SHORT PARTICULARS OF CASES
APPEALS

APRIL 2006

Thursday, 13 April 2006

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CAMPBELLS CASH & CARRY PTY LIMITED v FOSTIF PTY LIMITED (S514/2005)
AUSTRALIAN LIQUOR MARKETERS PTY LIMITED v BERNEY (S515/2005)
IGA DISTRIBUTION (VIC) PTY LIMITED v WHEELAN & HAWKING PTY LIMITED (S516/2005)
QUEENSLAND INDEPENDENT WHOLESALERS PTY LIMITED v MURRAY & ANOR (S517/2005)
IGA DISTRIBUTION (SA) PTY LIMITED v NEINDORF & ANOR (S518/2005)
COMPOSITE BUYERS PTY LIMITED v WILLIAMSON & ANOR (S519/2005)
IGA DISTRIBUTION PTY LIMITED v GOW & ORS (S520/2005)

Court appealed from: New South Wales Court of Appeal

Date of Judgment: 31 March 2005

Date of grant of special leave: 30 September 2005

The respondents ("the Retailers") are licensed tobacco retailers who sued their respective licensed wholesalers, the appellants ("the Wholesalers"), for the recovery of their licence fees. Their claims followed this Court's decision in *Ha v State of New South Wales* and *Roxborough v Rothmans of Pall Mall. Ha* declared the State and Territory tobacco licensing schemes to be invalid, while *Roxborough* allowed licensed retailers to recover their licence fees paid before those schemes were found to be invalid.

These claims, which purported to be representative actions on behalf of all the retailers who chose to opt-in, were funded by Firmstones Pty Ltd ("Firmstones"). The lead Retailers sought an order for discovery before Justice Einstein, seeking the details of all other potential members of the representative class. His Honour however refused that request. He also ordered that the proceedings were not to continue as representative proceedings. This was because the Retailers did not have the "same interest" within the meaning of Part 8 Rule 13 of the Supreme Court Rules ("the Rules"). Justice Einstein further held that the Retailers' actions were an abuse of process.

On 31 March 2005 the Court of Appeal (Mason P, Sheller & Hodgson JJA) unanimously allowed the Retailers' appeals. Their Honours held that their representative actions were not an abuse of process. They further found that champerty, or third party assistance, does not constitute an abuse of process per se. The Court of Appeal also found that Firmstones' activities did not constitute trafficking in litigation.

The Court of Appeal further found that the proceedings should be allowed to proceed as representative proceedings. Their Honours held that Part 8, Rule 13 of the Rules was engaged because there were common issues of law, concerning the application of *Roxborough* that linked the claims of each group of retailers. There were also significant common issues of fact. The Court of Appeal further found that a *Roxborough* cause of action does not depend upon the subjective intention of the retailer who paid the money sought to be recovered. Rather, it arises when *Ha* destroys the common, objectively discernible, basis of the relevant transaction.

Their Honours also held that the interests of fairness, when coupled with the need to "close the class", required giving the Retailers access to all of the

relevant facts. It was not to be confined to matters touching only on those who had already opted-in. It also included information on those who might be invited to opt-in.

The grounds of appeal (in each matter) include:

The New South Wales Court of Appeal erred:

- in that it should have held that there is a modern law of champerty which was infringed by reason of the involvement of the litigation funder in the institution and conduct of the proceedings;
- in holding that a conclusion about abuse of process must stem from a finding directed at the actual or likely conduct of the party in whose name proceedings are brought and could not stem from any subservience of the interests of that party to the interests of the litigation funder.
- in failing to hold that the involvement of the litigation funder constituted trafficking in litigation giving rise to an abuse of process and a proper basis for the exercise by the trial judge of his discretion to order that the proceedings no longer continue as representative proceedings under Part 8 r 13 of the Supreme Court Rules (NSW).

The appellants have issued a Notice of Constitutional Matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth). The appellants contend, inter alia, that for the Court to permit the representative proceedings to continue would be inconsistent with the requirements of Chapter III of the Constitution.

The Commonwealth Attorney-General is intervening in the appeals. IMF (Australia) Limited is seeking leave to intervene and the Australian Consumers Association is seeking to appear as amicus curiae.

MOBIL OIL AUSTRALIAN PTY LIMITED v TRENDLEN PTY LIMITED (S523/2005)

Court appealed from: Supreme Court of New South Wales

Date of Judgment: 27 July 2005

Date of grant of special leave: 30 September 2005

In August 1997 the respondent ("Trendlen") and the appellant ("Mobil") were respectively a retailer and a wholesaler of petroleum products. They were required to hold, respectively, a retailer's and a wholesaler's licence under the *Business Franchise Licences (Petroleum Products) Act* 1987 (NSW) until, on 5 August 1997, the High Court struck down equivalent licence provisions under the *Business Franchise Licences (Tobacco) Act* 1987 (NSW) in *Ha v State of New South Wales* (1997). Whilst the licensing scheme was in force, Mobil paid to the State of NSW licence fees referable to the value of petroleum products sold by it from month to month. Mobil passed that fee on to retailers, including Trendlen, as part of the purchase price of petroleum products. It did so for the first five days of August 1997. The decision in *Ha* meant that Mobil was not liable to pay, and did not pay, licence fees for the month of August 1997.

This proceeding was commenced on 11 July 2003 by Trendlen, seeking recovery of amounts said to have been paid in relation to the State licence fees on the wholesale sale of petroleum products. The claim was on an action for money had and received said to be of much the same kind as considered in *Roxborough v Rothmans.* The action was brought as a representative proceeding pursuant to Part 8 rule 13 of the NSW Supreme Court Rules (as they then applied) and was one of a suite of proceedings brought in the NSW Supreme Court against tobacco and petrol wholesalers, all promoted and funded by Firmstones Pty Ltd ("Firmstones"), the principal of which is Mr AJ Firmstone. These proceedings included the *Campbells Cash & Carry* matters.

Under the funding arrangement entered with Trendlen, and with retailers who later signed up to participate in the proceeding, Firmstones was to pay the costs of the proceeding in return for receiving $33^{1/3}$% of any recovery along with any amounts ordered to be paid by way of costs. Firmstones made an arrangement with Horwath GST Pty Ltd ("Horwath") to share the administrative running of the proceeding, in return for Horwath receiving a half share of Firmstones' $33^{1/3}$% recovery. Neither Firmstones nor Horwath had any prior material business relationship with Mobil.

Mr Firmstone admitted that his dominant purpose in bringing the proceeding was his company's own profit. Justice McDougall found that Mr Firmstone controlled the running of the proceeding, but his Honour found that the degree of control was not such as to be improper.

Justice McDougall's decision concerned two motions. Mobil relevantly sought that the proceeding be stayed, struck out, dismissed, or ordered not to continue as a representative proceeding. In its motion, Trendlen sought an order by way of discovery or interrogatories that Mobil provide within 28 days a verified list of the names and last known business addresses of petrol retailers to whom Mobil had supplied petrol in the relevant period throughout Australia (except Queensland and the Northern Territory). The stated intention of Trendlen and

Firmstones was then to send such retailers an "opt in" notice and a retainer agreement with Firmstones.

Mr Firmstone conceded that he sought the order for the names/addresses though those unknown retailers had not evidenced any sign of controversy.

At the hearing of the motions Mobil sought to tender a "without prejudice" letter dated 9 March 2005 from Mr Firmstone (on behalf of Firmstones) to the solicitors for Mobil. In that letter Mr Firmstone made a settlement offer to Mobil which included payment by Mobil of 85% of the amounts claimed in relation to those class members who had retained Firmstones and a further payment of a lump sum of $1 million plus GST "in consideration for my firm forgoing whatever our interests in relation to this matter might be in relation to the unknown plaintiffs". This letter was sent after the hearing in the Court of Appeal in the *Campbells Cash & Carry* matters, but before that decision had been handed down.

Justice McDougall held that it was not possible in light of the decision in the *Campbells Cash & Carry* matters to conclude that the institution of the proceedings was an abuse of process and he determined that the tender of the settlement offer, and the cross-examination of Mr Firmstone on it, should be rejected.

His Honour dismissed Mobil's motion (having also rejected the other points Mobil raised), and granted the relief Trendlen sought, which order he stayed pending resolution of any appeals in this case and in the *Campbells Cash & Carry* matters.

The grounds of appeal include:

The trial judge erred in failing to find that the proceedings:

- are tainted by maintenance and champerty;
- constitute trafficking in litigation;
- constitute an abuse of process; and
- do not constitute a "matter" for the purposes of Ch III of the Constitution in circumstances where:
    - a person not a party to the proceeding, Firmstones, is to receive 33 $^{1/3}$ % of the proceeds of any recovery to be shared with its joint venture partner in this exercise, Horwath;
    - Firmstones has practical control of the conduct of the proceeding;.and
    - such actions are inconsistent with the requirement that the judicial power of the Commonwealth be exercised in accordance with the judicial process.

The appellant has issued a Notice of Constitutional Matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth). The appellant contends, inter alia, that for the Court to permit the representative proceedings to continue would be inconsistent with the requirements of Chapter III of the Constitution. The Commonwealth Attorney-General is intervening in the appeal.

KOROITAMANA AN INFANT BY HER NEXT FRIEND SEREANA NAIKELEKELE & ANOR v COMMONWEALTH OF AUSTRALIA & ANOR (S225/2005)

Court appealed from: Full Court of the Federal Court

Date of judgment: 15 April 2005

The Applicants are two children who were born in Australia in 1998 and 2000 respectively. Their parents are Fijian citizens but the Applicants themselves are not. They do however have the right to apply for Fijian citizenship. Neither Applicant is an Australian citizen within the meaning of the *Australian Citizenship Act 1948* ("the Citizenship Act").

On 11 February 2005 Justice Emmett stated a case in the following terms:

1. Are the Applicants "aliens" within the meaning of section 51(xix) of the Constitution?
2. If the answer to (1) is "No", is section 198 of the *Migration Act 1958* ("the Act") capable of valid application to the Applicants?
3. If the answer to (1) is "No ", are sections 189 and 196 of the Act capable of valid application to the Applicants?

The Applicants submitted that the circumstances of their birth placed them outside the 'aliens' power of the Constitution. They also disputed the notion that they were stateless.

On 15 April 2005 the Full Federal Court (Black CJ, Conti & Allsop JJ) unanimously rejected the submission that birth in Australia gave rise to the existence of an allegiance to Australia, in circumstances whereby there was no allegiance to a foreign power. Their Honours held that the Applicants were aliens in respect of whom the Commonwealth had the power to make laws pursuant to section 51(xix) of the Consitution. They further found that the constitutional limits of section 51(xix) did not depend on the municipal or constitutional law of a foreign state dealing with the citizenship of that foreign state. For these reasons the Full Federal Court answered the first question 'yes'. The following two questions did not therefore arise.

On 19 July 2005 the Applicants filed a notice pursuant to section 78B of the *Judiciary Act 1903*.

On 30 September 2005 Justices McHugh and Callinan adjourned this special leave application into the Full Court to be heard and argued as if it was an appeal.

The questions of law said to justify the grant of special leave to appeal are:

- The present case raises the question of whether:

  a) a person born in Australia;
  b) who is not a foreign citizen or a subject of a foreign power; and
  c) is not a citizen within the meaning of the *Citizenship Act,*

is an alien for the purpose of section 51(xix) of the Constitution?

- Accordingly, the questions are:

  a) are the Applicants 'aliens' within the meaning of section 51(xix) of the Constitution?
  b) If the answer to (a) is 'no', is section 198 of the Act capable of valid application to the Applicants?
  c) If the answer to (a) is 'no', are sections 189 and 196 of the Act capable of valid application to the Applicants?
  d) Did the Full Court of the Federal Court of Australia err in answering 'yes' to question (a)?

MANSFIELD v THE DIRECTOR OF PUBLIC PROSECUTIONS FOR WESTERN AUSTRALIA (P53/2005)

Court appealed from: Court of Appeal, Supreme Court of Western Australia

Date of judgment: 29 April 2005

Date of grant of special leave: 25 October 2005

The appellant was charged by the Commonwealth in relation to a number of offences pursuant to the *Corporations Law*, *Criminal Code Act* (Cth) 1995 and the *Criminal Code* (WA). On 12 January 2002, the respondent obtained a freezing order pursuant to sections 43(3)(b) and 43(3)(c) of the *Criminal Property Confiscation Act* 2000 (WA) ("the Confiscation Act") over all of the property, including all future acquired property, of the appellant and his wife. The order was obtained on the grounds that an application for an order for examination had been made in relation to the property and it was likely that an application would be made within 21 days for a criminal benefits declaration. No undertaking for damages was proffered by the respondent, or required by the Court, and no provision was made in the freezing order for the payment of any of the appellant's living or business expenses. The freezing order was later varied by consent to allow for payments to the appellant out of the frozen property in respect of living expenses.

The appellant later applied for an order requiring the respondent to provide an undertaking as to damages as a condition of the continuation of the freezing order, and for payments to the appellant out of the frozen property for his legal expenses. The primary judge dismissed both applications.

The appellant applied for leave to appeal to the Western Australian Court of Appeal. By majority, the Court of Appeal refused leave to appeal in respect of the application for an order requiring an undertaking and a variation to the freezing order providing for payment of the appellant's legal fees out of his frozen property. Leave to appeal was granted and the appeal allowed in respect of another ground.

The grounds of appeal include:

- Whether the Supreme Court of Western Australia retains a discretion at common law or pursuant to section 25(9) of the *Supreme Court Act* 1935 to require an undertaking as to damages from the Director of Public Prosecutions to protect the interests of a respondent as a condition for the grant of a freezing order pursuant to the provisions of the Confiscation Act and, if so, what matters must the Court consider in exercising the discretion;

- When making a freezing order pursuant to section 43 of the Confiscation Act, does the Supreme Court of Western Australia have a discretion to make orders allowing for the payment of reasonable legal costs of a respondent incurred in objecting to the freezing order, defending any related application for a declaration under the Act and/or defending any related criminal prosecution?

MAGILL v MAGILL (M152/2005)

Court Appealed from: Supreme Court of Victoria, Court of Appeal

Date of Judgment: 17 March 2005

Date special leave granted: 18 November 2005

The appellant and the respondent married in 1988 but separated in 1992. The respondent gave birth to three children during this time. Unknown to the appellant, the respondent commenced a sexual relationship with another man after the birth of the first child. The appellant signed the usual birth registration forms, after each birth, identifying him as the father. After the separation he paid child support payments for all three children from 1993 until 1999. Paternity DNA testing in April 2000 proved the appellant was not the biological father of the second and third children.

The appellant brought an action against the respondent in the County Court of Victoria, based on the tort of deceit. Judge Hanlon found the respondent intended that the appellant sign and consent to the birth forms, knowing that he was not the father of the children, or at the very least, behaving recklessly as to the truth of her assertion that he was, having no genuine belief as to its truth. He awarded damages of $70,000, comprising general damages of $30,000 for a severe psychiatric condition that the appellant had suffered as a result of the respondent's misrepresentation of paternity, and past and future economic loss totalling $40,000.

The respondent‘s appeal to the Court of Appeal (Ormiston, Callaway and Eames, JJ A) was allowed. The Court found there was no reason to overturn the trial judge's findings that the respondent did not hold an honest belief that the appellant was the father of the two children, and that she had intended that he rely on her misrepresentations as to paternity. However, His Honour had erred in finding that the appellant had, in fact, acted in reliance on the misrepresentations, and that he had incurred loss and damage as a result of them. The Court found that the appellant's case in the County Court had been confined to the representations contained in the birth notification forms. There was no evidence that the completion of the forms had induced him to do anything, other than giving the children his surname. Rather, the evidence was that it was his belief that he was the father that caused him to provide financial and emotional support for the children, and his belief in that respect was based on the whole situation of being in a marriage and his ignorance of the fact that his wife was conducting an affair. It was not related to reliance by him on the contents of the forms.

The grounds of appeal are:

- The Court erred in holding that the appellant was not induced and that he had not relied upon the representations as to paternity made by the respondent in the birth notification forms.

- The Court erred in not finding that the respondent had the onus to show that the natural inference as to inducement must not be drawn in the case.

- The Court erred in finding that the loss and damage suffered by the appellant was not caused by his inducement or reliance on the representations as to paternity in the birth notification forms.

The respondent has filed a notice of contention, on the following grounds:

- The Court of Appeal erred in failing to conclude that the tort of deceit had no application in the circumstances of the case.

- The Court ought to have held that:
  (a) "tort" in s 119 of the Family Law Act 1975, properly construed, does not comprehend a claim of deceit arising from the paternity of children conceived and born during the course of a marriage; ... and
  (c) s 120 of the Family Law Act 1975 applied to prevent the appellant's claim.

The appellant has given notice that the matter involves a Constitutional issue, that is, ss 119 and 120 of the *Family Law Act* 1975 (Cth) are beyond the power of the Commonwealth Constitution. The Attorney-General of the Commonwealth of Australia will be intervening.

DARKAN v THE QUEEN (B87/2005)
DEEMAL-HALL v THE QUEEN (B88/2005)
McIVOR v THE QUEEN (B89/2005)

Court appealed from: Court of Appeal, Supreme Court of Queensland

Date of judgment: 10 June 2005

Date of grant of special leave: 30 September 2005

The appellants, Howard Rodney Darkan, Gwendoline Deemal-Hall and Marlow Philip Andrew McIvor, were convicted of the murder of Kalman Toth. The Crown case at trial was that Deemal-Hall, who was the former de facto wife of the deceased and who had a grievance against him, recruited Darkan and McIvor and the witness Shannon Bowen to give the deceased "a touch-up". To do this, Deemal-Hall contrived to lure the deceased to a park in Mareeba on the evening of 13 January 2003 where the deceased was viciously assaulted and died as a result of inhaling blood due to the facial injuries he sustained. The injuries were such that the jury was entitled to conclude that whoever inflicted the injuries did so with the intention of at least doing grievous bodily harm.

Bowen was the principal Crown witness at the trial and gave evidence that Darkan and McIvor attacked the deceased with a pick handle or stick and with their steel-capped boots. Forensic evidence of the deceased's blood on the stick and on McIvor's boots corroborated part of Bowen's evidence, as did evidence by Jean Lyall, McIvor's de facto wife, to whom McIvor admitted that he had "bashed this guy in a park". Bowen also gave evidence of Deemal-Hall's involvement, including that she and Darkan approached him with an offer of money for giving the deceased "a touch-up", that she drove Bowen, Darkan and McIvor to the park and later brought the deceased to the park, and that she drove Bowen, Darkan and McIvor away after the assault and gave Bowen $50, saying that she would come back the following week and fix them all up.

All three appellants were found guilty of murder. Their appeals against conviction were dismissed by the Court of Appeal (Williams and Keane JJA and Muir J in separate judgments concurring as to the orders made). Several grounds of challenge were argued in the Court of Appeal, but special leave in this Court was granted on one ground only. The *Criminal Code* (Qld) ("Code") provides in section 8:

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such a purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

The ground of appeal in each matter is:

- Whether the jury was wrongly directed that a "probable consequence" for the purposes of section 8 of the Code was one which was a "real possibility or a substantial cause or a real chance".

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS v NYSTROM (M5/2006)

Court Appealed from: Full Court, Federal Court of Australia

Date of Judgment: 1 July 2005

Date special leave granted: 16 December 2005

The respondent was born in Sweden during the course of a holiday his pregnant mother, who was ordinarily resident in Australia, had been undertaking. He entered Australia at the age of 27 days, has not since left, does not speak Swedish or have any close links with the country. In 2004 the appellant purported to cancel a transitional (permanent) visa held by the respondent pursuant to s. 501 (2) of the *Migration Act* 1958 (Cth) (the Act), on the basis that he had not passed the character test. Given his criminal convictions (including aggravated rape of a 10 year old boy) this was common ground between the parties.

Before to the Federal Magistrates Court, the respondent submitted that he did not hold a transitional (permanent) visa, but rather an absorbed person visa, pursuant to s 34 of the Act. He also contended that the Minister erred by purporting to cancel the transitional (permanent) visa, that failure to identify the correct visa was a jurisdictional error, and, in the alternative, he was the holder of each of these visas. Hartnett FM dismissed the respondent's application for judicial review and found that even if he had succeeded in establishing he was an absorbed person, he had been granted an entry permit in 1974 which the Minister had clearly considered and decided to cancel.

The respondent's appeal to the Full Federal Court (Moore and Gyles JJ, Emmett J dissenting) was upheld. The Minister conceded the respondent had held an absorbed person visa as well as a transitional (permanent) visa, and that visa had been validly cancelled, as a consequence of which the absorbed person visa was taken to have been cancelled by s 501F (3) of the Act. Moore and Gyles JJ found that the Minister had failed to identify and take into account a particular kind of visa (the absorbed person visa), and this vitiated the decision to cancel the transitional (permanent) visa. Emmett J found there was no error in exercising the discretionary power under s 501 (2) of the Act, that the respondent was the holder of a transitional (permanent) visa which the Minister purported to cancel and the failure to advert to the absorbed persons visa did not vitiate the exercise of power under s 501 (2) of the Act.

The grounds of appeal are:

- The Full Court erred in holding that the Minister's power to cancel a visa on character grounds under s 501 of the *Migration Act* 1958 (Cth) (the Act) ("the cancellation power") is subject to an implied obligation (enforceable by judicial review for jurisdictional error) to ascertain the existence of, and take into account the qualifications for, any absorbed person visa that would be cancelled either directly or indirectly by reason of the Minister's decision.

- The Full Court erred in holding that the cancellation power is subject to an implied obligation (enforceable by judicial review for jurisdictional

error) to ascertain the existence of, and take into account the qualifications for, every substantive visa that would be cancelled either directly or indirectly by reason of the Minister's decision.

- The Full Court erred in holding that the cancellation power is unavailable or restricted in the case of criminal conduct in Australia by persons the period of whose residence in Australia precluded the application to them of Division 9 of Part 2 of the Act.

The respondent has filed a notice of contention, on the following grounds:

- The Full Court should have decided that the appellant purported to cancel a visa that the respondent did not hold, and therefore her decision is not a valid decision under s 501(2) of the Act.

- The Full Court should have decided that the appellant's exercise of power under s 501(2) of the Act was invalid by reason of the operation of s 201 of the Act.

The appellant has given notice that the matter may involve a Constitutional issue, that is, whether s 501 of the Act, to the extent that it relies upon the legislative power conferred upon the Commonwealth Parliament by s 51(xix) of the Constitution with respect to "naturalization and aliens", authorises the Minister to cancel the visa of a person, even if the person has been absorbed into the Australian community.

AVON PRODUCTS PTY LIMITED v COMMISSIONER OF TAXATION (S541/2005)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 20 May 2005

Date of grant of special leave: 7 October 2005

The appellant claimed a refund of sales tax pursuant to Credit Ground CR1 of Table 3 to Schedule 1 of the *Sales Tax Assessment Act* 1992 (Cth) ("the Act") for overpaid sales tax during the period 1 March 1993 to 31 August 1998 ("the relevant period").

It was not in dispute that the appellant overpaid sales tax in the amount of $3,610,261 during the relevant period. What was in dispute was whether the appellant passed the amount of the overpaid tax on to its customers.

During the relevant period, the appellant carried on the business of selling by retail a variety of goods that fell into two categories, one being cosmetics, fragrances and toiletries and the other being jewellery, accessories, gifts, apparel and home items. The former accounted for approximately 60% of the appellant's total sales and the latter accounted for approximately 40% of the appellant's total sales.

The appellant conducted its business through a network of sales representatives who were independent contractors, not employees. Those sales representatives sold the appellant's products directly to the public through door-to-door sales, which constituted "indirect marketing sales" within the meaning of s 20 of the Act. Consequently the taxable value of those sales, for the purposes of sales tax, was *the notional wholesale selling price* in the hands of the seller under *Assessable dealings AD2d or AD12d* of the Tables of Schedule 1 to the Act, the former relating to Australian goods and the latter to imported goods.

The conclusion of the primary judge was that Avon had failed to demonstrate that the overpaid sales tax had not been borne by customers in the relevant period of time the subject of assessment, with the result that Avon was not entitled to the refund of sales tax which it sought. The majority of the Full Court (Ryan and Merkel JJ) agreed. Conti J dissenting, held that Avon had discharged the burden of proof in establishing that it had not passed on the overpaid sales tax. His Honour relied on two findings by the primary judge as being persuasive, namely: that the regular price of Avon products did not change in response to increases and decreases in the sales tax rate that occurred; and, that Avon did not set its prices at least principally upon the basis of or by reference to cost but rather by reference to market circumstances for the time being prevailing.

The grounds of appeal are:

- The majority of the Full Court erred in concluding that the question whether the appellant passed on the overpaid sales tax, within the meaning of credit ground CR1 in Table 3 of Schedule 1 to the Act, turned on whether the appellant ensured that it sold its products in a manner that recovered all of

its costs including sales tax.

- The majority of the Full Court should have concluded that the appellant did not pass on the overpaid sales tax because it had demonstrated that its customers did not pay more for the goods sold to them than if the sales tax had not in fact been overpaid.

VASILJKOVIC v COMMONWEALTH OF AUSTRALIA & ORS (C3/2006)

Date of Referral of Special Case to Full Court: 15 March 2006

The plaintiff, Dragan Vasiljkovic, was born in 1954 in the then Republic of Yugoslavia. When he was 15 years old, his family migrated to Australia. He was granted Australian citizenship in 1975. He is also a citizen of Serbia and of Montenegro.

On 12 December 2005, a warrant for the plaintiff's arrest was issued by the County Court of Sibenik in Croatia. That warrant accuses the plaintiff of two criminal offences against the Basic Criminal Code of the Republic of Croatia, specifically one count of a war crime against prisoners of war and one count of a war crime against the civilian population. The alleged offences relate to incidents which occurred in 1991 and 1993 during armed conflict between Croatia and Serbia. The plaintiff is alleged to have been the commander of a Special Unit which was part of the Serbia paramilitary forces, and is alleged to have directed and participated in war crimes against Croatian army prisoners and against civilians. The offences are punishable under Croatian law by a maximum penalty of 20 years' imprisonment.

On 19 January 2006, on application by the Australian Federal Police, a Magistrate of Western Australia (where the plaintiff is ordinarily resident) issued a warrant of arrest, which was executed on the same day in Liverpool, NSW, where the plaintiff was temporarily staying. On 20 January 2006, he was remanded in custody by a Magistrate of the Local Court in Sydney (the fourth defendant) pursuant to section 15 of the *Extradition Act* 1988 (Cth) ("the Extradition Act"). The plaintiff has remained in the custody of the Governor of Parklea Correctional Centre (the third defendant) since that date.

By application filed 25 January 2006 for an order to show cause why writs of habeas corpus, prohibition, certiorari and mandamus should not issue, the plaintiff challenges his detention and the validity of Part II of the Extradition Act and Regulation 4 of the *Extradition (Croatia) Regulations* 2004 (Cth). There is no formal extradition treaty between Australia and Croatia. On 15 March 2006, Gummow J ordered the parties to file an agreed special case to be referred to the Full Court.

The questions referred to the Full Court include:

- Is Part II of the Extradition Act invalid to the extent, if any, to which it purports to confer a power to deprive an Australian citizen of liberty otherwise than in the exercise of the judicial power of the Commonwealth?

- Is Part II of the Extradition Act read together with the *Extradition (Croatia) Regulations* 2004 (Cth) invalid to the extent to which it purports to confer a power to deprive an Australian citizen of liberty otherwise than upon a finding that there exists a prima facie case against that person of the commission of the offences alleged by the State requesting extradition?

- Is Regulation 4 of the *Extradition (Croatia) Regulations* 2004 (Cth) invalid because it was not made pursuant to the power conferred by section 51(xxix) of the Constitution or any other legislative power of the Commonwealth?