
The convicted felon's right to judicial review and the common law doctrine of attainder in Australia

Jason Donnelly*

The decision of Patsalis v State of New South Wales (2012) 266 FLR 207 represents a fundamental development in the common law of Australia. The extent to which the Felons (Civil Proceedings) Act 1981 (NSW) (FCPA) applied to applications for judicial review brought by prisoners convicted of a serious indictable offence or a felony remained unclear before the decision of Patsalis. This article examines some of the important implications that flow from the decision of Patsalis, such as the fact that "civil proceedings" in the statutory context of the FCPA was held not to apply to applications for judicial review of administrative decisions brought by a prisoner convicted of a serious indictable offence or a felony who sought to challenge his or her incarceration. The article also examines the common law principle of attainder in light of the statutory enactment of the FCPA.

INTRODUCTION

The judgment of *Patsalis v State of New South Wales* (2012) 266 FLR 207 is significant for the law in New South Wales for various reasons. This article explores the implications of the judgment and examines some of the important legal principles that flow from it.

Patsalis represents a bastion of protection for the civil rights of prisoners in New South Wales convicted of serious indictable offences. Moreover, it provides an important analysis of the legal meaning of the phrase "civil proceedings", delivers a useful discussion of important principles of statutory interpretation more generally and examines the effect of the common law principle of attainder in Australia.

THE FACTS

On 24 September 1999, Michael Patsalis (applicant) was convicted of murder.¹ On 23 February 2000, the applicant was sentenced to imprisonment for 21 years and six months, with a minimum term of 16 years. Accordingly, the applicant is serving a sentence for a serious indictable offence.²

On 9 May 2011, the applicant filed a statement of claim seeking damages for negligence from the State of New South Wales (respondent).³ The negligence was said to relate to the failure of the respondent to protect the applicant from an assault by another inmate, and also the conduct of the respondent in denying him access to his legal documents (negligence proceedings).⁴

In accordance with s 4 of the *Felons (Civil Proceedings) Act 1981* (NSW) (FCPA), the applicant sought leave to commence the negligence proceedings.⁵ The statutory effect of s 4 is that a person who is in custody as a result of being convicted of a serious indictable offence is prohibited from instituting "civil proceedings" in any court except by leave of that court.

* BA (Macq), LLB (Hons 1) (UWS), GDP (COL), Barrister of the Supreme Court of New South Wales and Lecturer-at-Law (UWS) (UOW). The author appeared for the applicant in these proceedings, led by Mr Angus Stewart of Counsel, BA (UON), LLB (Hons) (UON), BCL (First Class) (Oxford).

¹ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [9].

² *Crimes Act 1900* (NSW), s 4.

³ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [10].

⁴ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [14].

⁵ *Patsalis v State of New South Wales* [2011] NSWSC 1583 at [14] per Schmidt J; *Patsalis v State of New South Wales* [2011] NSWCA 364.

When the “leave question” in accordance with s 4 of the FCPA came on for hearing, Schmidt J refused to grant the applicant leave to proceed with his substantive claim against the respondent for access to his legal documents.⁶ In a judgment delivered on 26 July 2011, her Honour held that “leave to commence proceedings in respect of the complaints as to the access given Mr Patsalis to his legal documents, must be refused as an abuse of process”.⁷

The applicant’s substantive claim of access to his legal documents was said to be based upon his right of access to the courts and, by extrapolation, his right to petition the Governor under s 76 of the *Crimes (Appeal and Review) Act 2001* (NSW) “for review of his conviction or sentence or the exercise of the Governor’s pardoning power”.⁸

The applicant sought leave to appeal to the New South Wales Court of Appeal against the decision of Schmidt J “refusing” the applicant leave to commence proceedings in relation to his claim for access to his legal documents (appeal proceedings).⁹ With the benefit of legal representation in the appeal proceedings, a primary contention advanced by the applicant was that in circumstances where a prisoner seeks judicial review of an administrative decision, s 4 of the FCPA had no application.

Accordingly, in the appeal proceedings, the New South Wales Court of Appeal had to determine a number of important questions of law: first, whether s 4 of the FCPA applied to the applicant’s application for judicial review; secondly, whether s 4 of the FCPA imposes a leave requirement in cases where there had been no disability under the principle of attainder.

IMPLICATION 1 – LEGAL MEANING OF “CIVIL PROCEEDINGS”

The first important implication to be drawn from the decision in *Patsalis* relates to the statutory construction of the phrase “civil proceedings” given by the Court of Appeal. The court had to determine whether s 4 of the FCPA applied to the applicant’s application for judicial review. The answer to that question ultimately turned upon whether the phrase “civil proceedings” in s 4 of the FCPA was co-extensive with judicial review proceedings.

The court unanimously held that in the statutory context of the FCPA, the phrase “civil proceedings” was not to be reconciled with “judicial review proceedings”. This meant that the applicant did not need leave to proceed with his judicial review action against the decision of the Commissioner of Corrective Services refusing him access to all of his legal documents in his prison cell.¹⁰ However, this finding by the court has much wider consequences for the law in New South Wales.

First, since the statutory enactment of the FCPA in 1981, the general trend of jurisprudence in New South Wales had been to apply the leave requirement imposed by s 4 to prisoners in custody who were convicted of a serious indictable offence and who otherwise sought to commence judicial review proceedings in a New South Wales court.¹¹

Accordingly, in finding that the phrase “civil proceedings” in the FCPA does not encapsulate judicial review proceedings, *Patsalis* has effectively overturned 31 years of jurisprudence in those cases that have found to the contrary – albeit, without really deciding the question but merely assuming the FCPA applied to a prisoner in custody convicted of a serious indictable offence who sought to commence judicial review proceedings in a New South Wales court.

⁶ *Patsalis v State of New South Wales* [2011] NSWSC 1583.

⁷ *Patsalis v State of New South Wales* [2011] NSWSC 1583.

⁸ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [51].

⁹ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [9].

¹⁰ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [110] per Basten JA.

¹¹ *Potier v Magistrate Moore* [2004] NSWSC 1131 at [7], [14], [16]; *Potier v District Court of New South Wales* [2004] NSWCA 303 at [6]; *Whisprun Pty Ltd v Sams* [2002] NSWCA 394; *Sleiman v Commissioner, NSW Department of Corrective Services* [2008] NSWSC 617 at [26]; *Potier v Ruddock* [2008] NSWSC 153 at [2], [12]; *Potier v Magistrate Maloney* [2005] NSWSC 336 at [4]; *Sinanovic v New South Wales Department of Public Prosecutions* [2002] NSWSC 82 at [20]-[21]; *Schneidas v Jackson* [1982] 2 NSWLR 969 at [972G].

Secondly, and more expressly, *Patsalis* appears to have directly overturned the decision in *Potier v Director-General, Department of Justice* [2011] NSWCA 105. In *Potier*, Handley AJA held that the implication from the statutory text and background to the enactment of the FCPA “is that proceedings are either civil or criminal, and proceedings which are not criminal are civil”.¹²

Accordingly, *Potier* held that s 4 of the FCPA applied even where a prisoner in custody convicted of a serious indictable offence sought judicial review of an administrative decision. Despite this finding, Basten JA in *Patsalis* held:

Contrary to the intimation in *Potier*, the historical background does not support the proposition that all legal proceedings are necessarily either criminal or civil proceedings. Nor as a matter of policy does there seem to be any good reason why a prisoner should be able to bring criminal proceedings without leave, but not civil proceedings.¹³

Thirdly, the decision of *Patsalis* appears to have settled an apparent disquiet or ambiguity in relation to the question of whether the FCPA has application where a prisoner in custody convicted of a serious indictable offence or felony seeks judicial review of an administrative decision.

As noted previously, the general trend of cases in New South Wales have applied the FCPA in circumstances where a prisoner in custody convicted of a serious indictable offence or felony seeks judicial review. Despite this trend, the apparent “disquiet” or “ambiguity” appears in the fact that there are a series of other cases in New South Wales that have permitted prisoners in custody convicted of a serious indictable offence or felony to commence judicial review proceedings without any consideration of the FCPA.

For example, in *Potier v General Manager & Governor, MRRC (Metropolitan Reception & Remand Centre)* [2007] NSWSC 1031, *Potier* (a person convicted of a serious indictable offence) brought an application for writ of habeas corpus in order to prepare his appeal with better facilities and access to his legal team. Rothman J dismissed the application. Importantly, his Honour did not deal with the FCPA, despite stating: “These are civil proceedings; not criminal.”¹⁴

Fourthly, all three judges in *Patsalis* expressly provided an important analysis of what was meant by the phrase “civil proceedings” in the FCPA – it appears that such an analysis had not been undertaken in any great detail before the decision of *Patsalis*.

Allsop P held that the phrase “civil proceedings” in the FCPA should be “aptly understood as a claim for a private remedy to redress an injury from wrongful conduct. Its form may be at common law, in equity or in statute”.¹⁵ His Honour went further and stated:

The challenge to the exercise of public power (at least insofar as it concerns the conviction, sentencing and incarceration of the person covered by the Act) is not easily conformable with the expression of an action for a civil wrong.¹⁶

¹² *Potier v Director-General, Department of Justice* [2011] NSWCA 105 at [10].

¹³ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [45].

¹⁴ *Potier v General Manager & Governor, MRRC (Metropolitan Reception & Remand Centre)* [2007] NSWSC 1031 at [17]. Other cases that do not appear to have considered the statutory effect of the *Felons (Civil Proceedings) Act 1981* (NSW) include; *Anderson, Dunn and Alister v Release on License Board* [1984] 2 NSWLR 312; *Baba v Parole Board (NSW)* (1986) 5 NSWLR 338; *Bromby v Offenders’ Review Board* (1990) 22 ALD 249; 51 A Crim R 249; *Clarke v Minister for Corrective Services* (1988) 18 NSWLR 553; *Jackson v Director-General of Corrective Services* (1990) 21 ALD 261; *Johns v Release on License Board* (1987) 9 NSWLR 103; *Kelleher v Parole Board of New South Wales* (1984) 156 CLR 364; *Maybury v Osborne & Corrective Services Comm of NSW* [1984] 1 NSWLR 579; *Modica v Commissioner for Corrective Services* (1994) 77 A Crim R 82; *Montgomery v Parole Board* (1988) 40 A Crim R 8; *Potier v Maughan* [2004] NSWSC 590; *Potier v Huber* [2004] NSWSC 720; *Prisoners A to XX Inclusive v State of New South Wales* (1995) 38 NSWLR 622; *Rendell v Release on License Board* (1987) 10 NSWLR 499; *Riley v Parole Board of New South Wales* (1985) 3 NSWLR 606; *State of New South Wales v Bates* (1991) 24 ALD 467; *Todd v Parole Board* (1986) 6 NSWLR 71.

¹⁵ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [5].

¹⁶ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [6].

Basten JA held that “civil proceedings” has an “apparent simplicity about it which, may, on reflection, prove to be misleading”.¹⁷ In this respect, his Honour found that civil proceedings “applies to civil claims for damages (and related proceedings), but not to applications for judicial review of administrative decisions or other applications in the supervisory jurisdiction of the Court reflected in s 69 of the *Supreme Court Act 1969* (NSW)”.¹⁸

Sackville AJA agreed with the reasoning of Basten JA, adding:

[A] statutory prohibition on persons instituting civil proceedings may not prevent a person applying to the Court for judicial review of administrative decisions or conduct said to be beyond power.¹⁹

Accordingly, his Honour found that in the statutory context of the FCPA, the phrase “civil proceedings” did not extend to judicial review proceedings.

Given the foregoing, *Patsalis* represents a landmark decision in New South Wales law. The decision provides clear appellate authority for the proposition that persons in custody in New South Wales convicted of a serious indictable offence or felony who seek judicial review of an administrative decision do not need leave under s 4 of the FCPA.

IMPLICATION 2 – PROTECTION OF THE CIVIL RIGHTS OF PRISONERS

The second important implication from *Patsalis* is the protection of the civil rights of prisoners in New South Wales. In effect, the New South Wales Court of Appeal was faced with whether to adopt either a narrow or broad construction of the phrase “civil proceedings” in the FCPA – a narrow construction meaning that the phrase “civil proceedings” is not co-extensive with judicial review proceedings in the context of the FCPA; a broad construction meaning, in effect, that “civil proceedings” in the FCPA are inclusive of judicial review proceedings.

Basten JA, who wrote the leading judgment in *Patsalis*, sought to give effect to protecting the civil rights of prisoners by favouring a narrow construction of the phrase “civil proceedings” in the FCPA. In this respect, his Honour cited with approval the decision of *Raymond v Honey* [1983] AC 1 where Lord Wilberforce held that “a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication”.²⁰

Basten JA subsequently reasoned:

Thus, where a prisoner has a legal right enforceable by a court under the general law... such a right may be removed or conditioned by statute, but the intention in that respect must be clear.²¹

Given the apparent ambiguity of what legal meaning was to be ascribed to the phrase “civil proceedings” in the FCPA, his Honour reasoned that the ambiguity must be construed in favour of the prisoner:

While the imposition of a leave requirement, which vests control of access to the courts within the court themselves, will involve a lesser intrusion on civil rights than other forms of restraint, the presumption in favour of non-interference will mean that the leave requirement will not be given an expansive construction.²²

Basten JA went further, notably stating:

The requirement for leave is itself a constraint on access to the courts, being an important civil right which is no longer removed from those convicted of serious indictable offences. Accordingly, it is

¹⁷ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [43].

¹⁸ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [9].

¹⁹ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [116].

²⁰ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [52]. See further *Reg v Board of Visitors of Hull Prison, Ex p St Germain* [1979] QB 425 at [455]; *Solosky v The Queen* (1979) 105 DLR (3d) 745 at 760 per Dickson J.

²¹ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [53].

²² *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [53].

appropriate to adopt an approach to the question of statutory construction which limits the civil rights in question only to the extent necessary to give effect to the statutory provision.²³

Patsalis represents a prime example of a case where civil rights will not be taken away unless the intention of Parliament is abundantly clear in the passing of relevant laws.²⁴ Given that it was not clear that the enactment of the FCPA was to place greater limits on access to the courts by prisoners than applied at common law (given the common law principle of attainder), a broad construction could not be adopted. As Allsop P held: “The purpose of the leave provision was to ameliorate the perceived harshness of the doctrine of attainder.”²⁵

More modern thinking holds that the loss of liberty is the proper measure of the punishment imposed by the court, and that goals of rehabilitation and respect for authority will be better served if prisoners retain their civil rights in other respects.²⁶ In the past, the courts showed greater reluctance to accede to judicial review applications than is now the case.²⁷

It was formerly considered that there was a public policy that prevented the review of decisions made in the course of administering prisons,²⁸ on the basis that such interference might promote discord and undermine authority.²⁹ Such a policy was consistent with the view that imprisonment was accompanied by a loss of civil rights.³⁰

Accordingly, *Patsalis* appears to accord with modern thinking, which allows prisoners to retain their civil rights. Despite a change in judicial attitudes, willingness to intervene depends on where the decision under review falls along a spectrum, intervention being most likely when a right to release, albeit conditional, is directly affected and least likely where the decision made affects the enjoyment of amenities and is justified on administrative grounds.³¹

IMPLICATION 3 – THE COMMON LAW PRINCIPLE OF ATTAINDER IN AUSTRALIA

The third and final important implication from *Patsalis* is the significant discussion by the court of the common law principle of attainder. The ancient common law doctrine of attainder led to automatic extinction of various civil rights and capacities, such as the rights to inherit and to hold or deal with property, where the accused was sentenced to death or outlawry having been convicted of treason or a felony.³²

²³ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [56].

²⁴ The formal derogations of the rights and privileges of prisoners from the entitlements of ordinary citizens are considerable. See further Zdenkowski G, “Judicial Intervention in Prisons” (1980) 6 *Monash University Law Review* 294; Zdenkowski G, “Review of Disciplinary Proceedings in Australian Prisons” (1983) 7 *Crim LJ* 3; Staples JF, *Courts, Convicts and Labor Governments in New South Wales – From Cable to Dugan and Beyond* (11th Annual John Curtin Memorial Lecture, Australian National University, Canberra, 1981); Nagle JF, *The Report of the Royal Commission into NSW Prisons* (NSW Government Printer, 1978); Australian Law Reform Commission, *Sentencing: Prisons* (ALRC DP 31, AGPS, October 1987).

²⁵ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [4].

²⁶ “Judicial Review, Availability of Review” in *Halsbury’s Laws of Australia* (LexisNexis, accessed 13 November 2012) at [335-950]; *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [56] per Basten JA.

²⁷ *Flynn v R* (1949) 79 CLR 1; *R v Classification Committee; Ex p Finnerty* [1980] VR 561; *Ex p Johns* [1984] 1 Qd R 450; *R v Walker* [1993] 2 Qd R 345; (1992) 60 A Crim R 463; *R v Board of Visitors of Hull Prison; Ex p St Germain* [1979] 1 QB 425; [1979] 1 All ER 701; [1979] 2 WLR 42.

²⁸ *Gibson v Young* (1900) 21 LR (NSW) L 7; 16 WN (NSW) 158. Compare *Quinn v Hill* [1957] VR 439 at 452 per Smith J (public policy is no defence); *Hall v Whatmore* [1961] VR 225.

²⁹ See eg *Becker v Home Office* [1972] 2 All ER 676 at 682 per Lord Denning MR CA.

³⁰ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583; compare *R v Board of Visitors of Hull Prison; Ex p St Germain* [1979] 1 QB 425 at 455-456 per Shaw LJ.

³¹ *Smith v Corrective Services Cmr of New South Wales* (1980) 147 CLR 134; *Burke v R* (1981) 148 CLR 146; *Burr* (1981) 4 A Crim R 188; *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364; *Riley v Parole Board of New South Wales* (1985) 3 NSWLR 606; *Gibbs v New South Wales* (1990) 21 NSWLR 416; 51 A Crim R 306; *New South Wales v Bates* (1991) 24 ALD 467.

³² “Legal Incidents of Imprisonment, Legal Capacity” in *Halsbury’s Laws of Australia* (LexisNexis, accessed 13 November 2012) at [335-320].

The ancient common law doctrine of attainder is no longer part of Australian law.³³ However, various legal disabilities still affect prisoners in Australia. At common law, a prisoner serving a life sentence for a capital felony is disabled from suing in the courts until his or her sentence is served or a pardon is received.³⁴ The common law restriction has also been held to extend to non-capital felonies.³⁵ In some jurisdictions the effect of this common law³⁶ rule has been expressly abolished or modified by statute.³⁷

Importantly, the common law principle of attainder was considered in *Patsalis* in the context of the application of relevant principles of statutory interpretation. In the appeal proceedings in *Patsalis*, the applicant argued that the phrase “civil proceedings” is to be construed consistent with the objects and purposes of the FCPA.

The applicant argued that a fundamental object and purpose of the FCPA was to “expand” the rights of prisoners in New South Wales, by allowing them to commence “civil proceedings” in New South Wales subject to a grant of leave. In this respect, it was assumed by the applicant that at common law prisoners did not have legal rights to commence “civil proceedings” as convicted felons (*whether as convicted capital or non-capital felons*).

At common law, the High Court of Australia in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 confirmed that a convicted capital felon was prohibited from maintaining an action in an Australian court. However, despite *Dugan*, Sackville AJA held in *Patsalis* that the position with respect to the legal restriction on non-capital felons from commencing an action and the extent of the principle of attainder in Australia remained unclear:

Dugan... did not decide that an attained person was incapable of instituting proceedings claiming prerogative or declaratory relief in relation to the conditions of his or her incarceration. It is not clear whether the common law disability extended this far.³⁸

Accordingly, the New South Wales Court of Appeal in *Patsalis* was invited by the applicant to provide an analysis of the interaction of the common law principle of attainder and the statutory object and purpose of the FCPA – in the statutory context of resolving the correct legal construction of the phrase “civil proceedings” in the FCPA.

Allsop P in *Patsalis* provided a construction of “civil proceedings” by having regard not only to the statutory objects and purposes of the FCPA, but by considering the historical nature of the passing of the Act:

Whilst the context may be seen to be the whole historical context of English and Australian colonial law, the High Court’s decision in *Dugan* as the apparent catalyst for the Act is the primary point of context.³⁹

Allsop P held that “[t]he substantive legal context to the passing of the *Felons (Civil Proceedings) Act 1981* (NSW) was the decision of the High Court in *Dugan v Mirror Newspapers Ltd* (1978) 142

³³ Fox R and Freiberg A, *Sentencing: State and Federal Law in Victoria* (2nd ed, Oxford University Press, 1999).

³⁴ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583.

³⁵ *Macari v Mirror Newspapers Ltd* (unreported, NSWSC, Cantor J, CLD No 10312/1980, 4 March 1980). This decision has been criticised: see Zdenkowski G, “Prisoners Denied Access to the Courts” (1980) 5:5 *Legal Service Bulletin* 239.

³⁶ As to the Commonwealth position, it appears that the common law applies to federal prisoners. In the ACT the common law appears to apply despite change of law in New South Wales: *Seat of Government Acceptance Act 1909* (Cth), s 6 (all laws in force in the Territory immediately before 1 January 1911 continue in force until other provision is made); as to South Australia, see *Milera v Wilson* (1980) 23 SASR 485 (decision based on *Criminal Law Consolidation Act 1935* (SA), s 330 (repealed)); *Bromley v Dawes* (1983) 34 SASR 73; 10 A Crim R 98.

³⁷ *Criminal Code* (NT), s 435A; *Felons (Civil Proceedings) Act 1981* (NSW); *Public Trustee Act 1978* (Qld), s 95; *Prisoners (Removal of Civil Disabilities) Act 1991* (Tas) (repealed *Criminal Code* (Tas), ss 435-437, which provided that there were no proceedings for recovery of any property, debt or damage); *Crimes (Amendment) Act 1973* (Vic), s 5(1) (repealed *Crimes Act 1958* (Vic), ss 549-561); *Criminal Code* (WA), s 730 (common law restrictions have been abolished).

³⁸ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [113].

³⁹ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [5].

CLR 583”.⁴⁰ Given the statutory context and history of the passing of the FCPA, his Honour found that the effect of the phrase “civil proceedings” in the Act did not place greater limits on prisoners than the “perceived harshness of the doctrine of attainder”.⁴¹

Such a statutory construction of the phrase “civil proceedings” in the FCPA, according to Allsop P, places that phrase in its proper context.⁴² Basten JA agreed, indicating contrary “reasoning ignores historical considerations” in the passing of the FCPA.⁴³ Sackville AJA also agreed, adding that since:

s 4 of the Felons Act is no more extensive than the common law rule, a person in custody by reason of having being convicted of a serious indictable offence would not require leave to institute judicial review proceedings seeking relief in relation to administrative decisions which he or she would otherwise have standing to challenge.⁴⁴

CONCLUSION

The law should always attempt to be not only consistent but also clear.⁴⁵ Before the judgment of *Patsalis*, the extent to which the FCPA applied to prisoners convicted of a serious indictable offence or felony who sought to bring a judicial review claim challenging his or her incarceration remained unclear.

The extent otherwise of the application of the FCPA to prisoners convicted of a serious indictable offence or felony who seek judicial review independent of a challenge to his or her incarceration remains unclear. As Allsop P observed in *Patsalis*, it “is unnecessary to chart the metes and bounds of the phrase ‘civil proceedings’ in the FCPA”.⁴⁶ Whilst the legal operation and application of the FCPA has not been fully tested, *Patsalis* undoubtedly represents a step in the right direction for eliminating the apparent ambiguity of the proper legal operation of this important Act of Parliament.

⁴⁰ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [2].

⁴¹ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [4].

⁴² *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [5].

⁴³ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [38].

⁴⁴ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [114].

⁴⁵ Wilson G, “Unconscionability and Fairness in Australian Equitable Jurisprudence” (2004) 11 *Australian Property Law Journal* 1.

⁴⁶ *Patsalis v State of New South Wales* (2012) 266 FLR 207 at [7].