APPENDIX 8 – SUMMARY OF DECISIONS OF INTEREST

ADMINISTRATIVE LAW – Australian Crime Commission Examiner issued notice to health services provider requiring production of medical records of eight female Aboriginal children pursuant to s. 29(1)(b) *Australian Crime Commission Act 2002* (Cth) – whether the best interests of those eight children was a relevant consideration which the Examiner was required to take into account in issuing that notice – whether the Examiner had regard to the best interests of those eight children – consideration of whether the best interests of those children was a 'primary consideration'

Australian Crime Commission v NTD8
(10 July 2009, Chief Justice Black and Justices Mansfield and Bennett)

An Australian Crime Commission examiner issued a notice under s. 29(1) of the *Australian Crime Commission Act 2002* (Cth) (the Act) to an Aboriginal community-controlled health service provider (NTD8) requiring the production of medical records of eight young female Aboriginal children or teenagers, as well as certain other information. NTD8 provides sexual and reproductive health services, including contraceptive advice and counselling about rights and consent to young women and girls, among its other health services.

NTD8 was concerned that, if it provided those records, the police might interview the eight young girls and their families, who may see that as a breach of trust by NTD8 and its professional staff, and that those children or teenagers, or others, might then be deterred from seeking such medical services. It argued that it was in the best interests of the eight children, and other indigenous children, not to issue the notice. A single judge of the Federal Court quashed the decision of the Examiner to issue the notice requiring those documents because the Examiner did not treat the best interests of the children in question as a primary consideration.

Under the Act, the Examiner is required to be satisfied that it was 'reasonable in all the circumstances' to issue the notice, and to record in writing the reasons for it: s. 29(1A) of the Act. There is no express obligation of the Act requiring the Examiner to take into account the best interests of the children. The Full Court held that it is to be implied from the statute that the best interests of the children was a relevant consideration which the Examiner was bound to take into account. Although the Examiner's reasons were brief and formulaic, they were complemented by reference to a Statement of Facts and Circumstances and the Legal Submissions prepared by an officer of the Australian Crime Commission provided to the Examiner and adopted by him. They specifically referred to the concerns of NTD8 and its staff that the disclosure of the particular documents concerning the eight children may dissuade them and others from seeking medical attention.

The Full Court found the Examiner was required to take into account the best interests of the children when issuing the notice, but that the Examiner had done so. The appeal was therefore allowed.

CONTRACT – implication of terms in law – person employed by university as professor of surgery – express contractual obligations, inter alia, to undertake research, to organise research and generally to stimulate research among the university's staff and students

University of Western Australia v Gray
(3 September 2009, Justices Lindgren, Finn and Bennett)

The appellant, a university, employed the respondent as Professor of Surgery. The appellant claimed it had proprietary interests in inventions it alleged the respondent made in the course of his employment. The inventions, the subject of the dispute, related to the targeted treatment of liver tumours. The respondent's employment contract did not impose on the respondent a duty to invent but did require him to undertake research, organise research and generally to stimulate research among the appellant's staff and students. The basis of the appellant's claimed proprietary interest in the inventions was that it was an implied term of the respondent's employment contract that inventions developed in the course of his employment belonged to the appellant. Such an implication was said to arise by virtue of the respondent's contractual obligation to undertake research.

At first instance, the primary judge rejected the appellant's argument. Absent an express term to the contrary, the duty to research did not signify a duty to invent. There is no presumption at law that the rights to inventions made by academic staff in the course of their employment vest in the employer university. In this case, the relative freedom with which the respondent could undertake his research, publish his findings and secure funding for research from sources external to the university, was inimical to the implication at law of terms of the kind relied on by the appellant. Alternatively, even if such an implication was to be made, the primary judge found that the evidence did not support the conclusion that the respondent made the inventions during the course of his employment.

The Full Court unanimously dismissed the appeal. The Court rejected the appellant's assertion that the primary judge had erred in finding that the respondent's employment contract was not of a class or type of contract that attracted the implied term at law. The Court held that, in determining this threshold question, the primary judge had correctly taken into account the distinctive nature of universities as employers (compared to private sector commercial entities) and of academic employment in universities. Further, the freedom afforded to academic staff in terms of self determination of the nature and scope of their research, the publication of research results and inter-institutional collaboration, operated to negate the implication sought by the appellant.

The Full Court affirmed the primary judge's finding that the inventions were not made in the course of the respondent's employment with the appellant.

CORPORATIONS - deed of company arrangement - *Corporations Act 2001* (Cth) Pt 5.3A - clauses in deed of company arrangement providing for some creditors to release claims against creditors other than the company under administration

City of Swan v Lehman Brothers Australia Ltd
(25 September 2009, Justices Stone, Rares and Perram)

This case involved local government councils that invested in collateralised debt obligations sold to them by Lehman Australia. On 15 September 2008, Lehman Brothers filed for Chapter 11 Bankruptcy with the US Bankruptcy Court, Southern District Court of New York. On 26 September 2008, administrators were appointed to Lehman Australia.

On 28 May 2009, the administrators proposed to Lehman Australia's creditors a resolution that the company execute a deed of company arrangement (DOCA) in the form as proposed by Lehman Brothers Asia Holdings Limited. The resolution was passed at the meeting with 61 creditors voting in favour of the resolution, representing $256,237,474.48; and 58 creditors against, representing $71,802,996.19. Of the 61 creditors who voted in favour of the resolution, 9 of those creditors included Lehman entities which representing $245,160,674.20 by value of the creditors present.

The effect of the provisions of the DOCA would have been to release not only Lehman Australia but also the other Lehman entities from all claims that any of the creditors of Lehman Australia may have against them. The DOCA would also prevent those creditors from enforcing their rights under policies of insurance that may respond to their claims pursuant to statutory charges. On 28 July 2009, Rares J reserved eight separate questions under s. 25(6) of the *Federal Court of Australia Act 1976* for consideration by the Full Court. The questions concerned first, the proper construction of provisions in the DOCA and, secondly, whether there was power under Pt 5.3A of the Corporations Act 2001 (Cth) for a DOCA to include such provisions.

The Full Court concluded that, properly construed, the DOCA purported to extinguish the councils' rights to sue other members of the Lehman Group. In doing so it went beyond what Pt 5.3A permitted a DOCA to achieve. Therefore, the DOCA was held to be invalid and not binding on Lehman Australia's creditors, including the councils. The High Court subsequently dismissed the appeal.

EXTRADITION – function of magistrate in conducting hearing under s. 19 of the *Extradition Act 1988* (Cth) – function of primary judge in conducting review of magistrate decision under s. 21 of the *Extradition Act 1988* – whether magistrate and primary judge were required to determine whether alleged war crime was an extradition offence or whether appellant was an extraditable person – no appellable error – appeal dismissed

Zentai v Republic of Hungary
(8 October 2009, Chief Justice Black and Justices Tracey and Barker)

In July 2005, the Republic of Hungary made a request of the Commonwealth of Australia pursuant to a 1995 Treaty on Extradition between Australia and Hungary for the extradition of the appellant, who was alleged to have committed a war crime in Budapest in 1944.

The appellant was arrested on a provisional arrest warrant under s. 12 of the *Extradition Act 1988* (Cth). The Minister for Justice issued a notice under s. 16(1) notifying a magistrate of the extradition request. A magistrate determined under s. 19 that the appellant was eligible for surrender. The Federal Court dismissed an application for review of the magistrate's decision, pursuant to s. 21. The appellant then appealed to the Full Court of the Federal Court.

The sole issue for determination on the appeal was whether the s. 19 magistrate and the Court were correct in not considering whether the appellant was an 'extraditable person' who had committed an 'extradition offence', having regard to the terms of the Treaty which arguably did not apply to a 'retrospective offence' such as a war crime committed before the Republic of Hungary came into existence.

To the extent that *Director of Public Prosecutions (*Cth) v Kainhofer (1995) 185 CLR 528 appeared to require the approach taken by the magistrate and the Court, the appellant contended that the decision should be read as applying only to challenges that would collaterally seek to deny or qualify some factual, procedural or evidentiary aspects of the allegations made in an extradition request. The Full Court rejected this submission. *Kainhofer* was not stated to be a decision applicable only to such collateral challenges, but was a decision of general application.

The Full Court concluded that, while a s. 19 magistrate must be satisfied that there is a warrant for the arrest of a person for an 'extradition offence' identified by the supporting documents, there is no wider role to be played by the magistrate concerning whether the conduct stated in the supporting documents actually constitutes the offence described in the warrant.

The Full Court recognised that, while in theory it may be possible for a person in the position of the appellant to make representations on the substantive issues with which the appellant was concerned, in this case either before a s. 12 magistrate when an application for a provisional arrest warrant is considered, or to the Attorney General before a notice is issued under s. 16 of the Act, it will not always be the case that such questions are fully considered at that stage. The Court also noted the possible availability of judicial review of the Attorney's decision to issue a notice under s. 16 and the Attorney's final extradition decision under s. 22.

Notwithstanding that those opportunities for review of the substantive issue that the appellant wished to raise might generally be considered limited, the Court held neither the s. 19 magistrate nor the Court erred in the approach they had taken in not considering the retrospective offence issue that the appellant wished to raise. The appeal was dismissed.

CORPORATIONS – Managed investment schemes – whether a funded class action constitutes a managed investment scheme

Brookfield Multiplex Limited v International Litigation Funding Partners Pty Ltd
(20 October 2009, Justices Sundberg, Dowsett and Jacobson)

This was an important decision for those interested in the legality and regulation of class actions which receive litigation funding. The Full Court (Jacobson J dissenting) held that funding and retainer arrangements entered into by group members in class action proceedings against the appellant constituted a managed investment scheme which was required to be registered under s. 601ED of the *Corporations Act 2001* (the Act).

The highly publicised class action proceedings alleged a failure by the appellant to disclose information about the construction of the Wembley National Stadium that would have a material effect on the price or value of its shares. Each representative party and each group member retained Maurice Blackburn to act on their behalf and entered into a funding agreement with the litigation funder.

Section 9 of the Act relevantly defined managed investment scheme as a scheme that has the following features:

- people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme;
- any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the members) who hold interests in the scheme; and
- the members do not have day-to-day control over the operation of the scheme.

Multiplex argued, and the majority agreed, that the aggregate of the funding and retainer agreements entered into by group members satisfied each limb of the definition and was required to be registered.

All judges held that group members had contributed money's worth (in the form of contractual undertakings) as consideration for acquiring rights to benefits produced by the scheme. The term 'benefits' was construed broadly and included in this instance: the provision of legal services at no cost to group members; the absence of exposure to any adverse costs order; the benefit of the funder's promises to provide security for costs; and the benefit of contractual rights to participate in the distribution of any settlement or judgment.

The majority further held that the contributions were pooled and used in a common enterprise. These terms should be given their ordinary meaning, and pooling did not require any physical activity. Justice Jacobson dissented on the 'pooled or used in a common enterprise' limb, finding that the absence of any common fund into, or from which, the gains or losses of the members were to be paid meant there was no 'pooling'. In addition, his Honour said there was no 'common enterprise' because the contributions of the members and the funder, consisting of their respective contractual undertakings, were not used in an enterprise where one part was carried out by the members and another by the funder or by Maurice Blackburn, as his Honour considered was required by earlier authority.

This decision had significant implications for class actions which were backed by litigation funding arrangements. On 4 May 2010, the Government announced that it would make regulations exempting representative proceedings from the definition of managed investment scheme in the Act. In the meantime, the Australian Securities and Investments Commission (ASIC) has issued a class order (CO 10/333) providing relief to funded class actions from the requirements of the Act until 30 September 2010.

PROCEDURE – DEFAMATION – jury trial – ss. 39 and 40 *Federal Court of Australia Act 1976* (Cth) usual mode of trial in Federal Court by judge alone unless the Court otherwise orders – proceeding for damages for injury to reputation by reason of publication of defamatory matter together with representations in contravention of s. 53B of *Trade Practices Act 1974* (Cth) — s. 21 of *Defamation Act 2005* (NSW) giving party right to elect for trial by jury unless Court otherwise orders – whether Court should order that trial be heard by a jury

Kwang Suk Ra v Nationwide News Pty Limited
(13 November 2009, Justice Rares)

The case was the first time a jury trial for defamation has been ordered by the Federal Court. Kwang Suk Ra, the applicant, was a brothel owner. She commenced proceedings against the publisher of *The Daily Telegraph* newspaper, Nationwide News Pty Limited, and its associated company, for publishing material in *The Daily Telegraph* and on the internet.

On 3 December 2008 *The Daily Telegraph* published an editorial headed 'Sydney's Own Horror House' which appeared to have been republished on the internet by News Digital on either 3 or 4 December. *The Daily Telegraph* also published on 3 December an article under the headline 'Sex Slave Trade Revealed'. The article had a subheading, 'Brothel Madam Walks Scott Free'. On 4 December 2008 News Digital published an internet article headed 'No Way Out for Women in Debt and Total Despair'.

Ms Ra claimed that each of these publications contravened s. 53B of the *Trade Practices Act 1974* (Cth) because its publisher had engaged in conduct that was liable to mislead persons seeking employment as to the nature, terms or conditions of that employment by making misleading representations in each of the five publications in relation to the employment offered by her. Similarly, Ms Ra argued that each of the publications complained of defamed her by conveying similar meanings to the alleged misleading representations.

The publishers filed a motion seeking an order under s. 40 of the *Federal Court of Australia Act 1976* (Cth) that the issues in the proceedings, other than damages, be tried by a jury. Ms Ra opposed that order, but argued that if a jury were to be summoned, it should be a jury of twelve under s. 20(2) of the Jury Act 1977 (NSW), rather than a jury of four.

The Court considered ss. 39 and 40 of the Federal Court Act and the nature of its power under those sections to direct a trial of issues with a jury. Those sections required the publishers to establish a basis for the exercise of the Court's discretion to order a departure from the usual mode of trial by judge alone. The Court held that, in exercising that discretion, it was appropriate to have regard to the provisions of the relevant State or Territory Defamation Acts.

The Court found that the matter raised issues that required giving effect to significant moral and social values of the community. It was satisfied that a trial by a jury would be a better mode of trial than by judge alone, in order to assess the various claims and defences.

The Court also considered that a jury of twelve was appropriate. This was because the publications were made in a daily newspaper with a large circulation in Sydney, and on the internet, alleging criminal and other serious wrongdoing by Ms Ra. She had a highly contentious occupation of being a brothel owner. The jury would be asked to decide whether the publishers had defamed Ms Ra in each of the five matters complained of and had made similar misrepresentations in contravention of s. 53B of the Trade Practices Act. That would involve them considering whether defamatory meanings or representations had been conveyed and whether any defences raised by the publishers had been established by applying the moral and social standards of the community. The question of damages would be left to the trial judge.

HUMAN RIGHTS – Disability discrimination – hearing disability – alleged indirect and direct discrimination of applicant contrary to ss. 5, 6 and 15 of *Disability Discrimination Act 1992* (Cth) – whether respondent imposed requirement or condition that applicant perform employment without the assistance of flashing lights or telephone typewriter – whether respondent imposed requirement or condition that applicant attend training sessions and staff meetings without qualified interpreters

Devers v Kindilan Society
(27 November 2009, Justice Marshall)

This case concerned an application pursuant to s. 460 PO (1) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), following the termination of the applicant's complaint to the Human Rights and Equal Opportunity Commission alleging discrimination (both directly and indirectly) by reason of her disability, contrary to ss. 5, 6, and 15 of the *Disability Discrimination Act 1992* (Cth).

The applicant (Ms Devers) was employed on a casual basis by Focus, a not-for-profit organisation that provided services to people with disabilities. Ms Devers is profoundly deaf and is unable to communicate except by way of Australian Sign Language (Auslan). When Ms Devers commenced employment at Focus, she did not request qualified interpreters or special equipment in order to perform her duties.

During the course of her employment, Ms Devers made a number of requests asking for a telephone typewriter (TTY) and for flashing lights to be installed above her door so she would be alerted when someone entered the room. These requests were generally complied with by Focus. Ms Devers also required that interpreters be made available for staff meetings and training sessions. This request was occasionally complied with.

Focus imposed certain requirements or conditions on Ms Devers in the course of her employment. In his judgment Justice Marshall held that, the phrase 'requirement or condition' in s. 6 of the *Disability Discrimination Act* is to be construed broadly, to indicate any form of qualification or prerequisite. A requirement or condition may be imposed either explicitly or implicitly in the conduct said to constitute the indirect discrimination.

Prior to the flashing lights being installed, it was not established by Ms Devers that she suffered any serious disadvantage from her inability to answer the door. It is also uncertain whether Focus imposed a requirement or condition that Ms Devers access her employment without a TTY, as it was unclear to Focus that Ms Devers required the provision of a TTY. Nevertheless, Ms Devers did not establish that the imposition of such a requirement or condition was unreasonable. Ms Devers also failed to establish the unreasonableness of the requirement or condition that she attend training sessions and staff meetings without the use of an interpreter. The cost of providing interpreters would have been significant. In any event, Ms Devers received the information by other means and it was not established that she suffered adverse consequences as a result.

There was also no evidence to suggest any direct discrimination, by way of less favourable treatment, to Ms Devers due to her disability in the forms alleged.

APPEAL – TRADE PRACTICES – markets – alleged existence of a wholesale sports channel market – characteristics of 'competition' and 'markets' – relevant anti-competitive inquiry – application of the SSNIP test – alleged market not established – s. 45 – effect or likely effect – whether agreements entered into by various respondents had the effect, or likely effect, of substantially lessening completion in the retail pay television market

Seven Network Limited v News Limited
(2 December 2009, Justices Mansfield, Dowsett and Lander)

This appeal concerned events which occurred in the pay television industry in the late 1990s and early 2000s. It focused on the conduct of Foxtel, a supplier of pay television services, Fox Sports, a supplier of pay television sports channels to pay television services, News Ltd, Consolidated Media Holdings Ltd (PBL), Telstra Corporation Ltd and others (the Foxtel/Fox Sports parties). It also concerned the effects of such conduct upon Seven Network Ltd and C7 Pty Ltd, its subsidiary. C7 also supplied pay television sports channels to pay television services.

The conduct of the Foxtel/Fox Sports parties occurred primarily in connection with their acquisition of the pay television rights for coverage of the Australian Football League (AFL) Competition in 2002 to 2006 and for coverage of the National Rugby League (NRL) Competition in 2001 to 2006. In effect Seven claimed that the Foxtel/Fox Sports parties had acquired both the AFL and NRL rights in order to put C7 out of business so that Fox Sports could dominate the market for supplying sports channels to pay television suppliers Foxtel, Optus and Austar, and so that Foxtel could dominate the market for the supply of pay television services to subscribers. Seven and C7 claimed that the respondents' conduct contravened s. 45, s. 45D and s. 46 of the *Trade Practices Act 1974* (Cth) (Trade Practices Act).

Justice Sackville dismissed Seven's claim. The Court upheld that decision, although its reasons for doing so differed to some extent from his Honour's.

Seven also claimed that Foxtel had contravened the anti-siphoning regime contained in the *Broadcasting Services Act 1992* (Cth). Other claims were made against other parties, but they were not pursued on appeal. The appellants contended at the trial that the respondents had engaged in conduct that had the purpose, effect or likely effect of substantially lessening competition in the retail pay television market. Justice Sackville dismissed the appellants' claims in that regard. The Court agreed with the trial Judge's conclusions that the appellants did not establish that the respondents' conduct was likely to have the effect, or had the effect, of substantially lessening competition in the retail pay television market. The Court also agreed that the appellants failed to establish an anti-competitive purpose.

The majority (Justices Dowsett and Lander) also disagreed with Justice Sackville in two aspects of his construction of s. 45 of the Trade Practices Act. However that difference of opinion did not lead to a different result on the appeal. Justice Sackville construed ss. 45(2)(a)(ii) and (2)(b)(ii) as requiring that all parties responsible for inserting an anti-competitive purpose in a contract, arrangement or understanding have that subjective purpose in order that there be a contravention of the section. The majority considered that ss. 45(2)(a)(ii) and (2)(b)(ii) should be construed as meaning that s. 45 will be contravened if any party to the contract, arrangement or understanding, who was responsible for the inclusion of the impugned provision, had the subjective purpose of substantially lessening competition in the relevant market, provided that such purpose was, itself, a substantial purpose. The majority construed s.45 as not requiring a shared purpose. Justice Mansfield construed ss. 45(2)(a)(ii) and (2)(b)(ii) in the same manner as Justice Sackville.

Justice Sackville held that an anti-competitive purpose could only contravene s. 45(2)(b)(ii) if it related to competition in an existing market. The Court agreed with that conclusion. The trial Judge, however, concluded that if an apparently anti-competitive purpose could not, in fact, be achieved so as substantially to lessen competition in a relevant market, there could be no contravention. The majority did not agree with that conclusion, concluding that such a construction would require the Court to inquire into whether the relevant provision had the likely effect of substantially lessening competition in the market in question, thus failing to recognise that s. 45 distinguishes between purpose and effect or likely effect.

Justice Mansfield did not disagree with his Honour's reasons.

Although the majority differed in those two respects from the views of the trial Judge, all members of the Court were of the opinion that the trial Judge was right to conclude as a matter of fact that none of the parties to the Master Agreement had an anti-competitive purpose in the retail pay television market.

Seven conceded on appeal that the decision of the High Court in *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 meant that the case based on s. 45D of the Trade Practices Act must fail.

All members of the Court agreed with his Honour's conclusion that the respondents did not contravene s. 46. Section 46 prohibits the use of market power for an anti-competitive purpose.

The anti-siphoning regime ensures that important public events, including sporting events, are available to viewers of free-to-air television and not only to pay television subscribers. Seven claimed that the Foxtel/Fox Sports parties had tried to undermine the regime in order to benefit Foxtel.

All members of the Court agreed with his Honour's reasons for dismissing the appellants' anti-siphoning case.

CORPORATIONS - continuous disclosure - obligation to disclose information to ASX under Chapter 6CA *Corporations Act 2001* (Cth) - relationship between continuous disclosure provisions of ASX Listing Rules and Corporations Act - agreements contemplating execution of fuller and more detailed agreements - mining project contingent upon completion of definitive feasibility study - notification to ASX in purported compliance with continuous disclosure provisions under s. 674

ASIC v Fortescue Metals Groups Ltd (No 5)
(23 December 2009, Justice Gilmour)

Fortescue Metals Group (FMG) is a publicly listed mining company on the Australian Securities Exchange (ASX) and Mr Andrew Forrest was FMG's chairman and CEO.

In 2004 FMG executed three framework agreements, substantially in similar terms, with three Chinese contractors to build, transfer and finance the construction of a railway, port and mine in the Pilbara. In August and November 2004 FMG made notifications concerning the framework agreements to the ASX in purported compliance with continuous disclosure provisions under s. 674 and ASX Listing Rule 3.1. Section 674(2) required a listed disclosing entity to notify ASX as a market operator of information that is not generally available and is information that a reasonable person would expect, if it were generally available, to have a material effect on price or value of the entities' securities. The notifications reported that FMG had executed 'binding agreements' with the Chinese contractors. FMG made further public statements to the same effect.

The Australian Securities and Investments Commission (ASIC) alleged that FMG did not have a genuine or reasonable basis for making the disclosure concerning the framework agreements. ASIC's primary claim was that FMG and Mr Forrest deliberately misled the market by overstating the legal effect of the framework agreements with Chinese contractors as 'binding contracts', when they were merely at most agreements to further negotiate. ASIC alleged that the notifications had a positive material effect on the price of FMG's shares. ASIC alleged that (1) FMG and Mr Forrest contravened its continuous disclosure obligations under s. 674 and that Mr Forrest was knowingly concerned in those contraventions under s. 674(2A); and (2) the disclosures were misleading and deceptive under s. 1041H; and (3) Mr Forrest breached his duty as a director to exercise care and diligence under s. 180 by failing to ensure that FMG complied with its disclosure obligations and as a result exposed FMG to a risk of harm including these penalty proceedings. ASIC sought declarations of contravention and civil penalty orders against FMG and Mr Forrest, and additionally an order disqualifying Mr Forrest from being a director.

Justice Gilmour dismissed ASIC's application. Justice Gilmour held that the information which ASIC contends ought to have been disclosed principally comprised a judgment or opinion as to what was the meaning and legal effect of these agreements, which neither FMG nor Mr Forrest ever held. Justice Gilmour found that there was a reasonable basis for FMG and Mr Forrest to conclude as a matter of opinion that the framework agreements were binding. In support of that conclusion Justice Gilmour pointed to legal advice received by FMG, FMG's internal records and external communications, the public positions adopted in respect to the framework agreements by FMG and the Chinese companies as well as the construction of the terms of the framework agreements. Similarly, Justice Gilmour found there was no evidence that Mr Forrest was dishonest or deliberately misled the market. The allegations for breach of director's duties under s. 180 were also dismissed.

A more fulsome summary is contained in the head-note of the report of the decision in the Australian Law Report of *ASIC v Fortescue Metals Group* (2009) 264 ALR 201.

COPYRIGHT – whether recordings of a musical work infringed copyright in an earlier musical work by reproducing a substantial part of the earlier work – causal connection between works not denied – objective similarity determined by aural and visual comparison of musical elements of the works – emphasis is on quality rather than quantity of what is taken – copied features must be a substantial part of the copyright work, not of the infringing work – overall appearance of infringing work may differ from copyright work

TRADE PRACTICES – whether respondents misrepresented to collecting societies that there was no infringement in the copyright work and that they were entitled to 100% of royalties from infringing work – continuing representations made by respondents to collecting societies.

RESTITUTION – whether respondents were unjustly enriched at the expense of the applicant – whether mistake of fact or law was made by collecting societies – claim did not fall within recognised categories of restitution

Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd
(4 February 2010, Justice Jacobson)

The Applicant 'Larrikin', owned the copyright in a short musical work of four bars 'Kookaburra sits in the old gum tree' ('Kookaburra') an iconic Australian round, written and composed in 1934 by Miss Marion Sinclair.

The pop song 'Down Under' was written and composed in 1978 by Mr Colin Hay and Mr Ron Strykert who were members of the group 'Men at Work'. The flute riff of Down Under, which reproduces two of the bars of Kookaburra, was later added to Down Under by another band member, Mr Greg Ham, and formed part of the 1981 recording of Down Under which appeared on Men at Work's best selling album 'Business As Usual'.

The connection between Kookaburra and Down Under was exposed in the Australian Broadcasting Corporation's television program 'Spicks and Specks' in 2007.

Larrikin brought claims under the *Trade Practices Act 1974* (Cth) and the *Copyright Act 1968* (Cth) for copyright infringement against Mr Hay and Mr Strykert, and the owner and licensee of the copyright in the work, EMI Songs Australia Pty Ltd and EMI Music Publishing Australia Pty Ltd.

In considering the question of copyright infringement, his Honour applied *S.W. Hart & Co Proprietary Limited v Edwards Hot Water Systems* (1985) 159 CLR 466 in which it was held that for there to be a reproduction, there must be an objective similarity between the two works and a causal connection between the plaintiff's work and that of the defendant. His Honour also applied the principle stated in authorities such as *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, namely that if these two elements are satisfied, the question then arises as to whether the infringer has copied a substantial part of the copyright work.

In finding that there was a sufficient degree of objective similarity between the bars of Kookaburra which are seen and heard in Down Under to amount to reproduction of a part, his Honour undertook an aural comparison of the musical elements of the two works, including the melody, key, tempo, harmony and structure, as well as a visual comparison of the notated songs, with particular assistance from the evidence of the musicologist experts. The failure to call Mr Ham reinforced the finding of objective similarity.

His Honour considered Mr Hay's evidence that, during some performances of Down Under he sang the words of Kookaburra to the tune of the flute riff in Down Under, was sufficient to show that the qualitative test for substantial part was met.

Larrikin succeeded on its claim under s. 52 of the *Trade Practices Act 1974* that the respondents had misrepresented their entitlement to 100% of the income from Down Under to the Australasian Performing Right Association ('APRA') and the Australasian Mechanical Copyright Owners Society ('AMCOS'). However Larrikin's claim of authorisation of copyright infringement under the *Copyright Act 1968* was not successful because the necessary degree of knowledge was not established.

Larrikin's additional claim that the respondents had been unjustly enriched at its expense in relation to the income collected by APRA and AMCOS was rejected.

CONSTITUTIONAL LAW – act of state doctrine – non-justiciability – scope of act of state doctrine – where Australian citizen has brought proceedings against the Commonwealth – where a determination of the proceedings would depend on findings of the legality of the acts of foreign agents outside Australia – whether act of state doctrine applicable where allegations of grave breaches of international law – whether manageable judicial standards

HIGH COURT AND FEDERAL COURT – original jurisdiction of the High Court and Federal Court – judicial scrutiny of actions of the Executive by Ch III Courts – whether Constitutional framework and legislation in question enables such scrutiny

Habib v Commonwealth of Australia
(25 February 2010, Chief Justice Black and Justices Perram and Jagot)

The Full Court considered the scope and operation of 'the act of state doctrine'. Mr Habib, an Australian citizen, was arrested in the aftermath of terrorist attacks in the USA on 11 September 2001 and alleged that whilst incarcerated he was tortured by foreign agents in Pakistan, Egypt, Afghanistan and Guantánamo Bay, Cuba. These acts, Mr Habib claimed, involved breaches of Australian law. Proceedings against the Commonwealth arose from allegations that Australian officials aided, abetted and counselled these acts of torture and thereby had acted in excess of their authority.

The Commonwealth sought summary dismissal on the basis that the allegations were not justiciable by an Australian court because of the act of state doctrine [*Underhill v Hernandez* 168 US 250 (1897)] which prevents a domestic court from rendering judgment on the actions of a sovereign state committed inside that state's own territory. This gave rise to two issues for determination: firstly, whether the doctrine was applicable when the alleged actions involved gross breaches of international human rights and secondly, whether the doctrine was applicable when the putative actions were alleged to be in excess of Commonwealth power.

Justice Jagot, with whom Chief Justice Black agreed, decided that the doctrine had no operation in circumstances involving grave breaches of international human rights: *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249. Justice Perram did not decide that issue but rather attempted to characterise properly the doctrine. Ultimately, Justice Perram preferred a construction of the doctrine as a super choice of law rule which required domestic courts to treat foreign state action as valid, superseding a nation's private international law rules: *WS Kirkpatrick & Company v Environmental Tectonics Corporation International* 493 US 400 (1990). Since Mr Habib's claims did not concern the validity of actions by foreign agents, but rather whether they occurred, the act of state doctrine had no application. This conclusion was shared by Justice Jagot as another reason why the act of state doctrine was insufficient to ground a motion for dismissal.

With respect to the second issue, all members of the Court concluded that to permit the act of state doctrine to curtail judicial scrutiny of executive power would be incompatible with Chapter III of the *Constitution*, which firmly establishes that the judicial branch is to be the sole arbitrator and delineator of the scope of both legislative and executive power. Indeed, the Court observed that to hold contrary would be illogical as it would permit a common law notion, which is entirely subject to parliamentary modification, to impose a fetter upon judicial review in circumstances where Parliament could not.

INDUSTRIAL LAW – whether the Industrial Court of New South Wales had jurisdiction to hear and determine the application – whether the substantial activities of the Association should be characterised as 'trading' and whether it is therefore a 'trading corporation' to which the *Workplace Relations Act 1996* (Cth) applies so as to exclude the application of the Industrial Relations Act 1996 (NSW) – the application of paragraph 51(xx) of the Constitution – the time at which the activities of the Association are to be assessed

Bankstown Handicapped Children's Centre Association Inc v Hillman
(25 February 2010, Justices Moore, Mansfield and Perram)

The Association was a corporation which provided welfare and support services for people with disabilities, children and young people and provided support for their families and carers. Mr Hillman was formerly employed by the Association. He brought proceedings in the Industrial Court of NSW against the Association and its CEO, seeking a declaration that his contract of employment was unfair, an order declaring the contract void or an order varying the contract, and the payment of money and interest. The Association and its CEO challenged the jurisdiction of the Industrial Court, on the basis that the Association was a trading corporation within the meaning of s. 51(xx) of the Constitution, and therefore the Industrial Court's jurisdiction was excluded by the operation of the *Workplace Relations Act 1996* (Cth). A Full Bench of the Industrial Court held that it had jurisdiction to hear the matter. The Association and its CEO appealed against that decision to the Full Court of the Federal Court.

The Full Court allowed the appeal. The Full Court held that the appeal was competent in that there was a right to appeal to the Court, finding that the initial proceedings in the Industrial Court gave rise to a judgment in a matter arising under the Workplace Relations Act. The Full Court held that the Association was a corporation to which the Workplace Relations Act applied, and that as a result the *Industrial Relations Act 1996* (NSW) was excluded. In so holding, the Full Court found that the commercial nature of the Association's activities were indicative of trading, even though it may well be correct to have characterised the activities as the provision of public welfare services. In particular, the Association's relationship with the state, whereby it provided services and was remunerated for doing so, was of an essentially commercial nature.

TORTS – Negligence – Product Liability – Prescription medicine for relief of inflammation – Side-effects – Whether medicine caused or contributed to cardiovascular disease – Whether manufacturers knew or ought to have known of that tendency – Whether they owed duty of care to consumers – Content of duty of care – Whether affected by status of product as prescription medicine – State of scientific uncertainty as to side-effects of medicine – Whether manufacturers undertook sufficient research into side effects – Whether medicine should have been withdrawn from market pending resolution of scientific issues – Whether manufacturers breached duty of care by not doing so

Peterson v Merck Sharpe and Dohme (Aust) Pty Ltd
(10 October 2008, Justice Edmonds)

This judgment was given in an ongoing representative proceeding under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) in which the applicant, Graeme Robert Peterson, alleged that the consumption, by him and the other group members, of a medication for the relief of arthritic pain called Vioxx contributed to the onset of various kinds of cardiovascular disease. Vioxx was the commercial embodiment of the rofecoxib molecule, which was developed in the USA by Merck & Co, Inc. in the 1990s. Rofecoxib was a member of a new class of drugs for the relief of arthritic pain, the advantage of which was supposed to be the absence of gastrointestinal side-effects. Vioxx was marketed and sold in Australia by Merck Sharpe & Dohme (Australia) Pty Ltd, between late 2000 and September 2004, when it was withdrawn from the market internationally by Merck & Co, Inc.

In the proceeding, Mr Peterson, who had a heart attack in December 2003 after taking Vioxx for about 2½ years, alleged that Vioxx contributed to that event, that the Merck companies were negligent in not having withdrawn Vioxx from the market earlier than they did, in not having warned him of the risk of taking Vioxx and in the making of certain promotional representations to doctors and others, that the companies' failure to warn, and those representations, amounted to misleading and deceptive conduct under s. 52 of the *Trade Practices Act 1974* (Cth), that Vioxx had a defect within the meaning of s. 75AD of that Act, and that Vioxx was not reasonably fit for this purpose within the meaning of s. 74B, and was not of merchantable quality within the meaning of s. 74D, of that Act.

The judgment involved the determination of Mr Peterson's own case and of a number of questions common to group members. Justice Jessup upheld the allegations that Vioxx about doubled the risk of heart attack generally, and that it did contribute to Mr Peterson's heart attack. On Mr Peterson's case in negligence, his Honour rejected the allegation that the Merck companies had been negligent in not having withdrawn Vioxx from the market earlier than they did, but held that the failure by Merck Sharpe & Dohme (Australia) Pty Ltd to warn, and one of its promotional representations made to Mr Peterson's doctor, were less than what was required for a discharge of that company's duty of care. However, his Honour held that, had a sufficient warning been given, or had that representation not been made, Mr Peterson would still have taken Vioxx. In the result, Mr Peterson's negligence case as against both companies was dismissed.

Justice Jessup held that Vioxx did have a defect within the meaning of s. 75AD of the Trade Practices Act, but upheld the defence of Merck Sharpe & Dohme (Australia) Pty Ltd that the state of scientific or technical knowledge at the time when Vioxx was supplied to Mr Peterson was not such as would have enabled the defect to be discovered. His Honour upheld the allegation that, by reason of its effect on the risk of heart attack, Vioxx was not reasonably fit for Mr Peterson's purpose within the meaning of s. 74B, and was not of merchantable quality within the meaning of s. 74D, of that Act.

In this representative proceeding, Mr Peterson alleged also that Vioxx contributed to the risk of suffering certain named cardiovascular conditions in addition to heart attack. Justice Jessup rejected these allegations.

In the result, Mr Peterson's application against Merck & Co, Inc., and his application with respect to conditions other than heart attack, were dismissed. In his own case, he was awarded damages for the contribution made by Vioxx to his heart attack. In relation to other group members who suffered heart attacks, the case is continuing.

ADMIRALTY – LIMITATION OF LIABILITY – application under s.25 of the *Admiralty Act 1988* (Cth) by shipowner to limit liability under *Limitation of Liability for Maritime Claims Act 1989* (Cth) and the *Convention on Limitation of Liability for Maritime Claims 1976 as affected by the 1996 Protocol to amend that Convention* – meaning of 'claims arising on any distinct occasion' in Arts 2(1)(a) and 6(1) of the Convention – Arts 6(1)(b) and 11 of the Convention permitting shipowner to apply to limit liability for all claims arising on a distinct occasion – maritime liens – multiple claims alleged to arise from ship's anchor fouling submarine gas pipeline, ship then going astern, ship later moving ahead, pipeline then fractured, later ship moving astern and further bending pipeline – claims by pipeline's owners for repairs, loss of gas and economic loss – consumers of gas claiming economic losses – longer repair period because of further bending – whether the different events causing damage to the pipeline on one or more distinct occasions

Strong Wise Limited v Esso Australia Resources Pty Ltd
(18 March 2010, Justice Rares)

During a gale on Saturday afternoon, 13 December 2008, *APL Sydney* anchored at about 14:30 in the outer anchorage of Port Phillip Bay, Melbourne. *APL Sydney* was a two year old, 231 metre length overall, fully cellular container ship. The outer and inner anchorages of the Bay were separated by an area through which a submarine pipeline ran. It carried ethane gas at high pressure from Mordialloc on the east to Altona on the west. The pipeline was buried about three metres below the seabed.

The ship began dragging her anchor to the north east from her original position. Between 15:44 and 15:45 the vessel's starboard anchor fouled the pipeline. Immediately after, the master put the engine astern for ninety seconds, stopping when he realised that the anchor may have fouled the pipeline. The ship then yawed until about 16:20 when the pilot advised the master to put the engine ahead. Soon after this, the pipeline ruptured and the engine was stopped. A large amount of gas bubbled to the surface. About six minutes later, the engine was put astern, and the anchor pulled one end of the ruptured pipeline back towards Mordialloc, dragging it further out of its trench and bending it almost to a right angle.

In a number of separate proceedings, BHP and Esso sued the shipowner for damages estimated to exceed the cost of repair of $27 million, while two large consumers of gas supplied from the pipeline also brought two separate proceedings claiming damages for pure economic loss estimated at $12 million and $27 million.

The shipowner began proceedings under s. 25 of the *Admiralty Act 1988* (Cth). It claimed that it was entitled to limit its liability pursuant to the *Convention on Limitation of Liability for Maritime Claims 1976 as affected by the 1996 Protocol to amend that Convention* (the Convention) which is given force of law in Australia by the *Limitation of Liability for Maritime Claims Act 1989* (Cth). The value of the ship calculated under the Convention was about $21.5 million. Article 6(1)(b) of the Convention entitles the shipowner to limit its liability for claims 'arising on any distinct occasion'.

The case centred on the meaning of the expression 'arising on any distinct occasion' in the Convention. The shipowner argued that the whole episode beginning with the initial fouling and ending on the final separation of the anchor from the pipeline was a single 'distinct occasion'. Thus, it sought to limit all its liability by establishing a single limitation fund. Esso and BHP asserted there were four distinct occasions being the initial fouling and each engine movement beginning at 15:46, 16:20 and 16:27.

The question of what was a 'distinct occasion' under the Convention had not been decided previously by any court, anywhere in the world, so far as the researches of the parties or the Court had revealed. The Court reviewed the scheme of the Convention and the history of shipowners' rights to limitation of their liability. The Court concluded that a claim arises on a distinct occasion under the Convention where a single act, neglect or default of a shipowner places him in such a relationship that, as a matter of commonsense, it is a cause of the loss or damage suffered by a third party who has a claim under Article 2 of the Convention. It held that the occurrence that causes such a claim to arise amounts to a distinct occasion for the purposes of Articles 6, 7, 9 and 11.

However, the Court also held that if a subsequent act, neglect or default of the same shipowner separately operates to cause different or separately identifiable loss or damage to the same third party, or to others, then a new claim or claims will arise on that later distinct occasion. The latter occasion is distinct because first, there is a new event, secondly, there is a new loss or damage and thirdly, the new cause is, as a matter of commonsense, not a necessary or inseparable consequence of the earlier act, neglect or default.

The Court found that there were two distinct occasions, the initial fouling, and the subsequent astern movement which ruptured the pipeline. It held that the engine movements at 15:46 and 16:27 were inseverably connected to the events that immediately preceded them. The Court allowed the shipowner to limit its liability for each of those two occasions.

An appeal to the Full Court has been discontinued.

CORPORATIONS LAW – application pursuant to s. 411 *Corporations Act 2001* (Cth) for orders convening meeting of shareholders to approve scheme of arrangement and approving explanatory statement – proposed capital reduction condition precedent to scheme – risk that capital reduction will prejudice ability of CSR to meet asbestos liabilities – whether primary judge erred in dismissing application

CSR Ltd, in the matter of CSR Ltd
(23 April 2010, Chief Justice Keane and Justices Finkelstein and Jacobson)

CSR applied to the Court, pursuant to s. 411 of the *Corporations Act 2001* (Cth), for orders convening a meeting of shareholders to approve a scheme of arrangement. The scheme involved the demerger of CSR's sugar and renewable energy business from its building products and aluminium business. A capital reduction was a condition precedent to the scheme.

The Court at first instance had refused to make the order. The Australian Securities Investments Commission, the Attorney-General for the State of New South Wales, the Asbestos Injuries Compensation Fund Ltd and other entities were granted leave to intervene in the proceeding. They argued that the proposed demerger should not proceed because it could prejudice the prospects of recovery of damages by asbestos claimants.

The Full Court held that the discretion to refuse to make an order under s. 411(1) of the Corporations Act may properly be exercised where the making of the order would be futile because there is a clear indication that the scheme as proposed will not be finally approved. However, the inquiry under s. 411(1) is not intended to resolve difficult questions on which reasonable minds may differ. In circumstances where the judge at first instance did not conclude that the proposed scheme would increase the risk of non-payment to creditors in a material rather than abstract way, it was not open to the judge at first instance to refuse an order under s. 411(1). Discretion under s. 411(1) should have been exercised to allow the shareholders to vote on the proposal and the objectors to mount, if they chose to do so, a better informed and more focused challenge to the reduction of capital by the other means open to them under the Corporations Act.

Held by Chief Justice Keane and Justices Jacobson and Finkelstein agreeing: a 'material prejudice' to a company's ability to pay its creditors relates to a material, as opposed to theoretical, increase in the likelihood that the reduction in capital will result in a reduced ability to pay creditors.

By Justice Finkelstein: considerations of 'public policy' add nothing to existing principles, which adequately protect the interests of members, creditors and persons who might deal with the company by an inquiry whether the scheme is fair or reasonable. Notions of 'commercial morality' involve an 'ill-defined and largely subjective set of criteria' and should be jettisoned from the matters to be considered in approving a scheme under s. 411.

TAXATION – determination of preliminary questions arising in the context of appeals against objection decisions of the respondent – whether applicant entitled to claim deductions in relation to copyright – whether copyright subsists in patient medical records – whether interests in copyright were transferred to the applicant – whether the applicant used copyright interests for the purpose of producing assessable income – whether monetary consideration was paid for copyright interests

Primary Health Care v Commissioner of Taxation
(4 May 2010, Justice Stone)

Primary Health Care Limited v Commissioner of Taxation [2010] FCA 419 raised a number of preliminary issues concerning whether the applicant was entitled to claim deductions for the depreciation of intellectual property rights, being copyright in the patient records, it claimed to have acquired under individual contracts for the sale of approximately 300 medical and dental practices. In objection decisions relating to several years of income, the Commissioner had rejected the claimed deductions. By agreement the parties selected 12 of approximately 300 practices as sample practices with reference to which the trial judge was to answer the preliminary questions.

Justice Stone accepted that under the contracts for sale of the sample practices, ownership of the patient records of those practices passed to the applicant. Her Honour held, however, that except in relation to referral letters written by the sample doctors and the records relating to one patient of one of the sample practices, copyright did not subsist in the patient records.

It was a feature of the patient records that they comprised short entries, often of only a few words and, in most cases written by a number of different doctors. Copyright could not be established because either the authors of the patient records had not been sufficiently identified and shown to be qualified persons within the meaning of s. 32(1) of the *Copyright Act 1968* (Cth) or the applicant had failed to establish that the individual entries constituted original literary works. The entries did not display the independent intellectual effort directed towards expression that is necessary for an individual literary work.

On the question whether ownership of any copyright passed to the applicant under the contracts for sale, her Honour held that only in one instance, (in the only case in which copyright was expressly assigned) did any copyright owned by the sample doctors pass to the applicant. In this case, however, no consideration was paid in respect of this copyright and therefore, under the relevant provisions of the *Income Tax Assessment Act 1997* (Cth), the applicant was not entitled to claim a deduction with respect to the copyright that had passed.

NATIVE TITLE – common law extinguishment – particular non-exclusive native title rights agreed to exist subject to extinguishment – mineral leases granted pursuant to an agreement between the State and leaseholders ratified by specific legislation – purposes of agreement extended beyond mining – leaseholders conducted open cut mining, built a township and other infrastructure on one third of the leased area – the mine and town now closed and area rehabilitated – whether mineral leases conferred right of exclusive possession – whether rights granted by the mineral leases are inconsistent with the native title rights – whether grant of mineral leases extinguished the native title rights over the entire leased area or only the developed leased areas – relevance of actual exercise of rights by the leaseholders or by the native title holders - relevance of rehabilitation

Brown (on behalf of the Ngarla People) v State of Western Australia (No 2)
(21 May 2010, Justice Bennett)

The applicants claimed native title over certain land in Western Australia. Under present consideration were parts of the claimed area which are subject to two mineral leases (the mineral leases), granted pursuant to an agreement between joint venturers and the State of Western Australia (the agreement), which was ratified by specific state legislation. Pursuant to rights granted under the mineral leases and the agreement, the leaseholders constructed and utilised an open-cut mine, a town and other infrastructure over approximately one third of the leased area. The mine and town were subsequently closed and rehabilitation was carried out.

The parties agreed that, unless extinguished by the grant of the mineral leases, particular non-exclusive native title rights exist over the leased area (agreed native title rights). The issue of extinguishment was addressed in the form of preliminary questions. It was agreed that the extinguishing effect of the mineral leases was to be determined under common law principles and that the applicable test was whether the rights granted to the leaseholders under the mineral leases were inconsistent with the agreed native title rights.

The Court found that the mineral leases did not confer on the leaseholders a right of exclusive possession over the whole of the leased area such as to extinguish all native title rights in that area. The Court considered that the leaseholders did not have the right to exclude access by native title holders seeking to exercise rights over parts of the leased area that were not developed by the leaseholders.

The Court found that the rights granted to the leaseholders to construct and utilise the mine, the town site and associated infrastructure were inconsistent with the continued existence of any of the agreed native title rights within the areas on which the mines, town site and associated infrastructure have been constructed (the developed areas). The Court did not consider, however, that the rights granted by the mineral leases were inconsistent with the continued existence of the agreed native title rights in those parts of the leased area which were not affected by developments carried out pursuant to the mineral leases and the agreement. This was so even though the leaseholders could choose where on the leased area to exercise their rights. The Court found the reasoning of the Full Court in *De Rose v South Australia* (No 2) (2005) 145 FCR 290 to be applicable in that the grant of the mineral leases became operative to extinguish native title rights on particular parts of the leased area when the granted rights were exercised, because it was only then that the precise areas of land affected by the right could be identified.

The Court concluded that the agreed native title rights had only been extinguished over the developed areas and could not be ‘revived’ even though the mine and the town site are no longer used by the leaseholders.

SUPERANNUATION – superannuation guarantee scheme – liability for superannuation guarantee charge – s. 12(1) and s. 12(3) *Superannuation Guarantee (Administration) Act 1992* (Cth) definition of employee – whether interviewers employees or independent contractors

CONSTITUTIONAL LAW – powers of Commonwealth Parliament – s. 51(ii) taxation power – whether *Superannuation Guarantee Charge Act 1992* (Cth) a law with respect to taxation – severability of Superannuation Guarantee Charge Act and Part 8 *Superannuation Guarantee (Administration) Act 1992* (Cth) – s. 51(xxiii) invalid and old-age pensions power – whether Part 8 Superannuation Guarantee (Administration) Act a law with respect to invalid and old age pensions

Roy Morgan Research Pty Ltd v Commissioner of Taxation
(26 May 2010, Chief Justice Keane and Justices Sundberg and Kenny)

Roy Morgan appealed from a decision of the Administrative Appeals Tribunal affirming a decision of the Commissioner of Taxation in respect of assessments of superannuation guarantee charge. Roy Morgan paid interviewers to conduct market research. It did not treat the interviewers as employees and did not lodge superannuation guarantee statements in relation to them under the *Superannuation Guarantee (Administration) Act 1992* (Cth).

The issue before the Tribunal was whether Roy Morgan's interviewers were 'employees' either within the ordinary meaning of the word in s. 12(1) Superannuation Guarantee (Administration) Act or because they worked under a contract that was wholly or principally for their labour as specified in s. 12(3). The Tribunal decided the interviewers were employees within the meaning of both subsections.

Roy Morgan also argued the Superannuation Guarantee (Administration) Act and the *Superannuation Guarantee Charge Act 1992* (Cth) were constitutionally invalid. Specifically, it was said that the charge was not imposed for public purposes, and was not supported by any head of Commonwealth power.

The Court, consisting of Chief Justice Keane, Justices Sundberg and Kenny, held that the interviewers were employees within the meaning of s. 12(1). In relation to the constitutional matters, the Court held that the fact that the exacted moneys were paid into the Consolidated Revenue Fund established, in the absence of countervailing considerations, that the exaction was for public purposes. The Acts did not substitute a pre-existing private obligation with a statutory one, and the benefits received by employees would only eventuate upon their infirmity or retirement. As to the appropriate head of Commonwealth power, the Court found that Acts were within the scope of s. 51(xxiii) of the Constitution, and that it was contrary to the general approach to Constitutional interpretation to find that this section should be limited to old-age pensions provided by the Commonwealth.

INDUSTRIAL LAW – Workplace Agreements – Obligation to 'consult' with employees in respect of proposals to be implemented that will impact on 'terms and conditions of employment' – Contravention of that obligation in relation to proposal for partial privatisation of State railway - Penalties

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Ltd
(11 and 22 June 2010, Justice Logan)

This was an application under the *Fair Work Act 2010* (the Act) by railway industry unions for the imposition of pecuniary penalties on QR Limited and two of its subsidiaries ('the QR Group') for twenty two alleged contraventions of a civil remedy provision of that Act. That provision was a like term in each of twenty two governing industrial agreements that imposed an obligation on a particular employer within the QR Group to 'consult' with employees in respect of a proposal for change will impact upon the terms and conditions of their employment. The QR Group was owned by the Queensland Government and used the trading name, Queensland Rail.

On 8 December 2009 the Queensland Government announced a decision partially to privatise the QR Group via the sale to the public of shares in a new company, QR National, which was to become the operator of what had hitherto been the QR Group's coal and freight businesses. A government owned corporation, to be called 'Queensland Rail', was to operate the QR Passenger business, retain ownership of the existing publicly owned track network and maintain it. The date proposed for the break up of the QR Group was 1 July 2010.

Decisions were made in January 2010 by the QR Group, upon the recommendation of its 'People Resourcing Team' (PRT), as to which employees would be offered positions in QR National and who would remain in the new Queensland Rail. Letters advising this decision were sent to its workforce by the QR Group on 22 January 2010. The decision to constitute the PRT was made by the QR Group's senior managers alone and, in determining what allocation recommendation to make, the PRT dealt with senior managers only. Although, before 22 January 2010, the QR Group had extensively and intensively provided information to its workforce and made provision for feedback it had not put proposed individual allocations to employees for comment.

In the Termination Change and Redundancy Case (TCR Case) in 1984 the Australian Industrial Relations Commission for the first time made general provision for the insertion into Federal awards of clauses providing for consultation by employers with employees in relation to change in the workplace. This was the first case since the TCR Case when the Court had been required to consider in depth what constituted 'consultation' for the purpose of a consultation clause in an industrial instrument.

Justice Logan analysed the meaning given by courts to 'consult' in other contexts, the heritage of consultation clauses, International Labour Organisation commentary on provision for consultation in ILO Conventions and the wording of the particular term in the agreements. His Honour held that key elements of consultation were that the party to be consulted be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon, that while the word always carried with it a consequential requirement for the affording of a meaningful opportunity to that party to present those views, what will constitute such an opportunity will vary according to the nature and circumstances of the case and that a right to be consulted, though a valuable right, is not a right of veto. Justice Logan concluded that, in the circumstances, the QR Group had been obliged to consult with its workforce before 22 January 2010 and had not complied with the obligation in the industrial agreements.

In a later judgment with respect to penalty Justice Logan held that the change proposed was radical, affected the whole of the QR Group's workforce of some 15,000 persons and that the senior management of the Group had closed its eyes to the obvious in relation to the need to consult. His Honour held that these were serious contraventions of an important, modern workplace right and that in the public interest Parliament had made provision for adherence to industrial bargains. Penalties totalling $660,000, the maximum available under the Act, were imposed on the QR Group.