APPENDIX 7

SUMMARY OF DECISIONS OF INTEREST

Environment – Statutory and Treaty Interpretation – Civil penalties

Greentree v Minister for the Environment and Heritage
(13 July 2005, Justices Kiefel, Weinberg and Edmonds)

This was an appeal from the judgment in *Greentree v Minister for the Environment and Heritage (No 2)* and *Greentree v Minister for the Environment and Heritage (No 3)* where orders were made restraining Mr Ronald Greentree and the company he controlled, AUEN Grain Pty Ltd, from carrying out activities, including farming activities, in connection with a portion of the declared wetlands known as the Rasmar Gwydir wetlands. Mr Greentree was ordered to pay a pecuniary penalty to the Commonwealth of $150,000 and AUEN Grain pay a pecuniary penalty of $300,000. Both appellants were also required to undertake remedial works on the property, specifically tree planting in the wetlands.

The appellants appealed on the grounds that the area of land which led to their prosecution was not a 'declared Ramsar wetland' for the purposes of section 17(1) of the *Environment Protection Biodiversity and Conservation Act 1999* (Cth) (EPBC Act). Section 17(1) provides that a 'wetland or part of a wetland, designated by the Commonwealth under Article 2 of the Ramsar Convention' is a 'declared Ramsar wetland'. Article 2 of the Convention requires that 'the boundaries of each wetland shall be precisely described and also delimited on a map'.

It was submitted by the appellants that the site in question had not been designated in accordance within the meaning of section 17(1) of the EPBC Act, because no precise description had been given of the boundaries and it was not delimited on a map.

The Full Court held that the section did not require precision in description. That part of Article 2 of the Convention which did require precision was not imported into the section. It did borrow a phrase which included the word 'designated'. Its meaning was determined by reference to principles of treaty interpretation. Its purposes did not require precision of description. The obligation the Article sought to impose on Contracting States was not intended as a precondition to listing under the Convention. The Full Court also had regard to Article 31(3)(b) of the Vienna Convention, which permits reference to the subsequent practices of contracting parties. The obligation to provide precise information was regarded by them as something to be attended to as soon as possible and not as affecting the status of a listing or designation.

The Full Court upheld the finding that there had been a significant impact on the ecological character of the site. The removal of timber and trees had destroyed an integral component of the habitat for waterbirds and caused an imbalance of the soil. It considered factors relevant to pecuniary penalty and upheld the penalty imposed.

The appeal was dismissed with costs.

Bankruptcy – whether wife competent to bring contravention proceedings against husband for failing to pay to her monies ordered by the Family Court to be paid to her, the husband having presented his own bankruptcy petition before the contravention proceedings commenced

Melnik v Melnik
(16 August 2005, Justices Spender, Hill and Finn)

In this appeal the Full Court decided that a wife was not competent to bring contravention proceedings against her husband for failing to pay to her monies ordered by the Family Court to be paid to her, the husband having presented his own bankruptcy petition before the contravention proceedings commenced.

The case turned on the effect of sections 58(3) and 60(1) of the *Bankruptcy Act 1966* (Cth) on contravention proceedings under section 112AD of the *Family Law Act 1975* (Cth).

The Family Court had ordered the husband to pay $79,000 to the wife. He failed to comply with that order. He then presented his own petition for bankruptcy. The wife brought contravention proceedings under section 112AD of the Family Law Act. The Family Court held that the husband had contravened a final order of the Court to pay money, without reasonable excuse. Before the hearing in the Family Court to fix the husband's penalty, the husband applied, unsuccessfully, to the Federal Magistrates Court to enjoin the wife from proceeding with the contravention proceedings.

The day before the Family Court was to make final orders on penalty, the husband applied to the Federal Court, seeking to challenge the orders of the Federal Magistrates Court refusing to enjoin the wife from proceeding with the contravention proceedings.

The Family Court on the following day ordered the husband be imprisoned for three months. The Family Court stayed that order, pending determination of the husband's appeal to the Federal Court.

The Full Court set aside the orders of the Federal Magistrate refusing to enjoin the wife from proceeding with contravention proceedings. The Full Court held that the effect of sections 58(3) and 60(1)(b) of the Bankruptcy Act was that, the applicant having presented his own petition for bankruptcy, it was not competent for the respondent later to commence or continue contravention proceedings in the Family Court in respect of the non-payment of $79,000, or to take the further steps in those proceedings.

Section 58(3) of the Bankruptcy Act provides that after a debtor has become a bankrupt, it is not competent for a creditor to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt, or without leave of the Court, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.

The Full Court held that because no leave under section 58(3)(b) was ever sought by the respondent or granted, it was not competent for the respondent to commence the contravention proceedings, or to take any fresh step in those proceedings, the Full Court holding that those proceedings to be 'legal proceeding[s] in respect of a provable debt'.

The Full Court further determined that the proceedings should have been stayed by the Federal Magistrate, pursuant to section 60(1)(b) of the Bankruptcy Act. The Full Court considered the proceedings by the respondent were proceedings 'in respect of the non-payment of a provable debt', within section 60(1)(b)(i), and also were proceedings 'in consequence of his…refusal or failure to comply with an order of the [Family Court]…for the payment of a provable debt', within section 60(1)(b)(ii).

In relation to the order of the Family Court that the applicant be imprisoned, the Full Court concluded it was competent for the Federal Court, pursuant to section 60(1)(b) of the Bankruptcy Act, to stay that order.

Intellectual Property – Copyright – authorisation of infringement

Universal Music Australia Pty Ltd v Sharman License Holdings Ltd
(5 September 2005, Justice Wilcox)

Thirty applicants (major record companies) commenced proceedings against ten respondents, each of which were alleged to have been involved, in different ways, in the creation, development and provision of peer-to-peer file sharing software known as 'kazaa'.

The main issue in the proceeding was whether the respondents (individually or jointly) authorised users of the kazaa system to infringe the applicants' copyright in sound recordings. Section 101 of the *Copyright Act 1968* (Cth) provides that copyright is infringed by a person who, not being the owner of the copyright and without the licence of the copyright owner, authorises another person to do in Australia an infringing act.

The kazaa software was available to be downloaded from the kazaa website. There were two different types of software that could be downloaded. It is not necessary to discuss the differences for present purposes. Once the software was downloaded onto a computer, that computer became part of the kazaa network and the user was granted access to the electronic files stored on all other computers connected to the internet with similar software. Kazaa users could then search for and download music, and other, files from the computers of other users. The website contained some warnings against breaching copyright and, prior to the software being downloaded, users were required to enter into an end user licence agreement, which contained a condition not to infringe copyright.

There were many users of the kazaa system. The respondents were aware that many of them habitually used the software to transmit copyright material. The respondents conceded that the kazaa software provided a vehicle for breach of copyright. However, they contended that they did not authorise any infringing acts. The

respondents claimed that the kazaa system could be used for legitimate purposes; users were able to share original works or non-copyright works.

The applicants led evidence to show there were mechanisms that some of the respondents could have put into place to eliminate or substantially reduce infringement of copyright. However, it was not in the respondents' interests to put any of those measures into place; the greater the use of the kazaa system and website, the greater the income that could be generated from advertising. Advertising revenue was shared between some of the respondents.

His Honour concluded that, despite the warnings against copyright and the provision of an end user licence agreement, the respondents were aware that such measures had been ineffective in preventing or reducing the incidence of copyright infringement. There were technical measures that particular respondents could have taken to curtail the sharing of copyright files, but no such measures had been taken.

Six of the ten respondents were found to have authorised users to infringe the applicants' copyright in relation to specified sound recordings. The applicants' claims of direct infringement of copyright, contravention of the Trade Practices Act and conspiracy were all rejected.

Contempt – application for respondent to be punished for contempt of court for contravening an order of a Judge of this Court by taking part in the management of a corporation.

Australian Securities and Investments Commission v Reid
(13 September 2005, Justice Lander)

The applicant brought a notice of motion seeking punishment of the respondent for being in contempt of orders of the Federal Court.

The respondent was previously convicted of serious fraud. At the time of his conviction the Corporations Law provided that a person so convicted was prohibited from being involved in the management of a corporation for five years without leave of the Court. The respondent breached that prohibition. On 10 March 1992 Justice Jenkinson made orders, pursuant to section 230 of the Corporations Law, prohibiting the respondent from managing corporations until 10 August 2036.

Since Justice Jenkinson made that order, the respondent had been convicted of breaching it twice. On the first occasion, in 1994, he was given a six month custodial sentence, suspended on the condition he refrain from further breaching the order for its entire operation, that is until 10 August 2036. On the second occasion, in 2002, the respondent was sentenced to twelve months imprisonment, with the warrant ordered to lie in the registry for two years so long as he refrained from further breaching Justice Jenkinson's orders. The suspended sentence ordered in 1994 was discharged. At that time, the respondent gave an undertaking to the Court that he 'would not be involved in the management of a company, in any form at all, in the future'.

By notice of motion, dated 17 November 2003, the applicant sought orders that the respondent be committed to prison or punished for contravening the order of Justice

Jenkinson on 10 March 1992. In the alternative, it sought to have the warrant ordered by Justice Kenny to be executed. In the further alternative, it sought to have the respondent committed to prison or punished for breach of the undertaking given to Justice Kenny on 8 October 2001. The statement of charge accompanying the notice of motion alleged that the respondent was involved in the management of two corporations, Battstone Australia Pty Ltd and Australian Marble Pty Ltd, for specific periods of time between February 2003 and July 2003.

There was significant delay in the matter being heard. The respondent was unrepresented for many of the directions hearings. At other hearings the respondent was represented by different solicitors with whom he was negotiating a retainer. The respondent did not comply with orders of the court relating to the preparation of the litigation. After the matter was listed for trial, the respondent applied for an adjournment of the hearing date. The adjournment was refused. The respondent then failed to appear at the trial. A warrant was issued for the respondent's arrest. The warrant was executed on 11 August 2004 and the respondent was taken into custody. The respondent was finally released on bail on 2 November 2004.

The hearing of the trial commenced on 22 November 2004. The respondent was, at that time, unrepresented. During the course of the trial, the respondent informed the Court that he would be represented for closing submissions.

In closing submissions the respondent argued a number of procedural issues relating to the trial process, including a complaint that the judge erred in hearing the contempt proceedings at the same time as other civil proceedings under the *Corporations Act 2001* (Cth) relating to the same conduct. Justice Lander held that the applicant had at all times complied with the rules of the Court and there was no basis for declaring a mistrial. The two proceedings arose from the same factual material and, to avoid any issues with standard of proof, he applied the standard of beyond reasonable doubt to both the civil proceedings and the contempt proceedings, although a lower standard could have been applied in the civil proceedings.

The respondent next argued that the judge should disqualify himself for apprehended bias, on two grounds. First, that during the interlocutory procedure he became aware of matters prejudicial to the respondent, such as his non-attendance at trial and subsequent arrest. Secondly, it was argued that apprehended bias arose from the judge hearing the contempt proceedings at the same time as the related civil proceedings. The applicant argued that the respondent's conduct of the litigation to date before Justice Lander amounted to waiver of any apprehended bias.

His Honour held that there was no apprehended bias because it had not been made out that a fair minded observer might apprehend that the judge might not bring an impartial mind to the case. However, he did hold that, had he found an apprehension of bias, the delay in bringing the application for disqualification would not have amounted to waiver. Had there been a reasonable apprehension of bias, he would have disqualified himself to protect the integrity of the Court's processes.

In order to determine whether the respondent was in contempt it was necessary to consider whether he had breached the orders of the Court. In doing so, it was necessary to consider whether the respondent had been involved in the management

of a corporation. Justice Lander considered the evidence of the respondent's conduct in relation to two businesses, Battstone Australia Pty Ltd and Australian Marble Pty Ltd. It was held that Mr Reid managed both Battstone and Australian Marble. His Honour applied the test from *Commission for Corporate Affairs (Vic) v Bracht.* This test required His Honour to have regard to the size and nature of the company, to determine whether the person was involved in decisions at such a level that they affected the corporation as a whole or a substantial part and had impact on the financial standing and the conduct of the corporation.

In relation to Australian Marble, the evidence established that the respondent was solely in charge of the corporation. There were no other employees. The respondent procured finance for the company and engaged in negotiations for the company to purchase Battstone. In addition, it appeared that the respondent gave instructions to the company directors as to how to operate the company and gave a verbal guarantee on the company's behalf to cover the debts of Battstone. His Honour found that the respondent managed the company over a specific period of time.

In relation to Battstone, the evidence established that the respondent took up a management role within the company. He instructed employees about the manner in which to execute their duties, he gave instructions to the general manager before eventually terminating his employment, he negotiated on the company's behalf with suppliers and he employed new employees. His Honour found that after '3 March 2003 Mr Reid assumed the senior management role…The evidence is all to the same effect and that is that he assumed all of the responsibilities that usually attach to senior management. He continued to act in that capacity, at least until 3 June 2003 when Mr Broome was appointed liquidator'.

As the respondent had breached an order of the Court, he was in contempt of Court. His Honour adjourned the matter to enable the parties to address him on whether the contempt was criminal in nature and the appropriate penalty to be imposed.

Corporations – company in administration – whether member's claim against company in connection with acquisition of shares in the company is a debt owed to member in capacity as a member

Sons of Gwalia Limited (Administrator Appointed) (ACN 008 994 287) v Margaretic (15 September 2005, Justice Emmett)

The respondent bought 20,000 shares in Sons of Gwalia Limited ('the Company') and his name was entered on the Register of Members. Administrators were appointed to the Company less than 14 days after the purchase of the shares, which are now worthless. The Administrators propounded a proposed deed of company arrangement.

At the relevant time, the Company was a listed public company. Under section 674 of the Corporations Act ('the Act') and rule 3.1 of the Australian Stock Exchange Listing Rules, the Company was obliged to disclose to the ASX any information concerning the Company that a reasonable person would expect to have a material effect on the price of the shares in the Company once they became aware of it. A person who suffers loss by conduct by a company that contravenes section 674 is given a right to recover the loss from the company.

The respondent claimed that, at the time of his purchase, the Company was in possession of information about the state of its affairs and that, had he been aware of the information, he would not have bought the shares. He claimed that as a result he has lost a substantial sum of money, which he wished to be able to prove as a debt under the proposed deed of company arrangement.

The Administrators commenced the proceeding seeking a declaration that the respondent's claim would not be provable under the proposed deed of company arrangement, or that payment of his claim would be postponed until all debts owed to, or claims made by, persons other than shareholder creditors had been satisfied. The respondent filed a cross-claim seeking a declaration that he was a creditor of the Company and was entitled to all the rights of a creditor under Part 5.3A of the Act.

After a discussion of *Webb Distributors (Aust) Pty Ltd v State of Victoria* and the divergent lines of authority leading up to that case, Justice Emmett distinguished the current case and held that a claim by a person who, in reliance upon a company's misleading and deceptive conduct, has acted to his or her detriment by buying shares in that company, is not a claim by that person in his or her capacity as a member of the Company.

Justice Emmett held that the respondent's claim was not a debt owed by the Company to him in his capacity as a member of the Company; rather, if it was a debt owed by the Company, it was one arising out of the Company's contravention of consumer protection legislation. Accordingly, section 563A of the Act would not require any postponement of the debt. Justice Emmett also held that the shareholder was a creditor of the Company, who should have the right to attend meetings of creditors of the Company, to vote at such meetings and to receive information sent by the Company to its creditors.

Native title – grant of native title – nature and extent of non-exclusive native title rights over inter-tidal zone

Gawirrin Gumana v Northern Territory of Australia (No 2) (Blue Mud Bay No 2)
(11 October 2005, Justice Mansfield)

On 7 February 2005, Justice Selway determined that there should be a grant of native title to the Yolngu people in respect of an area in and around Blue Mud Bay in coastal remote East Arnhem Land. The grant of native title was to be for a right of exclusive possession over that part of the claim area other than the sea and the inter-tidal zone, and to be for rights associated with non-exclusive possession over the inter-tidal zone and the adjacent sea. His Honour also determined that it was not appropriate to make any order to the effect that the Northern Territory had no power to issue commercial fishing licences in relation to the inter-tidal zone.

Justice Selway died before final orders were made. The hearing was completed by Justice Mansfield, who made a determination of native title to reflect the reasons for judgment of Justice Selway. Several issues of substance arose concerning the nature and extent of native title rights to be granted over the inter-tidal zone.

The first issue which arose in respect of the inter-tidal zone was whether those parts of rivers, streams and estuaries that are affected by the ebb and flow of the tide (the 'arms of the sea') should be excluded from the defined areas comprising land and inland waters, even if they are not navigable. His Honour found that the public right to fish was exercisable in the inter-tidal zone, including tidal waters, whether those waters are navigable or not.

In respect of the native title rights to the inter-tidal zone and outer waters, Justice Mansfield found that the native title holders had the right to 'visit, have access to, and maintain sites, places and areas of religious, spiritual or cultural importance or significance within the area' but not to 'protect' those sites. His Honour considered that a right to 'protect' such sites would include the right to exclude others from those sites, which would be inconsistent with the public rights to fish and to navigate.

His Honour further held that any rights possessed under traditional laws and customs to use the waters of the inter-tidal zone and outer waters for commercial purposes were rights which were not recognised by the common law, and should not be the subject of a determination. However, the native title holders were granted the right to hunt, fish, gather and use resources within the area for non-commercial exchange or consumption for the purposes allowed by or under their traditional laws and customs.

Several other issues with respect to the form of the determination were resolved by Justice Mansfield. Being satisfied that the balance of the applicants' proposed determination gave effect to the reasons for judgment of Justice Selway, on 11 October 2005 his Honour made the determination of native title at Yilpara, Northern Territory.

Practice and Procedure – stay of proceedings – abuse of the Court's process – maintenance and champerty

Dorajay Pty Limited v Aristocrat Leisure Limited
(20 October 2005, Justice Stone)

This judgment concerned an interlocutory application made in a representative proceeding brought under Part IVA of the *Federal Court of Australia Act 1976* (Cth). The proceeding was commenced by Dorajay on behalf of itself and a group of other investors in Aristocrat. Initially Dorajay defined the group of investors on whose behalf it commenced the proceeding as those:

- who bought shares in Aristocrat between September 2002 and May 2003;
- who suffered damage because of alleged misrepresentations made by Aristocrat; and
- who retained Dorajay's solicitors, Maurice Blackburn Cashman (MBC), to act for them in the proceeding.

It was the last stipulation, that in order to be a member of the group a person needed to retain MBC, which was challenged in the interlocutory proceeding.

In practice, the stipulation that a group member instruct MBC was also a stipulation that the group member enter into a funding agreement with a company, Insolvency Litigation Fund Pty Ltd (ILF). This is because it was a term of the contract for legal

services between MBC and its clients in this proceeding that the clients enter into a funding agreement with ILF. In brief, the funding agreement provided that ILF would pay the group member's reasonable legal costs of the proceeding against Aristocrat, in return for ILF receiving a share of any money that the group member received from the proceeding (whether this be because of a settlement of the proceeding or upon judgment).

Justice Stone considered the impact of this funding arrangement on the various parties to this proceeding and found that the funding arrangement did not constitute an abuse of the Court's processes. In particular, her Honour found that although the funding arrangement meant that group members who wished to 'opt out' of the representative proceedings would be disadvantaged, such disadvantages were not so harsh that they undermined the Court's processes. In addition, her Honour found that the control that the arrangement gave ILF over the conduct of the litigation was not so extensive as to amount to an abuse of the Court's process.

However, Justice Stone held that the requirement that a group member retain MBC effectively meant that a prospective group member had to 'opt in' to the proceedings, that is, take positive steps to be a part of the proceedings. Her Honour found that, in Part IVA of the Federal Court of Australia Act, Parliament had expressed a clear choice that Federal Court representative proceedings ought to be conducted on an 'opt out' basis. That is, in the interests of equity and efficiency, all persons who have claims against a particular respondent that give rise to a substantial common issue and arise out of the same or similar circumstances ought to be included in the group represented in the proceeding unless they take positive steps to 'opt out' of the proceeding. Her Honour held that arrangements that effectively required group members to 'opt in' to the proceeding, subverted the opt out process and were an abuse of the Court's processes. In addition, her Honour found that it was repugnant to the policy of the Act that the group definition be restricted to the clients of one particular solicitor. Accordingly, her Honour ordered that the proceeding could not continue as a representative proceeding without an appropriate amendment of the definition of the group represented.

Copyright – counterfeit certificates of authenticity affixed to computers loaded with software onto hard disks thereof and accompanying restore compact disks

Microsoft Corporation v PC Club Australia Pty Ltd
(28 October 2005, Justice Conti)

These proceedings were brought by Microsoft primarily for infringement of its copyright in two well-known computer programs *Windows XP Home* and *Windows XP Pro* distributed in the so-called *OEM* channel. PC Club's primary defence was denial of standing of Microsoft and its related corporate applicants by reason of an assignment of the copyright to a Nevada resident corporation, and the absence of that corporation as an applicant for relief or of documentary evidence establishing that the Nevada corporation was not (or no longer) in law the author of those computer programs. PC Club denied any entitlement of Microsoft to rely on the statutory presumption of ownership and subsistence of copyright afforded by the Copyright Act.

Resolution of the issues arising in relation to copyright title involved interpretation of critical Microsoft inter-company United States contractual documentation, inclusive of distribution channel arrangements, and also of the law of the State of Nevada, and of the copyright title presumptions of Australian municipal law. Defences were also raised by PC Club as to absence of notice of assignment pursuant to section 12 of the *Conveyancing Act 1919* (NSW). Contentious issues arose also for resolution as to presumptive evidentiary provisions the subject of the Copyright Act (being sections 126A, 126B and 128).

Additional claims were advanced by Microsoft companies against PC Club for breach of trademarks and for misleading and deceptive conduct. A number of expert witnesses, some from the United States, provided testimonial evidence, both by affidavit and orally. Microsoft ultimately succeeded substantially on all causes of action. The proceedings took place in the context of *Anton Piller* and *Mareva* relief earlier set in train *ex parte*, and the consequential seizure of recently manufactured computer discs.

Administrative Law – jurisdictional error – military detention – application of principles of sentencing

Sargeson v Chief of Army
(17 November 2005, Justice Jacobson)

In this case Justice Jacobson ordered the immediate release of the applicant from military detention, pending a final hearing. Among the final relief sought was a writ of habeus corpus, on the grounds of jurisdictional error in the decision to sentence the applicant to 21 days detention, which had been made under the *Defence Force Discipline Act 1982* (Cth).

In finding a serious question to be tried, his Honour noted that one of the sentencing principles to be applied was taking into account the physical and mental condition and personal history of the applicant. It appeared that the Commanding Officer did not take into account a doctor's report which diagnosed the applicant as depressed, and which stated that detention posed 'a significant risk to this member's health' and that there was a significant risk of self harm.

His Honour noted that detention pursuant to the Act, that is to say without judicial mandate, can only be ordered to the extent that it is justified by a valid statutory power: see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*. He observed that the law is very jealous of infringement of personal liberty: *Re Bolton and Another; Ex Parte Bean*.

Justice Jacobson considered that, if the applicant's detention was unlawful, the court has power to order his release. He cited a number of authorities which consider the question of whether the court has power to issue a writ of habeas corpus or an order in the nature of habeas corpus, but ultimately issued a mandatory interlocutory injunction.

Migration – visa – protection visa – procedural fairness – applicant a woman with culturally induced reluctance to divulge to men what had happened to her

Applicants M16 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs
(24 November 2005, Justice Gray)

A Tamil woman, her husband and their children came from Sri Lanka to Australia in July 1996. The following year, the woman applied to the Department of Immigration and Multicultural Affairs (subsequently the Department of Immigration and Multicultural and Indigenous Affairs) (in both cases, 'the Department') for a protection visa. Her husband and the four children were also named in the application; their entitlement to a protection visa depended on the primary case of their wife and mother.

In her application, the primary applicant described an incident in which the family home had been invaded by members of a Tamil organisation sympathetic to the Sri Lankan government forces. She said she was taken to a room separate from her husband, kicked and beaten. She said that there was further information of a sensitive nature that was relevant to her application, which she would 'confess' in an interview, and that she would prefer to discuss these matters with a female case officer. The Department did not interview any of the applicants. In December 1997, the application was refused on the basis of the written material provided.

The applicants applied to the Refugee Review Tribunal ('the Tribunal'). The primary applicant provided further material to the Tribunal, indicating that she had other matters she would disclose to a woman. At her migration agent's request, the Tribunal provided a female interpreter, but the member constituting the Tribunal was male.

At the Tribunal hearing, the primary applicant gave evidence in the absence of her husband, but her migration agent, who was also male, was present. She did not provide further details of the incident in the family home. In answer to a question from the Tribunal member as to whether she had been traumatised, she said that she could not tell him how much. The Tribunal member did not ask whether she had further information she could reveal.

The Tribunal affirmed the decision to refuse a protection visa. The applicants applied unsuccessfully to the Federal Court, at a time when the relevant provisions of the *Migration Act 1958* (Cth) ('the Migration Act') prevented them from asserting in that proceeding that the Tribunal had denied them procedural fairness (natural justice). They appealed from the judgment, but then consented to the dismissal of the appeal.

In November 2001, the applicants applied to the High Court, seeking to overturn the Tribunal decision. They did not allege denial of procedural fairness. After the application for an order nisi was remitted to the Federal Court, this proceeding was also dismissed by consent. In January 2004, the applicants applied again to the High Court. The matter was also remitted to the Federal Court and became the proceeding heard by Justice Gray.

Justice Gray held that the applicants had been denied procedural fairness, and the Tribunal had failed to perform its duty under section 425(1) of the Migration Act to

invite the applicants to a hearing to give evidence and present arguments, by the failure of the Tribunal to afford the primary applicant a proper opportunity to provide further information, which the Tribunal member knew existed, and which may have been relevant to her claim. The Department had published extensive guidelines for dealing with claims raising gender-specific issues, which reflected the general understanding that there may be cultural barriers to women talking about some of their experiences in front of men. It should have been obvious to the Tribunal that there was such a barrier in this case, and that there were further matters about which the first applicant could have spoken if given the opportunity.

Justice Gray also held that the applicants were not precluded from seeking a remedy by reason of their involvement in the previous proceedings challenging the Tribunal's decision. This issue involved questions of: *res judicata*, or cause of action estoppel; issue estoppel; estoppel in respect of issues not raised in previous proceedings, on the basis that they ought to have been raised (as explained in *Port of Melbourne Authority v Anshun Pty Ltd*); and abuse of the process of the Court.

Justice Gray found that the fact that the first applicant had further information that she wished to reveal to a female case officer had not been raised by the applicants in the previous proceedings. There had been no judicial determination of the question whether the Tribunal denied the applicants procedural fairness in the manner that had occurred. There could be no cause of action estoppel or issue estoppel on that point.

Justice Gray then considered whether the issue ought to have been raised in the prior proceedings, giving rise to *Anshun* estoppel. In the first proceeding before the Federal Court the applicants were unable to raise denial of procedural fairness, as they were prevented from doing so by section 476(2)(a) of the Migration Act, which has now been repealed. The applicants could have raised the issue in their November 2001 application, but their application for an order nisi was dismissed by consent, so no final judgment on the merits was given. There could be no cause of action estoppel or issue estoppel arising from that proceeding. Alternatively, there were special circumstances, because of the cultural constraints on the primary applicant's ability to tell her full story in a male-dominated environment, so that *Anshun* estoppel should not operate to prevent the applicants from raising denial of procedural fairness.

For similar reasons, the current proceeding did not involve any abuse of the process of the Court.

Justice Gray therefore made orders for writs of certiorari and mandamus, directed to the Tribunal, the effect of which was to quash the Tribunal's decision and require the Tribunal to hear and determine according to law the application for review of the decision to refuse a protection visa.

Designs – appellant and respondent competitors in market for locking systems

Assa Abloy Australia Pty Ltd v Australian Lock Company
(2 December 2005, Justices Heerey, Finkelstein and Allsop)

The appellant and respondent were competitors in the supply of high security locking systems. The respondent's designs for its locks were registered under the *Designs Act*

1906 (Cth). The appellant applied to have some of these registrations expunged on the grounds that they were not new or original. The Act provided that applications for expungement could only be brought by a person who was 'aggrieved' or 'interested' in respect of the particular registration.

The appellant did not claim that any of the respondent's locks infringed any of the intellectual property which it had in its own locks. However, both parties in their promotional activities stressed the protection given by registration. Design registration was a 'critical marketing tool'.

Design registration helped to prevent unauthorized duplication of keys. Manufacturers only supplied key blanks to a limited number of authorised retail outlets such as locksmiths. These retailers were bound by contract with the manufacturers to satisfy themselves that the purchaser of the lock system had authorised any request for duplication. This protection was backed up by the fact that dealings with key blanks by unauthorized retailers could be prevented by enforcement of design registration rights.

A majority of a Full Court (Justices Heerey and Allsop, Justice Finkelstein dissenting) reversed the primary judge and held that the appellant was a person 'aggrieved' and 'interested'.

Taxation – income tax – deductions – tax avoidance – Tea Tree oil plantation scheme – interlocking agreements – Farm Management and Loan Agreements – limited recourse loan – management fees, interest and associated costs – whether taxpayer to be treated as having dominant purpose of obtaining a tax benefit

Calder v Commissioner of Taxation
(7 December 2005, Justices French, Stone and Siopis)

In June 1994 the appellant invested in a tea tree oil plantation project in New South Wales that involved the acquisition of seeds for 10,000 trees to be grown and managed in common with trees acquired by other investors for the purpose of producing and selling tea tree oil. They entered into a Farm Agreement with the Land Owner for the use of the land on which their trees would be planted, a Management Agreement with another entity to manage their interest in the Farm business for a period of 15 years and a Loan Agreement with a Lender to finance the payment of management fees and other outgoings associated with the investment. The loans were, in part, limited recourse loans.

The appellant claimed deductions on account of his outgoings for the years ended 30 June 1994 and 30 June 1995. The deductions claimed totalled $16,025 for the two years.

In August 2000 the respondent Commissioner issued amended assessments disallowing the deductions for the two years on the basis that they were tax benefits obtained under a scheme to which the tax avoidance provisions of Part IVA of the *Income Tax Assessment Act 1936* (Cth) (the ITAA) applied.

Objections taken to the amended assessments were disallowed and an appeal to the original jurisdiction of the Federal Court was dismissed. Justice Nicholson, who

dismissed the appeal, found it would be concluded that the appellant's dominant purpose in entering into the investment was to obtain a tax benefit. That conclusion was an objective one which did not depend upon the taxpayer's actual subjective purpose. It was reached by reference to the eight factors set out in section 177D(b) of the ITAA which are required to be considered in determining the purpose of a taxpayer entering into a scheme which gives rise to a tax benefit.

The appeal to the Full Court was largely by way of challenge to the evaluative findings made by the primary judge on undisputed primary facts. In such a case the Court gives weight to the primary judge's evaluation of the facts and does not interfere with such assessment unless the primary judge is shown to be wrong. In this case the Full Court held that Justice Nicholson's evaluation of the factors relevant to whether the tea tree oil project was a scheme to which Part IVA applied was open on the facts before him and did not disclose any error. The Full Court dismissed the appeal with costs.

Admiralty and Maritime – Shipping and Navigation – compulsory pilotage – shipowner liable for fault of pilot, though pilot not properly licensed

Braverus Maritime Inc v Port Kembla Coal Terminal Ltd
(12 December 2005, Justices Tamberlin, Mansfield and Allsop)

This was an important case about the operation in shipping in Australia of pilotage and about the responsibility for pilots and the Trade Practices Act. In the berthing of a large bulk carrier in Port Kembla, the coal berth was struck by the bow of the ship, causing considerable damage. Both the master and the pilot were negligent to a degree and the pilot was found to have engaged in misleading conduct by the information he gave to the master. Nevertheless, because of the operation of section 410B of the *Navigation Act 1912* (Cth), only the shipowner was liable, not the pilot. The case involved a comprehensive examination of the law governing the relative liabilities of ship and pilot in compulsory pilotage in Australia.

Administrative Law – appeal from the Administrative Appeals Tribunal – claims made under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) – application for access to documents under the *Freedom of Information Act 1982* (Cth) – claims of exemption on the ground of legal professional privilege

Comcare v Foster
(12 January 2006, Justice Greenwood)

This case concerned an application (by way of an appeal) from a decision of the Administrative Appeal Tribunal (the Tribunal) that Comcare was not entitled to withhold certain documents and video materials the subject of an application by Ms Foster under the *Freedom of Information Ac*t 1982 (Cth) (FOI Act), in reliance upon an exemption in section 42(1) of the FOI Act that the documents would be exempt from production in legal proceedings by virtue of legal professional privilege.

The evidence before the Tribunal was that the documents were created for the dominant purpose of Comcare's independent lawyers giving, and Comcare obtaining, legal advice in respect of the claims by Ms Foster for compensation or her

applications to the AAT for review of those claims. Alternatively, the dominant purpose involved use of the documents in the existing proceedings or proceedings then anticipated by Comcare. The evidence before the AAT was that:

- Comcare had retained independent legal advisers;
- Ms King (or other officers within the Appeals and Review Team of Comcare) was the point of contact between Comcare and the independent legal advisers;
- Ms King had administrative responsibility for managing the claims by Ms Foster and Comcare's response to those claims;
- Comcare was seeking advice, independent of Comcare, on Ms Foster's claims and Tribunal proceedings; and
- the advice from the independent lawyers was kept physically separate from other material such as administrative material passing between internal officers within Comcare.

Nevertheless, the Tribunal found the withheld documents did not attract legal professional privilege because they were 'purely procedural' and 'only referred to information on the public record'. The Tribunal also found that the video material could not attract legal professional privilege to the extent that it contained 'personal information' about the respondent.

Consistent with decisions of the High Court in cases such as *Propend Finance, Esso Petroleum, Daniels Corporation* and *Grant v Downs* (Barwick CJ on the question of the significance of routine documents), Justice Greenwood held that the correct principle to be applied when deciding whether legal professional privilege attaches to a document, is whether the *communications* as a whole (of which the documents are a component part), occurred for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings. Further, the following circumstances provide no determinative basis for rejecting what would otherwise be a proper attraction of legal professional privilege on the facts, namely that:

- the content of the correspondence between the solicitor and client was purely procedural; or
- the correspondence between the solicitor and client only refers to information available on the public register;
- the surveillance video contained personal information about Ms Foster.

In respect of the video surveillance tapes, Justice Greenwood considered the approaches of Justice French in *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA) (No. 1)* and the Court of Appeal of Western Australia (Justices Ipps, Pidgeon and Wallwork) in *Boyes v Colins*. His Honour considered the distinction drawn by Justice French between video tapes of events which occurred in public and the taking of witness statements. In *J-Corp*, Justice French considered the public nature of the recording of public events meant the material was not gathered as a function of a confidential communication between lawyer and client notwithstanding that the sole purpose for making the video was for submission of the video to the lawyers. In *Boyes*, the Court of Appeal considered describing video images as direct evidence of matters did not assist in determining whether legal professional privilege subsisted in the communication of the video because, in the words of Justice Jacobs in *Grant v Downs*, '…that privilege extends

not only to communications actually made, but to material prepared for the purpose of communication thereof to the legal adviser'.

Justice Greenwood preferred the observations of the intermediate Court of Appeal in *Boyes* on the question of the video material, allowed the appeal, set aside the Tribunal's decision and remitted to the Tribunal for determination according to law, the question of whether the documents are exempt for the purposes of section 42 of the FOI Act.

Statutory Interpretation – whether statutory powers of police to be read down to preclude assistance to foreign police where possible outcome is the imposition of the death penalty

Rush v Commissioner of Police
(23 January 2006, Justice Finn)

The four applicants involved in this application for preliminary discovery were Australian citizens and members of the group known as the 'Bali nine'. Much of the detail in the case related only to the first applicant (Scott Rush) with the other three cases arising from the applicants' involvement in the same events.

On 6 April and 8 April 2005 the applicants travelled to Bali. Prior to Rush's departure from Australia, his father, Lee Rush, became aware that he may have been travelling to Indonesia, and was concerned that his son was involved in illegal activities. Lee Rush contacted a barrister friend (Robert Myers) to seek advice. Mr Myers duly contacted an associate (Damon Patching) who was seconded to the Australian Federal Police (AFP) at the time. The evidence of Mr Myers was that he requested that Scott Rush be detained at Sydney airport and prevented from leaving Australia. If he could not be detained, Myers requested that Rush should be stopped at the point of exit and advised that the AFP were watching him and that he should not participate in any illegal activity. The factual basis of the applicant's claim was that Myers was apparently told that the AFP would talk to Rush if a passport alert was activated and was later informed that this had occurred, and Scott Rush had been spoken to. As a result, Lee Rush had not travelled to Bali to stop his son's involvement. The AFP denied that such an undertaking had ever been given.

The four applicants were subsequently arrested for alleged involvement in drug trafficking. It transpired that the arrests had resulted from action taken by the Indonesian police (INP) in consequence of information provided to them by the police in Australia. At the time of the application, each of the applicants faced the death penalty in Indonesia.

Pursuant to Order 15A rules 3 and 6 of the Federal Court Rules, the applicant's sought preliminary discovery in anticipation of possible later proceedings of the identity of the members of the AFP who made the operational decisions to request assistance from the INP regarding the applicants and who provided assistance to the INP concerning the applicant's activities in Bali. Scott Rush additionally sought the identity of the member or members of the AFP who made the operational decisions (a) not to inform him that he was under surveillance and (b) not to advise his parents that he had not been informed.

Discovery was also sought of the relevant documents of the AFP which related to the arrest and detention of the applicants on 17/18 April 2005 in Bali.

Under Order 15A, the issue for the Court was whether the proposed proceedings was in respect of a cause of action known to law which was not purely speculative in character and not devoid of prospects. Three possible causes of action were ultimately canvassed before the Court. Two involved declaratory relief against AFP officers for (i) acting without lawful authority in making decisions and taking actions which exposed the applicants to the death penalty in Indonesia and (ii) failing to satisfy the applicants' substantive legitimated expectations as Australian citizens that the Australian Government and its agencies and public officers would not act in a way as to expose them to the risk of the imposition of the death penalty. In addition the applicants put forward two potential tort claims, one in negligence and a claim for misfeasance in public office.

The Court held generally that the power to order identity discovery under Order 15A rule 3 was not to be used in favour of a person who intends to commence merely speculative proceedings. Further, information discovery under Order 15A rule 6 carried an objective test of whether or not there is reasonable cause to believe that the applicant may have the right to obtain relief in the Court. This said, it is not enough to merely assert that there is the mere possibility of a case against the second respondent. With these principles in mind and after outlining the various statutes, treaties, international instruments and agreements, his Honour considered each of the potential causes of action.

Acting without lawful authority

The applicants argued in the first instance, that sections 8 and 9 of the *Australian Federal Police Act 1979* (Cth) (AFP Act) do not empower or justify any decision made by a member which exposes an Australian citizen to the death penalty. His Honour held that the provision of information by the AFP to the INP related to a suspected importation of heroin contrary to the 'laws of the Commonwealth'. As such it fell squarely within their functions as defined in section 8 of the AFP Act. The applicants had argued that the section should be read down in light of Australia's internal attitude towards the death penalty as well as its international obligations. The Court rejected this argument having regard to the *Mutual Assistance in Criminal Matters Act 1987* (Cth) and the Death Penalty Charge Guide, which governed the actions of the AFP in various ways.

Substantive legitimate expectation

The applicants' position was that each of them, in their capacity as Australian citizens, had a substantive legitimate expectation that the Australian Government would not act in such a way as to expose them to the risk of the imposition of the death penalty. The Court held, that in light of the decisions in *Teoh* and *Lam* it was clear that the doctrine of substantive legitimate expectation was not a present part of Australian law.

Tortious claims

The Court considered the line of authority regarding the liability of police officers for acts or omissions in the course of official duty that occasion foreseeable harm. His Honour held that there would be no arguable basis for any contention that AFP officers had a legal responsibility to warn any of the applicants that they were under police surveillance or exposing themselves to the risk of the death penalty especially given the information previously gathered about the applicants in the ongoing AFP investigation. The AFP was already possessed with a body of information about the applicants' activities and there was a rational and proper police purpose for the making of the request to the INP. Any proposed duty would be inconsistent with the duty owed by the AFP to the public at large in the conduct of its investigations into the Bali drug trafficking operation.

Finally, the Court rejected the potential claim of misfeasance in a public office on the basis that there was nothing in the material to suggest that any of the AFP officers had acted with 'reckless indifference'. There was no reasonable cause to believe that the decision or actions were invalid because they were improperly motivated.

Shipping and Navigation – seafarers – injury – workers' compensation – whether ships 'operated by' company which had responsibility for crewing operations

ASP Ship Management Pty Ltd v Administrative Appeals Tribunal
(10 March 2006, Chief Justice Black, Justices Emmett and Allsop)

This decision concerned a claim by seafarers for compensation for injuries sustained in the course of their employment.

Mr Bergvall was employed by ASP Ship Management as a member of the crew of the oil tanker *MT Flinders*. The ship was owned by a company in the United States. She was registered in Panama and a company in the United Kingdom was responsible for her ultimate management. The UK company had entered into a ship management agreement with ASP Ship Management.

Mr Bergvall claimed to have been injured in the course of his employment and he made a claim for compensation under the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (the 'Compensation Act"). That claim was taken to have been disallowed by ASP Ship Management. Mr Bergvall then sought to have that decision reviewed by the Administrative Appeals Tribunal.

Mr Kelk was employed by Mermaid Labour and Management (Mermaid) as a member of the crew of the pipe-laying vessel *MV Lorelay*. The ship was owned by a Swiss company, she was registered in Panama and a separate Swiss company was responsible for her ultimate management. A third Swiss company had entered into a labour and catering agreement with Mermaid.

Mr Kelk claimed to have been injured in the course of his employment and he made a claim for compensation under the Compensation Act. That claim was taken to have

been disallowed by Mermaid. Mr Kelk then sought to have that decision reviewed by the Administrative Appeals Tribunal.

The compensation regime established by the Compensation Act was limited to seafarers employed on ships to which Part II of *Navigation Act 1912* (Cth) applied. Pursuant to section 10, that part of the Navigation Act applied, relevantly, to a ship which is 'operated by' an entity which has a relevant connection with Australia.

The Tribunal decided, as a preliminary question, that it had jurisdiction to review the seafarers' claims because the *Flinders* and the *Lorelay* were operated by, respectively, ASP Ship Management and Mermaid.

ASP Ship Management and Mermaid sought judicial review of that decision before the Full Court.

The Full Court held that, as there was an error in the Tribunal's interpretation of the meaning of 'operator', the Tribunal had misdirected itself as to the inquiry upon which it had to embark and had not found facts necessary to establish its jurisdiction in relation to the applications by Mr Bergvall and Mr Kelk for review of the deemed disallowance of their claims for compensation.

Legal Professional Privilege – whether legal professional privilege attaches to 'draft statement of contrition' proposed to be given in evidence to Royal Commission – powers of commissioner under *Royal Commissions Act 1902* (Cth)

AWB Limited v Honourable Terence Rhoderic Hudson Cole
(17 May 2006, Justice Young)

This case concerned a document entitled 'Cole Inquiry – Draft Statement of Contrition – Andrew Lindberg.' The document became Exhibit 665 in the Commission of Inquiry which became known as the 'Oil-For-Food Inquiry' conducted by Commissioner Cole under the *Royal Commissions Act 1902* (Cth) (RCA).

The document was inadvertently produced by AWB Limited (AWB) to the Inquiry in response to a notice to produce documents issued under section 3(2A) of the RCA. AWB claimed legal professional privilege in respect of the document. After hearing evidence and submissions concerning Exhibit 665, the Commissioner expressed his view in written reasons that the RCA conferred an ancillary or incidental power on him to determine whether the claim of legal professional privilege had been established in respect of Exhibit 665. On the evidence before him, the Commissioner ruled that Exhibit 665 was not privileged.

The document was drafted by Mr Lindberg, then managing director of AWB, as part of a proposed strategy of 'over-apologising' to the Commission to deal with reputational damage AWB had sustained and was likely to sustain in future in connection with the Inquiry. The document was created following a telephone conference that took place on 21 December 2005 between Mr Lindberg, Dr Sandman (a crisis management consultant engaged by AWB to provide public relations advice), Mr Zwier from Arnold Bloch Leibler (the solicitors for AWB) and a number of

employees of AWB. After the telephone conference, Mr Zwier provided written advice to AWB. Mr Lindberg drafted the statement of contrition, which was based closely on Mr Zwier's advice, and arranged for it to be circulated by email to the persons who had participated in the telephone conference of 21 December 2005 for further discussion.

AWB contended that the document attracted legal professional privilege on one or other of the following grounds. First, AWB contended that Exhibit 665 was brought into existence for the dominant purpose of obtaining legal advice from Mr Zwier. Secondly, AWB contended that the document was privileged because it was based closely on Mr Zwier's advice. And thirdly, it contended that Exhibit 665 was brought into existence for the dominant purpose of being used in relation to litigation.

Justice Young held that the document was not protected by legal professional privilege. His Honour found that the document had been created for a number of purposes, including the obtaining of public relations advice, and his Honour was not satisfied that the document had been brought into existence for the dominant purpose of obtaining legal advice. Justice Young found that the document would not, if disclosed, allow a reader to know or infer the nature, content or substance of any legal advice nor would the disclosure of Exhibit 665 result in any waiver of the privilege inhering in that legal advice. As to AWB's argument that the litigation limb of legal professional privilege applied to documents intended to be given in evidence to the Commission, Justice Young held that legal professional privilege does not extend to documents brought into existence for use in relation to a commission of inquiry. Further, his Honour held that Exhibit 665 was not brought into existence for the dominant purpose of being used in connection with litigation which might follow from the report of the Commissioner.

AWB also sought declarations that the Commissioner does not have the power to order the production of a privileged document or to determine whether a document is protected by legal professional privilege. Alternatively, AWB sought a declaration that the Commissioner should not determine whether a claim for legal professional privilege is established. Justice Young declined to make these declarations, holding that although the Commissioner had an administrative power or capacity to form an opinion as to whether the document was privileged and therefore not required to be produced under the notice, the Commissioner's opinion or ruling had no binding force or effect in point of law, and it was open to either party to bring declaratory proceedings in the Federal Court without the Court embarking on a review of the Commissioner's decision.