

# FEDERAL COURT OF AUSTRALIA

## Australian Institute of Private Detectives Ltd v Privacy Commissioner

[2004] FCA 1440

**PRIVACY LAW** – applicant seeks declarations that certain actions of its members on behalf of their clients are not prohibited by the *Privacy Act 1988* (Cth) – whether the Court has jurisdiction to make such a declaration

**FEDERAL COURT** – jurisdiction – whether there is a ‘matter’ before the Court – whether what is sought is an advisory opinion on a hypothetical question – lack of concrete facts – *Constitution*, ss 76(ii), 77(i) – *Judiciary Act 1903* (Cth), s 38B(1A)(c)

*Constitution* ss 75, 76, 77

*Privacy Act 1988* (Cth) ss 6, 6C, 13A, 16A, Pt IIIA, 36, 52, 55A, 72, 98, Sch 3 cl 2.1(g)

*Judiciary Act 1903* (Cth) s 39B(1A)(c)

*Federal Court of Australia Act 1976* (Cth) s 21

*Trade Practices Act 1974* (Cth) s 50

*Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 followed

*In re Judiciary and Navigation Acts* (1921) 29 CLR 257 followed

*Gould v Brown* (1988) 193 CLR 346 cited

*Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334 followed

*Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297 cited

*Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust* (2001) 109 FCR 488 cited

*Harts Australia Ltd v Commissioner of Taxation* (2001) 109 FCR 405 cited

*Kockums AB v Commonwealth* [2002] FCAFC 138 cited

*BP Australia Pty Ltd v Nyran Pty Ltd* [2002] FCAFC 163 cited

*SmithKline Beecham (Aust) Pty Ltd v Chipman* [2002] FCA 674 cited

*Australian Gas Light Company v Australian Competition and Consumer Commission (No 2)* [2003] FCA 1229 distinguished

**AUSTRALIAN INSTITUTE OF PRIVATE DETECTIVES LTD v PRIVACY COMMISSIONER**

**NSD 307 of 2004**

**SACKVILLE J**

**SYDNEY**

**5 NOVEMBER 2004**

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY**

**NSD 307 of 2004**

**BETWEEN: AUSTRALIAN INSTITUTE OF PRIVATE DETECTIVES LTD  
APPLICANT**

**AND: PRIVACY COMMISSIONER  
RESPONDENT**

**JUDGE: SACKVILLE J**

**DATE OF ORDER: 5 NOVEMBER 2004**

**WHERE MADE: SYDNEY**

**THE COURT ORDERS THAT:**

1. The application be dismissed.
2. The applicant pay the respondent's costs.
3. Reserve liberty to the Commonwealth to apply for a costs order.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY**

**NSD 307 of 2004**

**BETWEEN: AUSTRALIAN INSTITUTE OF PRIVATE DETECTIVES LTD  
APPLICANT**

**AND: PRIVACY COMMISSIONER  
RESPONDENT**

**JUDGE: SACKVILLE J**

**DATE: 5 NOVEMBER 2004**

**PLACE: SYDNEY**

### **REASONS FOR JUDGMENT**

#### **THE PROCEEDINGS**

1           The applicant ('the Institute') is a public company limited by guarantee. It represents the interests of licensed private inquiry agents and commercial agents in all States and Territories. The Institute has some 600 members.

2           The Institute claims to be aggrieved because the *Privacy Act 1988* (Cth) ('*Privacy Act*') effectively prevents 'organisations' (a defined term) divulging certain kinds of information that the members of the Institute apparently wish to obtain on behalf of their clients. The Institute has sought to address this grievance by claiming declaratory relief against the respondent ('the Commissioner').

3           The Institute has filed several successive versions of its pleadings, the latest of which is a second further amended statement of claim ('Statement of Claim'). Initially, the Institute named the Commonwealth as the respondent to the proceedings, but the Statement of Claim substitutes the Commissioner as the sole respondent. It is by no means clear that the Commissioner is the appropriate party to the proceedings, having regard to the nature of the relief claimed by the Institute. Nothing, however, turns on this for present purposes.

4           The declarations now sought by the Institute are in extremely wide terms, as follows:

- ‘1. *The disclosure by an organization of personal information to the plaintiff [sic] or its members for the purpose of enabling the plaintiff or member to investigate, on behalf of private citizens and corporations, matters concerning litigation, or potential litigation, constitutes disclosure or use “required or authorised by or under law” within the meaning of National Privacy Principle 2.1(g) and is not a disclosure or use which is contrary to the provisions of the Privacy Act 1988.*
2. *The disclosure of personal information by the plaintiff [sic] or its members which has been obtained by them for the purpose of enabling them to investigate, on behalf of private citizens or corporations, matters concerning litigation, or potential litigation, constitutes disclosure or use “required or authorised by or under law” within the meaning of National Privacy Principle 2.1(g) and is not a disclosure or use which is contrary to the provisions of the Privacy Act 1988.’*

5           The Commissioner has filed a notice of motion seeking orders that the proceedings be dismissed as incompetent or as disclosing no reasonable cause of action. The Commissioner relies on two arguments:

- First, the Court lacks jurisdiction to grant the relief sought by the Institute because to do so would amount to giving an advisory opinion on a hypothetical question. According to the Commissioner, the proceedings do not give rise to a ‘matter’ capable of being determined by the Court.
- Secondly, even if the Court has jurisdiction, the Statement of Claim discloses no reasonable cause of action because the pleadings cannot possibly justify the making of the declarations sought.

## **THE STATEMENT OF CLAIM**

6           The Statement of Claim is in the following terms:

- ‘1. *The Plaintiff [sic] is incorporated and capable of suing in its corporate name and style.*
2. *The Plaintiff is the Australian national entity representing its members who carry on the business of private inquiry agents and commercial agents throughout Australia and overseas.*
3. *The members of the Plaintiff conduct their activities under licences granted to them by the States under legislation enacted by those States.*
4. *The Plaintiff through its members undertakes investigations (hereafter referred to as “investigations”) on behalf of clients in connection with litigation, potential litigation and matters related to litigation.*
5. *The clients who engage the Plaintiff and its members are private*

- citizens, corporations and State and Commonwealth entities.*
6. *The investigations involve, inter alia, the obtaining of personal information of Australian citizens from organizations who have obtained and recorded that information for purposes connected with their own business activities.*
  7. *The provisions of the Commonwealth Privacy Act 1988 (hereafter referred to as “the Act”) proscribe the disclosure by organizations of personal information of citizens to the plaintiff and its members unless that disclosure is ‘required or authorised by or under law’.*
  8. *The disclosure by organisations of personal information of citizens to the Plaintiff and its members in circumstances where that information is sought in relation to investigations by the Plaintiff and its members connected to litigation or potential litigation is, within the terms of the Act, “required or authorised by or under law”.*
  9. *The Act permits the Privacy Commissioner to make a Public Interest Determination that an act or practice of an organisation which would otherwise constitute a breach of privacy under the Act does not constitute such a breach where the public interest in the organisation doing the act, or engaging in the practice, substantially outweighs the public interest in the act or conduct continuing to be proscribed.*
  10. *The Plaintiff has sought a determination from the Privacy Commissioner that the disclosure by organisations of personal information to its members for the purpose of its members investigating matters arising in relation to litigation or potential litigation does not constitute a breach of privacy within the Act and the Commissioner has declined to make such a determination.*
  11. *The Act permits the disclosure by organizations of personal information gathered for their own purposes to “enforcement bodies” where such disclosure is relevant to litigation and the investigation and prevention of criminal offences.*
  12. *Neither the Plaintiff nor its members are “enforcement bodies” within the Act.*
  13. *By reason of the refusal of the Privacy Commissioner to make a public interest determination as alleged herein the disclosure by organisations of personal information of citizens to the Plaintiff and its members in circumstances where that information is sought in relation to investigations by the Plaintiff and its members connected to litigation or potential litigation, constitutes a breach of privacy contrary to the provisions of the Privacy Act 1988.*
  14. *Organisations which breach the provisions of the Act by disclosing personal information contrary to the provisions of the Act may be subjected to penalties and may be required to pay compensation to the citizens whose personal information they have disclosed and may be subjected to other orders and relief, including injunctive relief.*
  15. *Where personal information has been disclosed by an organization to the plaintiff or its members contrary to the provisions of the Act the Plaintiff or its members may be subjected to penalties and orders, including injunctive relief and may be required to pay damages.*
  16. *Enforcement bodies do not undertake investigations for citizens, corporations or for the plaintiff or its members.*

17. *The proscription upon organizations disclosing to the Plaintiff or its members personal information concerning citizens where such information is sought by the plaintiff or its members on behalf of private citizens or corporations in connection with litigation or potential litigation may prevent the clients from obtaining information necessary for them to determine whether to institute, to maintain or to defend litigation, including criminal litigation and may prevent them from obtaining material necessary for them to be accorded a fair hearing or a fair trial.'*

7           The Statement of Claim then sets out the declarations claimed by the Institute (see [4] above). The declarations are said to be sought pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth), which empowers the Court to make binding declarations of right in relation to a matter in which it has original jurisdiction. Section 21 is not, however, a source of jurisdiction, since its terms presuppose the existence of original jurisdiction in the Court in respect of a matter.

8           In order to understand the claims made by the Institute, it is necessary to refer to certain provisions of the *Privacy Act*. Before doing so, however, it is appropriate to make some observations about the Institute's pleading.

9           First, neither the amended application nor the Statement of Claim identifies the source of the Court's jurisdiction to grant the declarations sought by the Institute. Mr Thomas, who appeared for the Institute, invoked s 55A of the *Privacy Act*. However, this provision cannot be the source of jurisdiction in the present case, as it is concerned with the enforcement of a determination made by the Commissioner following the investigation of a complaint. If the Court has jurisdiction, it must be pursuant s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'), which provides as follows:

*'The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:*

...  
(c) *arising under any laws made by the Parliament ...'*

It is this grant of jurisdiction that incorporates the requirement of a 'matter', reflecting the language of ss 76(ii) and 77(i) of the *Constitution*.

10           Secondly, par 10 of the Statement of Claim alleges that the Institute has sought a determination from the Commissioner that the disclosure by organisations of personal

information for purposes connected with litigation does not constitute a breach of privacy for the purposes of the *Privacy Act*. The evidence does not show that any such determination has been requested. On the contrary, I infer from the affidavit filed on behalf of the Institute that it has not sought any such determination from the Commissioner. In any event, the Statement of Claim does not challenge any decision made by the Commissioner, whether relating to the disclosure of information or otherwise.

11 Thirdly, the Statement of Claim does not make clear the substantive basis upon which the Institute claims to be entitled to declaratory relief. As I understood Mr Thomas, the argument he wishes to advance is that the disclosure of information necessary to enable a person to obtain a fair trial in civil or criminal proceedings is a disclosure 'required or authorised by or under law' within the meaning of National Privacy Principle 2.1(g). It is said to follow that the disclosure or use of such information cannot be contrary to the provisions of the *Privacy Act*.

12 Fourthly, although the pleading does not say so, the expressions 'organisation' and 'personal information', are apparently intended to have the same meaning as in the *Privacy Act*. Subject to certain important exceptions, an 'organisation', for the purposes of the *Privacy Act*, includes an individual, body corporate, partnership, unincorporated association or trust: s 6C(1). 'Personal information' is defined by s 6 as follows:

*'[I]nformation or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.'*

13 Fifthly, the Statement of Claim alleges, *inter alia*, that organisations which disclose personal information and individuals who receive such information in contravention of the *Privacy Act* are liable to 'penalties'. The allegation is not supported by particulars and I was not taken to the provisions of the *Privacy Act* that create offences. There are, however, some such provisions. The *Privacy Act* creates, for example, offences for certain deliberate contravening conduct by credit reporting agencies (ss 18K(4), 18R(2)), credit providers (ss 18L(2), 18N(2)), mortgage and trade insurers (s 18P(6)) and by persons who receive particular kinds of information from credit providers (s 18Q(9)). Penalties can also be imposed on persons who intentionally or dishonestly gain unauthorised access to an individual's credit file or credit report (ss 18S, 18T).

## LEGISLATION

14 I was not taken in any detail to the terms of the *Privacy Act*. However, the most significant provisions for present purposes appear to be the following.

15 Section 16A(1) of the *Privacy Act* provides that an ‘organisation’ must not do an act, or engage in a practice, that breaches an approved privacy code that binds the organisation. An ‘approved privacy code’ is a written code regulating acts and practices affecting privacy that is approved by the Commissioner: see s 6, Part IIIA.

16 Section 16A(2) of the *Privacy Act* provides as follows:

*‘To the extent (if any) that an organisation is not bound by an approved privacy code, the organisation must not do an act, or engage in a practice, that breaches a National Privacy Principle.’*

A National Privacy Principle means a clause of Schedule 3 to the *Privacy Act*: s 6.

17 Clause 2.1 of Schedule 3 to the *Privacy Act* prohibits an organisation using or disclosing personal information about an individual for a purpose other than the primary purpose of collection (described as the ‘secondary purpose’), unless an exception applies. One of the exceptions is set out in cl 2.1(g), as follows:

*‘the use or disclosure is required or authorised by or under law’.*

18 Section 72(2) of the *Privacy Act* provides that if the Commissioner is satisfied that an act or practice of an organisation breaches an approved privacy code or a National Privacy Principle, and that the public interest in the organisation doing the act or engaging in the practice substantially outweighs the public interest in adhering to that code or principle, the Commissioner may make a determination to that effect. The determination, in effect, exempts the organisation from the operation of s 16A in relation to the relevant act or practice: s 72(3).

19 The *Privacy Act* provides for an individual to complain to the Commissioner about an act or practice that may be an ‘interference with the privacy of the individual’: s 36(1). Section 13A(1)(b) provides that for the purposes of the *Privacy Act*, an act or practice of an organisation is an ‘interference with the privacy of an individual’ if, *inter alia*:

*‘(i) the act or practice breaches a National Privacy Principle in relation to personal information that relates to the individual;*



- (ii) *the organisation is not bound by an approved privacy code in relation to the personal information*'.

20 After investigating a complaint, the Commissioner may make a determination dismissing the complaint or finding it substantiated and making certain declarations. These include a declaration that the respondent should perform any reasonable act to redress any loss or damage suffered by the complainant and a declaration that the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint: s 52(1). Proceedings to enforce a determination may be instituted in the Federal Court or the Federal Magistrates Court: s 55A(1).

21 Where a person has engaged or is proposing to engage in conduct that constitutes a contravention of the *Privacy Act*, the Federal Court or the Federal Magistrates Court, on the application of the Commissioner or any other person, grant an injunction restraining the person from doing so: s 98(1). The Court may also grant a mandatory injunction in certain circumstances: s 98(1), (2).

## REASONING

22 Section 77(i) of the *Constitution* empowers Parliament to make laws defining the jurisdiction of any federal court other than the High Court '[w]ith respect to any of the matters' mentioned in ss 75 or 76. Section 76(ii) empowers Parliament to make laws conferring jurisdiction on the High Court in any matter 'arising under any laws made by Parliament'. Section 39B(1A)(c) of *Judiciary Act* is a law enacted pursuant to s 77(i) of the *Constitution* and for this reason refers to 'any **matter** ... arising under any laws made by the Parliament'. As I have noted, if this Court has jurisdiction to grant the relief sought by the Institute it must be pursuant to s 39B(1A)(c) of the *Judiciary Act*.

23 In *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, Gleeson CJ pointed out (at 388 [3]) that the framers of the *Constitution* adopted the expression 'matters' in preference to the terms 'cases' and 'controversies' which appear in Article III of the *United States Constitution*. As his Honour observed (at 389 [3]) in neither Australia nor the United States is giving an advisory opinion to other branches of government regarded as the legitimate function of the federal judiciary. This proposition was established for Australia by *In re Judiciary and Navigation Acts* (1921) 29 CLR 257. The majority of the

Court in that case rejected the contention that ‘matter’ meant no more than a legal proceeding. In their view, the expression referred to (at 265):

*‘the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of [s 76 of the Constitution] unless there is some immediate right, duty or liability to be established by the determination of the Court.’*

24 The reasoning in *In re Judiciary and Navigation Acts* explains why a Court exercising in the jurisdiction conferred by s 39B(1A)(c) of the *Judiciary Act*:

*‘does not pronounce, in the abstract, upon the validity or meaning of Commonwealth or State statutes. To do so would not be an exercise of judicial power conferred by or under Ch III. Such pronouncements are made in an adversarial context, where there is an issue concerning some right duty or liability’:*

*Re McBain*, at 389 [5], per Gleeson CJ. This does not mean that the determination of an abstract or theoretical question is not an exercise of judicial power. Rather, it is not an exercise of the judicial power **of the Commonwealth**, since the exercise of the judicial power of the Commonwealth must involve the determination of a ‘matter’ within the meaning of ss 75 and 76 of the *Constitution*: *Gould v Brown* (1988) 193 CLR 346, at 421 [118], per McHugh J, quoted with approval in *Re McBain*, at 404-405 [61], per Gaudron and Gummow JJ.

25 It is within this framework that the High Court’s decision in *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334, must be considered. In that case, a Full Court of this Court had answered separate questions which had been expressly formulated ‘having regard to the matters pleaded in the amended Statement of Claim and the material contained in the agreed bundle of documents’. Despite this formulation, there was no agreed statement of facts before the Court and no findings of fact had been made. The joint judgment in *Bass v Permanent Trustee* pointed out (at 355 [45]) that it is central to the notion of a judicial determination that it:

*‘includes a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy’.*

As their Honours observed (at 356 [47]), it is for this reason that ‘courts have traditionally refused to provide answers to hypothetical questions or to give advisory opinions’.

26 The joint judgment accepted that the Court may have jurisdiction and power to declare that conduct which has not yet taken place will not be in breach of a contract or a law

and that such a declaration will not be hypothetical in the relevant sense, citing *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297, at 305, per Barwick CJ. However, they noted (at 356 [48]) that there is a crucial difference between an advisory opinion and a declaratory judgment, namely:

*'the fact that an advisory opinion is not based on a concrete situation and does not amount to a binding decision raising a res judicata between parties. [Accordingly] where the dispute is divorced from the facts, it is considered hypothetical and not suitable for judicial resolution by way of declaration or otherwise.'*

27 Their Honours went on to hold that the Full Court should have regarded the separate questions as inappropriate to answer (at 357 [49]):

*'As the answers given by the Full Court and the declaration it made were not based on facts, found or agreed, they were purely hypothetical. At best, the answers do no more than declare that the law dictates a particular result when certain facts in the material or pleadings are established. What those facts are is not stated, nor can they be identified with any precision. They may be all or some only of the facts. What facts are determinative of the legal issue involved in the question asked is left open. Such a result cannot assist the efficient administration of justice. It does not finally resolve the dispute or quell the controversy.'*

28 The principles stated in *Bass v Permanent Trustee* have been applied in a number of cases by a Full Court of this Court. In each case the Court has set aside or declined to answer a separate question that in effect sought an advisory opinion on a hypothetical issue. In *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust* (2001) 109 FCR 488, for example, the Full Court set aside the answer to a separate question where the answer itself raised 'a variety of difficult factual and legal issues' and thus did not finally resolve the dispute between the parties. A similar conclusion was reached by the Full Court in *Hart Australia Ltd v Commissioner of Taxation* (2001) 109 FCR 405. See too *Kockums AB v Commonwealth* [2002] FCAFC 138; *BP Australia Pty Ltd v Nyran Pty Ltd* [2002] FCAFC 163; *Smithkline Beecham (Aust) Pty Ltd v Chipman* [2002] FCA 674 (Weinberg J).

29 In the present case, a reading of the Statement of Claim makes it plain that the Institute seeks the declarations it claims independently of any specific factual allegations. The pleading does not allege that the Institute or its members have sought specific information from an identified organisation for a particular purpose. Nor is it alleged that the

organisation denied the request by reason of a particular provision of the *Privacy Act* or determination of the Commissioner. As I have noted, the Institute seeks no relief in respect of any refusal by the Commissioner to make a determination under s 72 of the *Privacy Act*.

30           The Statement of Claim merely alleges that the Institute ‘through its members’ undertakes investigations on behalf of clients in connection with ‘litigation, potential litigation and matters related to litigation’ and that the investigations involve obtaining personal information from organisations which record the information for their own business purposes (pars 4, 6). It is then said that the *Privacy Act* proscribes the disclosure by organisations of personal information to the Institute and its members unless the disclosure is ‘required or authorised by or under law’. The Statement of Claim does not identify the circumstances in which particular investigations have taken place, the organisations requested for information or the particular use to which the information was intended to be put.

31           The difficulty is not that declarations sought by the Institute go merely to future events or circumstances. The difficulty is that they cannot quell any existing controversy between the Institute and the Commissioner. The first declaration, before it can be meaningful, requires a number of factual and legal issues to be determined. It must be established that the disclosing entity is an ‘organisation’ within the meaning of the *Privacy Act* and that the organisation is subject to the National Privacy Principles. The disclosure must be of ‘personal information’, as defined in the *Privacy Act*. It also must be for the purpose of enabling the Institute or a member to investigate on behalf of citizens in corporations ‘matters concerning litigation, or potential litigation’ (whose purpose is not made clear). The second declaration creates the same difficulties.

32           In effect, the Institute seeks an advisory opinion from the Court without reference to any concrete facts. The declarations, if made, will not determine finally the rights of the parties and could not amount to a binding decision creating a *res judicata* between them (cf *Bass v Permanent Trustee*, at 356-357). They would not establish any ‘immediate right, duty or liability’ as between the parties.

33           The hypothetical nature of the Institute’s claims is apparent from a comparison between the circumstances of the present case and those of a case cited by Mr Thomas in support of the Institute’s position. In *Australian Gas Light Company v Australian*

*Competition and Consumer Commission (No 2)* [2003] FCA 1229, AGL proposed to acquire shares in a company as part of a scheme to acquire an interest in a power station and coal mine. The ACCC claimed that the acquisition of the shares would have the likely effect of substantially lessening competition in a market, in contravention of s 50 of the *Trade Practices Act 1974* (Cth) ('*TP Act*').

34 AGL filed an application seeking declarations that the proposed share acquisition would not contravene s 50 of the *TP Act*. The statement of claim set out in detail the terms of the proposed acquisition and pleaded the existence of the relevant markets for the supply of electricity to customers in Victoria. The statement of claim also pleaded in detail the workings of the relevant markets and the competitive constraints on AGL. In short, the statement of claim alleged all the material facts necessary to make a judgment as to whether the proposed acquisition contravened s 50 of the *TP Act*.

35 French J noted (at [39]) that it was well established that a declaration can be made to the effect that a proposed course of conduct will not be unlawful and that the fact that declaratory relief relates to future conduct does not take the proceedings outside the bounds of federal jurisdictions. His Honour also observed (at [40]) that whether or not there is a real controversy between the parties to litigation is a question of judgment.

36 French J held that there was a real controversy between AGL and the ACCC concerning the right or freedom of AGL to proceed with the proposed acquisition, bearing in mind that its freedom to do so had been challenged 'in a very practical way' by the regulator and that the challenge could have 'very concrete commercial consequences'. Moreover, s 50 of the *TP Act* prohibited the acquisition of shares or assets conditionally – that is, if the likely effect of the acquisition was to substantially lessen competition in a market. As his Honour observed (at [45]):

*'[Section 50] necessarily imports uncertain judgments about the post-acquisition state of competition in the market whether those judgments are required to be made before or after acquisition and whether in the context of claims for declaratory or injunctive or other relief. Such judgments may require consideration of the likely responses of other actors or potential actors in the market. The uncertainty does not render the section non-justiciable. Uncertainty is an inescapable aspect of the operation of a section based upon likelihoods which have to be assessed in determining whether the condition upon which acquisition is prohibited is satisfied.'*

37 For these reasons, his Honour concluded that the Court was apprised of a real controversy, with real consequences depending upon its resolution. The Court was not therefore the deprived of jurisdiction for want of a ‘matter’.

38 It can be seen that in *AGL v ACCC (No 2)*, the material facts necessary to resolve a specific dispute were before the Court, in the sense that they were fully pleaded. The resolution of that dispute depended upon the application of a statutory provision which required an assessment of the likely future consequences of an acquisition of shares. Any declaration made by the Court would have immediate legal and practical consequences. In the present case, by contrast, no facts material to a specific dispute between the Institute and the Commissioner are pleaded. No consequences would flow from the making of declarations, at least without a series of further factual findings and determinations on issues of law. The circumstances of the present case are therefore far removed from those of *AGL v ACCC (No 2)*.

39 The result is that the present proceedings do not involve a ‘matter’ within the meaning of s 39B(1A)(c) of the *Judiciary Act*. Accordingly, the court lacks jurisdiction to entertain the Institute’s claim.

### **REASONABLE CAUSE OF ACTION**

40 In view of the conclusion I have reached, it is not necessary to consider the alternative ground for the Commissioner’s motion. Nonetheless, I think it appropriate to note that the argument that the Institute apparently wishes to advance, even if well-founded, could not justify relief in the form of the declarations included in the Statement of Claim.

### **CONCLUSION**

41 The Commissioner’s motion succeeds. The application must be dismissed. The Institute must pay the Commissioner’s costs.

42 Since the Commissioner was substituted for the Commonwealth as a respondent at the hearing, it may be appropriate to require the Institute to bear the Commonwealth’s costs. I reserve liberty to the Commonwealth to apply for such an order.

I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Sackville.

Associate:

Dated: 5 November 2004

Counsel for the Applicant: R Thomas

Solicitor for the Applicant: David H Cohen & Co

Counsel for the Respondent: A Markus

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 2 November 2004

Date of Judgment: 5 November 2004