

KPMG v COMMONWEALTH OF AUSTRALIA & ANOR (M66/2010)

Date Demurrer referred to Full Court: 11 August 2010

This matter concerns the constitutional validity of s 50 of the *Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act") which provides that:

Where, as a result of an investigation or from a record of an examination (being an investigation or examination conducted under this Part), it appears to ASIC to be in the public interest for a person to begin and carry on a proceeding for:

- (a) the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which the investigation or examination related; or
- (b) recovery of property of the person;

ASIC:

- (c) if the person is a company--may cause; ...

such a proceeding to be begun and carried on in the person's name.

In October 2008 the Australian Securities and Investments Commission ("ASIC") caused a proceeding to be commenced against KPMG in the Supreme Court of Victoria, in the names of eight companies in the Westpoint group of companies. In the proceeding, each of the companies seeks damages for negligence and seeks an order for compensation under s 87 of the *Trade Practices Act 1974* (Cth) in respect of conduct in contravention of s 52 of that Act. The proceeding was transferred to the Federal Court of Australia on 9 April 2010.

KPMG has filed a writ of summons in this Court, seeking a declaration that s 50 of the ASIC Act (to the extent that it authorises ASIC to begin and carry on a proceeding in the name of a company) authorises an acquisition of property otherwise than on just terms contrary to s 51(xxxi) of the Constitution, and is therefore invalid.

The issues raised by the statement of claim and demurrer are:

- whether, by authorising ASIC to cause the proceeding to be begun and carried on in the name of the Westpoint companies, s 50 of the ASIC Act provides for an acquisition of property within the meaning of s 51(xxxvi) of the Constitution?
- whether s 50 of the ASIC Act is properly characterised as a law with respect to the acquisition of property within the meaning of s 51(xxxvi)?
- whether any such acquisition of property is on just terms within the meaning of s 51(xxxvi)?