CASE NOTES

FEDERAL COMMISSIONER OF TAXATION v. WESTRADERS PTY LTD[1]

Taxation law — Principles of interpretation of tax Acts — Form and substance — Partnerships — Change in ownership — Disposals other than in the ordinary course of business — Election by partnership to value trading stock at cost price — Dividend stripping — Income Tax Assessment Act 1936 (Cth) — Ss. 36, 36A

Jensen Mining and Investment Limited was a public company which traded in shares. It also engaged in dividend stripping.[2] Through dividend stripping it made a "loss" of $6,463,484.00 between 1973 and 1975. It then worked out a way of sharing that loss among other people who wanted to avoid paying tax. This was done by setting up a partnership in 1975, called Jenspart. The other partners contributed $345,000.00 in cash, while Jensen transferred shares worth $111,284.00. These shares were originally worth $6,584,513.00, but after being stripped were worth only $121,029.00.

Jenspart exploited sections 36 and 36A of the Income Tax Assessment Act 1936 (Cth). Section 36 deals with the disposal of trading stock other than in the ordinary course of the taxpayer's business. By section 36(8)(a) the value of the trading stock shall be the market value at the time of disposal. That value is included in the assessable income of the person disposing of the trading stock. The person acquiring the trading stock is deemed to have acquired it at the same value. Thus what would otherwise be a tax-free capital gain becomes assessable income of the disposer and an allowable deduction for the acquirer.

Section 36A deals with a problem first revealed in 1951 in *Rose* v. *Federal Commissioner of Taxation*.[3] Section 36A(1) extends section 36 to include disposals of trading stock by a person to a partnership of which he is a member.[4] Section 36A(2), however, makes a significant

[1] (1980) 30 A.L.R. 353; (1980) 54 A.L.J.R. 460; (1980) 80 A.T.C. 4,357; (1980) 11 A.T.R. 24. High Court of Australia; Barwick C.J., Mason, Murphy, Aickin and Wilson JJ.

[2] At its simplest, dividend stripping can be described as follows. Over the years a company puts its profits into reserve, instead of distributing them as dividends. The company is then sold to a dividend stripper. The price that the stripper pays for the shares in the company reflects not only the profitability of the company business, but also the amount of profits lying in reserve. The stripper then distributes the reserves to himself as a dividend. Having done this, he sells the company. The price he gets for the shares is less than the price he originally paid, because there are no longer any reserves. But as long as he is a share trader, this loss is deductible. The loss is about the same as the dividends he received. Thus the loss and the dividend cancel each other out, and the stripper receives the profits of the company tax free.

[3] (1951) 84 C.L.R. 118.

[4] S. 36A is not actually confined to partnerships. It covers a change "in the ownership of, or in the interests of persons in, property". However, changes in the composition of partnerships is the most common application of s. 36A. By s. 36A(1)(a) and (b) they are specifically included in the operation of s. 36A.

exception to section 36(8). Instead of taking the market value of the trading stock the partnership can elect to value the trading stock at its cost price.[5] There is another significant difference between sections 36 and 36A. Section 36 applies to any disposal not in the ordinary course of the taxpayer's business (section 36(1)(c)). But section 36A is not so confined. On its face it could apply to every transaction from the most extraordinary to the most normal.

How did the provisions apply to the present case? Jenspart argued that because Jensen was a partner in Jenspart, section 36A applied to the shares that Jensen transferred to Jenspart. It was irrelevant whether or not the transfer was part of Jensen's normal business. Because section 36A applied, Jenspart could make an election under section 36A(2). It elected to treat the value of the shares as $6,584,513.00 (the price Jensen paid for them) and not $111,284.00 (their actual market value after being stripped). When Jenspart sold the shares for $121,029.00, it claimed that instead of making a modest profit, it had actually made a huge "loss" of $6,463,484.00.

Westraders Pty Ltd was a partner in Jenspart. It was entitled to 3.85% of the "loss". The Commissioner for Taxation disallowed its claim, and it appealed to the New South Wales Supreme Court. Rath J. found in favour of Westraders,[6] and the Commissioner appealed to the Federal Court. Deane and Toohey JJ. (Brennan J. dissenting) again found in favour of Westraders,[7] and the Commissioner appealed to the Full Court of the High Court. A bare majority (Barwick C.J., Mason and Aickin JJ., Murphy and Wilson JJ. dissenting) dismissed the appeal.

The Commissioner's principal argument was that section 36A did not apply to disposals of trading stock which occurred in the ordinary course of business. He argued this in two ways. First, section 36(1)(c) could be read into section 36A(1). In other words, since section 36A had been intended to apply section 36 to such things as partnerships, the requirement that the disposal be not in the ordinary course of business (which appears in section 36) could be impliedly incorporated in section 36A. The Commissioner's alternative submission was that sections 36 and 36A could be read together. This achieves the same effect as the first submission, but in a different way. Instead of incorporating the provisions of section 36 in section 36A, the two sections could be regarded as jointly covering the particular area.

All the judges rejected the Commissioner's first argument. Mason J. pointed out that the terms of section 36A were quite clear.[8] There was no reason to read anything further into them. Even the minority judges had to concede that section 36A was clear on its face. Wilson J. (with

[5] This is the effect of s. 36A(2). The wording of the sub-section relates to the various methods of valuing trading stock. S. 31(1) allows a taxpayer to value trading stock in one of three ways: its cost price, market value or replacement value.

[6] *Westraders Pty Ltd* v. *Federal Commissioner of Taxation* (1977) 17 A.L.R. 232.

[7] *Federal Commissioner of Taxation* v. *Westraders Pty Ltd* (1979) 38 F.L.R. 306.

[8] (1980) 30 A.L.R. 353, 366.

whom Murphy J. agreed) described the suggestion of reading section 36(1)(c) into section 36A(1) as a task of "extraordinary complexity"; section 36A had already "in its own words covered the ground" of section 36(1).[9]

The majority also rejected the Commissioner's alternative submission. Barwick C.J. repeated his view that section 36A was already sufficiently clear.[10] Mason J. went further. He denied that section 36A had been enacted merely to overcome the effect of *Rose's* case. He believed that it had a wider operation. The judgment of Latham C.J. in *Farnsworth* v. *Federal Commissioner of Taxation*[11] had "raised a very serious question as to the application of ss 28 and 31 to undivided fractional interests" in trading stock.[12] Section 36A was intended to overcome the doubts raised in *Farnsworth* as well as the effect of *Rose*. Therefore it did apply to disposals of trading stock in the ordinary course of business.[13]

If Mason J. is correct in his opinion, then the language of section 36A mirrors the intention of the drafters of the section. This is supported by the subsequent amendments to section 36A introduced in 1977[14] and 1979.[15] Instead of incorporating the provisions of section 36 in section 36A, Parliament excluded shares, debentures and choses in action from the election provisions (section 36A(5)). By sections 36A(7) and 36(9) the Commissioner is given wide powers to value trading stock. An election under section 36A(2) can now be made only where the Commissioner's valuation under section 36(9) is less than or equal to the valuation made by the persons making the election. The effect of these amendments is that instead of section 36A being restricted to disposals other than in the ordinary course of business, the ability to make an election has been restricted.

The minority judges took an unusual approach to the interpretation of the Act. Wilson J. (with whom Murphy J. agreed) looked at the structure of the Act. Sections 36 and 36A do not exist in isolation. They are placed

> in the context of the general charging sections of the Act in their application to trading stock. That context exhibits the features that purchases are allowable deductions under s 51, sales constitute income under s 25, and the position of stock on hand at the end of the financial year is regulated by ss 28 and 31. In my opinion, there is nothing to be gleaned from s 36A or any other section of the Act to yield a legislative intent that these sections to which I have just referred are abrogated in their application to transactions in the ordinary course of business which possess the added feature that the purchaser is a partnership of which the vendor is a member. Section 36A on its proper construction has no application to such transactions.[16]

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[9] *Id.* 372.
[10] *Id.* 356.
[11] (1949) 78 C.L.R. 504.
[12] (1980) 30 A.L.R. 353, 367.
[13] *Id.* 366-368.
[14] Act No. 57 of 1977, s. 6.
[15] Act No. 146 of 1979, s. 5.
[16] (1980) 30 A.L.R. 353, 372.

There is nothing new in regarding sections of Acts as being dominant over others. This approach was taken by the High Court in *Maguire* v. *Simpson*,[17] for example, in determining the basis for the Commonwealth's liability in tort. But it is unusual to use this approach in interpreting the Income Tax Assessment Act.[18] In the process of interpreting taxation and penal Acts strictly, the courts have tended to interpret individual sections in isolation from the rest of the Act.

Why are tax Acts interpreted literally?

Barwick C.J. has long believed that tax Acts should be interpreted literally. He repeated his views in this case. Parliament must specify

> as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax.[19]

The court must then simply interpret the language that Parliament uses. He emphasised that it is the language that is important.

> It is not for the court to mould or to attempt to mould the language of the statute so as to produce some result which it might be thought the Parliament may have intended to achieve, though not expressed in the actual language employed.[20]

He argued that it was essential to the maintenance of a free society that tax Acts be interpreted literally. He adopted the words of Deane J. in the Federal Court:

> For a court to arrogate to itself, without legislative warrant, the function of overriding the plain words of the Act in any case where it considers that overall considerations of fairness or some general policy of the Act would be best served by a decision against the taxpayer would be to substitute arbitrary taxation for taxation under the rule of law and, indeed, to subvert the rule of law itself . . .[21]

Barwick C.J. made three assumptions. First, he assumed that the English language is capable of the precision of meaning that he demands. Secondly, he assumed that taxation and penal laws are unique in having serious consequences for citizens who infringe them. Thirdly, he assumed that if these Acts are not interpreted strictly, courts will be arbitrary in deciding whether or not tax should be imposed. With respect, none of these assumptions is justified.

First, language is not a precise instrument. For example, is a floating casino a "leisure facility" (section 51AB(1) Income Tax Assessment Act 1936)? It is used "in connexion with holidays or sport, recreation or similar leisure-time pursuits". But it is not land, nor strictly speaking a "boat or vessel", and probably not a "building or other structure".

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[17] (1977) 139 C.L.R. 362.

[18] This does not include the special effect of s. 82, which prevents double deductions. In effect s. 82 allows the Commissioner to make some sections relating to deductions dominant over others. This prevents a deduction being claimed under more than one section. But the effect of the decision of Wilson J. is not related to this.

[19] (1980) 30 A.L.R. 353, 354.

[20] *Id.* 355.

[21] *Ibid.* ((1978) 38 F.L.R. 306, 319-320.)

Most people would accept that it was a leisure facility. But because it does not conform to the entire legal definition, its status under section 51AB is uncertain.[22] It is submitted that it is impossible for definitions such as the one in section 51AB(1) to be sufficiently precise to cover the infinite variety of human ingenuity. They can cover that variety in a general way, rather like guidelines. But it is a misunderstanding of the nature of definitions to expect them to include all things that are in fact leisure facilities (or whatever is being defined), and to exclude all things that are in fact not leisure facilities.[23]

Therefore, Parliament cannot specify "as far as language will permit, with unambiguous clarity" the obligation to pay tax. Murphy J. made the same point.

> The nature of language is such that it is impossible to express without bewildering complexity provisions which preclude the abuse of a strict literalistic approach.[24]

Murphy J. did not consider the other side of the problem. What is a court to do when Parliament clearly intends to do one thing, but through poor drafting the legislation equally clearly states something quite different?

One can note in passing the decisions of Mason and Wilson JJ. Mason J. did not reject the Commissioner's submissions simply because of a literal reading of sections 36 and 36A. He asked why section 36A had been passed, and concluded that it was intended to have the wide operation that appeared on its face. In other words he found it necessary to do more than look only at the words of the Act. Wilson J. interpreted section 36A in its context in the Act. He conceded that he was not interpreting the section literally. But one can hardly suggest that he was "without legislative warrant . . . overriding the plain words of the Act". He found that there was a general scheme of taxation liability. He found this scheme from the words of the Act itself.

Secondly, taxation and penal laws are not the only laws with severe consequences for those who infringe them. For example, damages in negligence cases regularly exceed $250,000.00 Property settlements under the Family Law Act 1975 (Cth) frequently involve houses and land worth many hundreds of thousands of dollars. In these and other cases, courts have gone out of their way to decide cases on principles of justice and equity. Arguments based on a strict literalist interpretation of statutes will usually be rejected. If the courts are prepared to impose liability in these areas of the law based on broad concepts, why should taxation and penal laws be treated differently?

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[22] S. 51AB(1) contains another problematical definition. Would a floating casino be "essential to the efficient conduct of that business"? A fishing boat would be essential to the efficient conduct of the business of fishing; but a casino does not have to be afloat. A similar problem arose in relation to a floating restaurant in the United Kingdom: *Benson (Inspector of Taxes)* v. *Yard Arm Club Ltd* [1978] 2 All E.R. 958.

[23] A further illustration of the problems of inclusion and exclusion is the definition of a lobster. The Oxford Dictionary defines it as a "ten-footed . . . crustacean". If you cut a leg off a lobster, does it cease to be a lobster?

[24] (1980) 30 A.L.R. 353, 371.

Murphy J. argued that tax Acts should not be treated differently.

> It is universally accepted that in the general language it is wrong to take a sentence or statement out of context and treat it literally so that it has a meaning not intended by the author. It is just as wrong to take a section of a tax Act out of context, treat it literally and apply it in a way which Parliament could not have intended.[25]

Thirdly, if the courts were to interpret tax Acts broadly rather than strictly, would their decisions necessarily be arbitrary? It is true that in negligence cases and family law matters it is hard to find consistency or certainty in the reported decisions. But the same High Court judges who have stressed certainty in taxation decisions have stressed fairness and justice in other decisions. Are these other decisions arbitrary? Taxation decisions themselves are not always consistent either. The cases on repairs, travel from home to work, home offices, and most notably section 26(a) (assessability of profits from profit-making undertakings or schemes) are difficult to reconcile. This is not a criticism of the courts. It is a reflection of the infinite variety of human ingenuity.

Other jurisdictions do not interpret tax Acts so strictly. The United States Supreme Court, for example, is prepared to look for the intention of Congress. In *Gregory* v. *Helvering*, the Court in discussing whether a particular transaction came within the terms of the Revenue Act 1928 (U.S.) said this:

> But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended.[26]

Murphy J. suggested that literalism was "an extreme, which has generally been rejected as unworkable and a less than ideal performance of the judicial function".[27] He pointed out the dangers involved in the way Parliament was responding to strict literalism.

> If strict literalism continues to prevail, the legislature may have no practical alternative but to vest tax officials with more and more discretion. This may well lead to tax laws capable, if unchecked, of great oppression.[28]

Support for this argument can be found in two recent articles. K. W. Ryan has discussed the trend towards vesting more discretion in tax officials, over 300 sections of the Act now vesting discretion in the Commissioner.[29] And Dr Spry has criticised the Commissioner's allegedly arbitrary imposition of penalty tax under section 226:

> Abuse of power, when it takes place, is denied and concealed; it is difficult to obtain admissions of true purpose or to prove that explanations that are given are false; and expense and, above all, the doubts and difficulties of dealing with an opponent with very considerable resources are oppressive.[30]

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[25] *Ibid.*

[26] (1935) 293 U.S. 465, 469.

[27] (1980) 30 A.L.R. 353, 371.

[28] *Ibid.*

[29] Ryan, "Curbing the Commissioner's Discretionary Powers" (1979) 1 Tax Essays 1.

[30] Spry, "Bad Faith And The Commissioner" (1979) 8 Australian Tax Review 127, 128.

He reached a similar conclusion to that of Murphy J. on the effect of this abuse of power:

> When taxpayers are unlawfully harassed because officials, for reasons of their own which have no statutory or other proper basis, choose to prejudice them, one of the bases for security in society is undermined.[31]

Form versus Substance

This issue was stated succinctly by Barwick C.J.:

> the citizen has every right to mould the transaction into which he is about to enter into a form which satisfies the requirements of the statute. It is nothing to the point that he might have attained the same or a similar result as that achieved by the transaction into which he in fact entered by some other transaction, which, if he had entered into it, would or might have involved him in a liability to tax, or to more tax than that attracted by the transaction into which he in fact entered. Nor can it matter that his choice of transaction was influenced wholly or in part by its effect upon his obligation to pay tax.[32]

Compare this with the way in which courts decide whether a partnership exists.[33] It is the substance of the relationship between the partners that is important, not the form.

> If a partnership in fact exists . . . no concealment of name, no verbal equivalent for the ordinary phrases of profit or loss, no indirect expedient for enforcing control over the adventure will prevent the substance and reality of the transaction being adjudged to be a partnership. . . . And no "phrasing of it" by dexterous draftsmen . . . will avail to avert the legal consequences of the contract.[34]

And the reverse may be true too. If the parties did not intend to create a partnership, mere words in their contract cannot make a partnership.[35]

Murphy J. dealt with the issue of form and substance in some detail. He argued that the shares sold to Jenspart were not the same shares that had been bought by Jensen. They might in form still be shares, and still be shares in the companies which had been bought. But in substance they were quite different. This argument was first put by Windeyer J. in his decision in *Investment and Merchant Finance Corporation Ltd* v. *Commissioner of Taxation of the Commonwealth*,[36] the first High Court decision on dividend stripping. He drew two analogies:

> If a man bought land with a crop ripe for harvest, and after harvesting the crop, sold the land bare for less than he paid for it under crop, the value of the crop to him must, in any rational economic calculation, be brought to account in arriving at his profit or loss of the

[31] *Ibid.*

[32] (1980) 30 A.L.R. 353, 355.

[33] That is, the common law partnership. A partnership for taxation purposes is a much wider concept (s. 6(1)).

[34] *Adam* v. *Newbigging* (1888) 13 App. Cas. 308, 315.

[35] *Beckingham* v. *The Port Jackson and Manly Steamship Company* (1956) 57 S.R. (N.S.W.) 403, 409-410.

[36] (1970) 120 C.L.R. 177.

> whole enterprise of buying, harvesting and selling. Similarly if he bought a mine, extracted some of the mineral from it, and then sold the mine.[37]

Windeyer J. decided the case in favour of the Commissioner. On appeal to the Full Court of the High Court his decision was reversed (Barwick C.J., Menzies and Walsh JJ., McTiernan J. dissenting).[38] But the only judge to refer to the question of form and substance was Menzies J., who drew a third analogy:

> It is as if an aged stud cow in calf were to be bought by a breeder and dealer for $500 and after the birth of the calf the cow was sold to a butcher for $100.[39]

Apart from this brief reference, little has been said or argued before the High Court on this issue in relation to dividend stripping. But in *Westraders* case Murphy J. took up the issue again. To the plethora of analogies he added a fourth. A jeweller buys and sells old rings. He buys rings with gemstones in them. The gemstones are removed and the stoneless rings sold. Although the jeweller has bought and sold rings, the rings he has sold are not the same rings he bought.[40]

Murphy J. did accept that stripped shares could themselves be trading stock.[41] But he did not accept the rest of the reasoning in the *IMFC* case and in *Patcorp Investments Ltd* v. *Federal Commissioner of Taxation*.[42] He described the argument put by Westraders as

> a feat of modern magic, successful only because observers allow themselves to be deceived. In commercial reality, the asset-stripped shares Jensen disposed of . . . were not the same trading stock as the shares originally acquired by it.[43]

He declared that the Act is intended to apply to "commercial realities".[44] Section 36A was not intended to be used

> as a vehicle for artificial and contrived transactions for tax avoidance purposes. It is a mistake to hold that any circumstances (however artificial and contrived) which literally fit the words in s 36A therefore comply with them.[45]

As Murphy J. pointed out, the U.S. Supreme Court has adopted a "substance" rather than "form" approach. This is how Michie[46] summarises the principle:

> In order for a tax avoidance device to succeed, it must have reality; it must have some real purpose other than mere tax avoidance or, at least, must accomplish some real result, outside of tax saving.[47]

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[37] *Id.* 187.
[38] (1971) 125 C.L.R. 249.
[39] *Id.* 267.
[40] (1980) 30 A.L.R. 353, 369-370.
[41] *Id.* 369.
[42] (1976) 10 A.L.R. 407.
[43] (1980) 30 A.L.R. 353, 370.
[44] *Ibid.*
[45] *Ibid.*
[46] Michie, *Federal Tax Handbook* (34th ed. 1971) 2 volumes.
[47] *Id.* ii, 923.

But an operation "having no business or corporate purpose" will be ignored in assessing the taxpayer's taxable income.[48]

Michie gives an example of the sort of "step" transaction that would be struck down by this approach. A company negotiates with X to sell some assets, and X pays a deposit. But the shareholders, realising that the sale in this form would attract capital gains tax, call a meeting of the company. They distribute the assets to themselves, and then sell the assets to X. The deposit is deducted from the sale price. By arranging the sale in this *form*, they hope to avoid the extra tax. But the *substance* of the arrangement is that the company is still selling its assets to X, and not to the shareholders. Therefore it is still subject to capital gains tax.[49]

Australian courts have rejected the "substance" approach, at least in taxation decisions: "So long as the parties choose to clothe the transaction with its present form, the legal consequences must follow".[50] The reasoning is much the same as that in favour of a literalist interpretation. A "substance" approach substitutes " 'the uncertain and crooked cord of discretion' for 'the golden and straight metwand of the law' ".[51]

It is nevertheless surprising that the arguments first raised by Windeyer J. and now taken up by Murphy J. have not been more strongly argued by the Commissioner. Although the Full Court of the High Court twice upheld the tax advantages of dividend stripping (in the *IMFC* and *Patcorp* cases), the decisions rested largely on other grounds.

Conclusions

The decision in *Westraders* case may indicate that the High Court is moving towards repudiating the strictly literalist approach to interpreting tax Acts. A majority of the Court (Mason, Murphy and Wilson JJ.) interpreted the Act in the light of Parliament's intention. With the retirement of Barwick C.J. and the appointment of Brennan J. to the High Court, this trend may be accelerated. Brennan J. dissented in the Federal Court in *Westraders*. Had he been sitting on the High Court in place of Barwick C.J., the decision in *Westraders* would have gone the other way (Murphy, Wilson and Brennan JJ., Mason and Aickin JJ. dissenting). More significantly, the appointment of Brennan J. means that there may be a majority of the seven judges of the High Court who would look to the intention of Parliament when interpreting tax Acts (Mason, Murphy, Wilson and Brennan JJ., and possibly Aickin J., who agreed with Mason J., though he also agreed with Barwick C.J.).

While this trend might please critics of the High Court, one should not confuse the decision with the reasons. Just because the High Court may change its approach to interpretation does not mean that its future decisions will necessarily be different. Mason J. did not interpret the Act

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[48] *Gregory* v. *Helvering* (1935) 293 U.S. 465, 469.

[49] Michie, *op. cit.* i, 119.

[50] *Stericker* v. *Commissioner of Taxation (N.S.W.)* (1935) 3 A.T.D. 160, 161 *per* Jordan C.J.

[51] *Inland Revenue Commissioners* v. *Duke of Westminster* [1936] A.C. 1, 19 *per* Lord Tomlin.

literally, yet he reached the same decision as Barwick C.J. who did interpret the Act literally. This result exposes a problem that the High Court will have to resolve if it changes its approach to interpretation. The question is not whether Parliament's intention should be considered. Both Mason and Wilson JJ. considered it. They disagreed, however, on the more fundamental question of *what* is Parliament's intention.[52]

CHRISTOPHER ERSKINE*

AUSTRALIAN CONSERVATION FOUNDATION INCORPORATED v. COMMONWEALTH OF AUSTRALIA AND OTHERS[1]

Administrative law — Environmental law — Standing to sue — Corporation — Environmental Protection (Impact of Proposals Act) 1974 (Cth) — Violation of public right — Boyce v. Paddington Borough Council

> But this is not ordinary, run-of-the-mill litigation. The case poses —if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?[2]

The Australian Conservation Foundation, an association incorporated in the A.C.T. with a membership throughout Australia of 6,500, brought an action before Aickin J. in the original jurisdiction of the High Court seeking declaratory and injunctive relief against the Commonwealth, three Ministers of State of the Commonwealth and the Reserve Bank of Australia, alleging a failure by the respondents to follow administrative procedures made under the Environmental Protection (Impact of Proposals) Act 1974 (Cth) in relation to approvals given in respect of the Iwasaki tourist development project at Yeppoon in Queensland. Aickin J. struck out the appellant's statement of claim and dismissed its action for want of *locus standi.* The appellant appealed to the Full Court which upheld the decision of Aickin J. and dismissed the appeal (Gibbs, Stephen, and Mason JJ., Murphy J. dissenting).

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[52] The possibility of referring to Hansard to discover Parliament's intention was rejected by the House of Lords in *Black-Clawson International Ltd* v. *Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591. However, it is still open to the High Court to take a different view.

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[1] (1980) 28 A.L.R. 257; (1980) 54 A.L.J.R. 176. High Court of Australia; Gibbs, Stephen, Mason and Murphy JJ.

[2] *Sierra Club* v. *Morton* (1972) 405 U.S. 727, 755-756 *per* Blackmun J. (dissenting).