undisclosed country information, geographic information and the member's own military experience.

The applicants argued that the use by the Tribunal of undisclosed material denied them procedural fairness and constituted a breach of the rules of natural justice. This, it was submitted, amounted to jurisdictional error founding relief under the Judiciary Act which was not precluded by the operation of the privative clause contained in section 474 of the Migration Act as amended.

Before considering whether relief ought to be granted pursuant to section 39B of the Judiciary Act, Justice Gyles looked first to the questions of the operation and validity of section 474 of the Migration Act.

Operation of section 474 of the Migration Act

It was submitted by the applicants that natural justice is a fetter on the lawful exercise of a power and, unless it has been expressly excluded by the legislature, obedience to its requirements is a necessary and indispensable prerequisite to the making of a valid decision. For the Minister, the Solicitor General argued that the construction of privative clauses laid down by Justice Dixon in *R v Hickman; Ex parte Fox & Clinton*, represents an exhaustive statement of the exceptions to the operation of such a clause. He further submitted that neither procedural fairness nor natural justice are referred to by Justice Dixon in the *Hickman* exceptions.

Justice Gyles held that the *Hickman* exceptions and the High Court authority which has followed them are exhaustive and authoritative and do not include breach of an implied duty to afford procedural fairness by supplying information going beyond the express requirements in Part 7 of the Migration Act. His Honour accepted that the *Hickman* exceptions establish a distinction between two categories of jurisdictional errors, and define those jurisdictional errors which will found the prerogative writs notwithstanding the existence of a privative clause.

Constitutional Invalidity

It was further argued by the applicants that section 474 invalidly vests part of the judicial power of the Commonwealth in bodies which are not courts in terms of section 71 of the Constitution. By making the Tribunal the final arbiter on questions of law, it was said, section 474 vests the conclusive determination of current rights in a non-judicial body. Justice Gyles however, relying on the decision of the Full Court of the Federal Court in *SZ v Minister for Immigration & Multicultural Affairs*, held that the decision to grant or refuse a protection visa is a determination only as to whether a new right should be created, and is therefore not properly to be construed as an exercise of judicial power. His Honour did not accept the argument put by the applicants that *SZ* was decided before the 2001 amendments and therefore should not be applied.

The constitutional validity of section 474 was also attacked by the applicants on the ground that if that section was to be construed in the manner his Honour held, then it amounted to a de facto withdrawal of jurisdiction from the High Court, contrary to the Constitution. His Honour refused this ground stating that there is no constitutional inhibition upon the legislature defining the procedure of a tribunal so as to exclude all the rules of natural justice that might otherwise be implied.

Breach of Rules of Natural Justice?

Notwithstanding his findings as to the validity and operation of section 474, Justice Gyles considered whether, in any event, there had been a denial of natural justice in this case.

His Honour considered it commonplace that a Tribunal member should consult a broad range of information pertinent to the claims of applicants for protection visas. The possibility of presenting the totality of that information to the applicants and allowing a sufficient time for reply is, he stated, problematic in both in theory and practice. His Honour held that a hearing before the Tribunal is not an adversarial proceeding, and the role of the Tribunal member is not one of a contradictor.

It was the applicant's submission that the High Court's decision in *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* stands for the proposition that information must be given by the Minister to an applicant for a visa even if that information is not specifically about that applicant or another person and is not just about a class of persons to which the applicant or another person belongs pursuant to a duty to afford natural justice. Justice Gyles disagreed, finding that the gravamen of that decision was that the applicants should have been informed of the substance of a possibly adverse issue. Moreover his Honour held that the decision in *Miah* did not travel beyond the facts in that case – a new event arising after the last communication between the delegate and the applicant. His Honour therefore found that there was no breach of the rules of natural justice in this case.

The application was dismissed.

The decision is the subject of an appeal to the Full Court of the Federal Court.

(10) Corporations – Takeovers – Acquisition of shares

Edensor Nominees Pty Ltd v Australian Securities and Investments Commission
(20 March 2002, Justices Hill, Sundberg and Mansfield)

Background

This was an appeal by Edensor Nominees Pty Ltd ("Edensor") from a decision at first instance finding a contravention of section 615 of the *Corporations Law* ("the Law") in relation to a takeover offer for Great Central Mines Ltd ("Great Central"). It was also held that there were breaches of section 52 of the *Trade Practices Act 1974* (Cth), section 12DA of the *Australian Securities and Investments Commission Act 1989* (Cth) and section 995(2)(b)(iii) of the Law as a necessary consequence of the contravention of section 615 of the Law.

The second respondent, Yandal Gold Pty Ltd ("Yandal Gold"), was a wholly owned subsidiary of Yandal Gold Holdings Pty Ltd ("Yandal Gold Holdings"), the third respondent. The shares in Yandal Gold Holdings were owned as to 50.1 per cent by the appellant, Edensor, who held the shares as trustee of a discretionary trust for the benefit of the Gutnick family, and 49.9 per cent by the sixth respondent Normandy Consolidated Gold Holdings Pty Ltd ("Normandy Consolidated Gold"). Normandy Mining Limited ("Normandy"), Normandy Mining Finance Limited ("Normandy Mining Finance"), Normandy Consolidated Gold and Normandy Mining Holdings Pty Ltd ("Normandy Mining Holdings") were the fourth to seventh respondents. The second to seventh respondents did not appeal and were joined as respondents to the appeal.

The second to seventh respondents were found to have entered into a shareholders agreement in relation to a takeover offer for Great Central. As a result of the agreement, all parties to it became associates of the others and entitled to relevant interests in the shares in Great Central Mines held by the other parties. The entitlement of Edensor to a relevant interest in great Central was increased from 12.56 per cent to 40.37 per cent and the entitlement of the Normandy Group from 27.81 per cent to 40.37 per cent. It was found also that Edensor had agreed with the Normandy Group that neither would accept the takeover offers ("the non-acceptance agreement"), and would retain their shares ("the retention agreement"), for the purposes of the takeover bid to enable Yandal Gold to reach the 90 per cent threshold and therefore entitle it to compulsorily acquire the remaining shares in Great Central Mines under section 701 of the Law.

Orders were made for the accepting shareholders to be entitled to withdraw and avoid the offers. Those shareholders whose shares had been compulsorily acquired would be entitled to give notice of avoidance and return the consideration received. Yandal Gold, Edensor and Normandy Mining Holders were to be restrained from giving effect to the agreements. Edensor was ordered to pay the Australian Securities and Investments Commission $28.5 million for distribution pro rata to the shareholders in Great Central who had accepted the offers or whose shares had been acquired.

Issues

The Full Court considered the following issues:

(1) whether there was a breach of section 615 of the Law by the shareholders agreement and the retention agreement not to accept the takeover offer and retain shares to enable compulsory acquisition.

(2) whether the bid structure agreement conferred power on the parties to it to exercise control over the disposal of the shares held in Great Central by Normandy Mining Holdings and Edensor. Whether acquisition of a relevant interest extends to a deemed relevant interest or is limited to an actual relevant interest under section 33 of the Law.

(3) The remedies available under section 737 of the Law, particularly the power to make a compensatory order to mitigate the detriment to shareholders who suffered as a result of conduct contravening section 615.

Decision

The appeal was dismissed and the findings of the primary judge upheld.

(1) It was held that the primary judge correctly found that the non-acceptance and retention agreements were in breach of section 615 of the Law. The effect of the shareholders agreement was that the respondents at first instance became entitled to a relevant interest in the shares in Great Central held by Edensor and Normandy Mining Holdings. The agreement provided for the participation of Edensor and the Normandy Group in many matters, including the conduct of the proposed bid, the shareholding structure and membership of the boards of directors of the Yandal companies, dividend policies, the composition and voting of the

board of directors of Great Central, and the financing of the bid by the Chase Manhattan bank loan facility.

(2) Edensor, Normandy Consolidated Gold, Yandal Gold Holdings and Yandal Gold were deemed by reason of the shareholders agreement and section 33 of the Law to have relevant interests which were acquired in contravention of section 615. The power to exercise control may be informal, indirect and unenforceable, and must involve "*some* true or actual measure of control" over the disposal of the shares and not a "minor, peripheral, or merely hypothetical, theoretical or notional" control. In this case, the two agreements together involved some true or actual measure of control over the disposal of shares, despite the control being indirect and exercisable by means of unenforceable agreements, because the assumption was that the parties would act in accordance with, rather than contrary to, these agreements.

(3) It was held that the primary judge did not impose a fine or penalty upon Edensor in making the order for disgorgement of $28.5 million. This order was made strictly in accordance with section 737(1) of the Law and was just in all the circumstances of the case. The compensation was to remedy the detriment to shareholders of a low share price by reason of Edensor's support for the bid and not to punish Edensor for its complicity. In making the appropriate remedial order it was correct to deprive Edensor of the benefit it received under the shareholders agreement of its 'carried interest' (that was the price Normandy was prepared to pay to secure Edensor's support for the takeover bid) in the overall transaction. The takeover bid was made in terms which secured advantages to the parties, by contravention of section 615. The takeover was secured at a price attractive to the parties, ensuring that a rival bid would be more unlikely and the takeover market for shares in Great Central would be less competitive. The shareholders were ignorant of the shareholders agreement and the benefits to Edensor.

(11) Fisheries – grant of fishing permit – effect of promise made on sale of Northern Prawn Fishery permits under voluntary adjustment scheme

Latitude Fisheries Pty Ltd v Australian Fisheries Management Authority
(10 April 2002, Justice RD Nicholson)

Latitude Fisheries ("Latitude") applied to the Australian Fisheries Management Authority ("AFMA") for a fishing permit to take tuna in Australian fishing zone areas identified as the Southern and Western Tuna and Bullfinch Fisheries in November 1998. A delegate of AFMA refused the application in January 1999. The decision of the delegate was affirmed by the Administrative Appeals Tribunal in November 2000, and Latitude "appealed" that decision in the Federal Court.

The foundation for the application for the fishing permit lay in an undertaking purported to be given in 1989 by the predecessor Commonwealth department, the Australian Fishing Service ("AFS"), that Latitude was entitled to a Commonwealth

Fishing Boat Licence (“CFBL”) – a kind which had ceased to be issued due to changes in the legislation.

Critical to Latitude’s case was a letter written by a senior officer of AFS to Latitude dated 16 January 1989, advising that, should Latitude sell two Class B and 535 Class A Northern Prawn Fishery (“NPF”) units under the NPF voluntary adjustment scheme, AFS would allow Latitude to retain the right to an unrestricted CFBL. Latitude contended that it finalised the sale of the units in about August 1989 in reliance upon this letter.

The other significant circumstance to the setting of the appeal was that the relevant legislation affecting the grant of the permit applied for by Latitude changed after the date on which the letter of 16 January 1989 was written. *The Fisheries Management Act 1991* (Cth) (“the Management Act”) replaced the *Fisheries Act 1952* (Cth). Under the 1952 legislation the Commonwealth issued CFBLs. Section 32 of the substituted 1991 legislation empowers the Commonwealth to issue fishing permits, and section 3 set out the objectives which must be pursued by the Minister and by AFMA. The AFMA was established by complementary legislation, the *Fisheries Administration Act 1991* (Cth). Section 6 enacted its objectives which included implementing effective cost-effective fisheries management “on behalf of the Commonwealth”.

His Honour Justice RD Nicholson held that each of the ten grounds of appeal should be dismissed. In respect of Latitude's arguments in relation to four of the grounds of appeal, his Honour accepted the contention of the respondent that the complaint was about how the Tribunal determined the merits of the application, rather than failing to take into account relevant considerations as properly determined. His Honour also found that ground 2 (“misconstruction of promise”) in substance sought to contest the findings of fact made by the Tribunal. In relation to ground 3 (“financial detriment”) his Honour found that the Tribunal was entitled to take the approach it did in exercising its fact finding powers. Ground 4 (“error of law in drawing inference of fact”) was not upheld because his Honour found the Tribunal had further evidence upon which it was entitled to act. In ground 6 (“error of law by application of incorrect test”) the applicant contended that a correct test would give effect to the view that a policy, adopted by a bureaucrat in order to structure a broad discretionary power, is merely a relevant consideration to be taken into account by the Tribunal, and that public interest considerations may require the honouring of an undertaking rather than the breaking of it (*R v Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association* per Lord Denning). It was said that the Tribunal had applied the test of determining whether the public interest would not be served, nor confidence in consistent application of established government policy upheld, by departing from the current practice and policy of the respondent in granting a fishing permit. Justice Nicholson held the tribunal applied the correct test in deciding whether the decision to grant the fishing permit was the correct or preferable decision in all the circumstances. Ground 10 (“error of law in construction of statute”) was not upheld. The objectives of AFMA set out in section 3 of the Management Act were held open to be given varying degrees of weight or emphasis, and the weight to be assigned to a particular factor is a matter for the decision-maker.

Ground 8 (“error of law in Tribunal’s rejection of application of estoppel”) raised questions in an area of the law that has been infrequently visited in recent years. The basic issue was whether, or under which circumstances, the law recognises an estoppel sourced in a representation that may interfere with the exercise of a statutory power, or the performance of a statutory duty, by an executive body. AFMA contended that the basis for this rule is that a public authority cannot preclude itself from exercising important discretionary powers or performing public duties by incompatible contractual or other undertakings. Justice Nicholson held that any doctrine of estoppel in the context of the exercise of discretionary power in section 32 of the Management Act would threaten to undermine the doctrine of *ultra vires* by enabling public authorities to extend their powers both *de facto* and *de jure* by making representations beyond power, which they would then be estopped from denying (*Minister for Immigration, Local Government & Ethnic Affairs v Kurtovic* per Justice Gummow). Even if the element of *ultra vires* were not present, the effect of the estoppel would be to bind the exercise of the statutory discretion in an impermissible way (*Haoucher v Minister for Immigration and Ethnic Affairs* per Justice McHugh). In any case the submissions urged the Court to accept the respondent was bound to issue a fishing permit on the basis of a promise made by a different entity, about a different right, when a different legislative scheme applied.

(12) Intellectual property – Subsistence and infringement of copyright in telephone books

Desktop Marketing Systems v Telstra
(15 May 2002, Chief Justice Black, Justices Lindgren and Sackville)

The Copyright Act confers property rights (copyright) in “original literary” works of qualified authors that are unpublished, or that were first published in Australia. These property rights include the right to reproduce the literary works in material form.

Telstra published, on an annual basis, white pages telephone directories and yellow pages telephone directories. The directories integrated alphabetically the names, addresses and telephone numbers of all telephone subscribers in a geographic area. The headings used in the yellow pages directories were taken from “headings books” in which business categories chosen by Telstra for assigning yellow pages listings are listed alphabetically and cross-referenced. Telstra reviewed the business categories used in the headings books each year.

Telstra claimed that it held copyright in the white pages and yellow pages directories, and headings books. It alleged that the copyright had been infringed by a company called Desktop Marketing, which used Telstra’s listings data to produce three CD-Rom software products for sale to marketing professionals. Desktop Marketing conceded that it had contracted a data-entry firm to copy the listings from the white pages and yellow pages to produce the primary data used in the “CD Phone Directory”, “Phonedisk” and “Marketing Pro”.

The case raised the question of whether or not Australian law confers copyright on a compilation of data – in this case the subscriber details found in the white pages and yellow pages – where the author does little by way of selecting or arranging the data in the compilation, but expends a great deal of labour and expense in producing the compilation. The question arises because copyright is only conferred on “original literary” works, and there was a dispute between the parties about whether originality

– as that term has been interpreted by the courts - requires some mental activity, such as in selecting or arranging data.

In 1991 the Supreme Court of the United States decided in *Feist Publications Inc v Rural Telephone Service Co Inc* that raw facts are incapable of attracting copyright in circumstances where those facts are merely collected and mechanically listed alphabetically. But this was the first time that the question had arisen in a case to be determined under Australian law.

At first instance, and before proceeding to determine subsidiary questions, Justice Finkelstein held that Telstra had copyright in the white pages, yellow pages and headings books, and that Desktop Marketing had infringed that copyright.

The Full Court dismissed the appeal by Desktop Marketing with costs.

On the question of 'originality', the Court held that copyright cases decided in the English and Australian courts strongly suggested that the labour and expense of collecting, verifying, recording and assembling data may establish originality. Originality was created by the authorship of the compilation as a whole, and it was unnecessary for the work to require 'inventiveness' or a 'creative spark' to convey a significance of its own. In the present case, Telstra expended substantial labour in the collection, recording and assembling which was sufficient to constitute originality and thus vest copyright in the work as a whole.

A second question raised by the case was whether Desktop Marketing had infringed the Telstra's copyright by taking a 'substantial part' of the original work. This question arose because Australian copyright law only gives the author of a copyright work the right to prevent people copying a substantial part of the original work. So, for example, where the originality of a work lies in the arrangement or selection, a person may generally copy the data as long as he or she doesn't also take the original arrangement or selection. Where the originality lies in the labour and expense of compiling the data, Telstra argued that taking the data itself infringes the copyright. Desktop Marketing argued that if Telstra's argument were accepted, this would have the effect of conferring copyright in the primary data, which is inconsistent with the principle that copyright does not exist in facts, which are not 'works' of an 'author'.

On the question of infringement, the Court held that where copyright is attracted by reason of labour and expense in compilation of factual information and not by the form of the compilation, a finding of infringement for reproduction need not require sufficient objective resemblance. The original aspect of Telstra's directories was the labour required to compile and record the factual information. Thus Desktop Marketing's copying of the data was the key ingredient in infringement. Desktop had infringed the copyright by copying a substantial part of the details compiled through Telstra's labour and expense.

The decision is the subject of an application to the High Court for special leave to appeal.

Defence Force Discipline Tribunal

[x]– the Appellant appealed to the Tribunal from his conviction by a Defence Force Magistrate on a charge of ill-treatment of an inferior contrary to the *Defence Force Discipline Act 1982*. The charge arose out of an incident which occurred in a jungle warfare training exercise involving infantrymen of the Regular Army. In the course of the exercise the Appellant "captured" a junior officer who had been in command of an "enemy party" and subjected that officer to an interrogation for a substantial number of hours. During the interrogation a pillow case was placed over the head of the junior officer, adhesive tape was placed over the pillow case and around the head and over the eyes of the junior officer, the wrists of the junior officer were bound, the junior officer was kept in a standing position for approximately three hours and the junior officer was subjected to a loud and aggressive interrogation during which a number of threats of physical harm were made. The junior officer, however, did not suffer any injury of significant nature, a Medical Corps non-commissioned officer was present with instructions to ensure that the junior officer was not to suffer distress or have any problems and the junior officer was provided with water throughout the day. In allowing the appeal and quashing the conviction the Tribunal found that an assessment of whether conduct is ill-treatment within the meaning *Defence Force Discipline Act 1982* requires an objective consideration of all the circumstances, particularly the military environment and consideration of whether the conduct was:

- likely to result in the person holding inferior rank suffering physical or mental ill effects of more than a transient nature;
- had a purpose related to the proper functioning of the armed forces; and
- cruel, vindictive, discriminatory or humiliating.

The Tribunal found that on the evidence it was not open for the Defence Force Magistrate to find that the conduct of the Appellant amounted to ill-treatment within the meaning of the Act and that the Defence Force Magistrate could not have been satisfied beyond reasonable doubt that the Appellant intended to cause ill-treatment or was recklessly indifferent to whether he was causing ill-treatment, an essential element of the offence in question.