# APPENDIX 8
# SUMMARY OF DECISIONS OF INTEREST



## CORPORATIONS – directors' duties – financial reporting – directors required to approve accounts and reports, and to take all reasonable steps to ensure statutory compliance – Statutory duty of care and diligence

*ASIC v Healey* [2011] FCA 717
(27 June 2011, Justice Middleton)

This case concerned the liability of directors of a group of substantial, publicly-listed companies for approving company accounts which failed to disclose significant matters which were (or should have been) well-known to the directors. Specifically, those matters related to the existence of short-term liabilities (which were incorrectly classified as non-current liabilities) and guarantees given after the balance date in relation to these liabilities, both of which affected the assessment of the companies' solvency and liquidity.

ASIC sought declarations (among other things) that the directors had contravened ss 180(1), 344(1) and 601FD(3) of the *Corporations Act 2001* (Cth) (the Act). The directors argued, however, that they were entitled to rely on the assurances and specialist advice provided by management and auditors regarding the accuracy of financial reports, and that this – coupled with the failure of those professionals to detect the errors in question – meant that they had not breached the Act.

Justice Middleton considered that directors have a non-delegable, primary responsibility for a company's financial report and the directors' report. As such, each director is required to take a diligent interest in and be able to understand financial statements, and to that extent, have a knowledge of conventional accounting practice and relevant accounting standards. Directors must inquire about any potential deficiencies they observe (or should reasonably have observed) in such documents. Under s 180, directors must also take reasonable steps to enable them to guide and monitor the management of a company (of which remaining informed about a company's financial position forms part). Although directors are entitled to rely upon the advice of management and auditors when it comes to a company's financial position, his Honour held that such reliance is not a substitute for directors' own non-delegable responsibilities (such as the need to be diligent and careful in considering a resolution to approve financial statements).

His Honour was not persuaded that such requirements would cause the boardrooms of Australia to empty overnight. In the circumstances, his Honour found that the directors had failed to (a) properly read and understand the financial statements; (b) apply the knowledge they had (or should have acquired) to perform that task; (c) make appropriate inquiries; and (d) have apparent errors corrected. Accordingly, his Honour held that the directors had failed in their duties to exercise the degree of care and diligence required of them, and had therefore breached ss 180(1), 344(1) and 601FD(3) of the Act.

## TAXATION – non-resident for income tax purposes – definition of 'trustee' – whether respondent entitled to assess non-resident individual as a trustee of the net income of a trust estate under s 98(3) of the *Income Tax Assessment Act 1936* (Cth)

*Leighton v Commissioner of Taxation* [2011] FCAFC 96
(10 August 2011, Justices Edmonds, Gilmour and Logan)

This case concerned assessments of income tax which the Commissioner of Taxation raised against a non-resident individual (the appellant) as trustee of a trust estate in respect of income which was alleged to be income of the trust estate and where the provisions of s 98(3) of the *Income Tax Assessment Act 1936* (Cth) were otherwise satisfied.

The issue in the case was whether income arising from the purchase and sale of shares, being trading stock, by two non-resident companies, Salina Investments Limited (Salina) and Kolton Holdings Limited (Kolton), were income of a trust estate of which the appellant was a trustee because the proceeds of sale were received by the appellant on behalf of Salina and Kolton. At first instance the assessments had been upheld.

On appeal the Court held that it was Salina and Kolton that derived the income from the sale of the trading stock represented by the shares, without the intervention of anyone other than a broker as agent; the basis of their derivation being accruals, they derived that income irrespective of whether or not they or a third party, such as the appellant, received payment on their behalf.

In the course of their reasons, the Court referred to and applied a number of basal propositions in support of its conclusion that the assessments against the appellant could not be sustained. First, that once Salina and Kolton derived their income from share trading, the subsequent payment of the proceeds of sale was no more than the 'realisation of income already derived'. Second, if Salina and Kolton derived on an accruable basis and as ordinary income the gross proceeds of the sale of the shares in the course of conducting their respective share trading businesses, there could not be a further derivation by them of the same income as beneficiaries presently entitled to the income of a trust estate or a share of that income under Div 6 of Pt III of the Income Tax Assessment Act. Nor could the appellant derive that income as a 'trustee', for it would not be the net income of a trust estate.

For these reasons, the appeal was allowed.

## EXTRADITION **– legislation providing for staged process of determinations by different functionaries – ultimate decision by Minister whether person to be surrendered for extradition – whether Minister obliged to reconsider a circumstance previously determined – whether person was 'accused' of an offence in Requesting State or merely wanted for questioning or investigation – relevance to power to order surrender**

*O'Connor v Zentai* [2011] FCAFC 102
(16 August 2011, Justices North, Besanko and Jessup)

This was an appeal from a judgment of a judge of the Court in which orders in the nature of certiorari and mandamus, and declarations, had been made with respect to a determination of the Minister for Home Affairs, as delegate of the Attorney-General, that Charles Zentai, whose extradition the Republic of Hungary had sought for what was said to be a war crime committed in 1944, be surrendered for extradition on that account. The effect of the primary judge's orders had been that the determination did not provide a legal basis for that extradition. In one respect, the Full Court, by majority, upheld his Honour's conclusion, but varied the orders made such that the question whether the facts allowed for Zentai to be surrendered to Hungary was required to be reconsidered by the Minister. Justices Besanko and Jessup took the view that, under the *Extradition Act 1988* (Cth) and the *Treaty on Extradition between Australia and the Republic of Hungary*, a person who was wanted for an offence in Hungary could be extradited only if that very offence was an offence in Hungary at the time when the facts which formed the basis of the allegation took place. Justice North took the view that it was sufficient if those facts would have given rise to the commission of an offence in Hungary at the time, even if not the very offence for which the person was wanted. As the Minister, in the determination which was challenged, had proceeded on a view of the law that was not that of the majority, the orders of the Full Court were such as required him to proceed again according to law.

The Full Court also held that the determination to be made by the Minister was the last in a sequence of decisions requiring to be made, and which in Zentai's case had previously been made, at various stages and under different provisions of the *Extradition Act 1988* (Cth). Thus it was no longer open to Zentai to challenge earlier decisions, specifically that he was 'accused' in Hungary and that he was an 'extraditable person' within the meaning of that Act. There were several other bases upon which the Minister's determination had been challenged, each of which was concerned with purely factual questions arising in connection with the detailed process by which the Minister came to make the decision which sustained his determination. None of those challenges was successful in the Full Court.

Special leave to the High Court was granted on 9 December 2011.

## FREEDOM OF INFORMATION **– legal professional privilege – whether impliedly waived – whether acts of disclosure are inconsistent with the maintenance of the privilege – legal advice referred to in Government Response – voluntary disclosure of summary in course of proceedings – advantage to person seeking to maintain the privilege or disadvantage to others which gives rise to possibility of inconsistency**

*British American Tobacco Australia Ltd v Secretary, Department of Health and Ageing* [2011] FCAFC 107 (23 August 2011, Chief Justice Keane, Justices Downes and Besanko)

British American Tobacco Australia Ltd (BATA) made a request to the Secretary of the Department of Health and Ageing (the Secretary) for access to a copy of a memorandum of advice (the Advice) under s 15 of the *Freedom of Information Act 1982* (Cth) (the FOI Act). The Attorney-General's Department (AGD) had provided the Advice to the Tobacco Policy Section of the then Department of Human Services and Health (DHSH). The Advice dealt with the legal and constitutional issues pertaining to the generic packaging of cigarettes.

The AGD refused the request on the basis that the document was exempt from production under s 42 of the FOI Act because it would be privileged in legal proceedings on the ground of legal professional privilege. The Administrative Appeals Tribunal (AAT) affirmed that decision.

BATA appealed the AAT's decision to the Court. It contended that the Secretary had waived the legal professional privilege that inhered in the Advice by five acts of disclosure. They were: a reference to aspects of the Advice in a Government Response paper that was tabled in the Senate; the subsequent publication of the Government Response paper on a government website; and the provision of a summary of the Advice to the Tobacco Working Group (TWG), to the Ministerial Tobacco Advisory Group (MTAG) and, in the course of the AAT proceedings, to BATA.

The Secretary contended on appeal that the tabling and publication of the Government Response paper were 'proceedings in Parliament' within s 16(3) of the *Parliamentary Privileges Act 1987* (Cth) (PPA). Accordingly, they attracted parliamentary privilege and could not be considered for the purpose of determining whether legal professional privilege in the advice had been waived. The Secretary relied on s 16(2)(c) of the PPA as indicating an extension in the reach of s 16(3) to encompass publication of the Government Response paper by the executive government.

The Secretary's contention formed the basis of the first issue to be considered by the Court. Chief Justice Keane and Justices Downes and Besanko held that, on its proper construction, s 16(3) protected the tabling of the Government Response in the Senate through parliamentary privilege. To escape the protection afforded by s 16(3), BATA would need to have shown that it sought to refer to the tabling of the Government Response in the Senate only to show that the words were published. The inescapable conclusion, however, was that BATA intended to use the tabling of the Government Response in the

Senate to invite the inference that it revealed an inconsistency in the position of the Secretary in later seeking to maintain legal professional privilege. The Court reasoned that this inference is precisely the kind of reflection that s 16(3) of the PPA provides may not be made upon the conduct of those whose published statements are privileged.

The privilege did not extend, however, to the subsequent publication by the executive government of statements made in the Parliament or the publication of the Government Response paper on the website of the executive government. Contrary to the submissions of the Secretary, the Court held that s 16(2) (c) of the PPA was concerned with that which is incidental to the activities of the legislative arm of government. The publication of the statements and the Government Response paper by the executive government was, on the face of things, unrelated to the business of the legislative branch.

The second broad issue for consideration by the Court was whether the Secretary's acts of disclosure effected an implied waiver of the legal professional privilege attaching to the Advice. The Court held that it did not. Legal professional privilege will be impliedly waived if the conduct of the person seeking to rely upon the privilege is inconsistent with the maintenance of the privilege: Mann v Carnell (1999) 201 CLR 1. The Court held that the Secretary did not seek to deploy a partial disclosure of the AGD legal advice for forensic or any other advantage for itself, so as to make its conduct inconsistent with the maintenance of privilege.

The final issue that the Court considered was whether the Secretary had waived the legal professional privilege in the Advice through the provision of a summary of the Advice to the TWG, to the MTAG and, in the course of the AAT proceedings, to BATA. The Court held that the privilege had not been waived in respect of the provision of summaries to the TWG or the MTAG. The advisors comprised in these groups could not sensibly be seen as outsiders to the executive government.

With respect to the provision of summaries to BATA in the proceedings below, the Court held that privilege had not been waived for the same reasons given in relation to the publication of the Government Response paper on the website of the executive government.

## NATIVE TITLE – determination by National Native Title Tribunal that mining leases may be granted subject to conditions – whether provisions allowing determination invalid as laws prohibiting free exercise of religion contrary to s 116 of Constitution – consideration of relevance of international treaty obligations to statutory interpretation

*Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2011] FCAFC 100 (1 September 2011, Justices North, Mansfield and Gilmour)

This appeal concerned two future act determinations of the National Native Title Tribunal under s 38(1) of the *Native Title Act 1993* (Cth). The Tribunal determined that the State of Western Australia could grant certain mining leases over land in the Pilbara to FMG Pilbara Pty Ltd subject to the imposition of four conditions, which included protection for sites of sacred stones and ochre under the *Aboriginal Heritage Act 1972* (WA).

The appellants, being registered native title claimants in relation to the land in question, first claimed that the determinations were invalid because ss 38 and 39 prohibited the free exercise of their religion contrary to s 116 of *The Constitution*. Second, they claimed that those provisions should have been construed in accordance with Art 27 of the *International Covenant on Civil and Political Rights 1966* notwithstanding that there was no ambiguity.

Justice McKerracher rejected these contentions and upheld both determinations *(Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2010] FCA 690).

The first issue for consideration by the Full Court was whether s 116 of *The Constitution* operates to invalidate Commonwealth laws that have the indirect effect of prohibiting the free exercise of religion. The Full Court held that the primary judge was correct to answer this question in the negative. In reliance on *Kruger v Commonwealth* (1997) 190 CLR 1, the Full Court held the test for invalidity under s 116 of *The Constitution* is whether the Commonwealth law in question has the purpose, and not merely the effect, of prohibiting the free exercise of religion. There was nothing on the face of ss 38 and 39 that evidenced such a purpose. Their Honours noted that some of the mandatory considerations under s 39 (eg the freedom of the native title parties to carry out rites, ceremonies or other activities of cultural significance on the land) demonstrated that the legislature was concerned about protecting religious freedom. A further obstacle for the appellants was that the Tribunal had made a fact finding that the free exercise of the appellants' religion would not be prohibited by the grant of mining leases subject to conditions. Finally, the Full Court also agreed with Justice McKerracher that the appellants' complaint was essentially directed to determinations of the Tribunal and the resulting grant by the State of the mining leases under State legislation to which s 116 has no application.

The second issue for consideration was whether the primary judge erred by failing to hold that the Tribunal wrongly concluded that international instruments were not relevant to its inquiry because there was no ambiguity in ss 38 and 39. The Full Court considered *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 and held that in the absence of ambiguity, Australia's international treaty obligations were of no assistance to the construction of ss 38 and 39.

Other grounds of appeal were dismissed by the Full Court as disclosing no legal error.

## HUMAN RIGHTS – Part IIA *Racial Discrimination Act 1975* (Cth) – offensive conduct based on race – newspaper articles and on-line blog articles – principles for determining imputations conveyed by articles – conventional meaning of 'Aboriginal' – whether Part IIA of the Racial Discrimination Act restricted to conduct based on racial hatred – whether articles were reasonably likely to offend, insult, humiliate or intimidate – whose reaction is to be assessed – relevance of community standards – 'in all the circumstances' – 'reasonably likely – 'offend, insult, humiliate or intimidate'

*Eatock v Bolt* [2011] FCA 1103
(28 September 2011, Justice Bromberg)

This proceeding raised for consideration Part IIA of the *Racial Discrimination Act 1975* (Cth) (the RDA), including questions as to the balance sought to be struck by Part IIA between justifiable freedom of expression and the right to freedom from racial prejudice and intolerance.

The applicant (Eatock) complained that two newspaper articles written by a well-known journalist Andrew Bolt (Bolt), and published in the Herald Sun by the Herald and Weekly Times (HWT), conveyed racially offensive messages about fair-skinned Aboriginal people. In a class action brought on her own behalf and on behalf of a class identified as people who have a fairer, rather than darker skin, and who by a combination of descent, self-identification and communal recognition are, and are recognised as, Aboriginal persons, Eatock claimed that Bolt's articles contravened s 18C(1) of the RDA, which relevantly provided:

*(1) It is unlawful for a person to do an act, otherwise than in private, if:*

- *(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and*
- *(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.*

Bolt and the HWT denied that the elements of s 18C had been established and claimed that in any event, their conduct was exempted by s 18D of the RDA, which relevantly provided that:

Section 18C does not render unlawful anything said or done reasonably and in good faith:

*…*

*(b) in the course of any statement [or] publication…made…for any genuine… purpose in the public interest; or*

*(c) in making or publishing:*

*…*

*(ii) a fair comment on any event or matter of public interest…*

Justice Bromberg determined that each of the elements required by s 18C was established and that the conduct of Bolt and HWT was not exempted from unlawfulness by s 18D. His Honour was therefore satisfied that each of Bolt and HWT had contravened s 18C of the RDA by reason of the writing and publication of the articles. As well as making a declaration of contravention, Justice Bromberg made orders which prohibited the re-publication of the articles and required HWT to publish corrective notices in the newspaper in which the articles had appeared.

In the course of his judgment and in construing s 18C of the RDA, Justice Bromberg held that:

(i) section 18C was not restricted to extreme racist behaviour based upon racial hatred or behaviour calculated to induce racial violence;

(ii) whether conduct is reasonably likely to offend a group of people, is to be analysed from the point of view of the 'ordinary' or 'reasonable' representative of that group, to whom will be attributed characteristics consistent with what might be expected of a member of a free and tolerant society;

(iii) the phrase 'reasonably likely' in s 18C(1)(a) refers to a chance of an event occurring or not occurring which is real, and not fanciful or remote; and

(iv) the phrase 'offend, insult, humiliate or intimidate' in s 18C(1)(a) does not extend to personal hurt which is unaccompanied by a public mischief of a kind that the RDA seeks to avoid and refers to conduct that has profound and serious effects.

Justice Bromberg held that Australian Aboriginal people are a race and have a common ethnic origin within the meaning of s 18C(1)(b) and that a person of mixed heritage but with some Aboriginal descent, who identifies as an Aboriginal person and has communal recognition as such, satisfies what is conventionally understood to be an Australian Aboriginal.

His Honour held that from the perspective of fair-skinned Aboriginal people, the articles contained imputations that:

- there are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the individuals identified in the articles are examples, who are not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and
- fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

Justice Bromberg was satisfied that fair-skinned Aboriginal people (or some of them) were reasonably likely, in all the circumstances, to have been offended, insulted, humiliated or intimidated by the imputations conveyed by the articles. Further, Justice Bromberg was satisfied that the causal nexus required by s 18C was satisfied because the articles were calculated to convey a message about the race, ethnicity or colour of fair-skinned Aboriginal people, including as to whether those people were sufficiently of Aboriginal race, colour or ethnicity to be identifying as Aboriginal people.

In relation to the construction of s 18D of the RDA, Justice Bromberg held:

(i) the onus of proof under s 18D falls on a respondent; and

(ii) that an assessment of whether conduct is done 'reasonably and in good faith' within the meaning of s 18D, involves a consideration of both objective and subjective good faith. Objective good faith will be assessed by reference to the values underlying Part IIA.

Justice Bromberg concluded that the articles were not written 'reasonably and in good faith', as required by s 18D of the RDA. The inclusion of untruthful facts, the use of inflammatory and provocative language and the failure to minimise the potential harm to those likely to be offended denied to Bolt and the HWT, both the 'fair comment' exemption provided by s 18D(c)(ii) and the genuine purpose exemption provided by s 18D(b) of the RDA.

## TORTS **– negligence – product liability – prescription medicine for relief of inflammation – side-effects – whether medicine caused or contributed to cardiovascular disease – content of duty of care – state of scientific uncertainty as to side-effects of medicine – state of scientific uncertainty as to plausibility of scientific hypothesis**

*Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128
(12 October 2011, Chief Justice Keane, Justices Bennett and Gordon)

The respondent suffered a heart attack while being treated for arthritis with the prescription medicine Vioxx. The appellant subsequently withdrew Vioxx from the market in light of findings from a trial which suggested that there was an increased risk of cardiovascular disease among Vioxx users. The respondent brought proceedings against the appellant alleging that his consumption of Vioxx contributed to his heart attack and that the appellant knew or ought to have known that the consumption of Vioxx increased the risk of heart attack and had been negligent in failing to warn him of that risk. The respondent also alleged that Vioxx was not reasonably fit for purpose, not of merchantable quality and was a defective product within the meaning of ss 74B, 74D and 75AD of the *Trade Practices Act 1974* (Cth) (the Act) respectively.

The primary judge found that the consumption of Vioxx made a material contribution to the occurrence of, and therefore caused, the respondent's heart attack and also upheld the respondent's claims under ss 74B and 74D of the Act. The appellant appealed against the findings on the issues of causation and contravention of ss 74B and 74D of the Act.

The Full Court of the Federal Court allowed the appeal, holding that an increased risk of harm by a tortious act is, alone, insufficient to found a conclusion of causation by material contribution to that harm. For the respondent to establish that Vioxx materially contributed to his heart attack he would need to show that his consumption of Vioxx was a necessary condition for the occurrence of the heart attack. The respondent was at risk of suffering a heart attack quite independently of his consumption of Vioxx. In light of this, the conclusion that Mr Peterson would not have had his heart attack but for the consumption of Vioxx was 'a matter of conjecture rather than reasonable inference on the balance of probabilities'.

Relief under ss 74B and 74D of the Act was not available in the absence of a finding that the respondent's heart attack would not have occurred but for the consumption of Vioxx. The proposition that Vioxx increased the risk of cardiovascular disease is relevant for the purposes of s 74B only if it is also established that the purpose for which the respondent acquired Vioxx and which he expressly or impliedly made known to the appellant included some quality of absolute safety or complete absence of adverse side-effects. This was not the case.

Special leave to appeal to the High Court was refused with costs on 11 May 2012.

## ADMIRALTY **– seafarer's wages – obligation of shipowner to pay seafarer's wages before or at the time of discharge under s 75 of the *Navigation Act 1912* (Cth) – whether shipowner had defence based on a reasonable dispute as to its liability for wages within the meaning of s 78 of the *Navigation Act 1912* (Cth)**

*Visscher v Teekay Shipping (Australia) Pty Ltd* [2011] FCAFC 137
(4 November 2011, Justices Greenwood, Rares and Foster)

This appeal concerned a claim by a ship's officer, Timothy Visscher, for unpaid wages against the shipowner-employer, Teekay Shipping Australia Pty Ltd (Teekay). Mr Visscher claimed that on 3 March 2004 the master of *MV Broadwater* signed his discharge from the ship on completion of a voyage from Thailand to Sydney. Mr Visscher contended that Teekay failed to pay him the whole of his wages and accrued leave on his discharge. He asserted that, as a result, sections 75 and 78 of the *Navigation Act 1912* (Cth) gave him the right to be paid at double rates until Teekay paid him in full.

Teekay had employed Mr Visscher in March 2001 as a third officer to sail on its ships. In August 2001, Teekay offered Mr Visscher a promotion to chief officer, which he accepted. However, in late September 2001 Teekay wrote to Mr Visscher and purported to rescind his promotion, which he did not accept. However, Teekay subsequently continued to engage and pay Mr Visscher as a chief officer.

As *Broadwater* sailed to Sydney in late February 2004, Teekay wrote to Mr Visscher informing him that on his next voyage he would sail as second officer. He wrote to Teekay and told the master that he treated this letter as a constructive dismissal. He claimed that *Broadwater's* master agreed to give Mr Visscher his discharge when he left the ship in Sydney. On 3 March 2004, Mr Visscher and the master signed his discharge. On 8 March 2004, Mr Visscher began proceedings against Teekay for wrongful dismissal in the Australian Industrial Relations Commission and told Teekay that he had accepted a new posting with a different employer. Teekay began negotiating with Mr Visscher in late March 2004 and they agreed that he would sail on *Broadwater* as chief officer on her next voyage commencing on 8 April 2004. At the conclusion of that voyage he again asked for his discharge.

The primary judge summarily dismissed Mr Visscher's claim for double wages. Her Honour found that he had no reasonable prospect of negating Teekay's defence under s 78 of the Act that there was a reasonable dispute as to his entitlement to be paid his wages after his discharge from *Broadwater* on 3 March 2004. Her Honour considered that the subsequent events showed that a reasonable dispute existed.

The Full Court allowed the appeal. It held that the master had agreed to discharge Mr Visscher at Sydney on 3 March 2004 on the basis that he had accepted his constructive dismissal. The Court held that because the master and Mr Visscher signed his discharge, s 75(1) of the Navigation Act required Teekay to pay him his wages and entitlements due up to 3 March 2004. It found that Teekay had not proved that there was any reasonable dispute that Mr Visscher was not entitled to be paid up to 3 March 2004 as he claimed. The Full Court held that the events after 3 March 2004 were evidence of a different dispute, namely a dispute about the terms on which Mr Visscher might continue to be employed. Accordingly, his claim should not have been dismissed summarily and ought to go to trial.

## APPEAL – appeal from decision to grant interlocutory injunctions – leave to appeal required – injunction has effect of finally determining the main matter at issue – PATENTS – claim of infringement of two patents – assertion of invalidity of one of those patents – interlocutory injunctive relief sought – whether strength of the infringement case and the balance of convenience and justice sufficient to sustain the grant of interlocutory injunction – fast-moving product – injunction likely to determine the fate of the product

*Samsung Electronics Co Limited v Apple Inc* [2011] FCAFC 156
(30 November 2011, Justices Dowsett, Foster and Yates)

The case involved Apple Inc. and its subsidiary, Apple Pty Limited (Apple), bringing an action in the Federal Court of Australia against Samsung Electronics Co. Limited and its subsidiary, Samsung Electronics Australia Pty Limited (Samsung). The question for determination was whether Samsung had infringed certain patents held by Apple, with the proposed release of the Galaxy Tab 10.1. At issue were three claims in two of Apple's patents. Apple sought an interlocutory injunction, restraining Samsung from releasing the Galaxy Tab until after the Court had determined the claim.

At first instance, the primary judge determined that Apple had established a prima facie case that Samsung had infringed certain claims in the two patents. She also held that Samsung had established a prima facie case of invalidity in respect of one of the patents. The primary judge held that, if the Galaxy Tab were released, significant harm would be caused to Apple. Her Honour observed that, in the circumstances, damages would be an inadequate remedy. Having taken account of a number of factors, her Honour concluded that the balance of convenience fell slightly in Apple's favour. Therefore, her Honour restrained the launch of the Galaxy Tab and granted an interlocutory injunction.

The decision of the primary judge was interlocutory, concerned a matter of practice and procedure and involved the exercise of a discretion. It did, however, have a significant impact upon the business of Samsung and on the future prospects of the Galaxy Tab.

On appeal, Samsung contended that substantial injustice had been visited upon Samsung by the grant of interim relief.

The Full Court said that it is well established that the relevant test (or 'litmus test') for whether leave to appeal from an interlocutory judgment will be granted comprises two integers. Firstly, whether, in all the circumstances of the case, the decision is attended by sufficient doubt to warrant its being reconsidered by the Full Court and, secondly, whether substantial injustice would result if leave were refused supposing the decision to be wrong. Applying that test, their Honours unanimously agreed to grant leave to Samsung to appeal from the orders made by the primary judge.

The Full Court then turned to consider the appeal. The Full Court doubted that Apple had established a prima facie case in respect of any of the alleged infringements of Apple's patents. Furthermore, the Full Court held that, in the circumstances of the present case, it was necessary for the Court to assess the strength of Apple's case for infringement and then to weigh that assessment in the balance when considering the balance of convenience and justice. The Full Court decided that the primary judge had failed to do this and had thereby erred. The Full Court exercised the discretion for itself and concluded that the balance of convenience and justice required the discharge of the primary judge's interlocutory orders. The appeal was therefore allowed. The injunctions which her Honour granted were discharged.

# APPENDIX 8
# SUMMARY OF DECISIONS OF INTEREST

Samsung was permitted to launch the Galaxy Tab 10.1 in Australia provided that it kept a detailed account of all transactions involving sales of that device in Australia or originating from Australia.

Apple's application for special leave to appeal to the High Court was refused on the ground that the High Court saw insufficient prospects of success on the part of Apple demonstrating error by the Full Court and also on the ground that the Full Court's detailed consideration of the strength of Apple's case weighed against a grant of special leave.

## HUMAN RIGHTS **– discrimination – direct disability discrimination – identification of service – refusal of service – whether provision of service would impose unjustifiable hardship**

*King v Jetstar Airways Pty Ltd (No 2)* [2012] FCA 8
(13 January 2012, Justice Robertson)

The principal issue in this case was whether Jetstar Airways Pty Ltd (Jetstar) unlawfully discriminated against Mrs King under s 24 of the *Disability Discrimination Act 1992* (Cth), as it was in force in 2008, on the ground of her disability because Jetstar imposed a limit of two passengers requiring wheelchair assistance on its flights using the A320 aircraft.

Mrs King had a physical disability and required a wheelchair to aid her mobility. In August 2008 she booked to travel from Adelaide to Brisbane on Jetstar flight JQ 769 departing on 23 September 2008 for $132 without then stating she needed wheelchair assistance. When she telephoned Jetstar to confirm her arrangements she was told that she could not travel on that flight because two other passengers requiring wheelchair assistance had already booked on the same flight and the limit for such passengers had been reached.

Mrs King applied to the Federal Court under s 46PO of the *Australian Human Rights Commission Act 1986* (Cth) seeking declarations in respect of unlawful discrimination, and seeking an order that Jetstar cease enforcing its policy limiting the number of passengers who required wheelchair assistance to two passengers per flight.

The Court held that the service was flight JQ 769 and that the ground on which Jetstar refused to provide the service to Mrs King for the purposes of s 24 of the Act was her disability.

However, the statutory defence of unjustifiable hardship was made out on the facts, so that s 24 of the Act did not render it unlawful for Jetstar to discriminate against Mrs King on the ground of her disability. Unjustifiable hardship was established by reason of the time taken to provide the assistance to wheelchair passengers to board A320 planes, the 30 minute turnaround time for flights on Jetstar as a low cost carrier and the consequent impact on Jetstar's scheduling, when assessed against the benefits likely to accrue if Jetstar had been required to provide assistance to wheelchair passengers boarding and disembarking from an A320 flight with no limit on the number of passengers requiring such assistance.

**INDUSTRIAL LAW – employment law – prohibited conduct – sham contracting – compensation – breaches of the *Workplace Relations Act 1996* (Cth) and of an industrial instrument by a company – accessorial liability of a company director – liability of company for acts of an employee under s 826(1) of the *Workplace Relations Act 1996* (Cth) – dismissal of casuals employed on a regular and systemic basis – meaning of 'representation' in s 900(1) of the *Workplace Relations Act 1996* (Cth)**

*Fair Work Ombudsman v Maclean Bay Pty Ltd* [2012] FCA 10
(16 January 2012, Justice Marshall)

In this proceeding, the Fair Work Ombudsman (FWO) claimed that Maclean Bay Pty Ltd (Maclean Bay), a company which operates a holiday resort at Bicheno on the east coast of Tasmania, contravened various provisions of the *Workplace Relations Act 1996* (Cth) and of an industrial instrument made under that Act.

The FWO also claimed that Mrs Wells, a director of Maclean Bay, was personally liable as a person involved in certain of Maclean Bay's contraventions.

The conduct in question took place prior to the Fair Work Act commencing on 1 July 2009 and so the *Workplace Relations Act 1996* (Cth) (WR Act) applied, by virtue of the *Fair Work (Transitional and Consequential Amendments) Act 2009* (Cth).

The contraventions alleged against Maclean Bay concerned breaches of provisions of the Workplace Relations Act dealing with sham contracting arrangements, dismissal of an employee for a prohibited reason and award breaches by failure to make monthly superannuation contributions on behalf of employees and failure to pay employees an amount in respect of their unused leave upon termination.

Sham contracting is defined in s 902 of the Workplace Relations Act as conduct where an employer dismisses or threatens to dismiss an employee where the sole or dominant purpose in so doing is to engage the individual as an independent contractor to perform the same work, or substantially the same work under a contract for services.

The allegations against Mrs Wells concerned breaches of the Act as a 'person involved in' Maclean Bay's contraventions.

Justice Marshall found that all of the FWO's allegations were established on the balance of probabilities. For his Honour, the unexplained failure to call Mrs Wells, who played a 'pivotal role in the actions of Maclean Bay', to give evidence at the trial added to an already 'strong' case of contravention.

His Honour rejected the proposition put forward for Maclean Bay, that dismissal of a casual employee cannot attract liability under the WR Act, holding instead that liability can arise where there is an 'ongoing relationship of regular and systematic employment'.

In light of his findings in respect of the contraventions, the judge ordered Maclean Bay to pay compensation to its dismissed employees. In a later judgment delivered on 31 May 2012, the Court ordered further pecuniary penalties to be paid to reflect the gravity of the findings.

# APPENDIX 8
# SUMMARY OF DECISIONS OF INTEREST

## TAXATION – liability to tax in relation to a petroleum project – taxable profit being the excess of assessable receipts over deductible expenditure incurred in the petroleum project – deductible expenditure – general project expenditure

*Esso Australia Resources Pty Ltd v Commissioner of Taxation* [2012] FCAFC 5
(20 February 2012, Chief Justice Keane, Justices Edmonds and Perram)

This case involved a joint venture in a petroleum project for exploring, treating and selling petroleum and natural gas (the Project). Esso Australia Resources (EAR), the taxpayer, was the manager of the Project and party to a service agreement with Esso Australia Ltd (EAL).

Under the service agreement, EAL was to provide all technical, operational, financial, accounting, advisory and related services that EAR required from time to time for its exploration, producing and marketing operations in both Australia and the Continental Shelf. EAL was also to make available to EAR trained personnel, equipment and facilities. In return for these services, EAR was to pay for EAL's direct costs, a share of EAL's overhead costs, proportionate to the services that EAL performed for EAR under the service agreement, and a fee of 7.5 per cent of EAL's overhead costs.

To assist in the carrying on of its business, EAR paid a mutualised research charge (MRC) to Exxon Mobile Upstream Research Company (URC) in return for the right to use intellectual property and research by URC.

For the relevant years of income, EAR claimed as deductible expenditure (in respect of its taxable profit for the Project) amounts attributed to its liability to EAL under the service agreement and the MRC.

EAR's claims were allowed in part by the Commissioner of Taxation (Commissioner) but were rejected to the extent that the Commissioner was not satisfied that they were payments of liabilities incurred by EAL in carrying on the operations comprising the Project. The Commissioner disallowed EAR's objections and it appealed to the Court.

The primary judge upheld EAR's appeal in relation to the service agreement issue and resolved the MRC issue in favour of the Commissioner. EAR appealed to the Full Court in relation to the MRC issue and the Commissioner brought a cross appeal in relation to the service agreement issue.

The first issue for the Full Court's consideration was whether the fees payable by EAR to EAL under the service agreement were deductible under s 41 of the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth) (the Act). Chief Justice Keane and Justice Edmonds (Justice Perram agreeing) held that these payments were not deductible because s 41 did not permit a deduction for excluded expenditure or for payments which include excluded expenditure in respect of activities deemed to have been carried on by EAR.

'[E]xcluded expenditure' as defined in s 44 of the Act included, among other things, payments of administrative or accounting costs, wages, salary or other work costs, incurred indirectly in carrying on or providing operations, facilities or other things of a kind referred to in ss 37, 38 and 39 of the Act.

Chief Justice Keane and Justice Edmonds reasoned that the deeming effect of s 41 is that an eligible person is in the same position to claim deductions from assessable receipts in relation to a Project as the person who actually carried on the activities comprising the Project. Therefore, where an eligible person incurs a liability to procure the provision of operations, facilities or things by another person, s 41(a) and (b) makes the eligible person liable to pay for the operations, facilities and things, including liabilities for operations, facilities or things which are excluded expenditure.

Justice Perram also held that deductions cannot be claimed under s 41 in respect of excluded expenditure whether or not the expenditure is incurred by the person carrying on the activities comprising the Project or passed on through a service company (an eligible person).

The second issue for the Full Court's consideration was whether the MRC was deductible. Chief Justice Keane and Justice Edmonds (Justice Perram agreeing) held that the MRC was not deductible because the work conducted by URC, in respect of which EAR paid the MRC, was not conducted in carrying on the activities comprised in the project. Although the work of the URC enured for the benefit of the Project, it could not be said that the URC was incurred to carry on operations, facilities or things comprising the project.

## WORKERS' COMPENSATION – 'injury' – definition – exclusionary provision – administrative action in respect of employee's employment – whether Administrative Appeals Tribunal erred in construction of exclusionary provision – whether any of causes capable of falling within exclusionary provision

*Commonwealth Bank of Australia v Reeve* [2012] FCAFC 21
(8 March 2012, Justices Gray, Rares and Tracey)

This appeal concerned a claim for compensation for a depressive illness that the respondent developed while working as manager of a Perth branch of the Commonwealth Bank of Australia.

The Administrative Appeals Tribunal found that a number of circumstances contributed to the respondent's depression, including staffing changes affecting his branch in June 2008, and a number of events on the day of 18 July 2008. These included a telephone conference with fellow managers and his area manager in which the respondent had to report poor results to colleagues and felt humiliated, an unsupportive visit from his area manager, his receipt of poor customer service results for the branch, and the anxiety he felt about reporting these results to his colleagues at an upcoming teleconference. On the morning of 21 July 2008, the respondent attempted suicide at work but he was not successful and sought medical advice. A psychologist found that that he had suffered the onset of a major depressive disorder. The respondent subsequently made a claim against the Bank for compensation.

Under s 14(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth), an employee can claim compensation for an 'injury' suffered at work. The definition of 'injury' in s 5A(1) of the Act creates an exclusion for diseases suffered by an employee as a result of reasonable administrative action taken in respect of their employment. The purpose of the exclusion was to limit the situations in which employers would be liable to pay their employees compensation.

On 2 October 2008 the Bank accepted that it was liable to pay the respondent compensation in respect of the depression he suffered, but subsequently reversed its decision after an internal review. The respondent then applied to the Tribunal to review the Bank's decision. On 12 November 2010, the Tribunal found that the Bank was liable to pay compensation. The Bank appealed against the Tribunal's decision and the proceedings were heard by a Full Court.

The Bank asserted that it was not liable to pay the respondent's compensation because the actions that contributed to his depression, such as the staffing changes and use of teleconferences, were 'administrative action' and so excluded the Bank from being liable.

The Full Court found that the Tribunal had interpreted the s 5A exclusion too narrowly when it limited its scope to 'legitimate human resource management actions'. The Full Court held that the exclusion applies to specific action taken in respect of an individual's employment, such as disciplinary action, as opposed to action forming part of the everyday tasks and duties of that employment. Thus, the ordinary work routine, changes to routine and directions to perform work were not 'reasonable administrative action taken in respect of the employee's employment'. The Full Court found, instead that those matters were part of the employment or ordinary work of the employee, not 'administrative action'. Applying this reasoning to the facts of the case, the Court held the Tribunal's error would not have affected the result it came to, so the decision in respect of the respondent's claim to compensation should stand.

## NATIVE TITLE – extinguishment – right to take marine resources for commercial purposes – 130 years of legislation controlling commercial fishing – whether simply regulatory in character or prohibitory – rights and interests – reciprocity based rights founded on a relationship to a person – whether content of rights include a right or interest 'in relation to land or waters': s 223(1) *Native Title Act 1993* – extent of determination area – criteria for determining 'boundaries' of several marine estates – whether gaps between, or unused areas – 'connection' to waters

*Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group* [2012] FCAFC 25
(14 March 2012, Chief Justice Keane, Justices Mansfield and Dowsett)

The Torres Strait Regional Seas Claim was filed on 23 November 2001. The original application was made on behalf of the Torres Strait Regional Seas Claim Group (the Seas Claim Group), who are descendants of a number of identified Torres Strait Islanders. The original application sought a determination of native title rights and interests in a large part of the sea area of the Torres Strait. The Seas Claim Group contended that their native title rights included the taking of fish and other marine resources for sale or trade and that this right had not been extinguished by legislation of the State of Queensland or the Commonwealth of Australia. The primary judge accepted this contention, holding that the Seas Claim Group members enjoyed a non-exclusive right '…to access, to remain in and to use their own marine territories or territories shared with another, or other communities…[and] to access resources and to take for any purpose resources in those territories'.

The Commonwealth of Australia, the State of Queensland and a number of persons described as The Commercial Fishing Parties, appealed against the decision of the primary judge, contending that any native title right to fish for trade or exchange (commercial purposes) had long ago been extinguished by controls placed upon commercial fishing in the Torres Strait by State and Commonwealth legislation. This was the primary question for the Full Court; however, the Full Court also considered the geographic boundaries to the area of sea in which any native title rights and interests subsist and the nature and extent of subsisting native title rights and interests.

The Full Court was divided over the answer to this primary question. The majority (Chief Justice Keane and Justice Dowsett) held that the native title right to fish commercially had been extinguished by State and Commonwealth legislation which prohibited commercial fishing without a licence. The majority held that:

> 'His Honour's conclusion that the licensing regimes did not extinguish native title because they were merely regulatory of fishing rights sits uneasily with the orthodox approach to the issue of extinguishment whereby one looks to see whether the activity which constitutes the relevant incident of native title is consistent with competent legislation relating to that activity. While it may be correct to describe the licensing regimes as concerned, in a general way, to regulate fishing, it is necessary to observe that these regulatory schemes operate by way of a prohibition on unlicensed fishing for commercial purposes. That prohibition is not deprived of its plain effect because it is an element of a regime which can be described generally as regulatory of fishing.'

His Honour Justice Mansfield, in dissent, upheld the approach taken by the primary judge.

At the time of writing the Seas Claim Group has applied for special leave to appeal the matter to the High Court.

## TRADE PRACTICES – contravention of s 51AD – 'involved in' under s 75B – 'involved in' requires knowledge of essential elements of a contravention not knowledge of contravention – essential elements of contravention of s 51AD by reason of failure to comply with Franchising Code of Conduct – knowledge must be actual not constructive

*Rafferty v Madgwicks* [2012] FCAFC 37
(20 March 2012, Justices Kenny, Stone and Logan)

Mr Rafferty (and his two associated companies) (the Rafferty parties) entered into a business venture with Mr Donovan (and his three associated companies) (the Donovan parties) to sell accommodation units, having been told by Mr Donovan that prototypes were under construction and that significant investors were interested. The business venture was established by a Heads of Agreement, a Joint Venture and Shareholders' Agreement and a Rights Agreement (the agreements) which were drafted by Mr Donovan's solicitors, Madgwicks. A separate company, Time 2000 West Pty Ltd (T2W) was incorporated as the vehicle for the business. Under the agreements the Donovan parties agreed to supply the intellectual property to T2W and would retain a significant degree of control over the business. The Rafferty parties agreed to market and sell the units through T2W and to pay $1.7 million into the business. When the Rafferty parties found out that the prototype and investor representations were false, the venture ended and the Rafferty parties brought claims against the Donovan parties and Madgwicks in the Federal Court.

On appeal, a significant question was whether the business venture involved a franchise. Justices Kenny, Stone and Logan held that it did and that the Donovan parties had accordingly contravened s 51AD of the *Trade Practices Act 1974* (Cth) (TPA) by failing to comply with an industry code (the Franchising Code of Conduct) in dealing with the Rafferty parties. Their Honours also held that the Donovan parties had, by their false representations, engaged in misleading or deceptive conduct, and that Mr Donovan was a person 'involved in' these contraventions under s 75B of the TPA. An order under s 87 of the TPA that the $1.7 million be repaid by the Donovan parties jointly and severally was upheld as even though the moneys had been paid to Mr Donovan's companies and not Mr Donovan, Mr Donovan was the sole natural person standing behind, controlling and acting for those companies.

Their Honours also held that Madgwicks had not, by failing to advise the Rafferty parties that the agreements might involve a franchise, engaged in misleading or deceptive conduct in breach of s 9 of the *Fair Trading Act 1999* (Vic), because, as Mr Donovan's solicitors, they had no duty to advise Mr Rafferty. Nor were Madgwicks 'involved in' the s 51AD contraventions under s 75B of the TPA as they lacked actual knowledge that the agreements were franchise agreements.

## TRADE PRACTICES – misleading and deceptive conduct – on-line advertising – where advertisers sought to promote their goods or services by means of sponsored links on search results pages – significance of 'keyword insertion' when used to generate headline which replicated terms of search query – where headline of sponsored link replicated third party's business name, trade mark or website address – whether advertiser made representations of association or affiliation – whether advertiser represented that information regarding a competitor could be found by selecting the advertiser's web address

*Australian Competition and Consumer Commission v Google Inc* [2012] FCAFC 49
(3 April 2012, Chief Justice Keane, Justices Jacobson and Lander)

The respondent, Google, operates an Internet search engine which provides results in response to a user's search. The results include 'sponsored links' which are a type of advertisement generated in response to a search, displayed separately from the organic search results and designed to link to the advertiser's website. In a number of cases, the advertiser's website address was provided in response to a user search for a competitor of the advertiser. For example, a search using the term 'Harvey World Travel' displayed the web address of STA Travel, one of Harvey World Travel's competitors.

The appellant brought proceedings against Google alleging a contravention of s 52 of the *Trade Practices Act 1974* (Cth) (the Act) which prohibits a corporation from engaging in conduct that is misleading or deceptive or likely to mislead or deceive in the course of trade or commerce. The appellant contended that Google falsely represented that there was a commercial association or affiliation between the advertiser and the competitors. The primary judge found that there was misleading or deceptive conduct; but it was the advertiser, rather than Google, that had engaged in the relevant conduct. The appellant appealed against this decision.

The Full Court concluded that it was Google that was displaying the sponsored link in response to the search, rather than merely the advertiser. Hence, Google actively engaged in the misleading and deceptive conduct. It was significant that the user makes a request and that Google provides a response in accordance with Google's AdWords program which was designed for this purpose.

Google also sought to rely on s 85(3) of the Act which provided a defence for publishers who merely publish or arrange advertisements and do not know or have no reason to suspect that an advertisement contravenes a provision. Again, it was relevant that Google took a more active role than merely publishing advertisements. Rather, the AdWords program was designed to interact with users and to target advertisements to specific searches. Furthermore, Google employees made recommendations to advertisers on how to get the best use out of the AdWords program. There was evidence that this included utilising the names of competitors.

Special leave for appeal to the High Court was granted for this decision on 22 June 2012.

## EXTRADITION **– applicant committed to custody – application for bail pending review of Magistrate's order pursuant to s 21(6)(f)(iv) *Extradition Act 1988* (Cth) – principles in *United Mexican States v Cabal (2001)* 209 CLR 165 – strong family, business and investment connections with Australia – cooperation with US authorities – previous compliance with bail conditions – four year delay between presentation of indictment and commencement of extradition proceedings – substantial surety offered – whether special circumstances – whether risk of flight – whether strong prospects of success of review of Magistrate's decision**

*Taylor v United States of America* [2012] FCA 366
(10 April 2012, Justice Collier)

A Queensland Magistrate determined that Mr Taylor was eligible for surrender to the United States of America and committed him to prison under s 19(9) of the *Extradition Act 1988* (Cth). Mr Taylor sought interlocutory relief being his release on bail pursuant to s 21(6)(f)(iv) of the Extradition Act, pending the hearing of his application for review of the Magistrate's decision.

The United States sought Mr Taylor's extradition in relation to criminal offences alleged to have been committed in 2001–02 for which Mr Taylor was indicted by a grand jury in Colorado on 7 February 2007. The allegations related to Mr Taylor's involvement in a scheme designed to defraud issuers of residential home loans, and amounted to, in summary, allegations of bank fraud, wire fraud and money laundering, offences with associated penalties including prison terms of up to 30 years and fines of up to $1 million.

Mr Taylor submitted that there were ‘special circumstances’ to justify his release on bail, including his significant business interests in Australia that relied on his presence in the community; his close knit family with strong Australian ties (while Mr Taylor is an Australian permanent resident but not an Australian citizen, his wife and two adult children are Australian citizens); his adherence to conditions of bail granted pending the extradition proceedings; his cooperation with United States authorities; the significant delay between the laying of charges in 2007 and the extradition proceedings in 2011; and the fact that a substantial surety could be provided. Mr Taylor also submitted that he had strong prospects of being successful in his application for review of the Magistrate’s decision and set out four bases on which he argued the Magistrate had erred in making his decision.

Justice Collier noted that bail was available if there were special circumstances to justify granting bail. Justice Collier considered the case of *United Mexican States v Cabal (2001)* 209 CLR 165, where the High Court set out principles relating to ‘special circumstances’ and noted that these circumstances needed to be different from the disadvantages faced by all extradition defendants. The Court also made it clear that a defendant will ordinarily need to demonstrate strong prospects of success and that any real risk of flight should be decisive against granting bail.

Mr Taylor claimed to have demonstrated that he was not a flight risk by providing evidence of his family ties and responsibilities, substantial business interests, compliance with previous bail conditions and the availability of a substantial surety. However, Justice Collier found that the fact that Mr Taylor was relatively young, healthy, facing serious penalties in the US and had access to substantial resources supported a finding that there was at least a slight risk of flight. In addition, Justice Collier found that Mr Taylor had neither demonstrated special circumstances sufficient to support the granting of bail, nor demonstrated strong prospects of success in relation to his application for review of the Magistrate’s decision. The interlocutory application was, as a result, dismissed.

## INTELLECTUAL PROPERTY **– copyright – television broadcast and cinematograph film – copying – infringement – television broadcasts recorded and copied at request of subscriber by automated recording system owned by Optus – ‘time-shifting’ – copy streamed by system to subscriber at subscriber’s request – who is maker of the copy – whether Optus or Optus and subscriber make(s) the copy**

*National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59
(27 April 2012, Justices Finn, Emmett and Bennett)

This appeal was brought by the National Rugby League (NRL), the Australian Football League (AFL) and Telstra against the communication services provider, Singtel Optus and Optus Mobile (Optus).

The issue to be determined was whether Optus had infringed the copyright interests of the appellants in television broadcasts of NRL and AFL games. The alleged infringing acts were the making of copies of the broadcasts.

The primary issues were: (1) who was the maker of the infringing copies?; and (2) if Optus was the maker, could it invoke the defence under s 111 of the *Copyright Act 1968* (Cth)?

Optus launched its ‘TV Now’ service in mid-2011. The service allowed subscribing customers to select, record and stream free to air TV shows to their mobile phone or computer. The subscriber paid for this service by purchasing parcels of recording time.

The appellants argued that Optus was the ‘maker’ of the copies. This was because of the control Optus retained over the remote recording system and the responsibility it had to maintain and operate the system. In response, Optus argued that the subscribers were the makers of the copies as they had control of which broadcasts were recorded and were responsible for pressing the ‘record’ button on the Optus ‘TV Guide’ website. These contentions gave rise to an issue of statutory interpretation about the meaning of ‘make’ in ss 86 and 87 of the Act.

The Court found that Optus or alternatively, Optus and the subscriber, were jointly and severally responsible for making the copies. Optus was responsible because of the level of control it retained over the recording system and its obligation to keep the system in constant readiness for recording. The role that the subscribers played in selecting a broadcast and instigating the recording was sufficient to constitute them also as makers.

The Court then turned to consider whether Optus could invoke the defence under s 111 of the Act. The Court’s interpretation of s 111 was that it was intended to protect individuals who privately made recordings of broadcasts for viewing at a more convenient time. So defined, the section does not extend to commercial copying on behalf of individuals. As the question, ‘was Optus a ‘maker’?’ was answered affirmatively, it follows that Optus was unable to fall within the scope of the defence as it was a commercial, not a private individual, copier.

The appeal was allowed. Optus has since filed a special leave application to the High Court.

## EQUITY **– fiduciary duties – company director and CEO – company conducting business on land leased from fiduciary – whether fiduciary entitled to conduct similar business on adjacent tract of his own land – whether opportunity to do so resulted from fiduciary position – whether second business would be in competition with first – whether fiduciary would be confronted with conflict of interest – whether second business within scope of fiduciary obligation – whether removal from position as director and resignation as CEO affected fiduciary obligations – CORPORATIONS – whether director and CEO exercised powers and discharged duties in the best interests of the company**

*Links Golf Tasmania Pty Ltd v Sattler* [2012] FCA 634
(26 June 2012, Justice Jessup)

The plaintiff, Links Golf Tasmania Pty Ltd, operated a golf course in Tasmania called ‘Barnbougle Dunes’, occupying the land under lease from the first defendant, Richard Sattler, who was also the majority shareholder in, and a director and the CEO of, the plaintiff. Sattler obtained loans from the Tasmanian Government and from a private investor which he put into the plaintiff as share capital, those funds being used in the construction of the golf course. The plaintiff alleged that the opportunity to obtain those loans came to Sattler by reason of his fiduciary positions. Later, Sattler embarked upon the construction of a second golf course on adjacent land (also owned by him), financed in part by another loan from the government. The plaintiff alleged that the opportunity to establish that second course, and to obtain that loan, also came to Sattler by reason of his fiduciary positions, and that, in conducting the second golf course business and ancillary retail businesses associated with it, Sattler would be competing with the plaintiff, thereby placing himself in a position in which his own interests conflicted with his duty to the plaintiff. One of those ancillary businesses was to be a wellness centre, the construction of which was financed by a grant obtained by Sattler from a Commonwealth Government program. It was alleged that the opportunity to obtain this grant, and to construct the centre, came to Sattler by reason of his fiduciary positions. The plaintiff’s case also included allegations that Sattler had diverted labour employed by the plaintiff to the performance of work on his own golf course, and that, in setting the commission which the plaintiff would be paid for handling bookings and other administrative tasks in connection with accommodation units owned by Sattler at the plaintiff’s golf course, Sattler was confronted with a conflict of interest.

The Court upheld the plaintiff's case only with respect to the wellness centre (and the grant which funded its construction) and one aspect of its labour diversion allegations. The Court held that Sattler's position as the owner of the adjacent land gave him a capacity which was recognised by those who had invested in the plaintiff as being separate from the capacities in which he served the plaintiff as fiduciary, such that the opportunities to obtain government and private loans, and to construct the second golf course, lay outside the scope of Sattler's fiduciary duty to the plaintiff. It also upheld Sattler's argument that, with respect to the construction of the second course and the second Tasmanian Government loan, the plaintiff had delayed too long before instituting the proceeding; and it upheld a similar defence on the matter of the accommodation commission.