**SHORT PARTICULARS OF CASES**
**APPEALS**

**COMMENCING WEDNESDAY, 6 MARCH 2013**

| No. | Name of Matter | Page No |
|---|---|---|

Wednesday, 6 March, Thursday, 7 March and Friday, 8 March 2013

1. Fortescue Metals Group Limited & Ors
   v. The Commonwealth of Australia

Tuesday, 12 March 2013

2. SZOQQ v. Minister for Immigration and Citizenship & Anor

Wednesday, 13 March 2013

3. Wallace v. Kam

Thursday, 14 March 2-13

4. Commissioner of Taxation v. Unit Trend Services Pty Ltd

**********

**FORTESCUE METALS GROUP LTD & ORS v THE COMMONWEALTH OF AUSTRALIA (S163/2012)**

Date questions reserved for the Full Court: 5 November 2012

The *Minerals Resource Rent Tax Act* 2012 (Cth) ("the Act") commenced operation on 1 July 2012. Three Acts related to that Act also commenced on that date. They are the *Minerals Resource Rent Tax (Imposition – Customs) Act* 2012 (Cth), the *Minerals Resource Rent Tax (Imposition – Excise) Act* 2012 (Cth) and the *Minerals Resource Rent Tax (Imposition – General) Act* 2012 (Cth) (together, "Imposition Acts"). This suite of legislation imposes a tax ("the MRRT") on a miner's total mining profits above $75M derived from the extraction of iron ore, coal and coal-seam gas. That tax is levied at a rate of 22.5% on the amount resulting after deducting "MRRT allowances" from mining profit. Mining profit consists of mining revenue less mining expenditure. Mining expenditure excludes mining royalties, but MRRT allowances include certain amounts for mining royalties. (Mining royalties are payable on the values of iron ore and other minerals pursuant to various Acts and regulations made in each of Australia's States.) Section 45-10 of the Act provides a partial tax offset for profits between $75M and $125M.

The First Plaintiff heads a group of mining companies which includes the other four plaintiffs. The Second to Fifth Plaintiffs are liable to pay mining royalties on iron ore to the State of Western Australia. They will also each be liable for the MRRT. The First Plaintiff may elect, pursuant to s 215-10 of the Act, to be consolidated with the Second and Third Plaintiffs for MRRT purposes.

On 22 June 2012 the Plaintiffs commenced proceedings in this Court to challenge the validity of the Act and the Imposition Acts (together, "the legislation") on the basis of alleged contraventions of the *Constitution*. Also on that date the Plaintiffs filed a Notice of a Constitutional Matter in accordance with s 78B of the *Judiciary Act* 1903 (Cth). The Attorneys-General of both Western Australia and Queensland are intervening in this matter.

The Plaintiffs claim that the legislation contravenes s 51(ii) of the *Constitution*, on the basis that the MRRT will be levied differently in each State (all other things being equal). This is due to the variation from State to State of the calculation of mining royalties, the amounts of which affect a miner's liability for the MRRT.

The Plaintiffs submit that such inequality also gives rise to a contravention of s 99 of the *Constitution*, as the legislation's provisions are laws both of revenue and of trade and commerce. With respect to the latter characterisation, the Plaintiffs further submit that the legislation impairs a State's ability to differentiate itself from competitor States or countries, as any reduction in royalties would attract a corresponding increase in the MRRT.

The Plaintiffs claim that the legislation is invalid for contravening s 91 of the *Constitution*, as it will curtail a State's ability to grant aid to mining of iron ore. This is on the basis that any aid given in the form of a reduction of, or exemption from, royalties would be negated by a corresponding increase in the MRRT.

The Defendant contends that the MRRT is imposed at a uniform rate irrespective of a mining project's location within Australia. Royalties are merely one type of allowance for which a miner can make deductions in calculating its liability for the MRRT. The Defendant submits that a variation of a royalty, which is a charge on the extraction of minerals from land, would not necessarily give rise to a countervailing change in any

MRRT payable by a miner. The reduction of a royalty would result in a definite saving for the miner irrespective of its profits. However, the miner's liability (if any) for the MRRT would arise at a later time, after the deduction from profits of any other MRRT allowances available. The Defendant further submits that any inequality in amounts of MRRT payable by miners in different States would be caused by the imposts of a State, not by some discriminatory attribute of the Act.

The Defendants contend that the MRRT is imposed only on miners, not on any persons at the higher levels of government. The Defendants submit that the MRRT does not fetter a State's freedom to make choices, including as to any encouragement of economic development (for which numerous means are available). The Defendants further submit that s 91 of the *Constitution* cannot render a Commonwealth law invalid, as that section is concerned only with provisions in the *Constitution*. Alternatively, it cannot be said that the MRRT Act prohibits a State from granting aid to mining.

On 5 November 2012 Chief Justice French reserved certain questions for determination by the Full Court. Those questions include:

- Are any or all of s 3 of each of the Imposition Acts invalid in their application to the Plaintiffs on one or more of the following grounds:
  - A. they discriminate between the States of the Commonwealth of Australia contrary to s 51(ii) of the *Constitution*;
  - B. they give preference to one State of the Commonwealth of Australia over another State contrary to s 99 of the *Constitution*;
  - C. they so discriminate against the States of the Commonwealth or so place a particular disability or burden upon the operations or activities of the States, as to be beyond the legislative power of the Commonwealth?

**SZOQQ v MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR (S334/2012)**

Court appealed from: Full Court of the Federal Court of Australia
[2012] FCAFC 40

Date of judgment: 23 March 2012

Special leave granted: 16 November 2012

The Appellant is an Indonesian citizen who had previously been active in the Free Papua Movement. He arrived in Australia in 1985 by canoe and was granted a protection visa in 1996. After being convicted of numerous crimes (including manslaughter) in 2003, the Appellant's protection visa was cancelled pursuant to s 501(2) of the *Migration Act* 1958 (Cth) ("the Act"). In December 2008 however the First Respondent ("the Minister") decided (under s 48B(1) of the Act) to permit him to apply for a fresh protection visa. Despite finding that the Appellant would face a real chance of persecution if he was returned to Indonesia, the Minister's delegate refused to grant him a protection visa. This was after finding, under s 36(2) of the Act, that Australia did not owe the Appellant any protection obligations under Article 33 of the 1951 International Convention relating to the Status of Refugees ("the Convention").

Article 33(1) of the Convention provides that a refugee may not be returned to a territory where his life or freedom would be threatened. Article 33(2) however provides that that benefit may not be claimed by a refugee who, having been convicted of a serious crime, constitutes a danger to the community.

On 2 September 2010 the delegate's decision was affirmed by the Administrative Appeals Tribunal ("AAT") and the Appellant's subsequent appeal to the Federal Court was dismissed by Justice Stone on 4 November 2011. Her Honour held that the AAT was correct in not weighing the danger posed to the Australian community against the severity of the likely consequences against the Appellant if he was returned to Indonesia.

On 23 March 2012 the Full Court of the Federal Court (Flick, Jagot & Barker JJ) unanimously dismissed the Appellant's appeal. Their Honours held that no balancing exercise was to be undertaken, as there was no relationship of proportionality between the relevant provisions. The Full Court found that a refugee simply could not obtain the benefit under Article 33(1) if his or her circumstances fell within Article 33(2).

The grounds of appeal include:

- The Full Court of the Federal Court erred in finding that s 36(2)(a) of the Act imported the exception to non-refoulement in Article 33(2) of the Convention. The Full Court of the Federal Court ought to have found that the Appellant satisfied the criterion for a protection visa referred to in s 36(2)(a) because the Appellant was found to be a refugee within the meaning of Article 1 of the Convention and thereby satisfied a relevant criterion in accordance with the requirements of s 65(1)(a)(ii) of the Act.

**WALLACE v KAM (S307/2012)**

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 82

Date of judgment: 13 April 2012

Special leave granted: 5 October 2012

The Appellant underwent surgery to alleviate pain caused by an intervertebral disc protrusion in his lumbar spine. Afterwards he suffered from bilateral femoral neurapraxia, or local nerve damage to the thighs. The Appellant sued the Respondent neurosurgeon, seeking damages arising from his failure to warn him of the material risks of the operation. Those risks included bilateral femoral neurapraxia and a 5% risk of paralysis.

The trial judge, Justice Harrison, held that the Respondent had breached his duty of care by failing to warn the Appellant of the material risk of bilateral femoral neurapraxia. His Honour nevertheless found that the Appellant had not established that he would have declined the surgery had he been warned of that risk. Justice Harrison however failed to find whether the 5% risk of paralysis was a material risk, or whether the Appellant would have declined the operation if so warned. His Honour treated the risk which did not materialise as irrelevant.

The issues upon appeal were whether Justice Harrison had erred in failing to consider whether a paralysis warning might have led the Appellant into not having the operation at all. It was also alleged that Justice Harrison had erred in finding that the only relevant breach was the Respondent's failure to warn of the risk that in fact materialised. This is in circumstances whereby such a warning would not have led to the Appellant declining the operation.

On 13 April 2012 the Court of Appeal (Allsop P & Basten JA, Beazley JA dissenting) dismissed the Appellant's appeal. The majority held that the purpose of s 5D(1)(b) of the *Civil Liability Act* 2002 (NSW) ("CLA") was to protect a patient from unacceptable material risks. They further found that where risks can be seen as separate and distinct, recovery is limited to those risks that were both material and which have materialised. These were the risks that should have been disclosed and were not acceptable to the patient.

Justice Beazley found that an undisclosed risk, such as occurred here, does not need to materialise in order to establish a causative link between the breach of the duty to warn of material risks and the harm suffered. Her Honour concluded that Justice Harrison had erred in finding that the duty to warn of material risks was confined to the risk of bilateral femoral neurapraxia.

The grounds of appeal include:

- The Court should have held that failure by a surgeon (the Respondent) to warn his patient (the Appellant) of the 5% material risk of a catastrophic outcome of permanent paralysis, paraplegia and death that was inherent in the proposed back surgery that the Respondent ultimately carried out on the Appellant on 22 November 2004, was, in itself, relevant to the determination of factual causation (s 5D(3)) and was a necessary condition of the occurrence of the Appellant's harm pursuant to ss 5D(1)(a) & 5E of the CLA.

**COMMISSIONER OF TAXATION v. UNIT TREND SERVICES PTY LTD ACN 010 382 242 (B61/2012)**

Court appealed from: Full Court of the Federal Court of Australia [2012] FCAFC 112

Date of Judgment: 17 August 2012

Date referred into Full Court: 14 December 2012

Unit Trend, the respondent, is in dispute with the Commissioner of Taxation, the applicant, about GST liabilities arising on sales to third party purchasers of apartments in two high-rise towers in the centre of Surfers Paradise.

The Full Federal Court upheld the respondent's appeal from the decision of the Administrative Appeals Tribunal ("the AAT"). The AAT had applied the anti-avoidance provisions in Div 165 of the *A New Tax System (Goods and Services Tax)* 1999 (Cth) (the "GST Act") to negate GST benefits in excess of $21 million in the context of the application of the margin scheme.

The respondent was the representative member of a GST group which included Simnat Pty Ltd ("Simnat"), Blesford Pty Ltd ("Blesford") and Mooreville Investments Pty Ltd ("Mooreville"). Simnat acquired land prior to 1 July 2000 with the intention of developing the land and selling to members of the public completed apartments in a resort development.

Prior to the sale of completed apartments to the public, a sale of some of the apartments whilst partially completed had taken place between Simnat and Blesford on the one hand, and Simnat and Mooreville on the other hand. The sales were completed in 2004. The applicant conceded that these were supplies of a going concern and thus were GST free.

In the subsequent sales of the completed apartments to members of the public, Blesford and Mooreville elected to invoke the provisions of the margin scheme under Div 75, and used the stepped up consideration of the respective acquisitions from Simnat to calculate the margin.

In applying Div 165 negating the GST benefits, the applicant alleged that the sale of the partially completed apartments from Simnat to either Blesford or Mooreville was part of a scheme which gave a higher value for the purposes of the margin scheme and this reduced the amount of GST payable.

The AAT held that for supplies up to and including 16 March 2005 (when Div 75 of the GST Act was amended), the taxpayer was entitled, subject to the potential application of Div 165, to apply the margin scheme on the basis that the consideration for the acquisition was the sale price between Simnat and Blesford and Simnat and Mooreville. However, the AAT held that Div 165 applied to supplies up to and including 16 March 2005 insofar as they were made pursuant to contracts entered into between Simnat and members of the public before the sale, by Simnat, of the partially complete apartments to either Blesford or Mooreville. In contrast, Div 165 had no application to supplies made pursuant to contracts entered into between either Blesford or Mooreville and members of the public, after the sale by Simnat.

The AAT further held that for supplies on and from 17 March 2005, the taxpayer ought to be given the opportunity to produce to the Commissioner an approved valuation of the apartments as at 1 July 2000.

The respondent appealed. The Full Court, Dowsett, Bennett and Greenwood JJ, by majority, Dowsett J dissenting, held that for all settlements up to and including 16 March 2005, Div 165 did not operate because it was excluded as the GST benefit on the end purchaser transactions was attributable to the choices or elections made by the respondent in relation to a going concern, grouping and the margin scheme, as provided for in s 165-5(1)(b).

On 14 December 2012 the Chief Justice and Justice Gageler referred this application to an enlarged bench, for argument as on an appeal.

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

- Did the majority of the Full Court of the Federal Court correctly construe and apply s 165-5(1)(b) of the GST Act?