

Inhouse counsel

THE MONTHLY LEGAL BRIEFING FOR CORPORATE LAWYERS
AND BUSY SENIOR EXECUTIVES

Volume 7 Number 6

Print Post Approved 255003/00772

WORKPLACE RELATIONS

Greater regulation for non-award employees in Victoria

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Conference

The commencement of the *Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003* (Cth) (the WR Amendment Act) introduces greater regulation for non-award covered employees and seeks to return Victoria to the pre-Kennett Government days of State awards.

The WR Amendment Act has important implications for all Victorian employers, as it:

- empowers the Australian Industrial Relations Commission (AIRC) to declare common rule awards for Victorian industries; and
- lifts the safety net of entitlements for all Victorian employees who are not covered by a federal award, a certified agreement or an Australian workplace agreement.

Common rule awards

In Victoria, until the Kennett Government came to power in 1992, state awards had operated as in other States to regulate minimum employment conditions for most employees not covered by a federal award. The abolition of state awards in 1993 meant that employees in Victoria were effectively award free (except where they were covered by federal awards). Since 1993 thousands of employees have been moved to federal awards by union efforts to serve logs of claims on employers and create 'paper' disputes, but approximately 350,000 employees remain unregulated. Neither state nor federal awards generally regulated the more senior employees within a business or organisation.

The Bracks Government resolved that this situation could not continue and with a majority in both Houses of Parliament passed, but did not enact, legislation that would have empowered a Victorian tribunal to declare certain federal awards binding on all Victorian employers who came within the industry of the award if not already covered by a federal award.

Then, in order to advance a uniform industrial system, Victoria and the Commonwealth reached agreement whereby the Victorian Government passed legislation referring certain powers to the Commonwealth, which led to the enactment of the WR Amendment Act.

The WR Amendment Act now empowers the AIRC to apply common rules across industries in Victoria. A common rule award is a minimum set of conditions that apply to all employees in a particular industry. On the application of a party, such as a union, the Commission can declare certain federal awards, for instance the Clerical and Administrative Employees Award 1995, as a common rule award that will apply throughout Victoria for employees not otherwise covered by a federal award irrespective of whether the employers are named in the award, bound through

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membership of an employer association or bound through a transmission of business. In other words, it will act like a state award; that is, be binding on all employers, current and new, who operate in Victoria and who fall under the scope of the award.

The AIRC may make the declaration of a common rule subject to conditions, exceptions and limitations, so that the common rule applies to a specified employer or specified class of employers, or that it only comes into force on a specified date.

In deciding whether to declare a term of an award to be a common rule, the AIRC must:

- aim to avoid any overlap of awards;
- minimise the number of awards applying to particular employers; and
- consider whether the award is the most relevant and appropriate for work performed in an industry.

The provisions that extend common rule awards to Victoria include a 12 month transitional period.

Therefore, no common rule awards can come into effect before 1 January 2005.

Several unions have already made applications and it is likely that a test case will be run in the year to test the scope of the legislation.

Improved entitlements for all employees

Whether or not employees will be covered by a common rule award, from 1 January 2004 non-award employees in Victoria are entitled to more generous leave entitlements and overtime payments. This includes all levels of employees, including senior executives not covered by federal awards or agreements.

Prior to these amendments, the minimum conditions guaranteed to employees under Sch 1A of the *Workplace Relations Act 1996* (Cth) were limited to:

- four weeks' paid annual leave per year;
- five days' paid sick leave per year;
- a minimum rate of pay, determined by the AIRC;
- unpaid maternity, paternity or adoption leave, and part time work in connection with the birth or adoption of a child; and

- notice of termination of employment or payment in lieu.

Schedule 1A employees (that is, those not covered by a federal award, certified agreement or Australian workplace agreement) are now entitled to:

- payment for work performed in excess of 38 hours per working week, to be paid at the ordinary minimum hourly rate for the relevant classification (or at a higher hourly rate subject to agreement between an employer and employee);
- one day of personal leave for every six weeks' service for employees who have worked for an employer for less than 12 months (to be calculated on a pro-rata basis for part time employees);
- eight days' paid personal leave per year for employees who have worked for an employer for 12 months or more, which includes sick leave and carer's leave and is to be broken up as follows:

- employees may use up to five days of their personal leave as carer's leave (carer's leave may be used to care for a member of the employee's immediate family or household);
- personal leave is cumulative, that is, unused leave may rollover to the following year; and

- up to two days' bereavement leave upon the death of an immediate family or household member.

Bereavement leave is not cumulative.

An immediate family member includes a spouse, former spouse, de facto spouse of the opposite sex, child, step-child, adopted child, parent, grandparent, grandchild or sibling.

The calculation of annual leave is also clarified by the WR Amendment Act. The amendments establish that annual leave:

- accrues on a pro-rata basis and is cumulative; and
- must be taken within 12 months after the end of the year in which it accrues unless otherwise agreed.

Comment

The delayed onset of the common rule provisions will allow employers time to seek advice about the potential impact of the changes on their business.



However, the improved safety net conditions will have immediate effect, particularly the obligation to pay overtime after 38 hours of work.

Many employers in Victoria not covered by federal awards pay employees well in excess of the minimum hourly rate of pay and may wonder whether in doing so there is an obligation to pay overtime after

38 hours. Whether that obligation applies will depend upon the way the contract of employment has been drafted, such as whether it specifies that the remuneration package has been set to take account of ordinary business hours and hours outside business hours as required.

Many employers in Victoria will have some staff who are not covered by

federal regulation and they should consider the implications of the legislative change on their employees to ensure compliance with the new laws. ●

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COMPETITION LAW

ACCC leniency policy begins to bear fruit

Paul Venus

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In June 2003 the Australian Competition and Consumer Commission (ACCC) released its final version of a leniency policy for cartel conduct. The purpose of the policy was to encourage businesses to disclose cartel behaviour by offering immunity from prosecution or, in some cases, penalties.

The policy has now been in place for over nine months and the first applications that have resulted from the implementation of the policy are being processed. To date, no cases resulting from this policy have reached the courts.

What conduct is subject to the policy?

The policy applies to a cartel. It defines a cartel to include two or more competitive businesses engaged in price fixing, market sharing or customer sharing, production or sales quotas. The policy states that while it is directed at cartel conduct by large businesses, it also applies to small businesses. The policy is also expressed not to apply to unsuccessful attempts at cartel conduct.

What form of leniency is provided?

Leniency may be provided to an individual or corporation. In the latter case all directors, officers and employees who also admit their involvement will receive leniency.

Where the ACCC is unaware of the alleged cartel and the applicant is the first person to disclose its existence, the ACCC may grant the applicant immunity from ACCC initiated proceedings.

If the ACCC was already aware of the alleged cartel conduct, it will not apply for the imposition of a pecuniary penalty against an applicant when, in

institute proceedings on reasonable grounds in respect of at least one relevant contravention.

Pre-conditions for grant of leniency

To be granted leniency, a corporation must give full and frank disclosure about its conduct to the ACCC. Its admissions and co-operation must be a

Leniency may be provided to an individual or corporation. In the latter case all directors, officers and employees who also admit their involvement will receive leniency.

the view of the ACCC, it has insufficient evidence to institute proceedings in respect of the alleged cartel and the applicant is the first person to make an application for leniency.

The ACCC has stated it will consider that it had awareness of cartel conduct if it had in its possession, at the time of the initial application, information from any source suggesting that the cartel has operated in Australia or affected a market in Australia.

The ACCC has stated that it will consider it had sufficient evidence to institute proceedings where it has sufficient material in its possession at the time of the initial application to

truly corporate act (as opposed to isolated confessions of individual representatives). The corporation must cease its involvement in the suspected cartel, must not have coerced other corporations to participate in the cartel and must not have been the clear leader in the cartel. Where possible, the corporation must make restitution to injured parties.

An individual who seeks leniency must give full and frank disclosure to the ACCC and cease involvement in the suspected cartel. The individual must not have been involved in the coercion of other persons to participate in the cartel and must not have been the clear individual leader in the cartel.

'Beware: first in — best dressed'

The leniency policy only applies to the first eligible person to approach the ACCC under any part of the leniency policy. The policy states that the 'ACCC will consider any subsequent application for leniency pursuant to the ACCC co-operation policy for enforcement matters published in July 2002'.

If an individual applies for leniency before a corporation of which they are a director or employee applies, only the individual will be eligible for leniency and not the company.

What is required to make an application?

An application must contain the full name and contact details of the applicant. It should outline in detail the conduct for which leniency is sought. The application should be made on a 'without prejudice' basis. This means that if a deal cannot be done with the ACCC, the facts in the application cannot be led in evidence against the

person making the application. The policy is silent on whether the application will be treated as being made on a without prejudice basis.

After the application is made

After the application is made the ACCC may request further information before deciding whether to grant leniency. If the ACCC accepts that it has enough information to do a deal, it may grant conditional leniency. This means that so long as the applicant co-operates and abides by the ACCC's conditions, the ACCC will either not sue or not seek penalties against the applicant.

Unsuccessful applications may still be considered by the ACCC under its co-operation policy. That policy states that in certain circumstances, if a party co-operates with the ACCC in an investigation, the ACCC may agree to seek lesser penalties against the person. ●

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COMPETITION LAW

Misuse of market power — the debate continues

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Section 46 of the *Trade Practices Act 1974* (Cth) (TPA) prohibits corporations with market power from taking advantage of that power for an anticompetitive purpose.

In April 2003 the Dawson Committee¹ considered the scope of the misuse of market power provisions contained in s 46 and found that there was no need to amend the section.

Soon after the Dawson Report was released, the decision of the High Court in *Boral Besser Masonry Ltd v ACCC*² sparked a public debate as to the effectiveness of the misuse of market power provisions. In that case, the High Court found that Boral had not engaged in predatory pricing by pricing some of its products at below

cost during a price war. One of the contentious elements of the case was the clear indication in Boral's internal company documents that its aim was to 'drive at least one competitor out of the market' [84]. The High Court held that Boral did not have market power as it did not have the ability to act without regard to the conduct of competitors or customers. In particular, the High Court found that Boral's pricing policy was a response to competitive pressures being exerted by both its customers and its competitors.

The decision in *Boral* led the Senate to establish a Senate Economics Reference Committee Inquiry into 'The Effectiveness of the TPA in Protecting Small Business'³ (the Committee).



Report of the Committee

Numerous submissions were made to the Committee, some suggesting that there is a gap in s 46 if a company can achieve a powerful position by undertaking anticompetitive conduct and yet not be caught by the section. Others have said that the notion of 'taking advantage' of power (a required element of a breach of s 46) is too problematic and should be removed. There are also calls for the onus of proof to be reversed, for the ACCC to have 'cease and desist' powers and for the use of financial power to sell below cost to be made illegal.

The Committee made a number of recommendations that, if adopted, would have far reaching implications. It recommended that the following amendments be made to s 46.

Recognising a lower threshold for market power

A statement should be inserted recognising that the threshold of 'a substantial degree of power in a market' is lower than the former threshold of 'substantial control'. It was also recommended that the concept of market power be clarified by stating that it does not require a corporation to have an absolute freedom from constraint but only that the corporation is not constrained to a 'significant' extent by competitors and suppliers and, further, that more than one company can have market power in any particular market.

Clarifying the concept of 'taking advantage' of market power

The concept of 'taking advantage' of market power should be clarified so that the courts can consider whether the conduct of the corporation was facilitated by its market power, whether the corporation engaged in conduct in reliance upon its market power and whether the conduct was otherwise related to its substantial degree of market power.

Predatory pricing

The issue of predatory pricing should be specifically dealt with in the TPA by stating that in determining whether there has been a breach of s 46, the capacity of the corporation to sell below its variable cost should be taken into

account and that it is not necessary for a corporation to be able to recoup the losses experienced as a result of a predatory pricing strategy.

Financial power is relevant to determining market power

Section 46 should be amended to state that in determining whether a corporation has market power, it is relevant if the corporation has substantial financial power.

The concept of 'taking advantage' of market power should be clarified so that the courts can consider whether the conduct of the corporation was facilitated by its market power ...

Market power should not be taken advantage of in any market

Section 46 should be amended to state that a corporation with market power should not take advantage of that power 'in that or any other market'.

Market power can arise from the ability to act in concert

Section 46 should be amended to recognise that a corporation may have market power, referred to as co-ordinated market power, because of its ability to act in concert (whether as a result of a formal agreement or otherwise) with another company.

Dissenting report from Government senators

The Government senators delivered a separate and dissenting report. They agreed that there is a need for legislative reform of s 46 but refused to endorse a number of the recommendations made by the Committee. They did, however, agree that there should be amendments to provide that the courts may take into account the ability of a corporation to price below the cost of producing the goods or providing the services in considering whether it has market power, so as to provide that market power should not be taken advantage of 'in any market' and to recognise co-ordinated market power.

The debate continues ...

The fundamental debate about the scope of s 46 relates to whether the object of the TPA is to protect the competitive process or individual competitors.

If all of the recommendations of the Committee were adopted, the scope of s 46 would be significantly expanded. Boral had a market share of approximately 30 per cent. If the amendments were adopted, then the

combination of amendments in relation to the concepts of 'market power' and 'taking advantage' is likely to mean that any corporation with more than 15-20 per cent market share that implements a competitive business strategy may be open to an allegation of a breach of s 46.

In light of the fact that s 46 relates to unilateral conduct by a corporation, policy makers need to ensure that the competitive strategies of corporations are not inappropriately proscribed by the TPA, as this would have the effect of dampening competition — the very thing the TPA is designed to protect.

In light of the fact that the Government senators disagreed with a number of the recommendations, it would seem unlikely that all the Committee's recommendations will find their way into law. At the end of the day the report of the Committee does not end the debate but merely adds to it. ●

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Endnotes

1. 'Review of the Competition Provisions of the *Trade Practices Act*' (the Dawson Report).
2. [2003] HCA 5 (7 February 2003) BC200300131.
3. Senate Economics References Committee 'The Effectiveness of the *Trade Practices Act 1974* in Protecting Small Business' March 2004.

INTERNATIONAL ARBITRATION

Confidentiality in arbitral proceedings

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For many years documents and information produced in and for the purposes of arbitral proceedings were regarded as confidential. As such, they could not be disclosed or used for purposes other than the arbitration unless ordered by a court in very limited circumstances. During the past 10 years, however, this protection has been significantly eroded.

In a 1994 landmark decision, the High Court of Australia held that arbitral proceedings are not intrinsically confidential. In the absence of an express confidentiality clause the documents and information provided in and for an arbitration could be disclosed or used by a party for a purpose other than the arbitration (see *Esso Resources Australia Ltd v Plowman (Minister for Energy & Minerals)* (1994) 183 CLR 10). In this case Mason CJ also observed that while a confidentiality clause would

the “public interest” requires disclosure’ (see *Ali Shipping Corp v Shipyard ‘Trogir’* [1988] 2 All ER 136).

The Australian and English leads have been followed by other courts, including the US Federal Court, District of Delaware (for example, see *United States v Panhandle Eastern Corp* (1988) 118 FRD 346), the New York Appeals Division (see *Galleon Syndicate Corp v Pan Atlantic Group* (1996) 6 Mealeys Lit R Reinsurance 73) and the Swedish Supreme Court (see *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Ltd* (27 October 2000)).

It has been held that the fact of an arbitration is not confidential and may be disclosed (see *Amco Asia Corp v Republic of Indonesia* (1985) 24 *International Legal Materials* 365). And arbitral documents (for example, witness statements, submissions and awards) that are tendered in a court of

In a 1994 landmark decision, the High Court of Australia held that arbitral proceedings are not intrinsically confidential.

bind the parties to the arbitration, it would not, without more, bind any third parties such as the arbitrator or any witnesses.

The decision in *Esso* prompted a number of courts to reconsider the extent to which arbitral proceedings are confidential. In 1998 the English Court of Appeal held that documents and information produced in and for the purposes of an arbitration could be disclosed for other purposes when, and to the extent to which, ‘it is reasonably necessary’ (for example, in order to enforce an arbitral award) or ‘where

law as part of appeal proceedings will not be treated as confidential (see *Baxter Intern Inc v Abbott Laboratories* (2002) 297 F3d 544, a decision of the US Seventh Circuit Court of Appeals).

Having regard to these developments, it is no longer wise or safe for legal counsel to assume that the reference of a dispute to arbitration (be it transnational in nature or not) will universally ensure that the fact of the arbitration and/or the contents of documents and information prepared for it will be shielded from the public eye.



Legal counsel advising on arbitration clauses should give detailed consideration to the confidentiality regime their client would want to apply to any arbitral proceedings. Relevant matters to be borne in mind are outlined below.

Subject matter

What does the client want or need to keep confidential? This may include:

- the fact of the arbitration;
- the identity of the parties to the arbitration;
- the identity of the arbitrator;
- the location and time of the arbitration;
- the general subject matter of the arbitration;
- the specific facts involved in the arbitration (including pleadings, discovered documents, evidence and submissions);
- any interim award; and
- the final award.

The fact of the arbitration and the identity of the parties may not, of themselves, seem worthy of protection. However, to a client in an industry where technology is involved, competition is keen and investor confidence is volatile, the disclosure of the fact that it is involved in a dispute can have significant and unanticipated effects.

Parties

Who must keep that information or data confidential? This may include:

- the parties to the arbitration;
- the arbitrator; and
- third parties (for example, the arbitral institution's secretariat, clerical assistants, lay and expert witnesses, and legal representatives).

Action required

Must any steps be taken by the parties to keep the information confidential? For example, must they ensure that third parties who become involved (for example, the arbitrator, the arbitral institution's secretariat, lay witnesses or any expert witnesses) agree to keep any information they receive confidential? Must this agreement be recorded in writing in the form of a confidentiality undertaking?

Is it desirable to limit the lengths to which the parties must go to ensure that third parties maintain confidentiality (for example, to 'reasonable steps')? It may, after all, be difficult to compel a third party, such as a witness, to give a confidentiality undertaking.

Duration

How long must the information or data be kept confidential? When (if at all) will the obligation of confidentiality cease — when the information is released into the public domain (by mutual agreement between the parties or by someone other than one of the parties) or if and when one of the parties takes court action to enforce the arbitral award?

Construction

Does the arbitration clause itself impose any obligation of confidentiality?

The rules of many arbitral institutions contain confidentiality obligations (for example, the International Chamber of Commerce Rules, the London Court of International Arbitration Rules and the UNCITRAL Ad Hoc Arbitration Rules). Thus, the arbitration clause may, by stipulating that the arbitration is to be conducted according to the rules of a nominated institution, indirectly impose confidentiality obligations upon the parties.

The confidentiality obligations imposed by many arbitral institutions vary in scope considerably. Legal counsel should consider the applicable institution's rules and the nature and extent of the confidentiality obligations imposed.

Legal counsel should also check whether the obligations apply in every case or only if the parties 'opt in'.

Applicable law

What is the legal matrix in which it is contemplated arbitration will occur? Factors to consider include:

- the substantive laws that will be applied by the arbitral tribunal in resolving any dispute;
- the procedural laws that will govern the conduct of the arbitration;
- whether any of those laws affect any

obligations of confidentiality; and

- whether the parties are subject to any laws in their own jurisdictions which may affect any obligations of confidentiality.

The answers to these questions may be critical. There is little point insisting on a comprehensive confidentiality clause if a party has statutory reporting obligations under which matters about the arbitration must be disclosed to the market.

Enforcement

How enforceable are the confidentiality obligations? Factors to consider include:

- whether the arbitrator has power to:
 - proactively protect the client's confidentiality;
 - coercively restrain a threatened breach of confidentiality; or
 - permit a party to disclose material (notwithstanding any confidentiality obligation);
- which (if any) courts may coercively restrain any threatened breach of confidentiality;
- the accessibility of those courts to the client; and
- whether a decision of those courts will bind the other party without further legal proceedings (for example, enforcement or recognition proceedings).

The answers to these questions will be particularly important. Obligations of confidentiality are not much use if your client cannot enforce them quickly and cost efficiently.

Drafting

Having regard to the factors outlined above, what obligations need to be inserted into the arbitral agreement to meet the client's needs? Are the obligations imposed by the current clause sufficient to meet those needs? Do they need to be supplemented or altered in any way to take account of any of the client's needs (for example, any reporting or other non/disclosure obligations to which the client is or may be subject)? ●

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Litigation risk management — Part 2

Richard Travers

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*Part 1 of this article appeared in IHC 7(5).
The article concludes with Part 2.*

Evaluating the risks

During this step the risks are evaluated and ranked.

If the litigation is a matter of life or death for the company, the main risk is obviously the loss of the company. All other risks pale in comparison. Costs will remain an issue, but if it is suggested that something can be done that will marginally improve the prospects of success, the added costs are unlikely to be a sticking point. Likewise, the risk of paying the opponent's costs is unlikely to be much of an issue — if the company is lost, who will be left to worry about the prospect of the opponent extracting costs from the shell of the company?

Lawyers love clients who litigate points of principle. The priority for the company in this case is to establish whether a court action will vindicate the principle it seeks to establish. Often it will not. The court may not see the case in the same light as the company. Commonly, it will compromise the principle by accepting parts of both parties' arguments. Is that a risk the company is prepared to run?

In a prosecution, factual issues may loom large. If the prosecution fails to prove a key issue, it may fail altogether: that issue becomes the priority. If conviction seems inevitable, the priority may be to repair the damage which a conviction will do to the company's reputation.

If the litigation is an argument about a modest sum of money, the priority is likely to be recovering a good percentage of the debt without incurring excessive costs. Such a case is not life or death; nor is there any point of principle or reputation. Only money is at stake, and the risk of throwing good money after bad may loom large.

After the qualitative analysis comes the quantitative analysis. What is the

range of possible results? What does each result mean in money terms? How does the incidence of costs (including the possibility that costs will blow out) affect each possible result? What is the bottom line for each possible result?

In most cases, the likely financial result for each possible outcome can be calculated with a reasonable degree of accuracy.

The final step at this stage of analysis is to rank the risks. This should produce a list of risks in priority order.

Treating the risks

At this step, a range of options is developed for treating each risk. The options include:

- avoiding the risk;
- reducing the likelihood of its occurrence;
- reducing the consequences of its occurrence;
- transferring the risk; or
- retaining the risk.

If the litigation involves a point of principle with far reaching consequences, the company may wish to avoid the risk that the point of principle will be decided against it. This may lead it to avoid the litigation. In the modest money case, if the company is the defendant it may wish to reduce the likelihood of an adverse costs order by making a payment into court. In the prosecution, the company may seek to reduce the likelihood of conviction by concentrating its resources on the issue on which the prosecution is vulnerable. It may also wish to reduce the consequences, if there is a conviction, by being prepared with a public relations response. A company may wish to transfer the risk of litigation altogether; for instance, by involving a litigation funder to assume the burden of funding the litigation. Finally, the company may agree to retain the risk. That may be the only option in the life or death case. It is also the only option with the 'runaway

jury' risk. If the case must be heard by a jury, there is no way of escaping that risk.

Settlement

The company facing prosecution generally has limited opportunities to settle the case; but in most civil litigation, settlement is an attractive option for treating risk.

As soon as a company has a good idea of the likely result of a case after all the costs have been paid, the question arises why it cannot achieve that result today.

A settlement secures a certain result. It eliminates all risk, including the risk of the rogue judge and the runaway jury. This is why 95 per cent of civil cases settle.

Unlike the options for treating risk considered above, settlement can only be achieved when both parties agree to put aside the litigation. In order to achieve this, both parties must have come to an assessment that what they can achieve from settlement is not much different from the settlement on offer.

If one party has come to the view that a particular settlement is the best means of treating the risk of the litigation, and the other party wants to continue on to trial, the first party is faced with a new risk which it must set out to treat. It must seek to convince the other party that settlement is in its best interests as well. This may be done by negotiation or, perhaps more easily, by mediation.

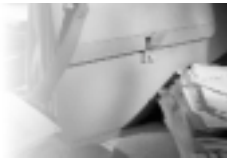
Monitoring and review

The above example illustrates the iterative nature of the risk management process.

The risks of litigation must be monitored continually. If new facts emerge which bear on any of the critical issues, or if new risks emerge, it is necessary to assess the impact which they will have on the final result. If costs blow out, the effect of this on the result must be examined.

In most cases only fine tuning will be required, but in some cases new developments can fundamentally change the prospects of the litigation.

A proper risk management system anticipates that there will sometimes be changes in the life of a court case. With a risk management system in place there is a framework within which the company can assess the impact of a change and work out a response to it.



Communication and consultation

When risk management processes are used to maximise safety on large building and engineering projects, it is necessary to communicate widely with everyone whose activities may affect worker safety and whose safety may be at risk.

By contrast, a company in litigation generally wants to play its cards close to its chest. Even so, it must maintain good communication

between the managers who have an interest in the litigation and between the managers and the lawyers to make the most of the risk management system.

Conclusion

Litigation abounds with risks.

The discipline of risk management provides a framework for identifying and treating those risks. A risk management program allows management to deal with litigation in a structured way. The

framework allows management to react to new developments in litigation in a considered way, consistent with the goals it has set for the litigation.

A risk management program can also limit the uncertainty which so often frustrates managers responsible for resolving a company's disputes. ●

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Federal legislation update

Assents and gazettals

Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004

This Act (No 11 of 2004) received assent on 11 March 2004. It strengthens s 127 of the *Workplace Relations Act 1996* (WRA) under which the Australian Industrial Relations Commission (AIRC) may make orders stopping unprotected industrial action or preventing industrial action from occurring. Sections 1-3 commenced on assent. Schedule 1 will commence on a day to be fixed by proclamation or six months after assent.

Workplace Relations Amendment (Transmission of Business) Act 2004

This Act (No 10 of 2004) received assent on 11 March 2004. It empowers the AIRC to order that a certified agreement does not bind a new employer as a result of a transfer of a business, or only binds the new employer to a specified extent. Sections 1-3 commenced on assent. Schedule 1 will commence on a day to be fixed by proclamation or six months after assent.

Corporations Amendment Regulations 2004 (No 4)

These Regulations (SR 36 of 2004) were gazetted on 18 March 2004. They correct a numbering error for reg 7.1.04E and make a minor drafting correction to reg 7.5.04(1). The Regulations commenced on gazettal.

Corporations Amendment Regulations 2004 (No 3)

These Regulations (SR 26 of 2004) were gazetted on 26 February 2004. They amend the regulation of financial markets to allow the legislative regime to accommodate two different types of compensation arrangements applying to the one market, and prescribe the Options Clearing House Pty Ltd (OCH) for the purpose of s 850A of the *Corporations Act 2001*. Regulations 1-3 commenced on gazettal and Sch 2 commenced on 11 March 2004.

Corporations Amendment Regulations 2004 (No 2)

These Regulations (SR 25 of 2004) were gazetted on 26 February 2004. They improve the operation of the disclosure regime, specify a number of things that are not financial products, and provide conditional exemptions from the licensing regime under Ch 7 of the *Corporations Act 2001*. The Regulations commenced on 26 February 2004.

Corporations Amendment Regulations 2004 (No 1)

These Regulations (SR 10 of 2004) were gazetted on 20 February 2004. They support the administration requirements of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*. The Regulations will commence on 1 July 2004.

Pending legislation

Trade Practices Amendment (Personal Injuries and Death) Bill (No 2) 2004

Introduced into the House of Representatives (HR) on 19 February 2004, this Bill is the second tranche of amendments implementing the 'Review of the Law of Negligence Report' released in October 2002 (Ipp Review) recommending reform of the *Trade Practices Act 1974* (TPA). It amends the TPA so that the rules relating to limitation of actions and quantum of damages recommended by the Ipp Review will apply to any claim for personal injuries or death brought under Pt IVA in the form of an unconscionable conduct claim, Pt V Div 1A, Pt V Div 2A or Pt VA.

Employee Protection (Employee Entitlements Guarantee) Bill 2004

Introduced into the HR on 16 February 2004, this Opposition Bill provides for a scheme to guarantee the payment of wages and other accrued liabilities owed to employees in the event of employer insolvency.

Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003

Introduced into the HR on 4 December 2003, this Bill amends the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* in relation to auditing and public disclosure requirements. It amends these Acts and the TPA to implement proportionate liability for economic loss or property damage. And it further amends the *Corporations Act* in relation to enforcement arrangements for corporate misbehaviour, remuneration of

directors and executives, continuous disclosure and infringements, disclosure rules, shareholder participation and information, and conflicts of interest of financial services licensees. On 1 March 2004 the Bill was read a first time in the Senate.

Corporation (Fees) Amendment Bill (No 2) 2003

Introduced into the HR on 4 December 2003, this Bill provides for companies to be charged a fee for referring a matter to the newly established Financial Reporting Panel. On 1 March 2004 the Bill was read a first time in the Senate.

Privacy Amendment Bill 2003

Introduced into the HR on 3 December 2003, this Bill amends the *Privacy Act 1988* to ensure that the protections of the Act are available to all irrespective of nationality and to provide the private sector with greater flexibility in relation to privacy codes. On 9 March 2004 the Bill was read a first time in the Senate.

Superannuation Safety Amendment Bill 2003

Introduced into the HR on 27 November 2003, this Bill implements the recommendations of the Superannuation Working Group. It provides for the Australian Prudential Regulation Authority to license trustees of the superannuation entities it regulates. The new licences will require trustees to meet minimum standards of fitness and propriety and to maintain risk management strategies and plans. On 10 March 2004 the amended Bill was sent from the Senate to the HR for concurrence.

Sexuality and Gender Identity Discrimination Bill 2003

Introduced into the HR on 25 November 2003, this Democrats Bill prohibits discrimination on the ground of sexuality, transgender identity or intersex status.

Workplace Relations Amendment (Better Bargaining) Bill 2003

Introduced into the HR on 6 November 2003, this Bill amends the WRA in relation to industrial action

before the expiration of an agreement, cooling off periods, third party suspensions, and protected and unprotected industrial action. On 3 March the Senate referred the Bill to the Employment, Workplace Relations and Education Legislation Committee for inquiry and report on 17 June 2004.

Kyoto Protocol Ratification Bill 2003 [No 2]

Introduced into the Senate on 30 October 2003, this Opposition Bill is for an Act to ratify the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The Environment, Communications, Information Technology and the Arts Legislation Committee was due to report on the Bill on 25 March 2004.

Corporate Responsibility and Employment Security Bill 2003

Introduced into the HR on 18 August 2003, this Opposition Bill inserts a new Div 6A into Pt 5.7B of the *Corporations Act*, addressing the liability of a related body corporate for the debts/liabilities of the company. It also amends the WRA to extend reinstatement orders to related bodies corporate and address their liability for employee entitlements.

Trade Practices Amendment (Public Liability Insurance) Bill 2003

Introduced into the HR on 18 August 2003, this Opposition Bill gives the Australian Competition and Consumer Commission power to deal with any price exploitation arising from changes in the law in relation to public liability.

Workplace Relations Amendment (Unfair Dismissal — Lower Costs, Simpler Procedures) Bill 2003

Introduced into the HR on 18 August 2003, this Opposition Bill simplifies the procedures involved in resolving claims for unfair dismissal.

Age Discrimination Bill 2003

Introduced into the HR on 26 June 2003, this Bill prohibits age discrimination in employment, education and access to goods and services, while exempting legitimate differential treatment in areas such as superannuation, taxation and health. On

23 March 2004 the Bill reached committee stage in the Senate.

Workplace Relations Amendment (Good Faith Bargaining) Bill 2003

Introduced into the HR on 16 June 2003, this Opposition Bill aims to ensure that negotiating parties to a proposed agreement take part in negotiations, negotiate in good faith and genuinely try to reach agreement.

Late Payment of Commercial Debts (Interest) Bill 2003

Introduced into the Senate on 6 March 2003, this Opposition Bill penalises the late payment of commercial debts by Commonwealth government agencies and large corporations to small business. The report of the Economics Legislation Committee was tabled on 29 October 2003.

Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002

Introduced into the HR on 27 June 2002, this Bill requires employers to make superannuation contributions on behalf of employees in compliance with the choice of fund requirements. On 10 February 2004 it was received in the Senate and read a first time.

Workplace Relations Amendment (Paid Maternity Leave) Bill 2002

Introduced into the Senate on 16 May 2002, this Democrats Bill provides for a system of paid maternity leave including a government funded basic maternity payment. The Senate Employment, Workplace Relations and Education Legislation Committee tabled its report on the Bill on 18 September 2002.

Bills terminated

Workplace Relations Amendment (Termination of Employment) Bill 2002 [No 2]

This Bill sought to amend the WRA to extend the federal unfair dismissal system to all employees of constitutional corporations, prevent employees from accessing remedies under State unfair dismissal schemes, and amend the operation of the unfair dismissal system. On 22 March 2004 a motion for a third reading in the Senate was lost. ●



Month in review

AUSTRALIA

ASX Listing Rules changes

On 31 March 2004 a number of changes to the Australian Stock Exchange Listing Rules relating to their capital raising provisions took effect. Some proposed changes have been temporarily deferred for further consideration and consultation.

ICA review paper

On 24 March 2004 an issues paper on the second phase of the review of the *Insurance Contracts Act 1984* (Cth) was released. Phase 1 focused on s 54 (see (2004) 7(3) IHC 36). The phase 2 paper covers the remainder of the Act. See <icareview.treasury.gov.au>.

Trade marks review paper

On 22 March 2004 IP Australia released Recommendations Paper 2 of its review of the trade marks legislation. See <www.ipaustralia.gov.au>.

ACA privacy paper

On 18 March 2004 the Australian Communications Authority (ACA) released a discussion paper, 'Who's got your number? Regulating the use of telecommunications customer information', proposing measures preventing unauthorised commercial use of personal data, including direct marketing. A mandatory standard will govern the use of customer information when it is made available for directories and other approved uses. See <www.aca.gov.au/aca_home/issues_for_comment/index.htm>.

National defamation law

On 18 March 2004 the Federal Attorney-General released a discussion

paper on the introduction of a national defamation law. The paper outlines a law that could be enacted by the Commonwealth in reliance on its existing constitutional powers. See <www.ag.gov.au/defamation>.

ACCC warns advertisers

On 15 March 2004 the ACCC announced a major campaign to bring to account those involved in the preparation and publication of advertising content. See MR 034/04 at <www.accc.gov.au>.

FSRA in full effect

On 11 March 2004 the *Financial Services Reform Act 2001* (Cth) (FSRA) came into full effect, putting in place a uniform licensing, conduct and disclosure regime for financial markets, products and services. Starting on 11 March 2002 with a two year transition period, the FSRA has now replaced Chs 7 and 8 of the *Corporations Act* with a new Ch 7.

Panel guidance on funding

On 4 March 2004 the Takeovers Panel published its guidance note on Funding Arrangements for Takeovers. See <www.takeovers.gov.au>.

APRA standards released

On 2 March 2004 APRA released proposed 'fit and proper' prudential standards for authorised deposit taking institutions, general insurance and life insurance institutions. The proposals will set minimum benchmarks for people in these industries at director, senior management or advisory level. See <www.apra.gov.au>.

TPA Senate report

On 1 March 2004 the Senate Economics References Committee released its report, 'The effectiveness of the *Trade Practices Act* in

protecting small business'. The report recommends strengthening the TPA's misuse of market power provision (s 46). See article on p 64 of this issue.

ACT industrial manslaughter laws

On 1 March 2004 the *Crimes (Industrial Manslaughter) Amendment Act 2002* came into effect in the ACT. It creates a new offence of industrial manslaughter, with penalties allowing for the jailing of business owners, executives or managers where a workplace fatality has occurred.

ACSI governance guidelines

In March 2004 ACSI launched its Corporate Governance Guidelines for Superannuation Fund Trustees. See <www.acsi.org.au>.

INTERNATIONAL

Three Rivers ruling

In *Three Rivers District Council v Governor and Company of the Bank of England* [2004] EWCA Civ 218 the UK Court of Appeal upheld the November 2003 decision of the UK High Court that advice given by lawyers for the Bank of England as to how material to be submitted to the Bingham Inquiry might be presented was not protected by legal advice privilege. See (2004) 7(3) IHC 30.

NZ governance principles

On 18 February 2004 the NZ Securities Commission released its report on Corporate Governance Principles for NZ. The principles focus on reporting and disclosure of corporate governance structures and processes, and reporting of financial and other material matters. They do not impose a new regulatory regime on listed entities. See <www.sec-com.govt.nz>. ●

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PUBLISHING EDITOR: Kerrie Tarrant **MANAGING EDITOR:** Elizabeth McCrone **PRODUCTION:** Alys Martin **SUBSCRIPTION INCLUDES:** 10 issues per year plus binder and index **SYDNEY OFFICE:** Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia **TELEPHONE:** (02) 9422 2222 **FACSIMILE:** (02) 9422 2404 **DX 29590 Chatswood** www.lexisnexis.com.au kerrie.tarrant@lexisnexis.com.au

ISSN 1326-8945 Print Post Approved PP 244371/00043 Cite as (2004) 7(6) IHC

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