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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M61 OF 2015

BETWEEN:

CROWN MELBOURNE LTD (ACN 006 973 262)
Appellant

and

COSMOPOLITAN HOTEL (VIC) PTY LTD (ACN 115 145 198) and

FISH AND COMPANY (VIC) PTY LTD (ACN 115 145 134)
Respondents

RESPONDENTS' SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. If leave to cross-appeal is granted, the issues will be:
   (a) In the appellant's application for leave to appeal and appeal to the Supreme Court of Victoria from the decision of the Victorian Civil and Administrative Tribunal was there a question of law within s 148 of the *Victorian Civil and Administrative Tribunal Act* 1998 (VCAT Act)?
   (b) If yes to (a), was there an enforceable collateral contract between the appellant and each respondent as found by the Tribunal?
   (c) If yes to (a) and no to (b), was the appellant estopped from denying it was bound to offer each respondent a renewed lease term as found by the Tribunal?

3. Issue (c) arises on the appeal and overlaps with the third ground of the cross-appeal. It will only arise if leave to cross-appeal is not granted or the cross-appeal is not allowed on the first and second grounds referred to in (a) and (b) above. The issues then will be whether the estoppel was promissory or proprietary and, if it was promissory, whether the promise relied on was sufficiently certain to found the estoppel.

Part III: Section 78B of the *Judiciary Act* 1903

4. The respondents certify that they consider there is no reason for notices to be given pursuant to s 78B of the *Judiciary Act* 1903.

Filed on behalf of Respondents
Mills Oakley
Level 6/560 Collins Street
MELBOURNE: VIC 300

Date of Filing
Tel: 03 9670 9111
Fax: 03 9605 0933
DX: 558
Ref: APB:2100924

Part IV: Facts

5. The appellant's summary of facts omits factual findings made by the Tribunal which were critical to its decision and, in at least one important respect, misstates the Tribunal's factual findings.

6. The negotiations between the appellant and the respondents for the leases were protracted. They had begun in October 2004 and were not concluded until March 2006. They comprised numerous meetings, telephone calls, items of correspondence and other documents. Key exchanges occurred in May 2005, when the appellant put a proposal to Mr Zampelis for leases involving multi-million dollar refurbishments at the tenants' expense but only five year terms.[1] Mr Rafaniello of the appellant had predicted that Mr Zampelis would push for longer lease terms and this is what he did in a telephone call in May 2005 to Mr Boesley of the appellant.[2]

7. Mr Zampelis gave evidence, which was accepted by the Tribunal, that the leases proposed by the appellant in May 2005 would be uneconomic for the tenants because they could not recoup the required capital expenditure in five years.[3] Mr Zampelis's assessment was ultimately vindicated when the leases were not renewed at the end of the five year terms and the tenants became immediately insolvent because of write downs of more than $2 million to the values of their major fixed assets (the refurbishments).[4]

8. The related issues of the level of expenditure on the refurbishments and the length of the lease terms became sticking points in the negotiations and this explained why they were so protracted.[5] The refurbished restaurants were expected to be ready to trade in time for the Commonwealth Games held in March 2006 in Melbourne.[6] Although the appellant had sent leases to Mr Zampelis in early September 2005 (containing both the major refurbishment obligations and five year terms) and Mr Zampelis had told the appellant in November that he had signed them, he had not by early December 2005 returned the signed leases to the appellant.[7] Although the respondents had taken possession of the premises and were being charged rent, they were behind in rent payments.[8]

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[1] [2012] VCAT 225 at [92].
[2] At [44], [45], [95].
[3] At [40].
[4] At [40]; [2012] VCAT 1407 at [21]; see the Reports to Creditors of the respondents' administrators dated 12 October 2010, p 21 (Fish & Co) and p 21 (Cosmopolitan Hotel).
[5] At [52].
[6] At [63].
[7] At [52].
[8] At [52].

9. In addition to telling Mr Boesley that he wanted longer lease terms, Mr Zampelis also had conversations in September to November 2005 with Mr Lloyd Williams, Mr John Williams and Mr Nick Williams – who Mr Zampelis believed had influence with the appellant – in which he sought assurances about longer lease terms.[9] Although the Tribunal found that no actionable assurances were given in these conversations, it did find that statements were made to Mr Zampelis in these conversations which did encourage him to believe that if a promise of a renewed lease term was made it would have the approval of the appellant.[10] The Tribunal also found that like assurances were given by Mr Boesley and Mr Rafaniello in a later conversation in February 2006.[11] The appellant's submission in para 13 of its written submissions that the Tribunal was not satisfied that these other statements were made is incorrect. The Tribunal found that statements were made on those occasions but that they were not actionable.

10. By late November 2005 Mr Boesley was becoming concerned because the refurbishments had not begun, Mr Zampelis had not returned the signed leases, the respondents were late with rent and had not provided the bank guarantees required by the leases.[12] Mr Zampelis (who was regarded by the appellant as a master of delaying tactics) was avoiding meetings to discuss these matters.[13] Eventually a meeting was held on 6 December 2005, when the Tribunal found that Mr Boesley made the crucial statement.[14] By this stage the timing had become critical if the restaurants were to be ready in time for the Commonwealth Games. Mr Boesley's statement on 6 December broke the deadlock as the refurbishments began in the early new year and were completed by early March just in time for the Commonwealth Games.[15] Mr Zampelis then handed over the signed leases.[16] The Tribunal found that the respondents spent $4.65 million on the refurbishments.[17]

11. The evidence of Mr Craig was critical to the Tribunal's findings about the 6 December statement by Mr Boesley. Mr Craig worked at the National Australia Bank, which was assessing whether to lend money to the respondents to finance the refurbishments. He gave evidence, which the Tribunal accepted, that he was at the meeting on 6 December and recalled that Mr Boesley said to Mr Zampelis: "If you spend the dough you will be looked after with a further

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[9] At [49], [50], [98] - [112].
[10] At [120].
[11] At [87].
[12] At [52].
[13] At [153].
[14] At [84].
[15] At [59], [153].
[16] At [65].
[17] At [37].

term. The lease is for 5 years because we want to align the leases with everyone else's lease."[18]

12. Mr Craig also gave evidence that he made a contemporaneous note of conversations he witnessed around this time.[19] The Tribunal held that the note was for an important purpose - as the Bank was assessing whether to lend a substantial amount of money to the respondents - and was satisfied that it was reasonably accurate.[20] Mr Craig wrote the note by hand on a copy of the lease Mr Zampelis had given to him. It was opposite the item in the lease schedule which stated the term of five years. The note said, in part:

> Whilst this is a 5 year term this is standard for Crown as it aligns with other venues. Have however been with Nick [Zampelis] at several meetings when discussions have confirmed that further terms will be provided as they have in the past. David Boesley (Crown) was talking to Nick one time and intimated that fit out should be high quality as this would reflect well and not to worry as he would be looked after at renewal time.

13. The appellant's factual summary is correct in saying that the respondents participated in the tender process called by the appellant for new leases of the premises in 2009 in anticipation of the end of the five year terms. But it fails to record that they did so only after first complaining that the tender was inconsistent with the promise that had been made to them of renewals of the leases.[21] It also omits mention of Mr Zampelis's evidence that he had received assurances from the appellant at this time consistent with the earlier promise of renewed leases before deciding to participate in the tender.[22]

14. A full appreciation of this context is essential to a proper understanding of the Tribunal's decision that Mr Boesley's statement on 6 December was actionable. It informs the findings made by the Tribunal at [84], [117] – [120], [133] – [142] and [172]. Those findings - *in full* - were: (i) that Mr Boesley on behalf of the appellant promised Mr Zampelis on behalf of the respondents that, if they spent the money on the refurbishments for a high quality finish, they would be "looked after" at renewal time; (ii) the leases were limited to 5 year terms to align with other tenancies; (iii) the statement meant to a reasonable person in Mr Zampelis's position that, at renewal time, the appellant would give the respondents a notice to renew the leases for a further 5 year term which the tenants would be free to accept; and (iv) the appellant was free to stipulate whatever other terms in the renewal notice it chose, but the commercial reality meant it was expected that the appellant would stipulate terms that had a

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[18] At [73].
[19] At [74].
[20] At [83].
[21] [2012] VCAT 225 at [179].
[22] Zampelis witness statement (dated 24 August 2011) paras 38-43.

reasonable correspondence with the existing leases. The Tribunal did not say expressly that the expectation of renewal on terms bearing a reasonable correspondence with the existing leases derived also from the fundamental promise to "look after" the respondents but that ought to be inferred.

15. While the Tribunal's decision was not precisely the case made by the respondents that the appellant would renew the leases on the same terms (or on the same terms *mutatis mutandis*)[23] it was certainly within the case made by them.[24] The appellant denied that the 6 December statement had been made and did not argue, in the alternative, that if such a statement was made it had a different meaning to that contended by the tenants or found by the Tribunal. The Tribunal made findings *of fact* about that meaning, which drew heavily on the context in which the statement on 6 December was made and were critically shaped by the evidence of Mr Craig.

Part V: Statutes

16. No issue of statutory interpretation arises on the appellant's appeal though the cross-appeal concerns the application of s 148 of the VCAT Act.

Part VI: Argument on the Appeal

Categorisation of the estoppel

17. As noted above the issues raised by the appellant in its outline only arise if neither of the first two grounds of cross-appeal succeeds. They also depend on the categorisation of the estoppel as promissory rather than proprietary. The appellant appears to contend that, since the respondents and the tribunal and judges below have described the estoppel as promissory, that is conclusive of the question of its proper categorisation or there is otherwise some reason why it cannot now be categorised as proprietary. In truth, the proper categorisation of the estoppel has not mattered until now, when the appellant for the first time in this Court seeks to meet the respondents' case in estoppel by an argument that depends on its categorisation as promissory, rather than proprietary.

18. Promissory estoppel and proprietary estoppel are both species of equitable estoppel. It has been doubted whether there is any logical basis for distinguishing between them.[25] In conventional analysis they differ according to the type of assumption or expectation which is

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[23] See *Lewis v Stephenson* (1898) 67 LJ QB 296 at 300; *Trade Practices Commission v Tooth & Co Ltd* (1979) 26 ALR 185 at 202.

[24] [2012] VCAT 1407 at [35].

[25] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 per Brennan J at 420; per Gaudron J at 460.

the basis of the estoppel: in proprietary estoppel the assumption or expectation goes to the acquisition of an interest in property; in promissory estoppel the assumption or expectation goes to the exercise of a legal right.[26] It cannot be doubted that a proprietary estoppel can arise by virtue of a promise and this explains why the expressions "promissory estoppel" and "proprietary estoppel" are often used interchangeably[27] and cases of proprietary estoppel have sometimes been described as cases of promissory estoppel.[28]

19. Brennan J expressly said that his now familiar six-step analysis in *Waltons Stores* (of the circumstances where an equitable estoppel might arise) [29] applied both to promissory and proprietary estoppel: the only difference being in the nature of the assumption in the second step.[30] Elsewhere in the same judgment his Honour said:[31]

> Thus a promissory or proprietary estoppel may arise when a party, not mistaking any facts, erroneously attributes a binding legal effect to a promise made without consideration.

20. There cannot be any doubt that, whatever label has been used below to describe the estoppel the respondents claim, they have always claimed a proprietary estoppel. In their points of claim and notice of contention relied on before Hargrave J, the respondents alleged the appellant was estopped from denying the collateral contracts.[32] Since performance of the collateral contracts would have secured further five year leasehold interests for the respondents, the estoppel they claimed always had the characteristics of a proprietary estoppel. Their reliance below on *Flinn v Flinn*[33] - specifically in answer to a defence of uncertainty to the claim in contract - also made clear that the estoppel they claimed was proprietary.

21. It is equally clear that the estoppel found *obiter dicta* by the Tribunal to bind the appellant was proprietary. In upholding the respondents' case that the appellant was estopped from denying the collateral contract, the Tribunal said: "The [respondents] expected there would be an offer of a renewed lease, at renewal time, that they would be free to accept."[34] This was

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[26] *Waltons Store's* per Brennan J at 420; per Gaudron J at 458.
[27] See, e.g., *Waltons Stores* per Brennan J at 421; *Crabb v Arun District Council* [1976] Ch 179 per Lord Denning MR at 187
[28] See, e.g., *Waipara Pty Ltd v The Police Association* (1997) V ConvR ¶54-557; *Wright v Hamilton Island Pty Ltd* (2003) Q ConvR ¶54-588.
[29] At 428-9.
[30] At 429.
[31] At 421.
[32] Echoing Brennan J in *Waltons Stores* at 424: "equitable estoppel almost wears the appearance of contract".
[33] [1999] 3 VR 712.
[34] [2012] VCAT 225 at [172].

consistent with Mr Zampelis's evidence that he believed the leases would be renewed for further five year terms.[35] The assumption or expectation of the respondents was thus that they would acquire interests in property and so the estoppel was proprietary.

22. Only the reasoning of the Court of Appeal (where the precise categorisation of the estoppel was not in issue) supports the categorisation of the estoppel as promissory and not proprietary. This is because the Court of Appeal attributed a narrower meaning to the promise which the appellant made on 6 December than did the Tribunal. The Court of Appeal found that the promise was only to "to look after" the respondents and that this did not entail the granting of further five year lease terms.[36] The appellant, in para 67 of its outline, makes the same point: "the Statement was that the Respondents 'would be looked after'. That does not connote any interest in land." But the Tribunal found, *as a matter of fact*, that the statement not only connoted but actually *meant* that an interest in land would be granted.

23. For the reasons given below on the cross-appeal it was not permissible for the Supreme Court, in an appeal under s 148 of the VCAT Act, to depart from the meaning attributed by the Tribunal to the promise made on 6 December. But even if the Court was not so limited on appeal it should not have departed from the meaning attributed to the promise by the Tribunal. The narrow meaning attributed by the Court of Appeal to the promise ignored the Tribunal's explanations in [135] and [139] of its reasons and ignored the context in which the promise was made: at the end of protracted negotiations about the length of the lease terms and the amount the respondents would be required to spend on the refurbishments. It also ignored the critical evidence of Mr Craig, in particular his contemporaneous note which explicitly described the promise as one to give further five year lease terms.

Promissory estoppel

24. If, contrary to the forgoing, the respondents are confined to a claim for promissory estoppel based on the narrower meaning attributed to the promise by the Court of Appeal, that claim should nevertheless be upheld.

25. The respondents accept that a claim in promissory estoppel must be based on a promise or representation which is sufficiently clear and unambiguous. However, the appellant's analysis leads to the wrong conclusion on this test because, contrary to authority, it atomises the constituent elements of the estoppel, isolates the promise relied on, ignores the context in which it was made and subjects the promise to a contractual analysis.

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[35] See his witness statement paras 29 and 47.

[36] [2014] VSCA 353 per Warren CJ at [65], [83], [88], [91]; per Whelan JA (with whom Santamaria JA agreed) at [157], [182], [183], [184], [198], [204].

26. Longstanding authority dictates that in cases of estoppel attention should be paid to broad principle and not rigid rules.[37] The constituent elements of an estoppel must be considered in combination and not sequentially or individually.[38] To do otherwise risks the erection of "the most elaborate artificial barriers constructed for the purpose of excluding inquiry"[39] and "the introduction of refined distinctions that do not address equity's fundamental concern with conscionable conduct."[40]

27. The focus of the inquiry is less on the representation, promise or other conduct said to have given rise to the estoppel and more on the assumption or expectation thereby created. In a passage cited with approval in *Giumelli v Giumelli,*[41] McPherson J explained in *Riches v Hogben*:[42]

> [W]hat attracts the principle is not the promise itself but the expectation which it creates. ... It is not the existence of an unperformed promise that invites the intervention of equity but the conduct of the plaintiff in acting on the expectation to which it gives rise.

28. Brereton J put the point this way in *Waterman v Gerling Australia Insurance Company Pty Ltd*:[43]

> [T]he requirement that a party should not be estopped on an ambiguity does not mean that the precise terms of the assumption or representation which founds the claimed estoppel must be entirely and unequivocally clear: an estoppel can arise even though the precise terms of the assumption or representation may be difficult to ascertain, so long as it is clear that there was an assumption, and the scope of the assumption, though its full extent may be uncertain, is at least sufficient that it can be said that the defendant's conduct would involve a departure from it.

29. To isolate the promise from the other elements of the estoppel, in particular the assumption or expectation created by it, and from its factual context, and then apply to its interpretation a test of certainty is to proceed as if at law and in contract. That is the error of the appellant's approach and of the approach of Hargrave J.[44] None of this gainsays the requirement for a

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[37] *George Whitechurch Ltd v Cavanagh* [1902] AC 117 per Lord Macnaghten at 130; *Western Australian Insurance Co Ltd v Dayton* (1924) 35 CLR 355 per Isaacs ACJ at 372.
[38] *Canadian & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 per Lord Wright at 55-6.
[39] *Western Australian Insurance Co Ltd v Dayton* per Isaacs ACJ at 372.
[40] *Construction Technologies Australia Pty Ltd v Doueihi* [2014] NSWSC 1717 at [217]; see also *Ramsden v Dyson* (1866) LR 1 HL 129 per Lord Kingsdown at 217.
[41] (1999) 196 CLR 121 at 121 [35].
[42] [1985] 2 Qd R 292 at 300-1.
[43] (2005) 65 NSWLR 300 at 327 [91].
[44] [2013] VSC 614 at [92] – [95].

clear and unambiguous promise or representation but it demonstrates that what equity requires by this test is not what the law requires for a contract. Equity requires that the representation must be *identified* with sufficient clarity, not that it must be capable of unambiguous interpretation. The cases relied on by the appellant bear this out.

30. *Low v Bouverie,*[45] *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Ltd*[46] and *Westpac Banking Corporation v Bell Group Ltd (No 3)*[47] were all cases in which the plaintiff failed to establish that any representation had been made at all. They all involved the question of law whether a representation could be discerned from various writings though it was nowhere stated explicitly in the writings. There was no issue in these cases about what a representation, clearly established, meant.

31. These authorities do not stand for the proposition that, once a representation is identified with sufficient clarity, it cannot found a promissory estoppel if it is capable of different meanings. *Waltons Stores* denies that proposition. The representation in that case, which was alleged to have been constituted by certain statements and conduct of the defendant, was held to have been capable of three different meanings: (i) that an exchange of leases had occurred; (ii) that an exchange would occur; and (iii) that a binding agreement to lease had already been made. The trial judge upheld the estoppel on the basis of meaning (ii), the Court of Appeal on the basis of meaning (iii), while in the High Court Mason CJ, Wilson and Brennan JJ opted for meaning (i) and Deane and Gaudron JJ for meaning (iii).

32. *Legione v Hately,*[48] *Foran v Wight,*[49] *Metropolitan Transit Authority v Waverly Transit Pty Ltd,*[50] *Galaxidis v Galaxidis*[51] and *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd*[52] are other examples of cases where a representation which was capable of more than one meaning was nevertheless held to be sufficiently certain to found a promissory estoppel. The possibility that an estoppel could be founded on a representation capable of different meanings had been acknowledged back in *Low v Bouverie.*[53] The test of certainty stated in that case has been

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[45] [1891] 3 Ch 82.
[46] [1972] AC 741.
[47] (2012) 44 WAR 1.
[48] (1983) 152 CLR 406.
[49] (1989) 168 CLR 385.
[50] [1991] VR 176.
[51] [2004] NSWCA 111. The appellant in its submissions, para 45, incorrectly characterises this as a case of proprietary estoppel. Although the promise was held at first instance to be a promise to convey property, on appeal it was held only to be a promise to grant a licence to use the property: see at [103].
[52] (2008) 66 ACSR 325.
[53] [1893] 3 Ch 82 per Bowen LJ at 106.

explained as requiring only the exclusion of far-fetched and strained interpretations.[54] The Court's function in such cases is to determine the reasonable meaning of the representation and the assumption or expectation created by it and then to give effect to the equity created by it. Thus there can be an estoppel even where the assumption or expectation found by the Court does not align precisely with that which the plaintiff alleges.[55]

33. Therefore, if the respondents are confined to a case of promissory estoppel based on the narrower meaning attributed by the Court of Appeal to the appellant's promise made on 6 December, that case should nevertheless succeed.

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Costs

34. In respect of the appellant's foreshadowed application for a costs order personally against Mr Zampelis, the respondents observe that the appellant was refused such an order by Hargrave J,[56] did not seek leave to appeal against that decision and has put no material forward to support such an order in this Court.

Part VII: Argument on the Cross-Appeal

35. The respondents' argument on the third ground of the cross-appeal is given above as part of the argument on the appeal. These submissions deal with the remaining two grounds of the

20 cross-appeal, concerning s 148 of the VCAT Act and the collateral contract.

Question of law

36. Section 148 confines appeals from the Tribunal to the Supreme Court to questions of law. The question of law not only states the subject matter of the appeal, it also confers jurisdiction to hear it.[57] Section 148 is directed at preventing the Supreme Court from usurping the Tribunal's fact-finding function.[58] The question or questions of law are not to be distilled from the grounds of appeal[59] and it is a matter of "great importance" that the appellant state the question or questions of law with "sufficient precision".[60] Any departure from the question or questions of law stated in the notice of appeal should be formalised by amendment to the

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[54] *Woodhouse* per Lord Hailsham at 755; see also per Lord Salmon at 771, who excluded a possible though unlikely meaning of the representation.

[55] See, e.g., *Waltons Stores*; *Galaxidis*; *MTA v Waverly Transit*.

[56] [2013] VSC 698.

[57] *Osland v Secretary, Department of Justice (No 2)* (2010) 241 CLR 320 per French CJ, Gummow and Bell JJ at 333 [21] citing *TNT Skypak International (Aust) Pty Ltd v FCT* (1988) 82 ALR 175 per Gummow J at 178.

[58] *Osland* per French CJ, Gummow and Bell JJ at 332 [19] (citing *Repatriation Commission v O'Brien* (1985) 155 CLR 422 per Gibbs CJ, Wilson and Dawson JJ at 430); per Hayne and Kieffel JJ at 351 [73].

[59] *Osland* per French CJ, Gummow and Bell JJ at 333 [21] citing *ASIC v Saxby Bridge Financial Planning Pty Ltd* (2003) 133 FCR 290 per Branson J at 301-2 [47] – [48]; per Jacobson and Bennett JJ at 313 [108].

[60] *Haritos v Commissioner of Taxation* (2015) 233 FCR 315 at [62](2), [91].

notice of appeal.[61] The Court might allow some latitude to litigants in person and assist them in framing appropriate questions which fairly arise from the notice of appeal.[62]

37. These strictures were all overlooked at both stages of the appeal in the Supreme Court.

38. The appellant in its notice of appeal set out a number of what purported to be questions of law. It is doubtful that any of those questions qualified as questions of law. Most of them were directed at challenging factual findings of the Tribunal but not on the stated basis that there was no evidence to support the finding. Some questions such as B – "What words are required to constitute a 'promise' capable of 'acceptance'?" – were simply meaningless. Others, like most of the questions numbered A, only begged the real question.

39. The inutility of the questions in the notice of appeal may explain why Hargrave J in his reasons made no reference to them. However, it did not excuse his Honour from determining whether leave should be granted and the appeal allowed on a particular question or questions of law posed by the appellant in its notice of appeal. Instead of doing that, his Honour said that "**if** leave to appeal were to given on all grounds of appeal ... the following **issues would arise for determination**" [emphasis added]. His Honour then set out eight "issues" in the form of questions but without making any attempt to relate them to the "questions of law" in the notice of appeal.[63] It is doubtful that any of these "issues" was a question of law, with the possible exception of (7), which concerned s 126 of the *Instruments Act* 1958 (Vic) and was resolved in the respondents' favour.

40. The Court of Appeal excused this approach on the basis that the hearing before Hargrave J combined the application for leave to appeal and the appeal, if leave were granted.[64] It is submitted that the combined nature of the hearing did not relieve the judge of the requirement to identify precise questions of law as the foundation of the grant of leave to appeal and of allowing the appeal. Not only did the judge fail to do that, he seemed to think that the articulation of questions of law should follow upon, rather than precede, the grant of leave to appeal.

41. In the Court of Appeal both the Chief Justice[65] and Whelan JA[66] (with whom Santamaria JA agreed) embarked on a further reformulation of the questions. Each stated five new questions

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[61] *Haritos* at [107].
[62] *Haritos* at [101] - [103] citing *Kowalski v Military Rehabilitation and Compensation Commission* (2010) 114 ALD 8 at [40] and [43]; *P v Child Support Registrar* (2013) 138 ALD 563 per Wigney J at [53].
[63] [2013] VSC 614 at [16].
[64] [2014] VSCA 353 per Warren CJ at [53]; per Whelan JA at [172].
[65] [2014] VSCA 353 at [53].

covering the same topics but in different terms. The Chief Justice referred to the "questions articulated by his Honour"[67] and appeared to assume that the questions she articulated were those put to the judge below and as framed in the Court of Appeal.[68] Otherwise, neither the Chief Justice nor Whelan JA sought to relate the five new questions to the questions in the notice of appeal or to Hargrave J's list of "issues". None of the questions so framed raised a question of law which arose on the application for leave to appeal to the Supreme Court.

42. Leave to amend the questions in the notice of appeal was never granted nor even sought. It has not been suggested, nor could it be, that the appellant merits the kind of assistance occasionally extended by the Federal Court to certain litigants in the formulation of questions of law.[69] Therefore, in point of strict procedure, leave to appeal was granted by the Supreme Court, and the appeal allowed, on one or more of the questions in the notice of appeal, though the questions have never been identified, it is not clear whether it is all of the questions or only some of them and it is doubtful at best whether any of them qualifies as a question of law.

43. These procedural irregularities are a sufficient basis for allowing the cross-appeal, setting aside the judgments of the Supreme Court and restoring the judgments of the Tribunal. But further examination of the purported "questions of law" – in all their iterations – and of the reasons of the judges reinforces that result. It shows that the Supreme Court did usurp the fact-finding function of the Tribunal and substitute its own factual findings for those of the Tribunal. The extensive appeals, which occupied three days before Hargrave J and a day in the Court of Appeal became, in effect, general re-hearings of the trial instead of confined inquiries into questions of law.

44. The respondents' case at the Tribunal comprised two causes of action, one in contract the other (in the alternative) in estoppel. Both causes of action were based on oral statements alleged by the respondents to have been made on behalf of the appellant to Mr Zampelis on behalf of the respondents. The Tribunal was called on decide, first, what was said and, secondly, what was meant by what was said. Both these questions were questions of fact. The meaning of ordinary English words in a contract is a question of fact.[70] While the construction

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[66] [2014] VSCA 353 at [173].
[67] [2014] VSCA 353 at [52].
[68] [2014] VSCA 353 at [53].
[69] *Haritos* at [101] - [103] citing *Kowalski v Military Rehabilitation and Compensation Commission* (2010) 114 ALD 8 at [40] and [43]; P *v Child Support Registrar* (20130 138 ALD 563 per Wigney J at [53].
[70] *The Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 per Isaacs J at 78.

of a written contract may be a question of law, construction of an oral contract is a question of fact.[71]

45. *Handbury v Nolan*[72] exemplifies this last proposition. The Court was called on to decide the meaning of a statement by an auctioneer before the auction of a cow that the cow's pregnancy test had been positive. A County Court judge held that the oral contract of sale contained a term, based on the statement, that the cow was in calf. The Full Court disagreed but the High Court (by majority) restored the County Court's decision, all members of the High Court agreeing that the meaning of the terms of the contract was a question of fact.

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46. Barwick CJ formed part of the majority (with Jacobs and Aickin JJ) and said:[73]

> The matter, in my opinion, is not to be resolved, as it were, by construction of written documents, but as a matter of fact, ie what in substance was the subject matter of the sale and purchase.

His Honour concluded:[74]

> In my opinion, on all this material it was open to the primary judge to find that it was a pregnant cow which was the subject matter of the sale and purchase. It must be
20 conceded that the view taken by the Full Court is a possible view of the transaction. But to entertain that view is not to deny the possibility of the view taken by the trial judge or to establish that he was wrong to take it. ... I would prefer the view of the trial judge to that of the Full Court but, in any case, see no reason to disturb the trial judge's finding that, in point of fact, the parties were bargaining about a cow in calf and not merely about the chance that she was in calf.

Jacobs J said:[75]

> The meaning which the parties to the contract intended by the oral statement at the
30 auction that the pregnancy test was positive was a question of fact for the trial judge, to be determined in light of all the circumstances of the case ...

47. Neither the question whether a binding contract has been made[76] nor the question whether a person is estopped[77] is a question of law.

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[71] *Deane v The City Bank of Sydney* (1904) 2 CLR 198 per Griffith CJ at 209; *Gardiner v Grigg* (1938) 38 SR (NSW) 524 at 532; Thorner *v Majors* [2009] 1 WLR 776 per Lord Neuberger at [82]; *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382 at [90].

[72] (1977) 13 ALR 339.

[73] At 341.

[74] At 342.

[75] At 348.

[76] *Ridgway v Wharton* (1856) 6 HLC 238; 10 ER 1287; *Alderton v Archer* (1884) 14 CBD 1; *George Trollope & Sons v Caplan* [1936] 2 KB 382 per Greene LJ at 399; *Rosebridge Nominees Pty Ltd v Commonwealth Bank of Australia* [2005] WASC 132; *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193 per Spigelman CJ at [7]; *Loudon-Shand v Jadasi Investments Pty Ltd* [2007] NSWCA 316; *US Manufacturing Co Pty Ltd v ABB Security Pty Ltd* [2008] NSWSC 705; *Homecare Direct Shopping Pty Ltd v Gray* [2008] VSCA 111 at [62]; *Westpac Banking Corporation v Bell Group Ltd (No 3)* (2012) WAR 1 per Drummond AJA at [1347]; *Batterham v Goldberg* (2014) 226 FCR 166 at [61].

48. Accordingly, the factual findings of the Tribunal about the meaning to be attributed to the statement on 6 December, and in particular whether it gave rise to the collateral contracts alleged by the respondents, or the estoppels, could not be the subject of an appeal to the Supreme Court under s 148 of the VCAT Act unless the question of law was whether there was no evidence to support the factual findings.

49. The judges in the Supreme Court failed to require the appellant to state questions of law, failed themselves to state any questions of law and their reasons demonstrate that what they did was take issue with the meaning attributed by the Tribunal to the statement made on 6 December.

50. Hargrave J concluded that "on the totality of the evidence" the 6 December statement was not promissory.[78] This was a problematic approach because only the Tribunal had heard and seen the totality of the evidence.[79] Hargrave J listed a number of items of evidence which he said did not appear to have been "factored into" the Tribunal's conclusion that the statement was promissory, though each item was referenced to a passage of the Tribunal's reasons.[80] He then stated his conclusion that "a reasonable person in the position of the parties would not have understood Mr Boesley's statement as a promise by Crown to take any particular action."[81] He further held that the collateral contract was also uncertain because the "words were too vague to found any objectively reasonable understanding to the effect found."[82]

51. The Chief Justice supported Hargrave J's approach to the question whether the statement was promissory.[83] She held that this raised a question of law because "VCAT failed to apply the legal test to its own factual finding, therefore his Honour was answering a question of law."[84]

52. Whelan JA (with whom Santamaria JA agreed) seemed to accept the difficulty in Hargrave J's approach to the question whether the statement was promissory.[85] However, Whelan JA denied that Hargrave J did purport to consider the totality of the evidence and instead upheld his conclusion because the Tribunal had only considered the form of words used and did not

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[77] See *Waltons Stores* 164 CLR 387 per Deane J at 449; *Wiltrading (WA) Pty Ltd v Lumley General Insurance Ltd* (2005) 30 WAR 290 per Steytler P at [28]; *Commissioner of Taxation v Hornibrook* (2006) 156 FCR 313 per Gyles J at [32]; *Eastman v Commissioner for Social Housing* [2010] ACTSC 71 per Lander J at [79] – [84].

[78] [2013] VSC 614 at [38].

[79] The trial in the Tribunal had occupied 12 days with 13 witnesses, 854 pages of transcript, a court of book of 11 lever arch folders comprising 2,555 pages and a further 33 exhibits.

[80] At [38].

[81] At [39].

[82] [2013] VSC

[83] [2014] VSCA 353 at [60].

[84] [2014] VSCA 353 at [54].

[85] At [178].

consider from all other relevant evidence what the parties' intentions were.[86] This was a very selective reading of the Tribunal's reasons (elsewhere described by Whelan JA as "thorough and comprehensive"[87]) and ignored in particular what the Tribunal had said at [135] and [139] as to what the statement should be taken to have meant.

53. The reasons given by the judges for overturning the Tribunal's finding that the contract was sufficiently certain also failed to disclose legal error by the Tribunal. They focussed on the Tribunal's finding that the appellant was free to stipulate whatever terms it chose in the renewal notices but ignored that the basic promise was to "look after" the respondents at renewal time and ignored the finding that the terms of the renewed leases would be expected to bear a reasonable correspondence with the terms of the existing leases.[88] They ignored the Tribunal's further findings of fact in the section of its reasons concerned with damages about particular terms it expected would be included in the renewed leases.[89]

54. The judges of the Supreme Court instead discerned a dichotomy between the promise "to look after" the respondents and the finding that the appellant was free to stipulate whatever terms it wished in the notice to renew and concluded therefore that the promise was meaningless and not capable of bearing the meaning attributed to it by the Tribunal.[90] Rather than seek to reconcile these findings with the finding that it would be expected that the offer to renew the leases would be on terms having a reasonable correspondence with the existing leases, the judges of the Supreme Court instead discerned legal error.

55. Whelan JA's conclusion on this issue was: "The statement which VCAT found was made is not capable of bearing the meaning VCAT attributes to it."[91] This could only disclose error of law if the conclusion was that there was no evidence on which the Tribunal could have based the meaning it attributed to the statement. But none of the judges approached the question in this way and neither Hargrave J nor the Chief Justice, in their assessments of the "totality of the evidence", drew such a conclusion.

56. The question whether there was relevant inconsistency between the collateral contracts and the main contracts (the leases) was again a question of construction of oral contracts and was therefore a question of fact. Hargrave J rejected the Tribunal's view on this because the

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[86] At [175] – [177].
[87] [2014] VSCA 353 at [110].
[88] [2012] VCAT 225 at [139]; see also [2012] VCAT 1407 at [35].
[89] [2012] VCAT 225 at [187] – [262].
[90] [2013] VSC 614 at [42]; [2014] VSCA 353 at [65] and [183].
[91] [2014] VSCA 353 at [182].

collateral contract attempted to fetter the appellant's discretion, but did not grapple with the distinction which the Tribunal drew between a discretion conferred by the main contracts and one which existed independently of the main contract.[92] Whelan JA seemed to think this distinction depended on the discretions covered by the main contract being co-extensive with those which existed independently of the main contract.[93] But there is nothing in the Tribunal's reasons, or in principle, which requires this to avoid relevant inconsistency.

57. The reasons of Hargrave J for disagreeing with the Tribunal about estoppel rely on fine distinctions between what the Tribunal found the relevant assumption or expectation to be and the evidence Mr Zampelis gave of his subjective assumption or expectation.[94] They proceed from the same misunderstanding of the Tribunal's findings about what the 6 December statement meant and ignore the Tribunal's specific finding on estoppel that the respondents expected there would be an offer of a renewed lease at renewal time, which they would be free to accept.[95] They depended in particular on the conclusion drawn earlier by his Honour in respect of the contractual claim that "the meaning which the Tribunal attributed to the statements [sic] was not that which a reasonable person in the position of the parties in the relevant surrounding circumstances would have understood the statements to mean."[96] This conclusion is not said to be reached because there was no evidence on which the Tribunal could have made its findings about what the statement meant. It therefore can only represent a different view of the facts and not one which Hargrave J was at liberty to substitute for the view taken by the Tribunal. Indeed, Hargrave J conceded that "[t]he authorities concerning this issue emphasise that each case must be determined on its own facts."[97]

58. From the Tribunal's findings about a what a reasonable person would have understood the 6 December statement to have meant Hargrave J extrapolated the proposition that Mr Zampelis's subjective understanding was unreasonable because the two did not precisely align.[98] He ignored the Tribunal's explicit finding about Mr Zampelis's expectation for the purpose of its *obiter dicta* finding on estoppel.[99]

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[92] [2013] VSC 614 at [80].
[93] [2014] VSCA 353 at [188].
[94] [2013] VSC 614 at [92] and [93].
[95] [2012] VCAT 225 at [172].
[96] [2013] VSC 614 at [88].
[97] [2013] VSC 614 at [89].
[98] [2013 VSC 614 at [94].
[99] [2012] VCAT 225 at [172].

59. The Court of Appeal agreed with Hargrave J that the Tribunal had erred on estoppel[100] except that it was granted there by the Chief Justice that a different case in estoppel had been made out[101] and, by Whelan and Santamaria JJA, that a different case in estoppel might be made out.[102] Whelan JA said that "VCAT made an error of law because it failed to analyse or consider what the Tribunal had found as to what had been said to Mr Zampelis and as to what that meant." It is, with respect, difficult to understand what is meant by that. Large parts of the Tribunal's reasons were given over to an analysis of what had been said to Mr Zampelis and what that meant. Having dealt exhaustively with those topics in both the factual findings and then the contractual findings, the Tribunal in its reasons returned again to them in the context of estoppel and made clear findings that were plainly supported by the evidence.

60. Whelan JA proceeded to find that, although the respondents in their negotiations with the appellant were seeking further five year terms at the end of the five year terms contained in the leases, "Crown [the appellant] refused to agree."[103] That directly contradicts the factual finding made by the Tribunal that the appellant did in fact agree to further five year terms, or at least to give a notice offering to renew for further five year terms. To contradict the tribunal of fact in this manner, in an appeal confined to questions of law, demonstrates the error which pervaded the decisions at both stages of appeal and why those decisions should now be set aside.

61. In summary, the reasons given by Hargrave J, the Chief Justice and Whelan JA for departing from the findings of the Tribunal on the collateral contract and the estoppels disclose no errors of law by the Tribunal. They reveal only differences about matters of fact, essentially about the meaning that should be attributed to certain words found by the Tribunal to have been spoken, in the context in which they were spoken. Thus the Supreme Court fell into the same error that was identified in *Osland*, where it substituted its view of the meaning of a press release for that of the Tribunal.[104] For that reason too, the cross-appeal should be allowed, the judgments of the Supreme Court set aside and the judgments of the Tribunal restored.

The collateral contracts

62. If, contrary to the forgoing, there was a proper question of law in the Supreme Court about whether there were binding collateral contracts as alleged by the respondents, nevertheless

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[100] [2014] VSCA 353 per Warren CJ at [77] and [78]; per Whelan JA at [191] and [192].
[101] [2014] VSCA 353 at [81] – [95].
[102] [2014] VSCA 353 at [193] – [204].
[103] [2014] VSCA 353 at [202]. The same error is repeated in the appellant's submissions, para 29, where it asserted the appellant "*expressly refused* a contractual right" [emphasis in original].
[104] See per Hayne and Kieffel JJ at [75] and [76].

the appeal on that question should have been dismissed. The Tribunal's conclusions on this question, even if open to challenge on appeal, should have been upheld.

63. The Tribunal was correct in concluding that the 6 December statement was promissory and that it was sufficiently certain to give rise to a contract. The time is long past for the Courts to act as the destroyers of bargains.[105] While there may not be a presumption of intention to create legal relations in the commercial setting[106] nevertheless the party arguing that a promise made in the course of commercial negotiations did not give rise to a binding contract bears "a heavy onus".[107]

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64. The Court's long recognised duty to give effect to commercial bargains obliges it to avoid the kind of "narrow or pedantic"[108] approach taken by the Supreme Court in confining the promise to a promise to give a notice of renewal on whatever terms the appellant might stipulate. But even on that approach there was a binding contract. The fact that latitude is left to one party in the performance of a promise does not make the promise illusory or uncertain: it is only illusory or uncertain if the promisor has a discretion not to perform at all.[109] Older cases about the certainty of options to renew where rent was not determined[110] should no longer be considered to be good law in the light of *Trustees Executors & Agency Co Ltd v Peters*[111] and *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd.*[112] Decisions about agreements to
20 purchase and agreements to lease are distinguishable.[113]

65. It is no objection that the collateral contracts were oral and were made in the context of negotiating contracts (the leases) which were reduced to writing. Nettle JA said about this situation:[114]

> The test is what was said and done and how it would be discerned objectively – and the fact is that business people are not infrequently inclined to trust other business persons who make promises to them to the point that they do not insist upon having those

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[105] *Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494 per Lord Tomlin at 499. See also *Upper Hunter County District Council v Australian Chilling & Freezing Co* (1968) 118 CLR 429 per Barwick CJ at 436-7; *Banque Bruxelles Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502 per Rogers J at 531.

[106] cf *Ermogenous v Greek Orthodox Community of SA* (2002) 209 CLR 95 per Gaudron, McHugh, Hayne and Callinan JJ at 106 [26], [27].

[107] Mason & Gageler, "The Contract" in Finn (ed) *Essays on Contract* (1987) p 1 at 14, citing *Edwards v Skyways Ltd* [1964] 1 WLR 349 at 355. See also *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32 per Ormiston J at 67.

[108] *Upper Hunter County District* per Barwick CJ at 437.

[109] *York Air Conditioning and Refrigeration (A/sia) Pty Ltd v Commonwealth* (1949) 80 CLR 11; *Thorby v Goldberg* (1964) 112 CLR 597; *Godeke v Kirwan* (1973) 129 CLR 629.

[110] See, e.g., *Beattie v Fine* [1925] VLR 363.

[111] (1960) 102 CLR 537.

[112] (1982) 149 CLR 600.

[113] See, e.g., *Whitlock v Brew* (1968) 118 CLR 445; *Powell v Jones* [1968] SASR 394.

[114] *McMahon v National Foods Milk Ltd* (2009) 25 VR 251 at 273 [41], in reasons in which his Honour ultimately deferred to the trial judge's finding that no collateral contract had been made.

promises reduced to writing. If such situations are to be looked at objectively with an informed knowledge of all of the circumstances, the honest and reasonable business person observer may not hesitate to conclude that a deal had been done.

66. It would, however, be a legitimate objection that the oral collateral contracts were inconsistent with the main contracts, based on the authority of *Hoyt's Pty Ltd v Spencer*[115] and *Maybury v Atlantic Union Oil Co Ltd*.[116] But in this respect the Tribunal's conclusion was also correct. The contrary view depends on construing the collateral contracts as fettering a discretion invested in the appellant by the leases. As the Tribunal reasoned, the discretion whether or not to offer to renew the leases was not invested in the appellant by the leases. It was a discretion which it possessed by virtue of being the reversioner and cl 2.3 of the leases merely regulated the manner of exercise of the discretion. Thus there was no relevant inconsistency.[117]

67. If the forgoing submission on the rule in *Hoyt's v Spencer* and *Maybury* is not accepted then the respondents seek special leave for a reconsideration of those cases. The rule derived from those cases has been widely criticised because it is inconsistent with the modern theory of objective intention, the relaxation of the parol evidence rule and the prevalence of standard form contracts.[118] It plainly works injustice as the present case demonstrates. Accepting (as the Tribunal found) that the parties' bargain in the present case was to confer further five year terms notwithstanding the written terms of the leases, and given the plausible explanation for that inconsistency, this bargain would be frustrated by a technical legal rule which business people cannot be expected to know. If the rule cannot be sensibly confined by constructions of the kind adopted by the Tribunal, then it should be abolished.

68. Alternatively, the rule can be avoided by upholding the estoppels contended for by the respondents. It has been held that the rule can be circumvented in this fashion.[119] Brennan J persuasively explained in *Waltons Stores* why the circumvention of contractual rules by estoppels poses no threat to the coherence of the law.[120] This was approved in *Giumelli*[121] and

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[115] (1919) 27 CLR 133.

[116] (1953) 89 CLR 507.

[117] [2012] VCAT 225 at [146].

[118] See Seddon, "A Plea for the Reform of the Rule in *Hoyt's Pty Ltd v Spencer*" (1978) 52 *ALJ* 372; Mason & Gageler *op cit* pp 17-18; Stewart, "Oral Promises, Ad Hoc Implication and the Sanctity of Written Agreements" (1987) 61 *ALJ* 119 at 125-129; Cheshire & Fifoot, *Law of Contract* (10th Aust ed) [10.6].

[119] *Edensor Nominees Pty Ltd v Anaconda Nickel Ltd* [2001] VSC 502 per Warren J at [193]; *Wright v Hamilton Island Pty Ltd* (2003) Q ConvR ¶54-588 (where the judges divided 2:2 on whether the collateral contract was inconsistent with the main contract); *Saleh v Roumanos* (2010) 79 NSWLR 453.

[120] 164 CLR 423-6; see also per Mason CJ and Wilson J at 401.

[121] 196 CLR 101 per Gleeson CJ, McHugh, Gummow and Callinan JJ at 120-1.

more recently the Court, in upholding an application of the parol evidence rule, allowed for exceptions in these terms:[122]

> [I]n the nature of things, oral agreements will sometimes be disputable. Resolving such disputation is commonly difficult, time-consuming, expensive and problematic. Where parties enter into a written agreement, the Court will generally hold them to the obligations which they have assumed by that agreement. At least, it will do so **unless relief is afforded by the operation of statute or some other legal or equitable principle applicable to the case.** Different questions may arise where the execution of the written agreement is contested; but that is not the case here. In a time of growing international trade with parties in legal systems having the same or even stronger deference to the obligations of written agreements (and frequently communicating in different languages and from the standpoint of different cultures) this is not a time to ignore the rules of the common law upholding obligations undertaken in written agreements. It is a time to maintain those rules. **They are not unbending. They allow for exceptions. But the exceptions must be proved according to established categories.** The obligations of written agreements between parties cannot simply be ignored or brushed aside. [Emphasis added.]

Special leave to cross-appeal

69. Finally, special leave to cross-appeal should be granted. The forgoing submissions demonstrate both that it would do an injustice to determine the appeal alone and also that the cross-appeal raises questions of a special nature requiring the attention of the High Court, especially as to the proper application of s 148 of the VCAT Act and the operation of the rule in *Hoyt's v Spencer* and *Maybury*.[123]

Part VIII: Estimate of Time for Oral Argument

70. Presentation of the respondents' oral argument on all issues in the appeal and cross-appeal is estimated to require 2½ - 3½ hours.

Dated: 19 February 2016

Michael Pearce
(03) 9225 8840
email@michaelpearce.com.au

Robert Hay
(03) 9225 7964
rhay@vicbar.com.au

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[122] *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2005) 218 CLR 471 at 483-4 [35].

[123] *DPP v United Telecasters Sydney Pty Ltd* (1990) 168 CLR 594 per Brennan, Dawson and Gaudron JJ at 602.