AUSTRALIAN GOVERNMENT SOLICITOR

Litigation Notes

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Treaties and Administrative Decision Making – Teoh in Question

Statements made by four members of the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (‘*Lam*’) suggest there is a strong likelihood that, if *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (‘*Teoh*’) was formally relied upon by a party in a future case, the High Court will overturn that aspect of the decision concerning legitimate expectations arising out of the act of entry into a treaty.

Re Minister for Immigration and Multicultural Affairs; Ex parte Lam

High Court of Australia, 12 February 2003
[2003] HCA 6; (2003) 195 ALR 502

Background

The applicant, Mr Lam, was originally a refugee from Vietnam. He subsequently had a long criminal history in Australia including trafficking in heroin, and in due course the Minister for Immigration and Ethnic Affairs cancelled his visa and sought to deport him. The applicant was unmarried but had two children born in Australia who were Australian citizens, and who were living with a relative carer. The applicant instituted High Court proceedings arguing that the Minister had failed to accord him procedural fairness.

High Court’s Decision

All members of the High Court rejected the applicant’s argument. The argument turned upon the fact that the Department of Immigration and Multicultural Affairs (as it was then known) had written to him requesting that he provide the names and contact details of his children’s carers because the department wished to contact them in order to assess his relationship with his children and the possible effects on them of a decision to cancel his visa. The department did not contact the children’s carer, despite indicating its intention to so do in this letter.

The applicant argued that he was denied procedural fairness because the decision to cancel his visa was made without him being told by the department that it had been decided not to contact the children’s carer and that the decision maker intended to rely on the information about the children provided in the applicant’s submission and annexures including a letter from the children’s carer.

The Court placed importance upon the fact that, in the proceedings, the applicant did not suggest that he relied to his disadvantage in any way upon the representation that the children’s carer would be contacted. The applicant had addressed the issue of the children’s welfare and best interests in his submission, as had the children’s carer in her annexed letter. The applicant did not argue that he was deprived of any opportunity to put any further information or submissions to the Minister in respect of the children. He could not demonstrate that there

was any new material that might have influenced the decision maker to decide the case differently.

All members of the High Court held that there was no unfairness to the applicant and no injustice could be shown to exist. The applicant had lost no opportunity to advance his case, and he did not rely to his disadvantage on the statement of intention.

Previous Decision in *Minister for Immigration and Ethnic Affairs v Teoh*

In the previous decision of *Teoh*, a majority of the High Court (McHugh J dissenting) held that a treaty ratified by Australia, but not incorporated into Australian domestic law, could found a legitimate expectation that administrative decision makers would act in conformity with it. Statutory and executive indications to the contrary could remove that legitimate expectation. The majority further held that, if a decision maker proposed to make a decision inconsistent with that expectation, procedural fairness required that the persons affected be given notice and an adequate opportunity of presenting a case against the taking of such a course.

Discussion of *Teoh* in *Lam*

The High Court in *Lam* did not have to formally reopen and reconsider *Teoh*. The applicant did not formally rely upon *Teoh*, although his case was based on legitimate expectation and denial of procedural fairness.

However, in their judgments, four of the five member Bench sitting in *Lam* expressed strong criticism of the reasoning and decision in *Teoh*. Only Gleeson CJ expressed no criticism of *Teoh*.

In a joint judgment, McHugh and Gummow JJ expressed the view that there still remains a fundamental question of the relevance of the doctrine of legitimate expectation [81–83], a view expressed by McHugh J (in dissent) in *Teoh*. Their Honours were critical of the reasoning in *Teoh* that ratification of a treaty is a 'positive statement' made 'to the Australian people', without it being accompanied by a consideration of the extent to which such matters impinge upon the popular consciousness [95]. McHugh and Gummow JJ suggested that *Teoh* is not consistent with the earlier reasoning and decision in *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 ('*Haoucher*'), a case which can be compared with *Teoh*. The legitimate expectation in *Haoucher* arose because of a detailed policy statement made by the Minister to the House of Representatives. McHugh and Gummow JJ also noted that the treaty under consideration in *Teoh* had not been followed by any relevant exercise of legislative power to make laws with respect to external affairs, nor was it a self-executing treaty (such as a peace treaty) [98–100]. There appears to be a clear implication in their joint judgment that the reasoning in *Teoh* failed to give sufficient attention to the relationship between international obligations and the domestic constitutional structure [98].

In a separate judgment, Hayne J was also critical of *Teoh*. His Honour agreed with McHugh J (in dissent) in *Teoh* that more attention needed to be given to whether legitimate expectation still has a useful role to play in the realm of procedural fairness [121], and he also agreed that 'it may be that, for the reasons given by McHugh and Gummow JJ' [in their judgment in *Lam*], *Teoh* cannot stand with the earlier decision in *Haoucher* [122]. Hayne J also noted that further consideration may have to be given to what was said in *Teoh* about the consequences which follow for domestic administrative decision making from the ratification, but not enactment, of an international instrument [122].

The fourth member of the Court in *Lam* who expressed strong criticism of *Teoh* was Callinan J. His Honour stated that he considered the term 'legitimate expectation' to be 'a complete misnomer' in the case of *Teoh*, as the treaty in question had not been incorporated into Australian law by enactment and neither Mr Teoh nor his children had any

knowledge of the treaty nor its ratification by the Executive [139–141]. Callinan J questioned the utility of the concept of legitimate expectation in discourse about the rights and obligations of applicants and administrators, and also questioned the necessity for the 'invention of the doctrine' [140]. Furthermore, his Honour suggested that the application of the doctrine of legitimate expectation in a case such as *Teoh* 'elevate[d] the Executive above the parliament', by the Court giving the effect to the treaty that it did [147, 152].

Conclusion

In light of the views expressed by these four members of the High Court in *Lam*, it seems very likely that, in a future case in which there is formal reliance upon *Teoh*, the High Court will reopen and overturn that aspect of the decision concerning legitimate expectations arising out of the act of entry into a treaty.

Text of the decision is available at <http://www.austlii.edu.au/au/cases/cth/high_ct/2003/6.html>.

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Native Title

The principal issue in this case is the proper approach to the definition of 'native title' and 'native title rights and interests' in section 223(1) of the *Native Title Act 1993* (NTA).

Members of the Yorta Yorta Aboriginal Community v State of Victoria and Ors

High Court of Australia, 12 December 2002
[2002] HCA 58; (2002) 194 ALR 538

The High Court dismissed an appeal by members of the Yorta Yorta Aboriginal community (the claimants) from a decision by a majority of the Full Court of the Federal Court. The Full Court's decision was to dismiss an appeal against the trial judge's determination that native title does not exist in relation to an area of land in northern Victoria and southern New South Wales in the vicinity of the Murray and Goulburn Rivers (the claim area) covered by the claimants' native title determination application made under the NTA.

Gleeson CJ, and Gummow and Hayne JJ gave a joint judgment dismissing the appeal. McHugh and Callinan JJ gave separate judgments dismissing the appeal. Gaudron and Kirby JJ gave a joint dissenting judgment that would have allowed the appeal.

As a result, the trial judge's determination stands. That is, native title does not exist in the claim area.

Background and High Court's Decision

The claimants had made a native title determination application under the NTA. Attention in the High Court was, therefore, focussed on the requirements that must be satisfied in order to come within the definition of 'native title' in s.223 of the NTA. In particular, did the definition import a requirement of continuous acknowledgement and observance, of

laws and customs since sovereignty and, if so, what part of the definition did this? Was it:

- the requirement in s.223(1)(a) that native title rights and interests be possessed under the 'traditional' laws and customs of the claimants, or
- the requirement in s.223(1)(c) that the rights and interests be 'recognised' by the common law?

This case confirms that proof of a continuous acknowledgement and observance of laws and customs since sovereignty is critical to establishing native title, and that this requirement flows from s.223(1)(a) not s.223(1)(c).

The joint judgment of Gleeson CJ, Gummow and Hayne JJ is the principal judgment. It starts from an observation that, upon the acquisition of sovereignty, the Crown acquired a radical title to the land which was burdened by rights and interests in relation to land – called 'native title' – owing their origin to laws and customs deriving from a normative system that pre-existed sovereignty.

It is therefore essential that claimants demonstrate the content of pre-sovereignty traditional laws and customs by reference to a society then in existence. They must also demonstrate that the society has continued to exist, and that the rights and interests being asserted pre-dated sovereignty; no new rights and interests can be created after sovereignty. There is however some scope for the adaptation, change or development of laws and customs post-sovereignty.

Implications of the Decision

It follows that it is wrong to confine an inquiry about native title to an examination of the laws and customs now observed in an indigenous society. Of course, current observance is still necessary. But claimants must also demonstrate that laws and customs have continued to be observed 'substantially uninterrupted' since sovereignty, that they were transmitted from generation to generation, at each stage they defined the rights and interests that the people could exercise in relation to the area concerned, and that the society under whose laws and customs the rights and interests are said to be possessed continues to exist as a body united by its acknowledgement and observance of the laws and customs.

All of this is said to flow from the requirement in s.223(1)(a) of the definition of 'native title' for the rights and interests to be possessed under the 'traditional' laws and customs acknowledged and observed by the claimants.

In the context of the NTA 'traditional' carries an understanding that the origins of the content of the laws and customs are to be found in the normative rules of indigenous societies that existed before the assertion of sovereignty.

Text of the decision is available at <http://www.austlii.edu.au/au/cases/cth/high_ct/2002/58.html>.

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Powers to Compel Production of Documents or Information

The High Court has unanimously allowed an appeal by The Daniels Corporation International Pty Ltd ('Daniels') and declared that section 155 of the *Trade Practices Act 1974* (Cth) ('the Act') did not require the production of documents to which legal professional privilege attaches. The High Court's decision overturned the unanimous decision of the Full Court of the Federal Court of Australia which had reached the opposite conclusion.

The High Court delivered judgment on the same day in proceedings brought by Woolworths Limited and Coles Myer Limited against the ACCC and Professor Fels, Chairman of the ACCC. The Court had been referred the same question to consider as in *Daniels*.

The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission

Woolworths Limited v Fels; Coles Myer Limited v Fels

High Court of Australia, 7 November 2002
[2002] HCA 49; [2002] HCA 50; (2002) 192 ALR 561

Background

The Australian Competition and Consumer Commission ('the ACCC') served notices on the solicitors for Daniels pursuant to s.155(1)(a) of the Act, requiring the production of documents held by them as a result of their having acted as solicitors for Daniels. The solicitors failed to produce all of the documents specified in the notices and they claimed that the remaining documents were subject to legal professional privilege. Proceedings were commenced in the Federal Court by the ACCC seeking a declaration that s.155 of the Act requires production of documents to which legal professional privilege attaches. The solicitors for Daniels were later joined as respondents to the proceedings.

In February 2001 the proceedings were heard in Sydney by a Full Court of the Federal Court specially convened by Wilcox J who had referred the legal question involved in the ACCC's proceedings to the Full Court which comprised Wilcox, Lindgren and Moore JJ.

The Full Federal Court unanimously held that Daniels' solicitors were not entitled to refuse to comply with the s.155 notices on the ground of legal professional privilege. Wilcox J noted that although 'in a technical sense, observations [made in a previous High Court case of *Pyneboard Pty Ltd v TPC* (1983) 152 CLR 328] concerning the relationship between that doctrine [of legal professional privilege] and s.155 of the Act were [outside the scope of the what had to be decided]… *Pyneboard* strongly suggests that the natural meaning of the words used in s.155(5)(a) excludes legal professional privilege' ([52] of the Full Court judgment).

Ultimately Wilcox J concluded that the better view is that a claim of legal professional privilege is not a valid answer to a notice under s.155 of the Act.

Moore J decided to grant the declaration sought by the ACCC because the language of s.155(5) is 'emphatic and requires compliance with a notice if the recipient is capable of complying with it'.

Lindgren J agreed with the approach taken by Wilcox and Moore JJ and, in addition, noted that it was not necessary to form a view about whether privilege was abrogated in relation to documents which were not physically in possession of the recipient of the notice but which were legally in the control of that person [95].

High Court's Decision

In *Daniels v ACCC, Woolworths Limited v ACCC & Fels*; *Coles Myer Limited v ACCC & Fels* the following question was considered by the Full Court of the High Court:

> Can the production of documents to which legal professional privilege attaches and is maintained be compelled by the Second Defendant pursuant to section 155 of the *Trade Practices Act 1974* (Cth)?

In a joint judgment, Gleeson CJ, Gaudron, Gummow and Hayne JJ, declined to follow the approach taken by the majority of the High Court in the earlier decision of *Pyneboard Pty Ltd v TPC* and suggested the decision of *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 may now be decided differently [35]. Both of these decisions had been relied upon by the Full Federal Court and the ACCC. Since 1991 the Australian Securities and Investments Commission (ASIC) has relied on *Yuill* to require the production of documents which are the subject of claims for legal professional privilege.

Gleeson CJ, Gaudron, Gummow and Hayne JJ identified a number of difficulties in adopting the approach to the construction of s.155 of the Act applied in *Pyneboard*. Firstly, Brennan J's approach was inconsistent with the rule in *Potter v Minahan* ((1908) 7 CLR 277) that provided statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.

Secondly, the approach adopted by Mason ACJ, Wilson and Dawson JJ concentrated on the terms of s.155(1) and paid no regard to s.155(2). They also argued that the earlier approach by the Court also rendered otiose the express abrogation, in s.155(7), of the privilege against incrimination.

Gleeson CJ, Gaudron, Gummow and Hayne JJ further noted that the question decided in *Yuill* was that legal professional privilege was not a reasonable excuse for failing to comply with a notice under s.295(1) of the Companies (New South Wales) Code and was not concerned with s.155 of the Act [19].

In separate judgments, McHugh, Callinan and Kirby JJ agreed with the conclusions of the majority. McHugh J held that neither *Pyneboard* nor *Yuill* assisted the ACCC, and Justice Callinan distinguished *Yuill* on the basis that there were no provisions in the Act making specific reference to legal professional privilege.

McHugh J held that s.155 would not become inoperative or be rendered futile if a person to whom a s.155 notice was addressed could refuse to produce the documents because they were protected by legal professional privilege. It is interesting to note that this position seems to be inconsistent with the earlier statement in *Yuill* by McHugh J that:

> Unlike s.155 of the *Trade Practices Act*, therefore, the general terms of s.295 [of the Companies (New South Wales) Code] show no implied intention to abolish all relevant common law rights and privileges. (*Yuill* at 351)

In concluding that legal professional privilege is not lost by statutory words of generality, Kirby J stated that [112]:

> Adoption of this approach does not mean a return to an excessively literalist interpretation of regulatory legislation, where important considerations of public interest are involved. The approach is not inconsistent with a purposive construction of legislation. It remains in every case to identify the purpose.

The High Court further noted that legal professional privilege does not attach to communications made for the purpose of engaging in contraventions of the Act and a 'communication the purpose of which is to "seek help to evade the law by illegal conduct" is not privileged' (per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [24]). Further, Kirby J stated at [114]:

Legal professional privilege will not be available where a conclusion is reached that particular communications were not prepared for the dominant purpose of giving or receiving legal advice. Similarly, legal professional privilege may not apply where an ulterior purpose for the communication is demonstrated, for example where the communication was made in furtherance of a criminal or fraudulent purpose.

The High Court's decision has implications beyond the Trade Practices Act and is relevant when considering the operation of provisions in other legislation which compel production of documents or information.

Text of the decision is available at <http://www.austlii.edu.au/au/cases/cth/high_ct/2002/49.html>.

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Governments and Public Instrumentalities – a Reality Check on their Liability in Negligence

The High Court has made clear that is not the role of the law of negligence to influence government decision making on the allocation of resources and spending. Otherwise, the courts risk interfering with political decision making. The Court's decision also demonstrates that the standard of care required to discharge a duty of care can only be determined after a proper consideration of the magnitude of the risk of harm and the degree of probability of its occurrence. The decision shows a continuation of the High Court's own approach to ascertaining the existence of a duty of care, which differs from the approaches of other common law jurisdictions, including the United Kingdom.

Graham Barclay Oysters Pty Ltd v Ryan; Ryan v Great Lakes Council and Ors; State of New South Wales v Ryan and Ors

High Court of Australia, 5 December 2002
[2002] HCA 54; (2002) 194 ALR 337

Background

In late January 1997, the plaintiff suffered illness through contracting the hepatitis A virus from the consumption of oysters grown at Wallis Lake within the Shire of Great Lakes in New South Wales. Following heavy rains in November 1996, Wallis Lake suffered increased pollution from human faecal effluent in water streams flowing into the lake. The effluent appears to have emanated from inadequately controlled sewerage storages in the general vicinity of the lake (principally defective septic tanks). Human faeces is a carrier of the hepatitis A virus. Oysters growing in the lake would retain the virus in

their flesh from absorption of the lake's waters. A New South Wales government task force attributed some 444 cases of hepatitis to the consumption of oysters grown in the lake, in the aftermath of this increased pollution in late 1996.

The plaintiff instituted a representative action for damages in the Federal Court under Part IVA of the *Federal Court of Australia Act 1976* on behalf of himself and 184 other persons who suffered illness through contracting hepatitis in this same outbreak. The action was brought against Graham Barclay Oysters Pty Ltd, the grower of the oysters, Graham Barclay Distributors Pty Ltd, the distributor of the oysters, the Great Lakes Council ('the Council') and the State of New South Wales ('the State'). Claims against the grower and distributor companies sought relief under the consumer protection provisions in Part V of the Trade Practices Act and damages in negligence. The claim against the Council was in negligence, based on its alleged failure to take sufficient steps under its statutory powers to minimize the faecal contamination in the lake. The claim against the State in negligence alleged failures by the State Ministers responsible for fisheries and public health, the State environmental control authority and other officials and responsible government committees for their respective alleged failures to exercise substantial control over the oyster industry concentrated on the lake.

The primary judge, Wilcox J, found each of the grower and distributor companies, the Council and the State liable in negligence. He also found that the grower and distributor companies had failed to supply goods fit for purpose in breach of section 74B of the Trade Practices Act and failed to supply goods of merchantable quality in breach of section 74D of that Act. The Full Court of the Federal Court upheld the appeal of the Council (by a 2:1 majority) ruling that the Council owed no duty of care to the plaintiff. The Full Court, however, dismissed the appeal of the State (again by a 2:1 majority). The same majority who dismissed the State's appeal also dismissed an appeal by the grower and distributor companies against the primary judge's ruling that they were negligent. The Full Court, however, unanimously rejected an appeal by the grower and distributor companies against the ruling of liability for breach of the Trade Practices Act provisions.

By special leave, the State appealed to the High Court against the finding of liability against it. Similarly, the grower and distributor companies obtained special leave to appeal against the rulings of liability and negligence against them. Finally, the plaintiff was granted special leave to appeal against the Full Court's overturning of the primary judge's ruling of negligence against the Council.

The High Court upheld the State's appeal. The Court, by a 4:3 majority, upheld the appeal of the grower and distributor companies against the negligence ruling of the primary judge. Finally, the Court unanimously dismissed the appeal of the plaintiff against the overturning of the liability ruling against the Council. The findings of liability by the primary judge against the grower and distributor companies under the Trade Practices Act provisions remained unchallenged.

High Court's Decision

As to the liability of the State and the Council, McHugh J pointed out that each should have foreseen the risk of harm to the consumer of oysters through the faecal contamination in the lake. However, this was only the start of the inquiry whether a duty of care existed. So far as the State was concerned, McHugh J saw the liability exposure in negligence of executive government as different from the position of individuals and other public authorities. He said at [91]:

> The powers and functions of the government of a polity are generally invested for the benefit of the general public. In the absence of a statutory direction, the mere existence of such a power in that government imposes no duty to exercise it for the protection of others. In that respect, its situation is analogous to a private citizen who, absent special circumstances, has no duty to take

> affirmative action to protect another person from harm. Nor does the bare fact that the Executive government has exercised its powers from time to time create any duty to exercise its powers. Such exercises of power do not constitute "control" of an activity in the sense that that expression is used in the law of torts. They are merely particular exercises of powers that were invested in the Executive government for the benefit of the general public to be exercised at the discretion of the Executive government. Unless a particular exercise of power has increased the risk of harm to an individual, the Executive government of a polity does not ordinarily owe any common law duty to take reasonable care as to when and how it exercises its powers. No doubt circumstances may arise where conduct of the government, short of increasing a risk of harm, creates a duty of care. But such cases are less likely to arise than in the case of other public authorities. In particular, knowledge of specific risks of harm or the exercise of powers in particular situations is less likely to be a factor in creating a duty than in the case of an ordinary public authority. This is because the powers and functions of the Executive government are conferred for the benefit of the public generally and not for the benefit of individuals.

Gleeson CJ in his judgment struck the same theme, even more strongly, when he said at [6]:

> [I]n the case of an action in negligence against a government of the Commonwealth or a State or Territory, [citizens] are inviting the judicial arm of government to pass judgment upon the reasonableness of the conduct of the legislative or executive arms of government; conduct that may involve action or inaction on political grounds. Decisions as to raising revenue, and setting priorities in the allocation of public funds between competing claims on scarce resources, are essentially political. So are decisions about the extent of government regulation of private and commercial behaviour that is proper. At the centre of the law of negligence is the concept of reasonableness. When courts are invited to pass judgment on the reasonableness of governmental action or inaction, they may be confronted by issues that are inappropriate for judicial resolution, and that, in a representative democracy, are ordinarily decided through the political process.

All judgments of the Court were consistent with the proposition that, notwithstanding the forseeability of harm to consumers from the contamination, the State had no relationship with those consumers which imposed on it an affirmative duty to take action to protect them against that risk in the circumstances.

As to the Council, the duty of care owed by a statutory authority such as a local government body was analysed in several of the judgments. In their joint judgment, Gummow and Hayne JJ said [149 and 150]:

> An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi-faceted inquiry. Each of the salient features of the relationship must be considered. The focus of analysis is the relevant legislation and the positions occupied by the parties on the facts as found at trial. It ordinarily will be necessary to consider the degree and nature of control exercised by the authority over the risk of harm that eventuated; the degree of vulnerability of those who depend on the proper exercise by the authority of its powers; and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute. In particular categories of cases, some features will be of increased significance. For example, in cases of negligent misstatement, such as *Tepko Pty Ltd v Water Board* [(2001) 206 CLR 1], reasonable reliance by the plaintiff on the defendant authority ordinarily will be a significant factor in ascertaining any relevant duty of care.

The factor of control is of fundamental importance in discerning a common law duty of care on the part of a public authority. It assumes particular significance in this appeal. This is because a form of control over the relevant risk of harm, which, as exemplified by *Agar v Hyde* [(2000) 201 CLR 552], is remote, in a legal and practical sense, does not suffice to found a duty of care.

The different members of the Court concluded in this case that the Council did not exercise a sufficient degree of control over the risk of illness through the consumption of contaminated oysters.

They contrasted the situation here with the state of control exercised by the defendant councils in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 and *Brodie v Singleton Shire Council* (2001) 206 CLR 512. The requisite control had to apply to what caused the loss or injury in the immediate sense; being here the consumption of the contaminated oysters. Control in this sense was not established by noting that the local government body had powers in respect of controlling faecal pollution. Gummow and Hayne JJ said at [152]:

> Control over some aspect of a relevant physical environment is unlikely to found a duty of care where the relevant harm results from the conduct of a third party beyond the defendant's control.

It was pointed out that the Council did not control the process by which commercial oyster growers cultivated, harvested and supplied oysters, nor the times or the locations at which these things were done [154].

The more contentious part of the case was the issue whether the grower and distributor companies were negligent. The companies (in line with *Donoghue v Stevenson* [1932] AC 562) conceded that, in supplying oysters to the plaintiff, they owed a duty of care to him. On this issue, Gummow and Hayne JJ in their joint judgment (with the agreement of Gaudron J), and McHugh J, in a separate judgment, expressed the view that the majority of the Full Court of the Federal Court had not correctly applied the test of whether the duty of care upon the grower or distributor had been performed. The issue was more complex than simply giving an affirmative or negative answer to the question whether the defendant carried out the duties formulated [106]. McHugh J said that the courts below 'did not attempt to evaluate and weigh the competing considerations' [106]. Gummow and Hayne JJ said that the proper inquiry as to whether a breach has occurred involves 'identifying, with some precision what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk' [192].

Gummow and Hayne JJ took the view that the Full Court of the Federal Court had failed to identify with the necessary precision, by reference to considerations of the nature of those indicated by Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40, at 47–8, what a reasonable response to the risk of harm would have involved. In practical terms, the majority justices on this issue did not see a reasonable response as going so far as to require the grower and distributor companies to shut down their businesses during the period of high oyster contamination, nor require the companies to put a warning on the oysters harvested in this period at the point of sale about the danger of eating them. On the other hand, Kirby J, in the minority on the issue, said that, where the oysters were known to be highly vulnerable after heavy rain to contamination with potentially seriously consequences, 'the duty of care owed to consumers, as required by the common law, was a heavy one' [260].

Several justices made passing comment on the interaction of the law of negligence with certain of the consumer protection provisions in Part V of the Trade Practices Act. Gummow and Hayne JJ in their judgment ([129]–[130]), and Kirby J in his ([226]–[228]), raised the issue of whether the provisions in Part V of the Trade Practices Act dealing with liability to consumers for defective products so comprehensively covered liability on this subject as to exclude the general law of negligence. These justices were content to proceed on the assumption in the present case that this had not occurred and that the plaintiff's claims under the Trade Practices Act against the grower and distributor companies could exist concurrently with those under the law of negligence (the plaintiff not being thereby being able to recover twice). See, to similar effect, the comments of Gaudron J at [62].

Duty of Care

On the broader landscape of negligence law in Australia, this decision confirms the approach of the High Court in a number or recent cases, starting with

Pyrenees Shire Council v Day (supra), in developing a distinct Australian approach to the ascertainment of a duty of care. This involves the identification of factors necessary to establish a duty of care, additional to the reasonable foreseeability of risk or damage (principally vulnerability, power, control, generality or particularity of the class, and the resources of and demands upon an authority: see Callinan J at [321]). Consistent with his position in earlier cases, Kirby J, while resigning himself to the development of this Australian approach [238], repeated criticisms of it, preferring the 'three tier' approach favoured in the United Kingdom, based on the House of Lords decision in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (that being (i) reasonable foreseeability of harm, (ii) proximity or neighbourhood of relationship, and (iii) whether imposition of a duty of care was fair, just or reasonable in the circumstances).

Kirby J saw confusion still reigning in Australian courts on what was the correct approach to adopt in ascertaining the existence of a duty of care [211]. He invoked the prayer of Ajax '[S]ave us from this fog and give us a clear sky, so that we can use our eyes'. While this decision involved pollution, not fog, it has brought some welcome clarity on several important issues in the law of negligence. It has also given a measure of comfort to governments and their instrumentalities that litigants will think more carefully before deciding to sue them for damages in negligence in similar circumstances in the future.

Text of the decision is available at <http://www.austlii.edu.au/au/cases/cth/high_ct/2002/54.html>.

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Abuse of Market Power

The High Court by a 6-1 majority (Kirby J dissenting) upheld an appeal by Boral Besser Masonry Limited ('BBM') from the unanimous decision of the Full Court of the Federal Court, and reinstated the decision of the trial judge. The case turned on whether s.46 of the *Trade Practices Act, 1974* had been contravened. This section prohibits a corporation with a substantial degree of market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing market entry, and deterring or preventing a person from engaging in competitive conduct.

Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Consumer Commission

High Court of Australia, 7 February 2003
[2003] HCA 5; (2003) 195 ALR 609

Background

The appellant, BBM, is a subsidiary of Boral Concrete Products Pty Ltd, which in turn is a subsidiary of Boral Limited ('Boral'). The trial judge, Heerey J, found in favour of both Boral and BBM, and dismissed the application by the ACCC. There was an appeal to the Full Court of the Federal Court, but ultimately the appeal was pressed only in relation to BBM. The Full Court (Beaumont, Merkel and Finkelstein JJ) allowed the appeal, finding BBM had contravened s.46. BBM appealed to the High Court. The High Court allowed the appeal with costs. It set aside the orders of the Full Court and in place ordered that the appeal to that Court be dismissed with costs.

Facts

The facts are summarised in the joint judgment of Gleeson CJ and Callinan J and in the judgment of McHugh J. In brief, the case is concerned with the manufacture and supply of concrete masonry

products ('CMP') which are manufactured from cement, sand, stone aggregate, and water. 'The process of manufacture is relatively simple, and the products are not the subject of patent, copyright, or any other form of intellectual property' [7]. Concrete masonry is a generic product, a 'commodity' [299]. There are a number of alternative products available to the building and construction industry for use instead of CMP including tilt-up and precast panels, plasterboard, and clay bricks. Relevantly, however, the market for the purposes of s.46 was accepted to be 'a market for CMP in Melbourne' rather than the 'more widely defined market for walling and paving products generally' [155].

The significant suppliers of CMP in Melbourne in 1993–1999 were:

- BBM
- Besser Pioneer Pty Ltd ('Pioneer')
- C & M Brick (Bendigo) Pty Ltd ('C & M'). It established a plant in 1993 and commenced full-scale production of concrete bricks and pavers in February 1994. It had a new Hess machine which was state of the art.
- Amatek Ltd trading as Rocla. It ceased to manufacture concrete bricks in Victoria in September 1993 and ceased to manufacture its remaining CMP in Victoria in August 1995.
- Budget Bricks & Pavers Pty Ltd ('Budget'). It ceased operations in June 1996.

Contravening Conduct

Gleeson CJ and Callinan J considered that the conduct under review could not be evaluated without having regard to the context in which it occurred [34] – namely a downturn in the building industry in Victoria in 1991 as a result of the general economic recession in the state at the time. This had led to over-capacity in the market and enhanced the countervailing power held by a small number of customers (block layers) who bought CMP largely on price.

The contravening conduct by BBM was alleged to have occurred in the period from April 1994 to October 1996, during which period BBM's market share was between 25 and 30 per cent. BBM competed in the CMP market with a small number of other companies, including Pioneer, Rocla, Budget and C&M. In 1993, C&M established a highly efficient state of the art plant on the outskirts of Melbourne and commenced production of concrete bricks and pavers in November 1993, production of blocks commencing later. In mid 1993, prices of block were driven down and a price war developed. During the relevant period BBM cut prices for CMP block product below its avoidable or variable costs. In February 1994 it entered negotiations with C&M with a view to possibly acquiring C&M's new plant. In addition, it upgraded its Deer Park plant, expanding its production capacity, demonstrating its financial strength. Heerey J noted that BBM's purpose was to damage its competitors and, if possible, to eliminate one or more [107].

High Court's Decision

In this case, the majority found that the market involved a simple undifferentiated product with no relevant technical constraints on its manufacture, readily available raw materials, little brand relevance or customer loyalty and the setup costs for an efficient production were less than $8 million. Price was the main determinant in product purchase and as structural barriers were low, there was prima facie no market power. BBM's competitor, Pioneer, was of a similar size and means as BBM and competed 'relentlessly and ferociously'.

The majority of the court agreed with the decision of Heerey J, notwithstanding his findings on purpose, that BBM did not have a substantial degree of power in a market, that its pricing behaviour and expansion of production capacity did not involve a taking advantage of market power, but constituted a rational and legitimate business response to conditions of intense competition, and rejected the

reasoning of the Full Court. Importantly, in the High Court, the case was 'stripped of any allegation of illegal conduct on the part of Boral, and of any allegation of collusion or conscious parallelism, past or anticipated, between BBM and Pioneer, and of any suggestion that BBM's offer to buy C&M's plant was other than in good faith' [97]. Findings of such actions will presumably impact upon the conclusions to be drawn in a different factual context.

Central Issue

As Justice McHugh explained at [262]:

> Section 46 of the Act poses four issues for determination. First, the court must identify the relevant market in which the conduct occurred. Second, the court must determine whether the alleged offender had a substantial degree of market power. Third, the court must determine whether the alleged offender has taken advantage of that market power. Finally, the alleged offender must have engaged in the conduct for one of the proscribed purposes.

Market Power and Substitution

According to the majority, there is no real controversy about what BBM did – cutting prices for 30 months in the expectation that one or more of its competitors would leave the market [173]. The central question in the matter before the High Court is whether in engaging in this conduct, BBM demonstrated it had both a substantial degree of market power of which it took advantage.

Significant to the majority decision is the finding that customers were able to force the price of CMP 'down and down' and that BBM was responding to competitive forces, operating as it was in an intensely competitive market. It had no ability to sustain a pricing policy or the terms on which it supplied its product without regard to market forces or supply or demand. 'The finding reflects the antithesis of market power on the part of an individual supplier' [32]. Accordingly, BBM could not be found to possess market power. 'Cutting prices is not evidence of market power. Any firm can do that' [287]. The majority judges confirmed that the 'ability to cut prices is not market power. The power lies in the ability to target an outsider without fear of competitive reprisals from an established firm, and to raise prices again later'.

Market Power and Constraint

It is clear from the majority decision that s.46 requires 'not merely the co-existence of market power, conduct and proscribed purpose, but a connection such that the firm whose conduct is in question can be said to be taking advantage of its power' [120]. The decision of the court in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 is emphasised. Gleeson CJ and Callinan J state that 'The essence of power is absence of constraint. Market power in a supplier is absence of constraint from the conduct of competitors or customers'. The judges also note it is inherent in the competitive process that competitors will be damaged [122]. It is clear 'that a "greed-driven desire to succeed" over rival firms is neither a basis of liability nor a ground for the inferring of the existence of such a basis' [195].

Pricing and Market Power

On application to the facts, the main aspect of the conduct of BBM in question was its pricing behaviour. Gleeson CJ and Callinan J say 'where the conduct alleged to contravene s.46 is competitive pricing, it is especially dangerous to proceed too quickly from a finding about purpose to a conclusion about taking advantage of market power' [123]. This is reiterated by McHugh J who refers to the same warning provided in the *Melway* case [262]. Analysis on the basis of predatory pricing, or recoupment, or selling below variable or avoidable costs 'are concepts that may, or may not, be useful tools of analysis in a particular case'. But '[w]e are concerned with the language of s.46' and care must be taken when using such analysis [124]. Similarly

Gaudron, Gummow and Hayne JJ refer to 'permissible statutory construction' [194].

McHugh J says at [273]:

> what is required is not a bright line rule about costs but a more sophisticated analysis of the firm, its conduct, the firm's competitors, and the structure of the market not only at the time in which the firm has engaged in conduct allegedly in breach of the Act but also before and after that conduct.

Recoupment

The primary judge found that BBM had no prospect of being able to recoup its losses by charging supra-competitive prices after driving out its rivals and the Full Court found it unnecessary to review that finding as their Honours held that recoupment analysis formed no part of the application. The High Court rejected this, considering that recoupment is a relevant consideration, or a 'a matter of factual importance' [130], in determining market power. For McHugh J, it is a fundamental requirement:

> It is the power to obtain *supra-competitive* prices that demonstrates market power, not higher or lower prices. [306]

Preferred Approach

The majority conclude that Heerey J used the correct approach in applying the law. He,

> consistently with the requirements of s.46(3), approached the question whether BBM had a substantial degree of power in the CMP market, by examining the actual conduct of BBM, case by case, over the whole of the relevant period (and beyond), in respect of each of the major contracts on which it bid, in the light of the evidence that those major contracts represented the business to which it attached most importance, and on the basis that what went on in relation to those contracts was the best evidence of the state of the market and the best indication of the extent of BBM's power. [140]

In contrast, the problem with the reasoning of the Full Court was explained to be that it 'began with the purpose of eliminating or damaging a competitor, and reasoned inferentially from that' [141]. The judges say at [147]:

> eliminating a competitor, unless it is done out of pure malice, is ordinarily only a means to the end of being able to raise prices. If, after one or two firms leave a market in the course of a price war, the remaining firms are in strong competition, then their departure does not achieve, or evidence, market power.

Similarly Gaudron, Gummow, and Hayne JJ reiterate that the object of s.46 is not the protection of the economic well-being of competitors [186].

Conclusion

The Boral case turns on the particular facts as found by the court and for that reason is not necessarily helpful in promoting a deeper understanding of the section's application and meaning. Kirby J (dissenting) is of the view that the purpose and statutory intention of the section is defeated by the narrow approach adopted by the majority. This narrow view is, however, very much based on the particular facts of the case. The relevance of these factual findings should not be underestimated in considering its application to other factual scenarios.

Text of the decision is available at <http://www.austlii.edu.au/au/cases/cth/high_ct/2003/5.html>.

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Unconscionable Conduct and the Trade Practices Act

As a condition of a lease renewal the owners of a shopping centre requested that a tenant abandon claims against them that were before the Commercial Tribunal of Western Australia. Four members of the High Court (Kirby J dissenting) determined that the conduct of the owners did not constitute unconscionable conduct insofar as unconscionability was to be judged 'within the meaning of the unwritten law' and that the tenants were not in a position of 'special disadvantage'.

Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd

High Court of Australia, 9 April 2003
[2003] HCA 18; (2003) 197 ALR 153

Background

Mr and Mrs Roberts leased a business called Leeming Fish Supply, in the Farrington Fayre shopping centre in Leeming, Western Australia. In 1990 a number of the tenants at the centre, including the Roberts, became concerned at some of the charges levied under the terms of their leases and instituted proceedings against the owners in the Commercial Tribunal of Western Australia ('the Tribunal').

Mr and Mrs Roberts were looking to sell their shop but had no asset to sell without the lease renewal. They had a sick child who was taking much of their time, energy and resources and a condition seeking abandonment of the claims in the Tribunal as a requirement of their lease renewal was imposed by the owners late in the day. This condition was clause 14 of the lease. The tenants, who needed to renew quickly, reluctantly signed the new lease and abandoned their claim.

The ACCC instituted proceedings in the Federal Court on 3 April 1998 alleging that the imposition by the owners of clause 14 as a condition of the grant of a new lease contravened s.51AA of the *Trade Practices Act 1974* ('the Act').

At first instance, French J granted declaratory relief, finding that the various respondents had contravened s.51AA of the Act and that the conduct of requiring, as a condition of the grant of the new lease, that the Roberts release the owners of the shopping centre from various claims arising under the Roberts' existing lease, was unconscionable within the meaning of s.51AA of the Act. He found that the Roberts suffered from 'situational' as distinct from 'constitutional' disadvantage.

An appeal to the Full Court succeeded and in place of the relief granted by the primary Judge the Full Court ordered that the application be dismissed with costs. The High Court dismissed the appeal by the ACCC by a majority of 4 to 1 (Kirby J dissenting).

High Court's Decision

Gleeson CJ pointed out that the relevant disadvantage does not occur simply because of inequality of bargaining power:

> Unconscientious exploitation of another's inability or diminished ability to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. [14]

Good conscience, he said, did not require the lessors to permit the lessees to isolate the issue of the lease from the issue of the claims the subject of clause 14. Clause 14 was part of the commercial negotiations and that parties to commercial negotiations frequently used their bargaining power to 'extract' concessions from other parties.

In a joint judgment, Gummow and Hayne JJ decided that the concept of unconscionability was limited to particular categories of case defined by reference to *Blomley v Ryan* (1956) 99 CLR 362 and *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. They held that the conduct that

breached s.51AA was more limited than unconscionability under general law principles because contravention of s.51AA attracted particular remedies under the Act which were not available otherwise for unconscionable conduct. Gummow and Hayne JJ referred to the decision in *Amadio* in which Mason J discussed the concept of special disadvantage saying that the litigation had been conducted on the basis that the expression in s.51AA 'engage in conduct that is unconscionable within the meaning of the written law, from time to time, of the States and Territories' was to be understood with reference to the equitable doctrine expounded, in particular, by the High Court in *Amadio*.

Callinan J held that the owners had the choice to make between compiling commercial considerations of, for example, keeping the Roberts as tenants, or obtaining another responsible tenant, preserving their 'public' image as non-oppressive landlords, fostering the goodwill of their tenants generally, and ridding themselves of irritating and expensive litigation when the opportunity to do so arose. The choice they made was a commercial one and did not render their conduct unconscionable.

In his dissenting judgment, Kirby J found the principle applied to be one which denies to those who act unconscientiously the fruits of their wrongdoing rather than a focus on the victim of undeserved misfortune. He said that [96]:

> To seek to answer the question whether the bargain was unconscionable first, and only then to reflect upon the conduct of the stronger party in procuring the assent of the weaker one, is to invert the proper approach to analysis in such cases. The quality of the bargain (or the adequacy of the consideration) has never been either a necessary or a sufficient element for establishing unconscionable dealing.

Kirby J said that the reference in s.51AA to 'the unwritten law' includes the case of a party to a contract who was in such a debilitated condition that there was not 'a reasonable degree of equality between the contracting parties' where 'the party's condition was sufficiently evident to those who were acting for the other party at the time to make it prima facie unfair for them to take his assent to the impugned transaction'. He preferred a broad and beneficial application of s.51AA as opposed to a narrow and restrictive one. He took the view that the reach of the section went further than the principles of unconscionable dealing as elaborated in *Blomley* and *Amadio* and that its full scope remains to be elaborated in future cases [77].

Text of the decision is available at <http://www.austlii.edu.au/au/cases/cth/high_ct/2003/18.html>.

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