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Litigation notes

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SLAVERY AND THE CRIMINAL CODE

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The High Court by a majority of 6:1 (Kirby J dissenting) allowed this appeal by the Commonwealth Director of Public Prosecutions (DPP) and upheld the respondent's convictions for slavery offences under s 270.3(1)(a) of the Commonwealth Criminal Code (the Code). The Court considered the meaning of 'slavery' in s 270.1 of the Code, deciding that it extends beyond 'chattel slavery' to cover de facto conditions of slavery including circumstances of the kind alleged in this case and that it is constitutionally valid for it to do so. The Court also considered the application to the slavery offences of the general provisions in Chapter 2 of the Code dealing with the physical elements and fault elements of an offence.

The Queen v Wei Tang
High Court of Australia, 28 August 2008
[2008] HCA 39; (2008) 82 ALJR 1334; (2008) 249 ALR 200

Background

Legislation

The subject-matter of Chapter 8 of the Code is 'Offences against humanity'. This includes Division 270, dealing with 'Slavery, sexual servitude and deceptive recruiting'. Under s 270.3(1)(a) of the Code a person who 'intentionally ... possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership' is guilty of an offence punishable by up to 25 years imprisonment. Although 'slave' is not defined, s 270.1 of the Code defines 'slavery' as:

> ... the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, *including where such a condition results from a debt or contract made by the person*.

This definition is almost identical to the definition contained in Article 1(1) of the 1926 *International Convention to Suppress the Slave Trade and Slavery* [1927] ATS 11 (the Slavery Convention). The Code definition adds the concluding words shown in italics; the Convention definition refers to 'the *status* or condition of a person'.

The slavery offences operate against the background of s 270.2 of the Code, which provides that '[s]lavery remains unlawful and its abolition is maintained'. Accordingly, Australian law does not recognise the concept of *legal* ownership of a person.

This issue

Facts

The respondent, the owner of a licensed brothel, was found guilty in the Victorian County Court of a number of charges of 'possessing' and 'using' a slave contrary to s 270.3(1)(a) of the Code. The charges related to five women who were recruited voluntarily from Thailand to work in brothels in Australia. Under the terms of the recruitment agreement and the subsequent purchase of the women in Australia (in four of the cases by a syndicate including the respondent), each woman owed a 'debt' of between $42,000 and $45,000. The 'debt' involved expenses supposedly incurred in paying the recruiters in Thailand, transporting the women to Australia and resultant accommodation and incidental expenses as well as a profit margin.

The respondent, the owner of a licensed brothel, was found guilty ... of a number of charges of 'possessing' and 'using' a slave contrary to s 270.3(1)(a) of the Code.

In order to pay off the 'debt' the women were required to work six nights a week servicing clients at the respondent's brothel. Their 'debt' was reduced by an amount of $50 for each client, with repayment involving serving up to 900 customers over a period of four to six months. Although the women were provided with accommodation and food, they earned nothing from this work until their debt was repaid. However, the women were given the option of working on their 'free' seventh day of each week and were able to retain any earnings made on that day (generally $50 per client after the deduction of amounts including 'brothel expenses'). The women entered Australia on visas that were illegally obtained, their passports and return air tickets were retained by the respondent and, although there was disagreement as to the facts, it seems their movements were effectively restricted to a considerable degree.

Court of Appeal

The respondent successfully appealed her convictions to the Victorian Court of Appeal on the basis that the directions given to the jury were inadequate with respect to the physical and fault elements of the slavery offences. The Court of Appeal quashed the respondent's convictions and ordered a new trial on all counts.

The High Court decision

Gleeson CJ and Hayne J delivered the principal judgments for the majority, with Hayne J also agreeing with Gleeson CJ ([132]). Gummow, Heydon, Crennan and Kiefel JJ each separately agreed with both Gleeson CJ and Hayne J ([60], [169], [170] and [171] respectively). The High Court, by a majority of 6:1 (Kirby J dissenting), allowed the DPP's appeal against the decision of the Victorian Court of Appeal. The respondent's slavery convictions were upheld and the matter was remitted to the Court of Appeal for consideration of the respondent's application for leave to appeal against sentence.

In his judgment, Gleeson CJ first dealt with a cross-appeal by the respondent which raised grounds including the meaning and validity of the offence provision.

The respondent's cross-appeal: scope and constitutional validity of definition of slavery

The respondent was granted special leave to cross-appeal from the Victorian Court of Appeal on the following grounds:

— that the Court of Appeal erred in holding that ss 270.1 and 270.3(1)(a) of the Code were within the legislative power of the Commonwealth

— that the Court of Appeal erred in holding that the offences created by s 270.3(1)(a) extended to the behaviour alleged in the present case and that they were not confined to situations akin to chattel slavery or in which

> the complainant is notionally owned by the accused or another at the relevant time.

However, the cross-appeals on these grounds were unanimously dismissed (Gleeson CJ at [2], [35] and [57], Kirby J at [84(1)] and [84(2)]). The Court also unanimously refused the respondent special leave to cross-appeal on a third ground (that the jury verdicts were unreasonable because of the inadequacy of the evidence: Gleeson CJ at [56], Kirby J at [84(4)]).

Gleeson CJ explained that the reference to 'chattel slavery' is a reference to 'the legal capacity of an owner to treat a slave as an article of possession, subject to the qualification that the owner was not allowed to kill the slave' ([27]).

The scope of the definition of slavery

Gleeson CJ discussed the meaning and validity of s 270.3(1)(a) at [19]–[35]. His Honour first considered the meaning of the definition of 'slavery' in the Slavery Convention ([22]–[27]) and concluded by reference to considerations of purpose, context and text that while chattel slavery falls within the definition, the definition is not limited to that form of slavery ([25]–[27]). The Slavery Convention was directed in terms to 'the complete abolition of slavery in all its forms' and reflected a purpose of bringing about the abolition of the legal status of slavery as well as the de facto condition of slavery where legal ownership was not possible. Gleeson CJ also concluded:

> In its application to the de facto condition, as distinct from the de jure status, of slavery, the definition was addressing the exercise over a person of powers of the kind that attached to the right of ownership when the legal status was possible; not necessarily all of those powers, but any or all of them. [26]

His Honour then addressed the various powers the exercise of which would be relevant to determining whether a de facto condition of slavery existed. Relevant to the present case, these included 'the capacity to make a person an object of purchase, the capacity to use a person and a person's labour in a substantially unrestricted manner, and an entitlement to the fruits of the person's labour without compensation commensurate to the value of the labour' ([26], referring to a 1953 Memorandum of the Secretary-General of the United Nations). Further guidance was found in the approach of the International Criminal Tribunal for the Former Yugoslavia in the case of *Prosecutor v Kunarac*, where both the Trial Chamber and the Appeals Chamber identified factors to be taken into account in determining whether a de facto condition of slavery existed as including 'control of movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour' ([28]).

His Honour ... addressed the various powers the exercise of which would be relevant to determining whether a de facto condition of slavery existed.

Gleeson CJ concluded that these approaches were also relevant to the application of s 270.3(1)(a) of the Code ([35]). The definition of 'slavery' in s 270.1 was not limited to chattel slavery, as Australian law did not allow legal ownership of a person. Rather, the provision addressed the de facto condition of slavery and 'the reference to powers attaching to the right of ownership, which are exercised over a person in a condition described as slavery, is a reference to powers of such a nature and extent that they are attributes of effective (although not legal, for that is impossible) ownership' ([33]). In addition, his Honour accepted that consent was not inconsistent with slavery ([35]; see also the discussion by Hayne J at [149]–[166]).

There may be difficulties in distinguishing a de facto condition of slavery from other circumstances of oppression. His Honour said that '[i]t is unnecessary, and

unhelpful, for the resolution of the issues in the present case, to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labour, or debt bondage', but noted that 'the various concepts are not all mutually exclusive' ([29]). However, his Honour was mindful of the need to distinguish between circumstances of slavery and other circumstances, such as harsh and exploitative conditions of labour, that fall short of slavery:

> Some of the factors identified as relevant in *Kunarac*, such as control of movement and control of physical environment, involve questions of degree. An employer normally has some degree of control over the movements, or work environment, of an employee. Furthermore, geographical and other circumstances may limit an employee's freedom of movement. Powers of control, in the context of an issue of slavery, are powers of the kind and degree that would attach to a right of ownership if such a right were legally possible, not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time or place. [32]

His Honour was mindful of the need to distinguish between circumstances of slavery and other circumstances, such as harsh and exploitative conditions of labour, that fall short of slavery ...

In his judgment Hayne J set out further observations on the meaning and application of the terms 'slavery' and 'slave' when used in the Code.

The constitutional validity of the definition of slavery

The respondent's argument on the constitutional issue was that the additional words in the definition of 'slavery' in s 270.1 ('including where such a condition results from a debt or contract made by the person') extended the definition of slavery in the Code beyond the ambit of the definition in the Slavery Convention and that, as a result, s 270.1 and s 270.3(1)(a) were invalid as being beyond the external affairs power. The definition of slavery in the Code in substance reflected the definition in the Slavery Convention and Gleeson CJ found that the additional words in the Code definition did not alter the meaning of the preceding words:

> ... because it is only where 'such a condition' (that is, the condition described earlier in terms of the 1926 Slavery Convention) results that the words of inclusion apply. The words following 'including', therefore, do not extend the operation of the previous words but make it plain that a condition that results from a debt or contract is not, on that account alone, to be excluded from the definition, provided it would otherwise be covered by it. [33]

Gleeson CJ summarised his conclusions on the meaning and validity of s 270.1 and 270.3(1)(a) as follows:

> In the result, the definition of 'slavery' in s 270.1 falls within the definition in Art 1 of the 1926 Slavery Convention, and the relevant provisions of Div 270 are reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under that Convention. They are sustained by the external affairs power. They are not limited to chattel slavery. [34]

As noted above, the other members of the High Court agreed with Gleeson CJ on these points, although in addressing validity under the external affairs power Kirby J preferred a test of 'reasonable proportionality'. Indeed, Kirby J regarded 'the challenge to the constitutional validity of the contested provisions of the Code as barely arguable' ([84(2)]).

The DPP's appeal: what are the elements of the slavery offence?

The High Court granted the DPP special leave to appeal from the Court of Appeal's decision on the adequacy of the trial judge's directions, which involved important questions about the operation of Chapter 2 of the Code (which contains the physical element and fault element provisions of the Code), both in respect of Commonwealth offences generally and in the context of the slavery offence in s 270.3(1)(a).

For the slavery offences, the DPP argued at the hearing of the appeal that, while an accused must intend to possess, or exercise some other power of ownership (such as use) over, another person who is a slave, the subjective basis on which the accused thought he or she was exercising those powers is not relevant.

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Gleeson CJ considered the reasons for the Court of Appeal's decision at [36]–[45] and concluded that the Court had wrongly proceeded on the basis that 'it was necessary for the prosecution to establish a certain state of knowledge or belief on the part of the respondent as to the source of the powers she was exercising, in addition to an intention to exercise those powers' ([42]). While acknowledging that the reason for the Court of Appeal's view seems likely to have been a concern to distinguish between slavery and harsh and exploitative conditions of labour ([44]), Gleeson CJ accepted the DPP's position and said that '(w)hat the respondent knew or believed about her rights and entitlements as an employer or contractor, as distinct from rights of property ... was not something that the prosecutor had to establish or that the jury had to consider' ([43]).

The answer to the Court of Appeal's concern about the borderline case 'may [in a given case] be found in the nature and extent of the powers exercised over a complainant' but not 'in the need for reflection by an accused person upon the source of the powers that are being exercised' ([44]). It was clear from the concluding words of the definition in s 270.1 that the existence of a contract of employment did not preclude the existence of a condition of slavery.

Furthermore, his Honour held that the provisions of Chapter 2 of the Code did not support the Court of Appeal's reasoning ([46]). The physical element of each offence (possessing a slave and using a slave) was conduct (which includes a state of affairs) and the (only) fault element was intention ([47]). 'A person has intention with respect to conduct if he or she means to engage in that conduct' ([47]). Here, '(i)t was not necessary for the prosecution to establish that the respondent had any knowledge or belief concerning the source of the powers exercised over the complainants' ([51]). Knowledge or belief about the facts relevant to possession or use, or which determine the existence of the condition of slavery, might, however, be factually relevant to establishing intention ([47], [49]).

Kirby J dissented on the outcome of the appeal, holding that the concept of 'intention' in s 270.3(1) of the Code applies 'not only to the physical elements but also to their quality and the "circumstances [that] make [them] criminal"' ([103]). His Honour went on to state that the fact that s 270.3(1)(a) required legal notions such as 'possession' or the 'right of ownership' to be exercised intentionally 'imports a necessity of consciousness of the quality, source and purported basis or justification of the "possession" and "right of ownership" being asserted' ([97], [108]). According to Kirby J, this construction of the notion of 'intention' avoided the 'serious risk of the over-expansion of the notion of "slavery"' and was 'more consonant with [the Slavery Convention] and the extremely grave international crime that "slavery", so expressed, involves' ([111], [113]).

AGS (Peter Prince, Simon Thornton, Rachel Harris and David Bennett QC) acted for the Commonwealth Attorney-General intervening, with the Commonwealth Solicitor-General David Bennett AO QC and Stephen Donaghue as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2008/39.html

NO IMPLIED POWER TO REMIT MATTERS IN HIGH COURT'S EXCLUSIVE JURISDICTION

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The plaintiff's application for a protection visa was refused by a delegate of the Minister for Immigration and Citizenship. As a result of the factual circumstances in which the plaintiff eventually received actual notice of this decision and a complex series of statutory provisions, the only Court with jurisdiction to review the delegate's decision was the High Court. Accordingly, the plaintiff commenced these proceedings in the High Court in its original jurisdiction under s 75(v) of the Constitution, seeking judicial review of the delegate's decision. An issue then arose as to whether the High Court could remit the proceedings to another court.

MZXOT v Minister for Immigration and Citizenship
High Court of Australia, 18 June 2008
[2008] HCA 28; (2008) 233 CLR 601; (2008) 247 ALR 58

Background

Although these proceedings were commenced in the High Court as required, the plaintiff wished to have the matter heard by the Federal Magistrates Court. However, the *Migration Act 1958* expressly prohibited matters such as the plaintiff's from being remitted by the High Court to another court (s 476B), notwithstanding the general statutory power of remittal conferred on the High Court by s 44 of the *Judiciary Act 1903*.

The plaintiff argued that the High Court has power *implied* from Chapter III of the Constitution to remit a matter commenced in its original jurisdiction to a lower court, and that the provisions of the Migration Act prohibiting the High Court from remitting his matter to the Magistrates Court and denying the Magistrates Court jurisdiction to hear it contravened that implied power and were invalid.

High Court's decision

The High Court unanimously dismissed the plaintiff's challenge. The reasons of the High Court consist of three separate judgments: a joint judgment by Gleeson CJ, Gummow and Hayne JJ (GGH); a further joint judgment by Heydon, Crennan and Kiefel JJ (HCK); and a separate judgment by Kirby J.

The Court held that:

- It does not have an *implied* constitutional power to remit to another court matters commenced in its original jurisdiction, at least where no other court has been conferred with concurrent federal jurisdiction in the matter (GGH at [38]–[39], [47]), and possibly at all (HCK at [192], [197]); although Kirby J left open the existence of such a power 'in a case of necessity' to protect the Court's 'essential character and functions', those circumstances did not exist here ([116]–[118]).
- Parliament can generally legislate to make any of the original jurisdiction of the High Court exclusive to that of other courts (GGH at [38], [41], [53] and HCK at [168], [199]–[204]). In general terms, it was for Parliament and not the Court to determine whether a matter in the High Court's original jurisdiction could be heard by another court.
  - However, a majority left open the possibility that the Commonwealth could not legislate in such a way as to place a burden on the High Court of such magnitude as to 'impair to a sufficiently significant degree the

discharge of the other jurisdiction of the Court' (GGH at [53], Kirby J at [137]–[141]). So, for example, GGH stated that it is 'hardly ... self-evidently correct' that the Commonwealth could validly repeal all legislation conferring federal jurisdiction on other courts and thereby burden the High Court with the full weight of original jurisdiction in federal matters: '[s]uch a state of affairs would, among other things, stultify the exercise of the appellate jurisdiction which is entrenched by s 73 of the Constitution' (GGH at [36], [37]).

— As to whether a State Supreme Court would have State (cf federal) jurisdiction to hear the matter on remittal: State Supreme Courts do not have any State jurisdiction in relation to any matters within the jurisdiction of the High Court, that State jurisdiction having been removed by the Judiciary Act (GGH at [22]–[24], HCK at [180]; Kirby J not deciding at [141]). Furthermore GGH held that, in any event, State Supreme Courts do not have *State* jurisdiction to issue mandamus to a federal officer to perform a federal duty (GGH at [30]); this may also be true in respect of other matters in s 75 of the Constitution including matters where the Commonwealth is a defendant (GGH at [26], [30]).

Katie Miller (AGS Melbourne) and Andrew Buckland (AGS Constitutional Litigation Unit) acted for the Minister and the Commonwealth Attorney-General (intervening) respectively, with the Commonwealth Solicitor-General David Bennett AO QC and Stephen Donaghue as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2008/28.html

COMPULSORY ACQUISITION OF NATIVE TITLE

In *Griffiths v Minister for Lands, Planning and Environment*, the High Court upheld by a 5:2 majority (Kirby and Kiefel JJ dissenting) the Northern Territory Minister's decision under s 43 of the *Lands Acquisition Act* (NT) to compulsorily acquire native title rights in unalienated Crown land in the town of Timber Creek for the purpose of conferring rights and interests in the land on others.

Gummow, Hayne and Heydon JJ delivered a joint judgment ('the joint reasons'). In a separate judgment Gleeson CJ concurred (at [1]–[8]). Justice Crennan also formed part of the majority. Her Honour agreed with both the joint reasons and the additional reasons of Gleeson CJ (at [155]).

Griffiths v Minister for Lands, Planning and Environment
High Court of Australia, 15 May 2008
[2008] HCA 20; (2008) 82 ALJR 899

Summary

There were two principal issues before the Court. The first was the construction of s 43(1) of the Lands Acquisition Act, which empowers the Minister, subject to that statute, to acquire land for 'any purpose whatsoever'. The Court had to consider whether that broad expression included acquiring the land simply for the purpose of private development.

The second issue arose from the fact that the only outstanding interests in the land that were sought to be acquired were native title rights and interests, and whether therefore the acquisition was in breach of the protection given to native title by the *Native Title Act 1993* (Cth).

Extent of power of compulsory acquisition 'for any purpose whatsoever'

The first issue centred on the meaning of the expression 'any purpose whatsoever' in s 43(1) of the Lands Acquisition Act. The appellants submitted that, notwithstanding the expression 'any purpose whatsoever', s 43(1) of the Lands Acquisition Act does not confer power upon the Minister to acquire land from one person solely to enable it to be sold or leased by the Territory for private use to another person (at [19]).

In rejecting this argument, Gummow, Hayne and Heydon JJ drew upon the legislative history of s 43(1), particularly the legislative amendments which were made following the High Court's decision in *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 (*Clunies-Ross*) (and the introduction of the *Native Title Amendment Act 1998* (Cth)) (at [29]):

> Against that background, the absence from s 43 in its post 1998 form of any reference to 'public purpose' and the presence of the expression 'for any purpose whatsoever' may readily be understood as a removal by the Territory legislature of any ground for the limitation of the statutory power by reference to considerations which had prevailed in *Clunies-Ross*.

Unlike the power to 'acquire land for a public purpose', which the Court in *Clunies-Ross* found did not extend to purposes 'unconnected with any need for or future use of the land' (at 200), Gummow, Hayne and Heydon JJ found that a power to acquire property for 'any purpose whatsoever' extended to acquiring land from one person solely to enable it be sold to another person for private use.

In contrast, Kiefel J (dissenting) held (at [159]) that '[t]he terms of s 43(1) do not permit land to be acquired absent any purpose for the acquisition and it is apparent that the purpose required is one connected with the Minister's act of

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acquiring land'. Her Honour drew upon statements made in *Andrews v Howell* (1941) 65 CLR 255, *Attorney-General (Cth) v Schmidt (No 1) (Doehnert Mueller Schmidt)* (1961) 105 CLR 361 and *Clunies-Ross* to support the proposition that the need for the land must be that of the acquiring authority (at [171]). In Kiefel J's view (at [172]):

> The expression 'any purpose whatsoever', understood in this light, extends the nature of what might be proposed for the land, but refers to the government's proposals. The omission of the word 'public' in the section provides no warrant for a construction that the power of acquisition may be used for private purposes in connection with the land. There is no clear statement of any such intention.

In his dissent, Kirby J was also of the view that 'specificity and high particularity' would be required for the Lands Acquisition Act to permit the Minister to acquire native title interests compulsorily for the private benefit of others (at [77]). In addition, Kirby J raised the issue of the relationship between s 51(xxxi) and laws made under the *Northern Territory (Self-Government) Act 1978* (Cth) (cf [171], Kiefel J). Arguing that *Teori Tau v Commonwealth* (1969) 119 CLR 564 should be overruled, Kirby J expressed the view that that '[a]ll compulsory acquisitions of property in and for the Northern Territory under s 122 of the Constitution are subject to the limiting requirements of s 51(xxxi) of the Constitution' (at [83]). However, Kirby J conceded (at [86]) that the appellants had sought to reach the conclusion that the compulsory acquisitions fell outside the legislative power of the Northern Territory legislature 'by a statutory rather than a constitutional route'.

Kirby and Kiefel JJ also made reference to the decision of the Supreme Court of the United States in *Kelo v City of New London, Conn.* 545 US 469 (2005) (*Kelo*) (at [124]–[127] and [183] respectively). In *Kelo* the United States Supreme Court held that, where property is compulsorily acquired in furtherance of an 'economic development plan', the constitutional requirements in the Fifth Amendment that private property shall not be taken for public use without just compensation are satisfied. Kirby J was of the view that the judgments in *Kelo* nevertheless expressed an 'affront ... to pure forms of "private to private" transfer of property under legal compulsion' (at [127]). Kiefel J found that the question whether economic development could be said to be a public purpose to be 'one of considerable difficulty', but that in this case '[t]he acquisition of the land was not connected to such a purpose' (at [183]).

Does the fact that only native title interests were acquired breach the Native Title Act?

The second issue centred on the construction of s 24MD(2)(b) of the Native Title Act. Under s 24MD(2), for a compulsory acquisition to extinguish the whole or part of the relevant native title rights and interests, three conditions must be satisfied. These conditions were designed to avoid racial discrimination (at [3] per Gleeson CJ). They included, in s 24MD(2)(b), that 'the whole, or the equivalent part, of *all* non-native title rights and interests ... is also acquired' (emphasis added).

Section 24MD(2)(b) was found to be effective to extinguish native title rights and interests where they are the only outstanding interests in unalienated Crown land, despite the use of the term 'all'.

The appellants had fastened upon the word 'all' and submitted that this condition can only be satisfied where there are some non-native-title rights and interests in the subject land, and they are also acquired (at [4]).

This submission was unanimously rejected by the Court. Section 24MD(2)(b) was found to be effective to extinguish native title rights and interests where they are the only outstanding interests in unalienated Crown land, despite the use of the term 'all' (see [1]–[8] per Gleeson CJ; [47]–[49] per Gummow, Hayne and Heydon JJ; [76] per Kirby J; [155] per Crennan J; and [156] per Kiefel J).

The word 'all' was variously described as referring to 'any and all' (at [4]), 'any whatever', or 'such numbers as proves to be the case' (at [47]). As Gleeson CJ explained (at [7]), to construe the condition otherwise would result in a new form of discrimination between different kinds of native title interests (those that co-exist with non-native-title rights and interests, and those that do not).

Text of the decision is available at:
http://bar.austlii.edu.au/au/cases/cth/HCA/2008/20.html

AUTHORITY TO PERMIT ENTRY TO WATERS OVERLYING ABORIGINAL LAND IN THE NORTHERN TERRITORY

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In *Northern Territory v Arnhem Land Aboriginal Land Trust* (*Blue Mud Bay*), the High Court held by a majority of judges[1] that a provision of the *Aboriginal Land Rights (Northern Territory) Act 1978* (Cth) (the Land Rights Act) preventing access to Aboriginal land without the consent of the owner—in this case, the Arnhem Land Aboriginal Land Trust (the Land Trust)[2]—was enforceable against persons holding licences authorising fishing in the inter-tidal zone[3] issued under the *Fisheries Act 1988* (NT). That is, in order 'to fish', whether on land or waters, above low water mark on Aboriginal land, a person must obtain, in addition to any licence required under the Fisheries Act, the consent of the Land Trust to enter the land.

Northern Territory of Australia v Arnhem Land Aboriginal Land Trust
High Court of Australia, 30 July 2008
[2008] HCA 29; (2008) 248 ALR 195

Overview

In *Blue Mud Bay* the High Court interpreted the distinctive legislative arrangements associated with operation of Commonwealth Aboriginal land rights legislation in the Northern Territory after NT self-government. They did so in the context of grants of special fee simple title known as 'Aboriginal land' under the Land Rights Act[4] which extend to the tidal low water mark.

Aspects of the decision dealing with licences to fish above the low water mark on Aboriginal land are distinctive to the NT. The decision's implications appear to extend to fishing on all Aboriginal land above the low water mark, including recreational freshwater fishing.

In *Blue Mud Bay*, the High Court also overturned previous authority[5] on the common law public right to fish in NT tidal waters. A majority held that this common law right had been abrogated by fisheries legislation. This aspect of the decision has potential implications for interpretation of fisheries legislation, especially the rights of recreational fishermen, elsewhere.

Background

Blue Mud Bay is a large bay on the east Arnhem Land coast, north-west of Groote Eylandt.

Establishment of the Arnhem Land Aboriginal reserve

Arnhem Land Aboriginal reserve was proclaimed[6] over land, including around Blue Mud Bay, in 1931, under a policy of setting aside large areas[7] of the (then) relatively undeveloped Northern Territory (NT) for Aboriginal people. As a result, Yolngu people from eastern Arnhem Land were fairly well protected from the

vicissitudes of European 'settlement'—until the 1960s mining boom and post-1970s growth in the NT's non-Indigenous population and tourist numbers.

Before the 1970s, NT Aboriginal 'protection' and 'welfare' legislation made it an offence for a non-Aboriginal person to enter a reserve without official permission.[8] In the 1930s, disputes about access to the eastern reserve and its offshore waters by non-Aboriginal fishermen led to insertion into the 'protection' legislation of a provision controlling entry by vessels into 'the territorial waters adjacent to a reserve for aboriginals'.[9] However, this provision was not re-enacted after it was criticised for uncertainty in the definition of 'territorial waters' by the NT Supreme Court.[10]

Arnhem Land reserve's original boundaries were drawn, on the seaward side, at 'the coastline'. The reserve was extended in 1940. After amalgamation with other reserves further west in 1963, and resumption of land around Gove for mining (see further below), Arnhem Land reserve covered 89,872 square kilometres, plus 5,956 square kilometres of islands. The 1963 amalgamation appears to have been driven by doubts about the various reserves' validity entertained by a parliamentary committee.[11]

When the enlarged reserve was re-proclaimed in 1963, its boundaries were extended to the low water mark, although the explanation for this change is not readily apparent. As the Woodward Land Rights Commission commented a decade later, 'the estuaries and tidal flats of Northern Territory Aboriginal reserves have been generally regarded as being part of the reserves and therefore out-of-bounds to commercial fishermen'.[12]

Opening of the reserve to mining and the Gove Land Rights Case

Northern Territory Aboriginal reserves were opened to mining after the discovery of bauxite in the Wessel Islands off Arnhem Land, and adoption by the Commonwealth of an Indigenous 'assimilation' policy, in the early 1950s.[13] Mining for manganese began on Groote Eylandt in 1965. In 1963, residents of the then Yirrkala Methodist Mission, on Gove Peninsula north of Blue Mud Bay, presented the Commonwealth Parliament with a 'Bark Petition' seeking protection of their traditional lands from proposed bauxite mining under leases granted to Comalco. However, the Commonwealth allowed the Gove mine to proceed,[14] implementing the 1950s compromise of paying royalties from mining on Aboriginal reserves into a special trust fund to benefit Aborigines.[15]

In 1968, Yolngu clan leaders—including a man whose personal name, Mathaman Marika, presumably derived from Yolngu involvement in the NT's earliest (pre-colonial) export fishery[16]—commenced proceedings challenging the Gove mine.[17] The case was continued after Mathaman's death by his Rirratjingu clan successor, Milirrpum Marika.[18] *Milirrpum v Nabalco* (the *Gove Land Rights Case*),[19] led the Federal Court to deny the existence of native title in Australia, despite recognising a Yolngu 'system of laws'.

The Woodward Land Rights Commission and the Land Rights Act

The then Commonwealth government responded to the Gove Land Rights Case by appointing the Woodward Land Rights Commission to inquire into appropriate ways of recognising Aboriginal land rights in the NT. Commissioner Woodward recommended[20] that statutory land trusts be granted fee simple title to land, including former Aboriginal reserves, for the benefit of the land's traditional owners. Because '[o]ne of the most important proofs of genuine Aboriginal ownership of land will be the right to exclude from it those who are not welcome', a permit system should be devised to control entry to Aboriginal land by non-Aborigines and those not on official duties.[21]

Woodward also observed that 'Aboriginal clans generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land.

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So also are the waters between the coastline and offshore islands belonging to the same clan.'[22] However, he rejected a proposal to extend the boundaries of Aboriginal land 12 nautical miles out to sea, in favour of one involving establishing a two-kilometre 'buffer zone' adjacent to Aboriginal land, seaward of low water mark. Fishermen and tourists would not be permitted to enter that buffer zone.

Parliament enacted most, but not all, of Woodward's recommendations as the Land Rights Act. That Act converted existing Aboriginal reserves, including Arnhem Land, to a special form of freehold held by statutory Land Trusts for its 'traditional Aboriginal owners', and allowed other Crown land in the NT to be granted on the same terms following successful traditional land claims. However, establishment of 'buffer zones' seaward of Aboriginal land was left up to the new NT legislature. NT legislation has made declaration of these zones, from which holders of existing fishing licences are not excluded, discretionary, contingent on a process equivalent to a traditional land claim, and revocable.[23]

Blue Mud Bay and earlier litigation about Indigenous rights to offshore areas

Blue Mud Bay involved a native title claim to the offshore, as well as a question of construction of the Land Rights Act. Yolngu people claimed native title to the seabed of Blue Mud Bay, as well as the ability to control, via the Land Trust, fishing in the inter-tidal zone over Aboriginal land granted to the Land Trust in 1980.[24]

Blue Mud Bay *involved a native title claim to the offshore, as well as a question of construction of the Land Rights Act.*

Blue Mud Bay was the most recent High Court appeal in a string of cases about native title and Land Rights Act title to offshore areas of the NT. The following cases preceded it:

— In the first native title claim to offshore areas (those adjacent to Croker Island off west Arnhem Land), *Yarmirr v Northern Territory* in 1998,[25] Olney J ruled that native title was capable of being recognised offshore. However, his Honour held that any such title (whether to seabed or waters) was necessarily non-exclusive since the common law could not recognise exclusive rights because they were inconsistent with public rights to fish and navigate there. In 1999, Olney J's decision was upheld by a Full Court majority.[26] Beaumont and von Doussa JJ also expressed the view that the grant of freehold title to the inter-tidal zone to the Land Trust under the Land Rights Act was also subject to the public right to fish,[27] and declined an application to reopen their decision on this issue.[28]

— A previous attempt by the Land Trust to agitate the issues ultimately decided in *Blue Mud Bay* failed in the Federal Court in 2000, when Mansfield J held that the public right to fish applied to inter-tidal waters overlying Aboriginal land, and that the NT Director of Fisheries could grant licences authorising fishing in those waters.[29] However, Mansfield J's decision was overturned by the Full Court on procedural grounds in February 2001.[30] Nonetheless, the Full Court judges[31] suggested that the Land Trust's fee simple title to the inter-tidal zone was subject to the public right to fish, had that right not been abrogated by statute. They declined to determine whether the NT Director of Fisheries could grant commercial fishing licences over inter-tidal waters on Aboriginal land without fuller argument on the Land Rights Act and better information about the fisheries licensing regime.[32]

— On 11 October 2001, the High Court upheld Olney J's decision in the *Croker Island* case that common law public rights to fish and navigate prevented recognition of exclusive native title rights to the offshore: *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1 at [94]–[100]. The judges did not consider the relationship between Land Rights Act grants and NT statutes.

— In *Risk v Northern Territory of Australia* (2002) 210 CLR 392, the High Court dismissed an appeal against the Aboriginal Land Commissioner's refusal, under the Land Rights Act, to entertain a traditional land claim to 10,000 square kilometres of seabed beyond the low water mark in Darwin harbour and adjacent offshore areas. The appeal was dismissed on a statutory construction basis: the seabed is not 'land' under the Land Rights Act. By contrast, in obiter dicta the majority judges treated areas above low water mark as 'land' within the Land Rights Act, observing that 'there is nothing in the Land Rights Act which appears to limit the rights of the holder of an estate in fee simple in land granted under the Act to rights over only the solid substance of the earth's crust, as distinct from those parts of the superjacent fluid (be it liquid or gas) which can ordinarily be used by an owner' (at [32]).

— Despite being (or considering himself) bound to hold to the contrary by *Yarmirr*, the *Blue Mud Bay* trial judge, the late Selway J, thought that:

  – any public right to fish in the Arnhem Land inter-tidal zone had been abrogated in 1931 by proclamation of the reserve, to which entry (including from the sea) was prohibited under the 'Aboriginal protection' ordinances, as well as by the grant of freehold under the Land Rights Act, s 70 of which prevents entry to Aboriginal land

  – because parliament had made clear its intention that the Land Trust control access to the inter-tidal zone and superjacent waters, the provisions of the Fisheries Act authorising the NT Director of Fisheries to grant fishing licences over Aboriginal land would be invalid for repugnancy with the Land Rights Act, were it not for the fact that they could be read down under the NT Interpretation Act so as not to apply to Aboriginal land.[33]

  However, Selway J rejected an argument that the Fisheries Act did not authorise fishing in coastal waters adjacent to, and within two kilometres of, Aboriginal land. Although this last issue was not pursued on appeal, the High Court ultimately agreed with Selway J that the NT Legislative Assembly had power to enact laws over these coastal waters.

— Selway J adjourned proceedings so that the parties could make submissions on final orders. However, his Honour died after delivering judgment. Mansfield J completed the hearing, dismissing an amended application for declarations that the fisheries licences were invalid.[34]

— Selway J's view that the Fisheries Act did not authorise grants of licences over Aboriginal land was upheld by a unanimous Full Court on an appeal by the Land Trust from Mansfield J's decision. The Full Court described the contrary views of the *Yarmirr* judges as 'plainly wrong'.[35] Among the textual indications in the Land Rights Act relied on by the *Blue Mud Bay* Full Court in support of its conclusion were the 'uncompromising' language of s 70, which restricts entry to Aboriginal land (for example, at [94]) (see below) and the lack of room in the statutory scheme for survival of background common law rights like the public right to fish (for example, at [99]).

Such an outcome would have meant that non-traditional fishing in waters overlying Aboriginal land could have been permitted only under licence from the Land Trust. The Northern Territory and its Director of Fisheries appealed the Full Court's decision. Before the High Court, the Land Trust conceded the power of the NT Legislative Assembly to regulate fishing on Aboriginal land, provided that the holders of statutory fishing licences obtained Land Trust consent to enter Aboriginal land.[36]

Selway J's view that the Fisheries Act did not authorise grants of licences over Aboriginal land was upheld by a unanimous Full Court ... Such an outcome would have meant that non-traditional fishing in waters overlying Aboriginal land could have been permitted only under licence from the Land Trust.

The High Court decision

A majority of the High Court[37] resolved the question of the NT Director of Fisheries' powers in such a way as to preserve the regulatory powers of the NT Legislative Assembly while still upholding the rights of the Land Trust, as fee simple holder in the context of the Land Rights Act, to exclude others. The Court ordered:

> ...[T]he Fisheries Act (NT) do[es] not confer on the Director of Fisheries (NT) a power to grant a licence under that Act which licence would, without more, authorise or permit the holder to enter and take fish or aquatic life from areas within the boundary lines described in the Arnhem Land (Mainland) Grant and the Arnhem Land (Islands) Grant made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

The reasoning of the courts below—that the Fisheries Act could not apply to Aboriginal land, to the extent that it purportedly did so—was said to have 'proceeded from incorrect premises', including an assumption that the Fisheries Act licensed fishing in particular locations (at [39]). The correct question, the High Court majority judges said, was whether the holder of a Fisheries Act licence entered Aboriginal land 'in accordance with a law of the Northern Territory' as permitted by s 70(2A)(h) of the Land Rights Act (at [17], [61]). He or she did not, because the Fisheries Act merely licensed the taking of fish, and was silent on *where* its holder may fish.

The correct question, the High Court majority judges said, was whether the holder of a Fisheries Act licence entered Aboriginal land 'in accordance with a law of the Northern Territory' as permitted by s 70(2A)(h) of the Land Rights Act ...

The majority also held that recreational fishing was not permitted in (waters overlying) Aboriginal land pursuant to the public right to fish, because this common law right had been abrogated by the Fisheries Act or predecessor legislation (at [27]). Recreational fishing will be permitted on Aboriginal land only if it complies with the Fisheries Act and occurs with the consent of the Land Trust.

The judges declined to distinguish fishing in waters overlying Aboriginal land from the taking of marine creatures (for example, mud crab) from that land (at [51]–[58]). While the Land Rights Act grants did not confer on the Land Trust property in waters, they did not distinguish between dry land and submerged land. Entry to the inter-tidal zone, whether by boat or foot, would fall within s 70 of the Land Rights Act, which prohibits (with exceptions) entry to Aboriginal land. Otherwise, the judges appeared to reason, this would make a mockery of the two-kilometre offshore buffer zones: in places where it would not be possible to sail in to the coast through these buffers, it would nonetheless be possible to walk in between high and low water mark (at [57]).

Heydon and Kiefel JJ dissented on this issue, holding that the distinct use of the terms 'land' and 'waters' in the Land Rights Act meant that waters overlying Aboriginal land were not within s 70 (Heydon J at [101]–[105]). In their view, any two-kilometre buffer zone should be measured from the high water mark.[38]

Notes

1 Gleeson CJ, Gummow, Hayne and Crennan JJ and Kirby J.

2 Under the Land Rights Act, land trusts hold land for the benefit of Aboriginal people with traditional entitlements to it. The land's 'traditional Aboriginal owners' direct a Land Trust's activities through statutory land councils. See ss 5, 23, 23AA(3) and 71.

3 This term is used in this note to refer to land underlying waters between the high and low water marks of the sea and other areas (eg estuaries and rivers) subject to the flux and reflux of the tides.

4 See the definition of this term in s 3(1) of the Land Rights Act.

5 See discussion of the *Yarmirr* cases concerning Croker Island below.

6 Under the *Crown Lands Ordinance 1927* (NT).

7 In this case, 31,200 square miles (80,808 square kilometres).

8 Relevant legislation included the *Aboriginals Ordinance 1918* ss 3 and 19, the *Welfare Ordinance 1953* s 45 and the *Social Welfare Ordinance 1964* s 17(3).

9 Former s 19AA of the *Aboriginals Ordinance 1918*, inserted in 1937. This provision was enacted following a string of killings in the Blue Mud Bay area. Police officer Albert Stewart McColl was killed on Woodah Island in Blue Mud Bay after police had successfully prosecuted three Yolngu men for the 1932 killing of Japanese fishermen at Caledon Bay to the north. Dhakiyarr Wirrpanda's conviction for McColl's murder was quashed by the High Court for breach of client legal privilege in *Tuckiar v The King* (1934) 52 CLR 335. However, Dhakiyarr, who had previously been acquitted of murdering two Anglo-Australian sailors on Woodah Island in 1933, disappeared, presumed murdered, after his release from prison. See Ted Egan, *Justice all their own: The Caledon Bay and Woodah Island Killings, 1932-1933* (Melbourne, 1996).

10 *Haruo Kitakoka v The Commonwealth* (unreported, Sup Ct NT, 1937), per Wells J.

11 Australia, House of Representatives, *Report from the Select Committee on Grievances of Yirrkala Aborigines*, Aboriginal Land Reserve, October 1963. See *Blue Mud Bay* at [114].

12 *Second Report* at [420].

13 This was achieved via an amendment to the *Mining Ordinance* (NT) in 1952. On the history of mining on Aboriginal reserves, see Jon Altman, 'Land rights and Aboriginal economic development' (1995) 2(3) *Agenda* 291.

14 See *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT).

15 The 'Aboriginals Benefit Trust Fund': see *Northern Territory (Administration) Act 1910* (Cth) as amended in 1969. From 1971, 10 per cent of these monies was paid to people directly affected by mining.

16 'Mathaman' sounds like a corruption of 'Massaman', derived from the Sanskrit 'Masalman' or 'Musalman', probably related to the 'musulman' of European Romance languages. These are all words for 'Muslim', which 'Macassan' trepang fishers from Sulawesi had become by the time they started to visit Australia's northern coasts in the 17th or early 18th century, sometimes involving Yolngu in their fishing and drying.

17 *Mathaman v Nabalco* (1969) 14 FLR 10.

18 Milirrpum Marika was also the brother-in-law of Garriwin Gumana, the applicant in *Blue Mud Bay*: see the biography of Wanyubi Marika on the Ceremony: the Djungguwan of North-East Arnhem Land website, http://www.filmaustraliaceremony.com.au/s2_6.htm.

19 (1971) 17 FLR 141.

20 Commissioner Woodward delivered two reports, the first in 1973 and the second in 1974. Relevant recommendations are discussed by the majority judges in *Blue Mud Bay* at [116]–[123].

21 *Second Report* at [109]–[122] and [144].

22 *First Report* at [205].

23 See generally *Aboriginal Land Act 1978* Part III.

24 See the 'Arnhem Land' (Mainland)' and 'Arnhem Land (Islands)' definitions in Schedule 1 of the Land Rights Act, and s 10, which authorised their grant.

25 *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533

26 *Commonwealth of Australia v Yarmirr* (1999) 101 FCR 171 per Beaumont and von Doussa JJ. Merkel J dissented, holding that native title to offshore areas was capable of conferring exclusive rights.

27 Ibid at [97]–98] and [201]–[203]. Their Honours discussed this issue because the native title claim related to the waters overlying the inter-tidal zone only, not the seabed in that zone (which had already been granted under the Land Rights Act).

28 *Yarmirr v Northern Territory* [2000] FCA 48.

29 (2000) FCA 165, (2000) 170 ALR 1.

30 *Director of Fisheries (Northern Territory) v Arnhem Land Aboriginal Land Trust* (2001) 109 FCR 488.

31 Spender, Sackville and Merkel JJ.

32 See the judgment of Sackville J (with whom Spender and Merkel JJ agreed) at [156]–[160].

33 *Gumana v Northern Territory of Australia* (2005 181 FCR 457.

34 *Gawirrin Gumana v Northern Territory [No 2]* (2005) 158 FCR 539.

35 *Gumana v Northern Territory of Australia* (2005) 141 FCR 457.

[36] *Blue Mud Bay* [2008] HCA 29 at [38].

[37] Gleeson CJ, Gummow, Hayne and Crennan JJ (with Kirby J in agreement).

[38] For example, Heydon J at [105], Kiefel J at [156]–[157].

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2008/29.html

HIGH COURT UPHOLDS TAX DECISION ON 'SHAM' TRANSACTIONS

In a significant decision dealing with the application of the doctrine of 'sham'[1] to tax cases, the High Court has upheld a finding made by the trial judge in this matter that certain steps undertaken in establishing and operating the Raftland Trust should be disregarded for the purposes of determining whether the trustee, Raftland Pty Ltd, was liable to tax on the net income of the trust in the relevant years of income.

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Raftland Pty Ltd as Trustee of Raftland Trust v Commissioner of Taxation
High Court of Australia, 22 May 2008
[2008] HCA 21; 246 ALR 406

Summary

Before this decision, it was generally believed that there was little scope to attack tax avoidance or tax minimisation arrangements as shams. This view was reflected in the remarks of Lehane J in *Richard Walter Pty Ltd v Commissioner of Taxation* (1996) 67 FCR 243 at 267–268, which were quoted by Edmonds J in the Full Federal Court in this matter:

> ... it must be borne in mind that it is of the essence of a structure intended to be effective to minimise tax that it be created by means of real transactions giving rise to real rights and obligations, however 'artificial' they may be, in the sense of being incapable of rational explanation except on the basis of their tax consequences. ... One expects, in a case such as this, that transactions are intended to have their apparent legal effect because it is only if they do that they are efficacious to achieve the desired consequences.[2]

The High Court disagreed with the narrower approach adopted by the Full Federal Court on appeal from the trial judge and the decision has led to some concern amongst commentators in the tax profession that the Commissioner will seek to rely on the Court's comments to attack a wide range of transactions as 'shams'. One author[3] described the High Court's decision in this case as 'the most important tax decision in the last decade because of its practical implications for taxpayers and tax practitioners'.

Background

In broad terms, the dispute concerned an attempt to shelter from income tax profits from building and property activities carried on by companies connected with brothers Brian, Martin and Stephen Heran by channelling income through associated trusts to the newly-created Raftland Trust and, thereafter, to the previously unrelated E & M Unit Trust, which had substantial accumulated tax losses.

The E & M Unit Trust had been established pursuant to a deed of trust dated 8 July 1986 to acquire and sell real property. The original trustee of the unit

trust was a company known as E & M Investments Pty Ltd and, at all relevant times, the units continued to be held on behalf of trusts associated with a Mr and Mrs Thomasz. In July 1991, when Mr and Mrs Thomasz were facing bankruptcy and the unit trust was in considerable financial difficulty, E & M Investments Pty Ltd resigned as trustee and a Mr Carey agreed to act as trustee instead. E & M Investments Pty Ltd was subsequently deregistered and, between July 1991 and June 1995, little activity was undertaken on behalf of the unit trust apart from some modest share dealings.

When it became apparent in about May 1995 that companies associated with the Heran brothers were facing substantial tax liabilities, the E & M Unit Trust was identified as having tax losses which might be utilised to absorb the forecasted profits and, following an approach to Mr Thomasz, an amount of $250,000 was agreed upon as a 'price' for securing access to the losses.

When it became apparent ... that companies associated with the Heran brothers were facing substantial tax liabilities, the E & M Unit Trust was identified as having tax losses which might be utilised to absorb the forecasted profits ...

The Raftland Trust was established on 30 June 1995. The Heran brothers were named as Primary Beneficiaries whilst the Secondary Beneficiaries included relatives of, and entities associated with, the Heran brothers. The Tertiary Beneficiaries of the trust were the trustee for the time being of the E & M Unit Trust and any other person nominated by Brian Heran before the perpetuity date. Pursuant to the terms of the Raftland Trust, Raftland Pty Ltd was empowered to determine at the end of each year whether to pay, apply or set aside the income of the trust for one or more of the Primary, Secondary or Tertiary Beneficiaries or to accumulate the income. In default of such a determination by 30 June, Raftland Pty Ltd was to hold the income on trust for the Tertiary Beneficiaries or, if they were not then in existence, for the Primary Beneficiaries or, if there were no such Beneficiaries, for the Secondary Beneficiaries.

Pursuant to the terms of a different trust deed, Raftland Pty Ltd (as trustee of the Raftland Trust) was a beneficiary of the Brian Heran Discretionary Trust. On 30 June 1995, the trustee of the discretionary trust resolved to distribute to Raftland Pty Ltd an amount of approximately $2.8m and, on the same date, Raftland Pty Ltd as trustee of the Raftland Trust resolved, firstly, to distribute the sum of $250,000 to Mr Carey in his capacity as trustee of the E & M Unit Trust and, secondly, to distribute the balance of its income for 1995 to Mr Carey in the same capacity. In the 1996 and 1997 years, the Raftland Trust received smaller distributions of income from various Heran entities and these amounts were in turn purportedly distributed to the E & M Unit Trust.

Apart from the above amount of $250,000, no money was ever paid to the E & M Unit Trust and payment was never called for or expected. Instead, the amounts were applied for the benefit of the Heran interests.

The Commissioner's arguments

The Commissioner sought in each year to assess Raftland Pty Ltd on the net income of the Raftland Trust under s 99A of the *Income Tax Assessment Act 1936* (ITAA).

Relevantly, s 99A(4) provides that, where there is no part of the net income[4] of a resident trust estate that is included in the assessable income of a beneficiary pursuant to s 97 of the ITAA, the trustee of the trust shall be assessed and is liable to pay tax on the net income of the trust estate. Under s 97, the question whether part of the net income of a trust estate is included in the assessable income of a beneficiary depends on whether there is a beneficiary who is 'presently entitled' to a share of the income of the trust.

In the present case, it was therefore crucial to determine whether any beneficiary of the Raftland Trust was 'presently entitled' to a share of the trust's income. Raftland Pty Ltd would only be liable to tax if, as the Commissioner

argued, neither the trustee of the E & M Unit Trust (as the named Tertiary Beneficiary) nor the Heran brothers (as Primary Beneficiaries) were so entitled.

In summary, the Commissioner contended:

— The purported resolutions by the Taxpayer were not effective to distribute income to the E & M Unit Trust because the unit trust had ceased to exist by 30 June 1995. There was no trustee of the trust—the attempt to appoint Mr Carey to replace the original trustee was not effective because of a failure to comply with certain requirements under the trust deed (as to giving notice and executing documents) with the result that E & M Investments continued as trustee until it ceased to exist upon its de registration. Further, there was no property remaining in the unit trust as at 30 June 1995 and any property which had been in existence in 1991 had not vested in the new trustee, assuming one to have been validly appointed.

— Alternatively, the appointment of the trustee of the unit trust as a Tertiary Beneficiary of the Raftland Trust and the subsequent distributions were a 'sham' and should be ignored.

— On either basis, the trustee of the E & M Unit Trust could not be 'presently entitled' to a share of the income of the trust for the purposes of s 97.

— The default clause in the Raftland Trust deed would make the Heran brothers beneficiaries by default where the Tertiary Beneficiary did not exist. However, having regard to other factual matters which it is not necessary to recite here, the reimbursement agreement provisions in s 100A of the ITAA operated in such a way that the brothers were deemed not to be 'presently entitled' to the income of the trust.

— Accordingly, s 99A applied to render Raftland Pty Ltd liable to tax.

Raftland Pty Ltd appealed to the Federal Court from the Commissioner's disallowance of its objections to the assessments.

The Commissioner contended ... the purported resolutions by the Taxpayer were not effective to distribute income to the E & M Unit Trust.

At first instance: Kiefel J

Justice Kiefel rejected the Commissioner's arguments concerning the existence of the E & M Unit Trust ([2006] FCA 109). Her Honour noted (at [66]) an established principle that equity would not allow a trust to fail for want of a trustee and inferred from the terms of the trust deed that the settlor of the unit trust would not have intended such a consequence. On the construction of the trust deed, her Honour concluded (at [69]–[70]) that Mr Carey's appointment was not dependent upon compliance with the formal requirements noted above and that, accordingly, he had been validly appointed as trustee. Referring to *Scott on Trusts*,[5] her Honour further noted (at [72]) that, although a trust cannot be created unless there is trust property, it is not altogether extinguished merely because the trustee no longer holds any property in trust—the trust may not be a full and complete trust, but fiduciary relations continue, although they cease to be related to any specific property.

Importantly, however, Justice Kiefel upheld the Commissioner's submission in relation to sham. After citing relevant authorities,[6] her Honour observed (at [79]) that 'a *"sham"* refers to steps which take the form of a legally effective transaction, but which the parties do not intend should have the apparent, or any, legal consequences'. In the present case, whether the parties had an intention to the contrary of the apparent distributions was to be determined by reference to the evidence and by inferences which may be drawn. As a general proposition, issues relating to the true character of the transaction were not to be determined separately from the overall case to be made out by a taxpayer and the ultimate onus of proving that the assessments were excessive lay on

the taxpayer. In this regard, her Honour noted the Commissioner does not have the burden of proving that a transaction is a sham (although he may come under a factual obligation to identify the real transaction for which it was contended that the ostensible transaction is a disguise) (at [80]–[81]).

Her Honour held (at [83]) that it may be readily inferred that Raftland Pty Ltd and the other entities controlled by the Heran brothers were not concerned about the creation of a relationship of trustee and beneficiary between Raftland Pty Ltd and the E & M Unit Trust—they had no reason to benefit the unit trust and the only reason why the Raftland Trust was created with the E & M Unit Trust as a beneficiary was to enable the income to be channelled to a trust which had accumulated losses. Further, Mr Thomasz knew that, whilst a debt was to be recorded as owed to the E & M Unit Trust, he and his wife would have no further dealings with the unit trust once the $250,000 had been paid ([86]).

On the evidence, her Honour held (at [89]) that the true nature of the transaction was one whereby Raftland Pty Ltd was to pay, and the E & M Unit Trust was to receive, a sum for control of the unit trust and access to its tax losses. The purported distributions by Raftland Pty Ltd were a sham and, accordingly, there had been no effective distribution of income to the unit trust. Further, as the appointment of the E & M Unit Trust as a beneficiary of the Raftland Trust was made only as part of the façade, that appointment should also be disregarded ([90]). In relation to the later years of income, the further purported distributions were held to be characterised by the initial transaction and thus were to be disregarded also ([104]).

Her Honour held ... that the true nature of the transaction was one whereby Raftland Pty Ltd was to pay, and the E & M Unit Trust was to receive, a sum for control of the unit trust and access to its tax losses.

As the distributions to the unit trust were ineffective, Raftland Pty Ltd, under the terms of the Raftland Trust, was treated as holding the income on trust for the Primary Beneficiaries, who were therefore 'presently entitled' to the income for tax purposes. However, Justice Kiefel found that the Primary Beneficiaries' present entitlement arose in connection with a 'reimbursement agreement' within the meaning of s 100A of the ITAA with the result that they were not to be taken as presently entitled to the income of the Raftland Trust (see [92]–[103]). Accordingly, her Honour held, Raftland Pty Ltd was liable to be assessed on the income of the trust under s 99A.

Full Federal Court

On appeal by Raftland Pty Ltd, the Full Federal Court disagreed with Justice Kiefel's conclusion that the appointment of the E & M Unit Trust as a beneficiary of the Raftland Trust was a sham which should be disregarded ([2007] FCAFC 4). In summary, it was held[7] that, because the evidence showed that the parties' fiscal objective—to use the losses of the unit trust to shelter income from tax—could only be achieved by ensuring that the trustee of the E & M Unit Trust became presently entitled to the income of the Raftland Trust (either as a result of a distribution or by operation of the default clause), it must necessarily have been intended by those responsible for establishing the Raftland Trust (a reference to the Heran brothers' solicitor, Mr Tobin, and the settlor who was one of his employees)[8] that the appointment of the unit trust as a beneficiary was to have effect according to its tenor (see [79]–[83]).

On this reasoning, and but for the operation of s 100A of the ITAA, the trustee of the E & M Unit Trust was taken to be presently entitled to the income of the Raftland Trust ([84]).[9] The Full Court accepted however—albeit by adopting a different starting point from Justice Kiefel — that s 100A applied (except in relation to an amount of $57,973 distributed in the 1996 year) so that Raftland Pty Ltd was assessable under s 99A of the ITAA.[10]

High Court

On a further appeal by Raftland Pty Ltd, the High Court upheld the approach taken by Justice Kiefel at first instance ([2008] HCA 21). In a joint judgment, Chief Justice Gleeson and Justices Gummow and Crennan noted (at [33]) that '[t]he apparent discrepancy between the entitlement appearing on the face of the documents and the way in which the funds were applied gave rise to a question whether the documents were to be taken at face value'. Their Honours continued: '[i]n various situations, the court may take an agreement or other instrument … as not fully disclosing the legal rights and entitlements for which it provides on its face', in which case the parol evidence rule would not apply.

One such case is where other evidence of the intentions of the relevant actors shows that the document was brought into existence 'as a mere piece of machinery' for serving some purpose other than that of constituting the whole of the arrangement ([34]). Their Honours sounded a need for caution about adoption of the description 'sham'—which, used in its correct sense, denoted an objective of deliberate deception of third parties—but nevertheless accepted that in this case 'it may be used in a sense which is less pejorative but still apt' to deny the critical step in Raftland Pty Ltd's case ([36]).

Their Honours sounded a need for caution about adoption of the description 'sham'... but nevertheless accepted that in this case 'it may be used in a sense which is less pejorative but still apt' to deny the critical step in Raftland Pty Ltd's case.

In their Honour's view, the intentions of the Heran brothers[11] (rather than those of Mr Tobin) were critical to the question of whether the trusts apparently created by the Raftland Trust deed were wholly or partly a pretence and they noted the findings by Justice Kiefel in this regard. Mr Tobin's evidence on the issue had been evasive and there was an inconsistency between the fiscal and financial objectives of the transaction. Their Honours concluded (at [57]–[58]) that Justice Kiefel had been 'fully justified' in finding that the entitlement under the Raftland Trust deed was not intended by the settlor or the trustee, or the Tertiary Beneficiary, to have substantive, as opposed to apparent, legal effect.

Justice Heydon did not consider it was open to the High Court to make a finding of 'sham' ([173]). Rather, in agreeing that the appointment of the E & M Unit Trust as a beneficiary and the purported distributions should be disregarded, his Honour indicated (at [178]) that, having regard to the findings made by Justice Kiefel, a court of equity would not enforce a claim by the trustee of the unit trust to beneficial entitlement and that it followed therefore that it did not have a beneficial entitlement.

In a lengthy judgment which traced the emergence of the concept of 'sham' in various jurisdictions, Justice Kirby was unabashed in describing the arrangements as a 'sham'. In doing so, his Honour observed (at [82]) that fear of overreaction should not prevent courts, where justified, from calling a sham what it is and that the High Court 'should not be diffident to invoke the tool of reasoning that sham provides in cases of this kind'.

The Court confirmed that, for the reasons given by Justice Kiefel, s 100A of the ITAA applied to render Raftland Pty Ltd liable to assessment. A cross-appeal by the Commissioner in relation to the amount of $57,973 distributed in the 1996 year was upheld. In this regard, the Court found that, contrary to the view expressed by Justice Edmonds in the Full Court, there was no material difference between this amount and the other amounts in question.

Notes

1 As Gleeson CJ, Gummow and Crennan J note in the judgment ([2008] HCA 21 at [35]), the term 'sham' is ambiguous, and uncertainty surrounds its meaning and application. One definition is that given by Lockhart J in *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 at 454: 'something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front.'

[2] See also the comments of Connolly J in *Lau v Federal Commissioner of Taxation* (1984) 54 ALR 167 at 172-173 (referred to by Kiefel J at first instance in this matter) where his Honour considered that a transaction will not be a sham if all the parties to the transaction intended that the instruments in question should take effect and operate according to their tenor and that the parties should have the rights and be bound by the obligations thereby created.

[3] Speed, R, *Thomson Weekly Tax Bulletin*, 20 June 2008.

[4] As defined in s 95.

[5] Fratcher, WF, *Scott on Trusts* (4 ed, Little, Brown and Co, Canada, 1987), Vol II.

[6] See *Re State Public Services Federation; Ex parte Attorney-General (WA)* (1993) 178 CLR 249; *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449; *Scott v Commissioner of Taxation* (1966) 40 ALJR 265; *Coppleson v Federal Commissioner of Taxation* (1981) 52 FLR 95 and *Snook v London West Riding Investments Ltd* (1967) 1 QB 786.

[7] By Edmonds J with Conti J agreeing. Dowsett J adopted a slightly different approach. In his Honour's view, the appointment of the unit trust as a Tertiary Beneficiary did not reflect an intention that the trust would take a benefit but simply that it might be a possible recipient of a benefit. On the other hand, there was no reason to conclude that there was no intention to nominate the unit trust as a beneficiary.

[8] In looking to the intentions of Mr Tobin and the settlor, Edmonds J relied on comments of Hill J in *Faucilles v Commissioner of Taxation* (1989) 90 ATC 4003, where his Honour said (at 4025): 'Where it is alleged that the trusts of a settlement or some of them are a sham, of necessity, it will need to be proved that it was the intention of the settlor that the settlement itself be a sham, or in a case such as the present that some of the trusts of that settlement are a cloak or disguise for the real trusts intended to bind the trustee'.

[9] Note also that the Commissioner did not re-agitate on the appeal the contention that the unit trust had ceased to exist by 30 June 1995.

[10] The Full Court's consideration of s 100A is at paras [86]–[115].

[11] In accordance with whose wishes the settlor was also presumed to have acted.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2008/21.html

THREE RECENT GST CASES: RELIANCE, HORNSBY, AND AXA

FCT v Reliance Carpet Co Pty Ltd
High Court of Australia, 22 May 2008
[2008] HCA 22; (2008) 246 ALR 448

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Earlier this year, the High Court unanimously allowed an appeal in *Reliance*—the first GST case to be granted special leave. The court held that, under s 99-5(1) of the GST law, a deposit forfeited under a standard land sale contract by the would-be purchaser for failure to complete was consideration for a taxable supply in return by the vendor.

Section 99-5(1) says that a 'deposit held as security for the performance of an obligation is not treated as *consideration for a supply, unless the deposit: (a) is forfeited because of a failure to perform the obligation; or (b) is applied as all or part of the consideration for a supply'.

The taxable supply in question involved certain 'contractual rights exercisable over or in relation to land' made to the purchaser at the time the contract was entered into. The deposit was consideration for that supply because it was paid 'in connection with' those rights. The court rejected the idea there was a singular supply of land under the contract ('nothing more and nothing less', as the Full Federal Court had said). Accordingly, the High Court ruled that the court below 'fell into error' when it allowed the appeal from Olney DP's decision in the AAT.

The High Court supported its decision by reference to the technical characteristics of a deposit for legal purposes (referring in turn to Roman law, Bracton and 17th century legislation). Neither the recent ECJ decision in *Société*

thermale d'Eugénie-les-Bains v Ministere de L'Économie nor the treatment of deposits under other VAT regimes were of help in resolving the present case. This was because those regimes insist on a much closer connection between 'supply' and 'consideration', and because the foreign statutory provisions lacked 'any sufficiently close analogue to Div 99' (at [31]).

The court characterised s 99-5 essentially as a 'wait and see' provision. What was called a 'lack of temporal coincidence' by the court between supply and consideration in this case was resolved by s 99-10—that is, GST is attributable to the advance supply of contractual rights, but only at the later time at which forfeiture actually takes place (at [39]). In the case of routine completion of a land sale contract, however, the deposit becomes consideration for a different supply—that being, supply of the land itself. By this statutory mechanism, there is only ever one *taxable* supply.

This decision will have profound implications for administration of the GST law and taxpayer compliance with it. One important practical thing it does is remove the threat to revenue of vendor taxpayers being entitled to refunds of GST previously paid on forfeited deposits (the media had reported an exposure of $1b here). However, the case is noteworthy for the range of GST issues it fails to deal with, just as much as with the reasons given for the deposit being taxable.

One important practical thing the decision does is remove the threat to revenue of vendor taxpayers being entitled to refunds of GST previously paid on forfeited deposits ...

In this regard, the High Court said nothing about purposive interpretation, the 'practical business tax' approach, the move away from juristic analysis, the asymmetry problem (in other words, how deposits for input taxed and GST-free supplies are to be treated), the impact of the nexus word 'for' in s 9-5, artificial dissection of supplies, the need to consider the 'social and economic reality' of transactions, or the GST treatment of forfeited deposits in non-land contexts. The High Court also had next to nothing to say about the relevance of VAT law generally to our GST system.

In its Decision Impact Statement, the ATO noted that the High Court took a 'practical approach' to the GST issue, and that the decision confirms the broad nature of 'supply'. Importantly, the Decision Impact Statement also rules that deposits forfeited in situations where the underlying supply would not be taxable similarly will not attract GST (see s 9-30 of the GST law). There was concern before *Reliance* that the law operated differentially in this regard to the prejudice of taxpayers.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2008/22.html

Hornsby Shire Council v FCT

Administrative Appeals Tribunal, 26 November 2008
[2008] AATA 1060

In *Hornsby Shire Council v FCT*, the AAT has ruled that a compulsory acquisition of land by a council entitled it to an input tax credit because the landowner (CSR) had triggered the acquisition and surrendered the land. The environmental plan in question enabled CSR to request the council to acquire the land by compulsory process, for which compensation of $26.5 million was paid.

In earlier proceedings, the council had failed to persuade the Supreme Court that 1/11th of the compensation determined as payable by the Valuer-General could be withheld from CSR on account of GST (*CSR Ltd v Hornsby Shire Council*

[2004] NSWSC 946). CSR paid no GST on the compensation. The council nonetheless sought a credit on the basis it had made a creditable acquisition of the quarry by reason of CSR making a 'supply' of that land to it for GST purposes.

The only question was whether the acquisition involved a 'supply' under the wide definition in s 9-10(2) of the GST law. If so, the ATO accepted that a credit was available. The AAT characterised the right under the environmental plan as 'analogous to a statutory put option', agreeing that CSR was the 'driving force' behind the acquisition and the 'very antithesis of an unwilling party'.

By exercise of the right under the plan, CSR accepted certain obligations, entry into which involved a 'supply' for GST purposes under s 9-10(2)(g). The AAT expressly rejected the idea that there was no nexus between that supply and payments of compensation (at [42]), and said that the 'complete factual matrix' needed to be considered (at [38]). There was also a 'surrender of real property' by CSR for s 9-10(2)(d) purposes by reference to the ordinary dictionary meanings of that term.

The AAT reviewed cases from other VAT jurisdictions, and considered the need for some positive act before a 'supply' is made. It also surveyed case law concerning whether compulsory acquisitions involve any 'sale' for income tax purposes, as well as UK gun surrender decisions. The AAT accepted that 'some positive action' was required for there to be a supply, but that the question 'is by no means free from doubt'. In the end, it held that there was both an 'obligations' supply and a 'surrender' supply by CSR, in relation to which the council could claim an input tax credit of $2.4 million.

The decision is contrary to the prevailing ATO public ruling on the issue (GSTR 2006/9), and it is possible that an appeal will be lodged. It was not denied by the AAT that the acquisition was legally effected by *Gazette* notice. However, to the extent that positive action by CSR is required, it was provided by exercise of the right under the environmental plan by which CSR assumed obligations and later surrendered the quarry. One problem is that the AAT failed to articulate why there was the required nexus between either 'supply' and the compensation. It is ironic also that, in a case involving obligation supplies, no mention is made of the High Court decision in *Reliance* (despite factual resonances), yet a variety of decisions from NZ, UK and South Africa are analysed in detail.

The decision is contrary to the prevailing ATO public ruling on the issue (GSTR 2006/9), and it is possible that an appeal will be lodged.

Media reports have suggested that the ATO will now face a barrage of similar claims from government agencies who have paid compensation to acquire land by compulsory process. While the AAT hinted (at [56]) that an entirely passive landowner may not make any 'supply' for which the agency could claim a credit, a range of facilitation is engaged in by landowners under various acquisition regimes. Given that those landowners will invariably have relied on ATO rulings for not having remitted any GST to the ATO, credit access by agencies would produce what might be called 'asymmetrical tax warfare'. In all cases, however, those agencies would also first need to secure tax invoices from affected landowners, something more easily said than done.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/AATA/2008/1060.html

AXA Asia Pacific Holdings Ltd v FCT

Federal Court of Australia, 3 December 2008
[2008] FCA 1834

In *AXA Asia Pacific Holdings Ltd v FCT*, without making orders, the Federal Court has held that the representative member of a GST group (one member of which was a life insurer which invested in related unit trusts) was not entitled to full credits on general administrative expenses. The case confirms that independent consideration is not necessary to support an acquisition of units being a financial supply [credits in relation to which are denied], and that, for entities acting as trustees of unit trusts to be GST grouped, they need to be grouped in their trustee capacity (meaning that acquisition of units cannot be disregarded for credit access purposes).

AXA is the representative member of a GST group. One group entity, NMLA, conducts a life insurance business, as well as investing in unit trusts (most of which are managed by related entities). NMLA also invested directly in property and other assets, some of which may be offshore. NMLA claimed to be entitled to credit access on general administrative expenses on business inputs not attributable to identifiable supplies on the basis that unit trust investments were not financial supplies made by it (because no independent consideration was given by trustees), and/or that those supplies were to be disregarded because NMLA and the trustees were GST grouped.

The ATO maintained that acquiring units was itself a financial supply for being an 'acquisition supply', and that the unit trustees were not grouped for GST purposes because they were not grouped in that capacity. Lindgren J accepted both these propositions in clear terms.

He said (at [92]) that NMLA made financial supplies by acquiring units 'because it made a payment "in connection with" its deemed supply of the units'. This accorded with underlying policy, and the 'legislature intended to catch an investment of the present kind'. The judge also rejected a 'subset argument' that a supply first had to be a taxable supply before it could be a financial supply', as well as the point (at [103]) that units had to be acquired in the course of some 'economic activity'. On the grouping question, Lindgren J said (at [112]) that trustees were different entities when acting in that capacity and had to be registered and grouped as such. Also, any ability otherwise to 'look through' interposition of unit trusts to determine credit access was inconsistent with the GST law.

AXA is not entitled to credits on expenses to the extent they relate to making supplies that would be input taxed (s 11-15(2)(a) of the GST law). What now needs to be determined in the extent of credit access in the light of Lindgren J's reasons, bearing in mind that the GST law does not prescribe the methodology for such an exercise. Accordingly, the matter has been stood over to 10 December.

Media reports have pointed to the fact that this decision will have important impacts for the credit access of banks and life insurers on general administrative expenses. Although methodology questions for apportioning these expenses are still to be determined (some accommodation between the parties being likely), this decision is a significant win for the ATO. Subject to a successful appeal, it confirms the legal effectiveness of a crucial aspect of the financial supplies regime (that being, the making of acquisition supplies by acquirers of other financial supplies). It also confirms that an entity acting in different capacities is a different entity for GST purposes. AXA might be able to regroup some trustees in that capacity, but that would depend on wider eligibility.

The decision confirms that an entity acting in different capacities is a different entity for GST purposes.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/FCA/2008/1834.html

JUDICIAL REVIEW OF TAX ASSESSMENT

In 2005, Futuris Corporation Ltd brought proceedings in the Federal Court of Australia under s 39B of the *Judiciary Act 1903* claiming that an amended assessment to income tax issued by the Commissioner was invalid and should be quashed. In the 2008 appeal, the High Court overturned an earlier decision of the Full Federal Court which held that the amended assessment had not been a bona fide exercise of the Commissioner's power to assess and was therefore invalid. The decision clarifies the circumstances in which judicial review of a tax assessment, otherwise than under the appeal process provided for in Part IVC of the *Taxation Administration Act 1953* (the TAA), will be available to a taxpayer.

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The High Court's decision makes it clear that relief under s 75(v) of the Constitution or s 39B of the Judiciary Act will only be available to a taxpayer where an assessment can be said to be 'tentative' or 'provisional' (in the sense discussed in the authorities) or where there has been 'conscious maladministration' of the assessment process or a 'deliberate failure' on the part of the Commissioner to administer the law according to its terms.

Commissioner of Taxation v Futuris Corporation Ltd
High Court of Australia, 31 July 2008
[2008] HCA 32; (2008) 247 ALR 605

Background to the proceedings

The dispute between the taxpayer and the Commissioner related to the treatment, for capital gains tax purposes, of the disposal by Futuris of shares in a company known as Walshville Holdings Pty Ltd in the course of a public float. In an internal reorganisation undertaken in anticipation of the float, assets owned by another Futuris subsidiary, Vockbay Pty Ltd, were transferred to Walshville, thereby attracting provisions of Division 19A of Part IIIA of the *Income Tax Assessment Act* 1936 (ITAA), which deals with the transfer of assets between companies under common ownership. The effect of these provisions was to reduce the cost base of Futuris's shares in Vockbay and to correspondingly increase the cost base of its shares in Walshville (and, consequently, reduce any capital gain on their disposal).

After the float, Futuris, in lodging its tax return for the relevant year, calculated the cost base so 'transferred' as being $82,950,090, of which approximately $63 million was attributed to shares and approximately $19 million to loans. In accordance with s 166A of the ITAA, the return was deemed to be an assessment issued by the Commissioner.

In November 2002, the Commissioner concluded that the cost base of the Walshville shares was $19,950,088 lower than the amount calculated by the taxpayer and issued an amended assessment (the first amended assessment) which increased the taxpayer's taxable income accordingly. An objection to that amended assessment was disallowed and proceedings under Part IVC of the TAA had been commenced in the Federal Court and were pending at the time of the High Court's decision.

In November 2004, the Commissioner concluded that the taxpayer had engaged in a scheme to which the general anti-avoidance provisions in Part IVA of the ITAA applied. After considerable internal discussion as to the correct amount of the tax benefit and the adjustment to be made, the Commissioner made a determination under s 177F(1) and issued a second amended assessment increasing the taxpayer's taxable income by a further $82,950,090. To the extent that the increase of $82,950,090 might have involved 'double counting' of the

amount of $19,950,088 included in the taxpayer's taxable income by the first amended assessment, it was thought by the Commissioner's officers—relying on a decision of Kenny J in *Australia and New Zealand Banking Group Ltd v FCT* [2003] FCA 1410 (*ANZ Banking Group*)—that this could be overcome in due course by making a compensating adjustment under s 177F(3) of the ITAA.

In June 2005, after the disallowance by the Commissioner of an objection to the second amended assessment, Futuris appealed to the Federal Court pursuant to Part IVC of the TAA. Subsequently, in October 2005, the company brought these proceedings under s 39B of the Judiciary Act seeking an order quashing the second amended assessment. It contended that, in issuing the second amended assessment, the Commissioner had purported to ascertain figures for taxable income and tax payable which he knew to be incorrect (owing to double counting of the amount of $19,950,088) and that the assessment was therefore invalid. In response, the Commissioner filed a notice of motion seeking to have the proceedings struck out on the basis that the taxpayer's claim was unarguable and doomed to fail.

Futuris contended that, in issuing the second amended assessment, the Commissioner had purported to ascertain figures for taxable income and tax payable which he knew to be incorrect ...

At first instance: Finn J

Finn J heard the taxpayer's application and Commissioner's motion concurrently. In his judgment ([2006] FCA 1096), his Honour began by identifying the issue before him as being whether the Commissioner was entitled to the privative clause protection of ss 175 and 177(1) of the ITAA. Section 175 provides:

> 175 The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

Section 177(1) provides:

> 177(1) The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the *Taxation Administration Act 1953* on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.

His Honour noted the existence of a 'voluminous body' of case law on the interpretation and effect of these provisions and observed (at [30]) that:

> ... it is sufficient to say that the protection of s.177(1) and s.175 will be lost (a) if the Commissioner has not made a bona fide attempt to exercise the power of assessment; or (ii) if the alleged 'assessment' is tentative or provisional in that it does not create a definitive liability ....

In this connection, his Honour referred to *Briglia v Federal Commissioner of Taxation* (2000) ATC 4247 at 4249 and *ANZ Banking Group*.

After summarising the parties' submissions, his Honour then compared the circumstances of the present case with those before Kenny J in *ANZ Banking Group*. There, her Honour dismissed an application by the bank under s 39B for a declaration that an amended assessment increasing the bank's assessable income by $65 million in reliance on Part IVA was not a valid assessment. The bank had submitted that the amended assessment was either 'tentative or provisional' or alternatively not a bona fide exercise of the power to assess because the Commissioner, in making the amended assessment, had not taken any action to eliminate from the bank's assessable income an amount of $29 million already returned by it as income as consequence of implementing

the scheme in question. Her Honour held that the Commissioner was not obliged to make a compensating adjustment at the same time as he made a determination under s 177F(1) and, further, the fact that it was contemplated that the amended assessment might be the subject of a compensating adjustment in the future did not make it tentative or provisional or lead to an inference of bad faith on the Commissioner's part.

Finn J agreed with the Commissioner's submission that the present case was relevantly indistinguishable from *ANZ Banking Group*. In his Honour's view, the case was one which fell naturally within both the language and evident purpose of s 177F(3). However, his Honour added that, even if he was wrong in that view, he was satisfied that, at best, all that Futuris had shown was that, in making the second amended assessment, the Commissioner proceeded upon a mistaken view of the applicability of s 177F(3). That mistake did not invalidate the assessment or evidence bad faith on the Commissioner's part in the exercise of the power to assess. Rather, his Honour observed, the effect of the mistake could, and should properly, be addressed in Part IVC proceedings ([60]).

His Honour went on to add that he was not satisfied that the Commissioner deliberately engaged in what Futuris called 'double counting'. The Commissioner was entitled, he said, to take the course he did given the following:

(a) appeal proceedings in relation to the first amended assessment had not been determined

(b) there was uncertainty about how the $19 million was calculated in any event, and

(c) his view that there was a need to protect the revenue by making the second amended assessment.

The Commissioner was therefore entitled to defer making a compensating adjustment ([61]).

His Honour concluded that the second amended assessment was intended to, and did, create a definitive liability and that it attracted the protection of ss 175 and 177(1) of the ITAA ([62]–[63]). He therefore dismissed the taxpayer's application.

His Honour concluded that the second amended assessment was intended to, and did, create a definitive liability and that it attracted the protection of ss 175 and 177(1) of the ITAA.

Full Federal Court

The Full Federal Court (Heerey, Stone & Edmonds JJ) upheld an appeal by the taxpayer ([2007] FCAFC 93).

Their Honours rejected two key conclusions drawn by Finn J. Firstly, on the basis of statements contained in various ATO internal documents in evidence, they considered that there had been a 'deliberate' double counting of the amount of $19,950,088 by the Commissioner ([10]–[12]). Secondly, they disagreed with his Honour in relation to the applicability of *ANZ Banking Group*. In their Honours' view, the circumstances in the present case were materially different from those in *ANZ Banking Group* ([17]–[20]). Furthermore, they observed, s 177F(3) would not have afforded the Commissioner a source of power to cure the overstatements of Futuris's taxable income because s 177F(3) could not operate to reduce the amount of a tax benefit which has previously been the subject of a s 177F(1) determination ([22]–[23]).

The Full Court then proceeded to consider whether the second amended assessment was a valid assessment. Like Finn J, they approached this question by asking whether the amended assessment enjoyed the protection of ss 175 and 177(1) of the ITAA ([24]).

Their Honours noted the review of the authorities undertaken by Kenny J in *ANZ Banking Group* and her Honour's identification of 'two strands of invalidity'. The first 'strand' concerned tentative or provisional assessments. Citing a line of authority beginning with *Federal Commissioner of Taxation v S Hoffnung & Co Ltd* (1928) 42 CLR 39 (*Hoffnung*), her Honour noted that 'there will be no assessment for the purposes of the Act, including s.177(1), if a purported assessment is tentative or provisional in the sense that it does not create a definitive liability'. The second strand of invalidity (which Kenny J said was 'not utterly free from doubt') concerned the adoption of the so-called *Hickman* test[1] as 'a rule of construction allowing for the reconciliation of s.177(1) and other provisions of the Act'. Her Honour referred to *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 and later authorities, including *Darrell Lea Chocolate Shops Pty Ltd v Commissioner of Taxation* (1996) 72 FCR 175, and went on to conclude that a purported assessment will lose the protection of ss 177(1) and 175 of the ITAA if it was not made in good faith or did not otherwise satisfy the *Hickman* test.

After quoting from a number of the authorities cited by Kenny J, their Honours proceeded to briefly state their conclusions. They rejected Futuris's submission that the second amended assessment was tentative or provisional in the *Hoffnung* sense ([47]–[52]). However, they concluded that the assessment was not protected by ss 175 and 177(1) because it was not a bona fide exercise of the power to assess. In this regard, their Honours noted (at [53]–[54]) that:

> ... The Commissioner knew, at the time he issued the Second Amended Assessment, that the taxable income of Futuris for the year ended 30 June 1998 could be no greater than $169,038,135 and yet he issued the Second Amended Assessment for a taxable income of $188,988,223 ...
>
> The Commissioner's application of the provisions of the ITAA to facts which knew to be untrue—that there is no possibility that the amount of $19,950,088 could be assessable income of Futuris over and above the maximum tax benefit of $82,950,090—brings the case squarely within terms of what the Full Court said in *Darrell Lea* ...

The Commissioner sought, and was granted, special leave to appeal.

High Court

In the High Court ([2008] HCA 32), Gummow, Hayne, Heydon and Crennan JJ, in a significant joint judgment, held that Finn J was correct to dismiss the s 39B application and that the Full Court erred in displacing that result.

At the outset, their Honours emphasised that the central issue presented by reliance on s 39B for an order quashing the second amended assessment was not merely whether there had been an error of fact or law by the Commissioner but whether there had been an error in the exercise by the Commissioner of powers conferred by the ITAA which amounted to jurisdictional error ([4]): see *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476. Ultimately, they concluded that there had been no such error and that the assessment was therefore valid. Their Honours' reasoning may be summarised in the following way:

Their Honours emphasised that the central issue ... was not merely whether there had been an error of fact or law ... but whether there had been an error ... which amounted to jurisdictional error ...

1. The critical matter for the determination of the appeal is the proper construction of s 175 of the ITAA and its application to the facts as correctly found by the primary judge ([62]).
2. The significance of s 175 of the ITAA for the operation of the Act and for the scope of judicial review outside Part IVC is to be assessed in the manner indicated in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998)

194 CLR 355. Consistently with the reasons of McHugh, Gummow, Kirby and Hayne JJ in that case, the relevant question is whether it is a purpose of the ITAA that a failure by the Commissioner in the process of assessment to comply with the provisions of the Act renders the assessment invalid; in determining that question, regard must be had to the language of the relevant provisions and the scope and purpose of the statute ([23]).

3. Section 175 must be read with s 175A—which provides for a taxpayer to object against an assessment in the manner provided by Part IVC—and s 177(1). The result is that the validity of an assessment is not affected by failure to comply with any provision of the Act, but a dissatisfied taxpayer may object to the assessment in the manner provided by Part IVC. Where s 175 applies, errors in the process of assessment do not go to jurisdiction and so do not attract the remedy of a constitutional writ under s 75(v) of the Constitution or under s 39B of the Judiciary Act ([24]).

4. Section 175 only operates where there has been what answers the statutory description of an 'assessment'. Tentative or provisional assessments do not answer the statutory description and may attract a remedy for jurisdictional error. Further, 'conscious maladministration' of the assessment process may also be said not to produce an 'assessment' to which s 175 applies ([25]). A deliberate failure to administer the law according to its terms would manifest jurisdictional error and attract the jurisdiction to issue the constitutional writs ([55]–[56]).

5. There was no absence of bona fides attending the issue of the second amended assessment and no jurisdictional error vitiating that amended assessment ([15]). Any error in the making of the second amended assessment fell within the scope of s 175 and could not found a complaint of jurisdictional error. If there were errors, they occurred within, and not beyond, the exercise of the powers of assessment and would be for consideration in the Part IVC proceedings ([45]).

6. In particular, the second amended assessment was neither tentative nor provisional in the sense discussed in *Hoffnung* or later cases such as *Commissioner of Taxation v Stokes* (1996) 72 FCR 160. Further, the evidence did not support a conclusion that the Commissioner engaged in double counting with any knowledge or belief that there was a failure in compliance with the provisions of the ITAA. In this regard, the reasoning in *ANZ Banking Group* was fairly open to the construction that it supported the course taken by the Commissioner ([58]–[59]).

The evidence did not support a conclusion that the Commissioner engaged in double counting with any knowledge or belief that there was a failure in compliance with the provisions of the ITAA.

In the course of their judgment, their Honours also made a number of other important observations:

1. To the extent that there is any indication in *FJ Bloemen Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 360 which might suggest that a deliberate failure to administer the law according to its terms would be immune from challenge under s 75(v) or s 39B, it should not be followed ([56]).

2. In relation to the availability of declaratory relief in proceedings under s 39B, the pendency of a proceeding by Futuris under Part IVC should have led the Full Court to refuse declaratory relief in any event ([48]).

3. Allegations that statutory powers have been exercised corruptly or with deliberate disregard to the scope of those powers are not lightly to be made or upheld ([60]). Their Honours endorsed remarks by the Full Federal Court in *Kordan Pty Ltd v Federal Commissioner of Taxation* (2000) 46 ATR 191 to the effect that it would be a rare case where a taxpayer will succeed in showing that an assessment has in the relevant sense been made in bad faith and should for that reason be set aside.

4. The outcome of the case does not depend upon giving determinative effect to s 177(1) of the ITAA. The evident policy reflected in s 177(1) (and corresponding provisions in other tax legislation) is the facilitation of proceedings for the recovery of tax. It is not a privative clause in the ordinary sense of the term—it does not purport to oust the jurisdiction conferred upon any other court in matters arising under the Act. In recovery proceedings, s 177(1) operates to change what would otherwise be the operation of the relevant laws of evidence but, given the presence of Part IVC, it does not operate to impose an incontestable tax. On its proper construction and application to the present s 39B proceedings, s 177(1) did not conclude against Futuris curial consideration of alleged deliberate maladministration of the ITAA with respect to the second amended assessment ([62]–[63]).
5. There is no conflict between s 177(1), s 175 and the requirements of the ITAA governing assessments which calls for the kind of reconciliation contemplated by *Plaintiff S157/2002 v The Commonwealth*. Their Honours endorsed the comments of Dawson J in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* to similar effect and noted that there is no scope for the operation of the so-called *Hickman* principle ([67]–[68]).

In a separate judgment, Kirby J summarised the constitutional requirements underpinning the tax law and noted the fundamental proposition that a law providing for an incontestable tax would be beyond power ([78]–[82]). His Honour also alluded to the crucial role that the remedies provided for in s 75(v) of the Constitution and s 39B of the Judiciary Act have in ensuring the conformity of federal officials to the Constitution and the laws made under it but he stressed that those remedies were discretionary ([85]–[92]).

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After summarising the facts, the judgments below and the issues on the appeal, his Honour agreed with the other members of the Court that the second amended assessment was neither tentative nor provisional ([118]) and, further, that the ATO records did not sustain a conclusion that the Commissioner acted with intentional falsehood, corruptly or in deliberate disregard of the requirements of the Act ([120]). Whilst his Honour noted (at [121]) that these conclusions would 'seemingly' foreclose Futuris's claim to relief under s 39B, he went on to discuss a number of other issues including whether ss 175 and 177(1) might be invalid and whether, as a matter of principle, the availability of relief under s 75(v) and s 39B should be limited to cases of 'jurisdictional error' (see [122]–[131]).

His Honour then considered the scope of 'jurisdictional error' generally and whether, aside from the two matters referred to earlier, Futuris's claim raised other complaints which, if made out, would establish such error but his Honour did not ultimately decide this issue ([133]–[152]). Instead, he considered that the Full Court should have dismissed Futuris's application on discretionary grounds, having regard to the availability of the appeal mechanism under Part IVC of the TAA ([166]–[168]).

Notes

[1] See *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2008/32.html

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