In the final analysis, in the words of the joint judgment, '[t]he effect of the legislation of Western Australia was to restrict what otherwise is the operation of competition in the stated national market by means dependent upon the geographical reach of its legislative power within and beyond the state borders. This engages s92 of the Constitution'.

By reason of the operation of s92, the High Court did not rule on the plaintiffs' grounds of further challenge to the validity or operation of s27D, which included a challenge on the basis of the 'full faith and credit' provision of s118 of the Constitution.

By Georgina Wright

Mahmood v Western Australia (2008) ALJR 372 and Carr v Western Australia (2007) 82 ALJR 1

Western Australia and videotape evidence have occupied the High Court in two recent decisions.

In *Mahmood v Western Australia* (2008) ALJR 372 part of the evidence against the appellant accused of murdering his wife at their restaurant was an interview with the police on the day of the murder. At that time the appellant had blood on his clothes.

Further evidence was a videotape 'walk through' of the restaurant involving the accused made by the investigating police a week after the killing. In the taped 're-enactment' of some of the events on the day of the murder, the appellant sought to explain things he had recounted to the police in the earlier interview. These included a description by the appellant of his physical actions when he discovered and cradled his wife's body. This could have provided an innocent reason for the blood on his clothes.

During cross-examination of a police witness about the re-enactment video, defence counsel tendered a few minutes of the two hour plus tape.

In his final address the prosecutor drew the jury's attention to what was described as 'cold-bloodedness' and apparent lack of distress by the appellant as he described events in the tendered portion and the prosecutor invited the jury to draw an inference of guilt from this. In fact at other times on the full tape the appellant became quite emotional. The defence unsuccessfully applied to re-open and tender some further parts of the tape where the appellant portrayed this emotion.

The High Court unanimously allowed the appeal deciding that although the appellant's actions on the video did not originally form part of the Crown case, once comments were made about a few minutes of the tape by the prosecutor it was incumbent on the court to deal with the whole. In a joint judgment Gleeson CJ, Gummow, Kirby and Kiefel JJ drew a distinction between a direction and a comment by a trial judge (referred to in *Azzopardi v The Queen* (2001) 205 CLR at [49]-[52]) and said at [18]:

> It was necessary for the jury to be directed, in unequivocal terms, that they knew so little of the context in which the segment of the video recording appeared that they could not safely draw the inference that the prosecutor had invited them to draw, that is to say, that they should ignore the prosecutor's invitation and remarks.

Carr v Western Australia (2007) 82 ALJR 1 involved a tape made in different circumstances which resulted in an unsuccessful appeal by the offender.

The appellant stood trial on a charge of aggravated armed robbery of a Commonwealth Bank. Part of the evidence included admissions made by him at a police station following his arrest.

The appellant was aware that questioning in an interview room at the police station was being videotaped and he had been cautioned in the usual manner. No substantial admissions were made at that time.

Later, in the lock-up area of the station during routine activities relating to photographing and recording of personal details the appellant made substantial admissions which strongly suggested he was involved in the bank robbery. No further caution had been administered in the lock-up. The police involved in the conversations were aware of video recording facilities in that area, the appellant was not.

In the High Court the appellant submitted that he did not consent to and had no knowledge of the videotape being made and accordingly it was not admissible. This was said to follow from a provision in the Criminal Code of Western Australia requiring the need for videotaping of interviews. He also argued that the same provisions regarding the need for videotaping of interviews required a 'degree or element of formality' lacking in the lock-up conversation. In short, a mere conversation could not be described as an 'interview'.

Gleeson CJ dismissed the appeal. In a joint judgment Gummow, Hayden and Crennan JJ also dismissed the appeal ruling that the appellant's admissions were properly admitted and common law exclusionary rules had also not been infringed.

The whole circumstances of the case are a cautionary tale for any counsel offering advice to a suspect who is 'assisting with enquiries.' If a client is exercising a right to silence it should be constant when in the company of the police.

By Keith Chapple SC