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MERGERS AND ACQUISITIONS

Landmark ruling on Loy Yang opposition — AGL v ACCC (No 3)

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Month in review

Jo Daniels

CLAYTON UTZ

Since Graeme Samuel has taken the reins at the Australian Competition and Consumer Commission (ACCC), the ACCC has stated its intention to oppose four significant transactions based on its view that each transaction could have the effect of substantially lessening competition in a market.

One of these transactions was the proposed acquisition by the Australian Gas Light Company (AGL) of a 35 per cent stake in the Loy Yang A Power Station.¹ In response to the ACCC's opposition, AGL instituted proceedings in the Federal Court seeking a declaration that the proposed acquisition would not have the effect of substantially lessening competition.

In the decision of *AGL v ACCC (No 3)*² the Federal Court found that the proposed acquisition would not result in a substantial lessening of competition. This decision was based, in part, on the extensive undertakings offered by AGL, including a guarantee that:

- the interest held by AGL in Loy Yang Power would not exceed 35 per cent;
- a separate marketing company would be responsible for bidding, dispatch and market activities, and AGL would have no interest in this company;
- AGL would not otherwise be involved in the dispatch and marketing activities; and
- the parties would establish a confidentiality regime which would ensure that AGL would not have access to confidential customer information or confidential generator information.

On 2 February 2004, the ACCC announced that it would not be appealing the decision. This followed further negotiations between the ACCC and AGL which resulted in AGL providing further undertakings as to the provision of information to the ACCC to help it ensure AGL was complying with the undertakings given to the Federal Court.

There are a number of significant implications of the case, but the three most significant are:

- the adoption by the Court of a broader market definition than was previously assumed would be adopted;
- the acceptance by the Court that 'transient market power' should be given little weight in determining whether the acquisition would result in a substantial lessening of competition; and
- the possible implications for the informal merger process which is currently adopted by the ACCC.

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Broad approach to market definition

The Federal Court adopted a market definition that geographically covers the National Electricity Market (NEM) for the supply of electricity. In this definition, the Court included electricity derivative contracts.

The Court gave the following reasons for its adoption of a NEM wide geographic market definition:

- there was evidence of competition between generators located in different regions of the NEM through interconnection and that the incidence of restricted flows through the interconnectors was low;
- the NEM is an evolving market which is intended and designed to operate in a single market in relation to the regions that it covers; and
- a number of market participants operate across the regional boundaries.

The ACCC's rejection of a narrow approach to market definition will have significant implications for other mergers and acquisitions in the electricity industry.

Transient market power

The Court concluded that the acquisition would not result in Loy Yang Power having market power because it would not have an ongoing ability to price without constraint from competition.

In reaching this conclusion the Court took into account that in certain circumstances a generator may be able to temporarily influence the pool price for electricity. However the ACCC did not believe that this 'transient market power' argument reflected a long run phenomenon and disregarded other competitive constraints on generators, including new entrants and the upgrading of interconnectors. This conclusion is consistent with the decision of *Universal Music Australia*

Pty Ltd v ACCC,³ where the Full Federal Court found that temporary market power in relation to the chart music market did not result in market power for the purpose of the *Trade Practices Act 1974* (Cth) (TPA).

In concluding that Loy Yang Power did not have market power, the Court also took into account the following matters:

- Loy Yang Power only generates 8.6 per cent of the NEM wide market, and the Court found that the degree of concentration of suppliers did not support a view that Loy Yang Power had market power;
- there was a degree of countervailing power which arose from political and regulatory intervention in the market; and
- during the summer of 2000/01, when rebidding by Loy Yang Power resulted in significant increases in prices, the market responded in a competitive way by increasing announced generation capacity.

Implications for informal clearance procedure

The TPA does not have a compulsory pre-merger notification procedure but does allow parties to a merger transaction to seek authorisation. However, authorisation can be a lengthy and expensive process and the ACCC has adopted an informal clearance process.

Ordinarily, if the ACCC indicates at the end of the informal clearance process that the proposed acquisition would be likely to create substantial competition concerns, then either the parties decide not to proceed with the transaction or the ACCC seeks an injunction under the TPA preventing the acquisition from going ahead.

However, in the Loy Yang matter, at the end of the informal clearance process the ACCC indicated that it had

Implications of the decision

- The rejection of a narrow approach to market definition by the Federal Court has significant implications for other acquisitions, particularly transactions in the electricity industry.
- The decision provides additional comfort that market participants characterised as having 'transient market power' will not necessarily be found to possess market power for the purposes of the TPA.
- The decision may result in the ACCC adopting a more formal approach to clearance procedures for mergers and acquisitions.



substantial competition concerns but it took no steps to prevent the transaction from proceeding. AGL then applied for a declaration that the acquisition was not in breach of the TPA.

The Court rejected the ACCC's argument that an application for a declaration was an inappropriate method of resolving the issue and that

AGL should have sought an authorisation. ●

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Endnotes

1. The other transactions opposed

were the proposed alliance between Qantas and Air New Zealand, the proposed acquisition of Berri Ltd by Coca-Cola Amatil and the proposed acquisition of Austrim Nylex's Pryda Reid Group by MiTek Australia Ltd.

2. [2003] FCA 1525 (19 December 2003) BC20037919.

3. (2003) 201 ALR 636 at [242].

INFORMATION TECHNOLOGY

Regulation of business email marketing — Spam Act 2003

Bruce McFarlane and Nicole Tumiati HALL & WILCOX LAWYERS

With the coming into effect of the *Spam Act 2003* (Cth) (the Act) on 10 April 2004, it is timely to consider the use of electronic marketing. This article aims to assist inhouse counsel and senior management in reviewing whether current practices within their organisations comply with the new rules.

What is prohibited?

'Spam' is a term generally understood to mean unsolicited electronic messages, usually transmitted to a large number of recipients.

The main penalty provisions of the Act prohibit the sending of unsolicited commercial electronic messages (CEMs). Significantly, the Act also regulates the sending of general CEMs, regardless of whether or not they are solicited.

The primary prohibitions are outlined in s 15 of the Act, namely:

- unsolicited CEMs must not be sent (s 16);
- CEMs must include information about the person (individual or organisation) who authorised the sending of the message (s 17); and
- CEMs must contain an unsubscribe function (s 18).¹

The above prohibitions apply to both CEMs originating from Australia and sent to any destination worldwide, and CEMs originating from overseas and sent to an address accessed in Australia.

What is a CEM?

'Commercial'

An electronic message will have a commercial purpose if, for example, it

constitutes an offer to supply or provide goods, services, land, business or investment opportunities or constitutes an advertisement in relation to the supply or provision of goods, services, land, business or investment opportunities (s 16).

When determining purpose, the following factors should be considered (s 16):

- the content of the message;
- the way in which the message is presented; and
- the content that can be located using the links, telephone numbers or contact information (if any) set out in the message.

'Electronic'

An electronic message is a message sent using either an internet carriage service or any other listed carriage service to an electronic address (for example, email account, instant messaging account, telephone account or similar account) (s 5).

Messages sent by way of a voice call made using a standard telephone service are not electronic messages for the purposes of the Act.

'Carriage service' has the same meaning as in the *Telecommunications Act 1997* (Cth) — namely, a service for carrying communications by means of guided (for example, wire or cable) and/or unguided (for example, radio communications) electromagnetic energy. Insofar as it is possible, the definition aims to be technology neutral and takes into account the convergence of technologies and media (for example, short message service

(SMS), MMS, 3G, email).

'Message'

Message is to be interpreted broadly to mean any information, whether in the form of text, data, speech, music or other sounds, visual images or any combination of these (s 4).

Checklist

Before sending a CEM, the following questions should be considered (also see diagram 1).

Does my organisation have the consent of the intended recipient?

Consent may be expressed or inferred (Sch 2). While there is no requirement that express consent be in writing, it would be prudent to adopt a policy of obtaining and retaining the written consent of all intended recipients.

Certain conduct or relationships can give rise to 'inferred consent'. Consent may reasonably be inferred from the conduct, the business and the other relationships of the individual or the organisation concerned (Sch 2).

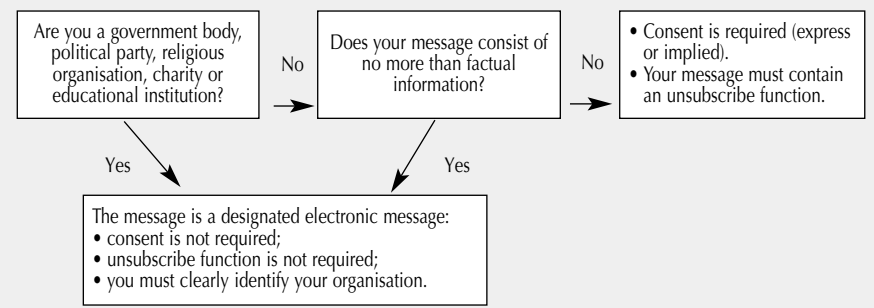
Consent is not required where a CEM is a 'designated CEM', that is, where the message consists of no more than factual information or it is sent from a government body, political party, religious organisation, charity or educational institution (Sch 1).

In the event that a CEM is sent without the recipient's consent, penalties apply.²

Has my organisation been clearly identified?

Any CEM, whether solicited or

Diagram 1



unsolicited, must clearly identify the party who authorised the sending of the message and must also include accurate information about how the recipient can contact that individual or organisation (this may be a physical or virtual address) (s 17).

The information provided must be reasonably likely to be valid for at least 30 days after the message is sent.

Designated CEMs are not exempt from this requirement.

Failure to clearly identify your organisation may result in the imposition of penalties.³

Does my message contain an unsubscribe function?

The CEM must include a clear conspicuous statement to the effect that the recipient may use an electronic address set out in the message to send an 'unsubscribe' request to the individual or organisation who authorised the sending of the message.

Examples of an unsubscribe function include:

- in the case of an email message, a statement that says 'if you no longer want to receive notification simply reply to this email'; and
- in the case of an SMS message, a statement saying 'please ring this number if you no longer want to receive these messages or, alternatively, register at this website'.

Any further CEMs sent to a recipient who has unsubscribed shall constitute a breach of s 16 (that is, the message is deemed to have been sent without the recipient's consent).

Designated CEMs are exempt from this provision.

Failure to provide an unsubscribe function may result in the imposition of penalties.⁴ ●

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Endnotes

1. The *Spam Act* also prohibits the use of address harvesting software and harvested address lists (see Pt 3), however this is not covered in this article.

2. Where the corporation has no prior record, a penalty in respect of a single breach of up to \$11,000, and where more than one breach has occurred on a single day a total penalty of up to \$220,000 (s 25 (3)(a)(i) and (b)(i)). Where the corporation has a prior record, a penalty in respect of a single breach of up to \$55,000, and where more than one breach has occurred on a single day, a total penalty of up to \$1,100,000 (s 25 (5)(a)(i) and (b)(i)). Maximum penalties noted in this article relate to corporations only.

3. Where the corporation has no prior record, a penalty in respect of a single breach of up to \$5,500, and where more than one breach has occurred on a single day, a total penalty of up to \$110,000 (s 25 (3)(a)(ii) and (b)(ii)). Where the corporation has a prior record, a penalty for a single breach of up to \$27,500, and where more than one breach has occurred on a single day, a total penalty of up to \$550,000 (s 25 (5)(a)(ii) and (b)(ii)).

4. Where the corporation has no prior record, a penalty in respect of a single breach of up to \$5500, and where more than one breach has occurred on a single day, a total penalty of up to \$110,000 (s 25 (3)(a)(ii) and (b)(ii)). Where the corporation has a prior record, a penalty for a single breach of up to \$27,500, and where more than one breach has occurred on a single day, a total penalty of up to \$550,000 (s 25(5)(a)(ii) and (b)(ii)).



The genie in the bottle — discovery of electronic documents

Sally Scott and Michelle Ould

HALL & WILCOX LAWYERS

Litigation can have more harmful consequences for an organisation than the negative outcome of a dispute. The discovery process can result in information being seen by a customer, a competitor or the general public that may harm the reputation or commercial advantage of an organisation or its relationship with its customers. Technology presents a range of additional dangers for an organisation in the discovery process. This article outlines the traps as well as steps that can be taken to minimise the potential harm of discovery of emails and computer data.

Emails

Traps

Emails are fast becoming the most common form of business communication. However, unlike the treatment of letters and faxes, many staff tend to treat emails as a casual and informal form of communication, more akin to speech (although with a written record). They often apply imprecise language and use less care. This has the potential to cause significant problems for organisations when emails are produced in discovery and later tendered in court, which is generally a public forum.

Emails produced in discovery and tendered in court could contain comments that may:

- cause harm to an organisation if seen by a customer, competitor or the public (for example, an email to a colleague may contain flippant, derogatory or offensive comments about a customer);
- be misleading and deceptive or defamatory (for example, an informal email may contain overstated representations/promises about products or services or may defame someone); or

- assist a party to attack the credibility of a witness (for example, a flippant and inaccurate comment may be used to contradict evidence being led or attack the character of a witness).
- It should be kept in mind that even if emails are deleted and not printed, they may still be retained on a back up system, and thus be discoverable.

Tips

- Instruct staff to be cautious about the content of emails, such as representations, language and derogatory or offensive comments.
- Instruct staff that emails (and other forms of communication including brief notes in diaries) may end up being discovered, tendered in court and seen by a customer, competitor or the general public — staff should act on the assumption that this will occur.
- Essentially, the attitude of staff towards emails may need to be changed from assuming they are merely casual forms of communication to understanding that they can be used against or in favour of your organisation in court proceedings.
- Consider the need for all or certain emails to be signed off by a superior prior to being sent (if practical).
- Consider the relevance of harmful emails, as it may be possible to withhold them from discovery or cover irrelevant parts on grounds of relevance (your external lawyers can assist with this).
- Ensure that emails are always printed or saved so that if your organisation does want to establish say, the existence of a contract by communications in emails, evidence is retained. Printed emails should be stored in a logical and organised manner, for example, according to transactions or customers.

Data on computers

Traps

One difficulty presented by the storage of data on computers is that it may not be practical or possible to extract relevant data while preventing irrelevant, commercially sensitive or privileged data from being discovered. Further, many cases require the discovery of financial data. The amount of relevant financial data may be endless and repetitive, although in different forms and databases, and may not be easily extracted for relevant transactions.

In the recent case of *Sony Music Entertainment (Aust) Ltd v University of Tasmania* [2003] FCA 532 (30 May 2003) BC200302696, the Federal Court addressed the issue of whether or not computer backup tapes should be discovered, despite the fact that files irrelevant to the dispute would be disclosed, some containing personal information on students. The Court ordered that a computer expert retained by Sony access *all* backup tapes to perform a search for relevant documents and extract the relevant data. However, the expert was required to give a strict undertaking as to non-disclosure and confidentiality.

While the order for discovery in this case appears to adequately protect irrelevant or confidential data, in reality, not having to disclose documents of this nature should always be preferred rather than relying on an undertaking of confidentiality. Aside from any legal remedy available to an organisation, should an undertaking of confidentiality not be honoured, sensitive documents leaked to the public may damage the reputation of the organisation in the eyes of the public and provide a competitor or a customer with information that may affect future dealings.

Tips

- Don't have one backup tape for all types of documents. Break down backup procedures into departments or other relevant groupings.
- Inhouse counsel, human resources staff and senior executives should maintain a separate hard drive and backup system.
- Consider making an application for limited discovery in a court proceeding so that only one type of financial data which can prove or disprove an issue is required to be discovered, rather than every type that is relevant.
- Irrelevant data should be excluded. This may be difficult if the data is voluminous and stored on a

computer disc and the entire disc is discovered. Consideration should be given to whether it is possible to extract relevant data or to print it out but cover up irrelevant data.

Conclusion

In summary, be on guard about the potential impact of discovery of emails and computer data and consider steps, such as those mentioned above, to protect your organisation. ●

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INTELLECTUAL PROPERTY

Tying the laces on copyright ownership — Dr Martens case

Samantha Christie

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Who owns the rights to your famous brands or your best selling products and services? The recent Dr Martens UK case (*Griggs Group Ltd v Evans* [2003] EWHC 2914 (Ch) (2 December 2003)) shows that written intellectual property (IP) assignments may be worthless, and that careful footwork is required to ensure a solid platform for product and service development and investment.

The Dr Martens case is a good lesson in what not to do when commissioning product related artwork from third parties. It concerned rights to the combined Dr Martens/AirWair logo (the Logo) which appears on every pair of the world famous Dr Martens shoes. Prescott J found that despite the fact that the business interests behind the Dr Martens shoes did not own legal title to the copyright in the Logo, they were entitled to declaratory relief and an order compelling Evans, the legal

copyright owner, to formally assign the copyright to them.

Following the decision of Evans (the freelance designer, that is 'author' of the Logo) to assign his copyright in it to a third party, the Dr Martens parties had to go to the expense and trouble of instituting legal proceedings to ensure good legal title to all aspects of their valuable brand. This was notwithstanding that the Griggs family, owners of the Dr Martens business, had received a written assignment of the copyright in the Logo from their advertising agency (which Prescott J found to be legally ineffective) and had rights to use both the registered and common law Logo trade mark.

Background and issues

The Griggs family successors and other parties (Griggs) initiated proceedings against a number of parties including Evans, the graphic artist who designed the Logo for Griggs'



advertising agency, and Raben Footwear Pty Ltd (Raben), an Australian retailer who had bought the copyright in the Logo from Evans. Raben was hostile to Griggs and the latter was concerned to shore up full rights in its famous Logo. As Prescott J pointed out, there were a number of commercial risks for Griggs in having a hostile third party own copyright in its Logo. These included:

- the risk of Raben attempting to stop Griggs using the Logo;
- the risk of Raben assigning the Logo to a competitor of Griggs; and
- the potential problem for Griggs in preventing others using the Logo in countries where Griggs did not yet have trade mark rights as an alternative property right on which to rely.

Commenting that the story of Dr Martens shoes was so improbable that 'no novelist would have dared to invent it', Prescott J noted that following design changes made in the 1950s by the Griggs family to an air cushioned sole designed by two German doctors to deal with elderly women's feet problems, the Dr Martens shoes became world famous. The shoes are now sold in over 78 countries and purchased by a diverse demographic including popstars, skinheads, builders, policemen, supermodels and street buskers.

Griggs uses the 'Dr Martens' registered trade mark under licence from the successors of the two German doctors, and also developed and registered the 'AirWair' logo trade mark. In 1988 Griggs decided to combine the two trade marks into the one logo. They approached their advertising agency which arranged for their regular independent contractor/designer, Evans, to do the work. Given that there was no express agreement to the contrary between the agency and Evans, Evans owned the copyright in the Logo as its author.

The resulting combined logo was used on Dr Martens footwear from 1988 and Prescott J noted that this use was supported by Griggs' trade mark licence for the 'Dr Martens' word mark, Griggs' own registrations for 'AirWair' and the 'AirWair' logo, the common law trade mark rights for these marks and

the Logo that Griggs had acquired through extensive use in the marketplace. Prescott J noted that while these rights would support an infringement or passing off action by Griggs against a third party purporting to use their marks, the fact that Evans, as the author and copyright owner of the Logo, had assigned his legal copyright title in the Logo to Raben, left Griggs commercially vulnerable.

... it's good insurance to not only obtain a copyright assignment ... and moral rights consents, but also a warranty as to the validity of copyright title supported by a commercially backed indemnity ...

Prescott J found that as the Griggs agency did not own the copyright in the Logo, their purported copyright assignment to Griggs was legally ineffective. Evans claimed that he retained legal and beneficial title to the copyright work comprising the Logo because:

- he was not paid sufficiently for its creation to imply a term of copyright assignment into his contract with the agency (the contract); and
- the intended worldwide use of the Logo was not made known to him at the time the agency commissioned the work from him.

Given the absence of an express provision for copyright ownership in the contract, Prescott J considered a number of factors in order to determine what sort of term should be implied into the contract — a copyright licence for use of the Logo by Griggs or an assignment of the copyright?

Outcome

After surveying the law on implication of contractual terms in copyright cases, Prescott J found that in this instance there should be implied into the contract a term providing for Evans to assign the copyright in the Logo to Griggs as the client of the commissioning agency. This conclusion was based on a number of factors, including the arrangement between the agency and Evans, the terms of his payment and the fact that Evans was

not in the habit of bargaining for higher or different payment terms for different work.

In concluding that Griggs therefore held equitable title to the copyright in the Logo, Prescott J noted that this case fell into a category of cases where, for business efficacy, the client in question needed not only the right to use the copyright work itself (such right usually being supported by an implied licence in

the absence of express provision), but also the right to exclude not only the contractor from using the work, but also third parties.

Lessons and practical implications

Notwithstanding the purported assignment of copyright in the Logo to Griggs from their advertising agency, the proprietors of the Dr Martens shoes found themselves in a potentially commercially vulnerable position because of a failure to tie the laces and knot the bow on the copyright ownership issue. This case is a timely reminder of the need to ensure full ownership of all the IP rights in your companies' products and services, and to recognise that different IP rights, such as trade marks and copyrights, can exist simultaneously and be owned by different parties.

If commissioning work through a third party such as an advertising agency, it's good insurance to not only obtain a copyright assignment (which in this case turned out to be ineffective) and moral rights consents, but also a warranty as to the validity of copyright title supported by a commercially backed indemnity (covering things such as legal costs) which can be called on in the event of a dispute as to rights. ●

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litigation matters

When two heads are better than one

Richard Travers ALTIOR PTY LTD

The practice of obtaining second opinions is common in medicine. Why not in law?

Medical model

In medicine, treating doctors carry out diagnostic tests and investigations before reaching a diagnosis and recommending a treatment plan based on their interpretation of the results of the tests and the investigations.

It is accepted that good doctors commonly interpret test results differently. This leads them to suggest different treatment plans for the same problem, especially in difficult cases. In these circumstances, it is common sense to ask a second, or even a third, doctor to review the interpretation and advice of the treating doctor.

the facts to determine the client's legal rights. This is the equivalent of diagnosis. Finally, they suggest a course of action to enforce the client's rights. This is the equivalent of the treatment plan.

It is notorious that lawyers often arrive at different interpretations of the same facts, yet it is almost unknown for a client embarking on a court case to ask a second lawyer (still less a third) to review the advice of the trial team to proceed with the case. Most clients leave the call on whether to run contentious litigation to the trial team.

This is surprising. Where the litigation is likely to be long and expensive, and the decision to sue or not is finely balanced, clients leave the 'go/no go' decision to a team of lawyers

... it is almost unknown for a client embarking on a court case to ask a second lawyer ... to review the advice of the trial team to proceed with the case.

In the US, health insurers encourage patients to obtain second opinions in difficult cases. And second opinions are mandatory before some hospitals will allow complex surgery to be undertaken.

Second and third opinions are vital to maintain standards of service and treatment. The second opinion is a check on the first and it may suggest a differential diagnosis or a form of treatment not considered by the treating doctor. The availability of different, intelligent opinions improves the quality of medical decision making.

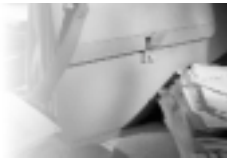
Approaches to litigation

Lawyers address legal problems in much the same way as doctors address medical problems. First, they establish the facts. This is the equivalent of the doctor's diagnostic tests and investigations. Lawyers then interpret

who stand to earn huge fees if the case proceeds, and nothing if it does not.

The reluctance of clients to test critically and independently the advice of a trial team is all the more surprising given their awareness of the pressure to produce fees, which is the unavoidable consequence of the structure of the large law firms today.

The second opinion acts as a check on the views of the trial team. If the second lawyer disagrees with the trial team, clients can address the problems identified before their opponents expose them in the courtroom and before needless costs are incurred. If the second lawyer supports the recommendation of the trial team but suggests new ideas or a modified strategy, clients and the trial team can incorporate the suggestions into their approach. If the second lawyer endorses the recommendation of the



trial team, clients will be reassured that the decision to proceed is the best decision.

Cost

The cost of the second opinion need not be great. The trial team should have established all relevant facts before making its recommendation. The

material outlining the factual position can be made available to the second lawyer, leaving the second lawyer to concentrate on the legal position and formulate the best strategy for the case. This should avoid needless duplication of work and minimise the cost of the second opinion.

More importantly, a second opinion

that improves a client's chances of winning an expensive case, or that saves it from embarking on litigation that cannot be won, will repay its cost many times over. ●

Richard Travers, Managing Director, Altior Pty Ltd (legal strategists), <www.altior.com.au>.

Federal legislation update

Assents and gazettals

Corporations Amendment Regulations (No 11) 2003

These Regulations (SR 369 of 2003) were gazetted on 23 December 2003. They require breaches of certain legislation by a financial services licensee to be reported to the Australian Securities and Investments Commission (ASIC) and specify documents that must contain the licensee's licence number. Regulations 1-3 and Sch 1 commenced on gazettal and Sch 2 commenced on 14 January 2004.

Corporations Amendment Regulations (No 10) 2003

These Regulations (SR 368 of 2003) were gazetted on 23 December 2003. They amend disclosure provisions under the *Financial Services Reform Act 2001*, including provision for practical relief from the financial services guide (FSG) requirements when advertising through the mass media, stipulate a number of things that are not financial products and provide exemptions from the financial services licensing regime. Regulations 1-3 and Sch 1 commenced on gazettal and Sch 2 commences on 11 March 2004.

Corporations Amendment Regulations (No 9) 2003

These Regulations (SR 367 of 2003) were gazetted on 23 December 2003. They partially exempt foreign based market licensees from the requirement to inform ASIC of breaches or disciplinary action involving non-Australian market participants and other persons. The amending Regulations commenced on gazettal.

Designs Act 2002

This Act (No 147 of 2003) received assent on 17 December 2003. It replaces the *Designs Act 1906* and establishes a more streamlined registration system, better enforcement and dispute resolution procedures, stricter eligibility and infringement tests and clearer definitions. Sections 1 and 2 commenced on assent. Sections 3-161 will commence on a date to be proclaimed or six months after assent.

Financial Services Reform Amendment Act 2003

This Act (No 141 of 2003) received assent on 17 December 2003. It amends the *Corporations Act 2001* to clarify aspects of the financial services regulatory framework. All provisions have commenced but for Sch 2 items 46D-46F, 72A, 88 and 88A, which will commence on 1 July 2004.

Trade Practices Legislation Amendment Act 2003

This Act (No 134 of 2003) received assent on 17 December 2003. It repeals the *Prices Surveillance Act 1983* and inserts a new Pt VIIA into the *Trade Practices Act 1974* providing for selective surveillance of the prices of certain goods and services. Sections 1-3 commenced on assent. Schedules 1 and 2 will commence on a date to be proclaimed or six months after assent.

Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003

This Act (No 137 of 2003) received assent on 17 December 2003. It amends the *Workplace Relations Act 1996* (WRA) to improve the workplace

relations arrangements in Victorian workplaces covered by Sch 1A of the WRA. Sections 1-3 commenced on assent. Schedules 1-4 commenced on 1 January 2004.

Spam Act 2003

This Act (No 129 of 2003) received assent on 12 December 2003. It prohibits sending commercial emails without the recipient's prior consent and using email harvesting or list generating software for the purpose of sending spam. The law will be enforced by the Australian Communications Authority. Messages sent by government bodies, political parties, religious organisations and charities are exempted. Sections 1-14, 42, 47 and Sch 2 commenced on assent. Parts 2-6, ss 41 and 43-46 and Schs 1 and 3 will commence on 10 April 2004.

Corporations Amendment Regulations (No 8) 2003

These Regulations (SR 282 of 2003) were gazetted on 13 November 2003. They address practical or technical difficulties with Ch 7 of the *Corporations Act*. The Opposition has moved in the Senate to disallow the Regulations, and that motion is expected to be debated in February 2004.

Draft legislation

Corporations Amendment Regulations 2004 (Batch 8)

These Regulations were released in draft by Treasury on 7 January 2004. They amend the 'reasonably practicable' criteria for disclosure requirements under Ch 7 of the *Corporations Act*.

Corporations Amendment Regulations 2003/04 (Batch 7)

These Regulations were released in draft by Treasury on 24 December 2003. They address the meaning of 'class' of financial services and 'able to be traded' in Ch 7 of the *Corporations Act*, extend relief for risk management advice and address the licensing of overseas derivative counterparties.

Corporations Amendment Regulations 2003 (Batch 6)

These Regulations were released in draft by Treasury on 6 November 2003. They contain a number of technical amendments, many of which follow from amendments made to Ch 7 of the *Corporations Act*.

Pending legislation

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

Introduced into the House of Representatives (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.

Privacy Amendment Bill 2003

Introduced into the HR on 3 December 2003, this Bill provides the private sector with greater flexibility in relation to privacy codes.

Sexuality and Gender Identity Discrimination Bill 2003

Introduced into the HR on 25 November, this Democrats Bill prohibits discrimination on the grounds 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.

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

Introduced into the HR on 6 November 2003, this Bill extends the federal unfair dismissal system to all employees of constitutional corporations, prevents employees from accessing remedies under State unfair dismissal schemes, and amends the operation of the unfair dismissal system.

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. On 26 November 2003 the Senate referred the Bill to a standing committee for inquiry and report by 4 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 (ACCC) 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, the 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. The Bill received its second reading in the Senate on 3 December 2003.

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.

Trade Practices Amendment (Personal Injuries and Death) Bill 2003

Introduced into the HR on 27 March 2003, this Bill prevents individuals and the ACCC in a representative capacity from bringing actions for damages from personal injury or death resulting from

contraventions of Div 1 of Pt V of the TPA. Senate amendments were rejected in the HR and the Bill was returned to the Senate where it was received; message reported on 3 December 2003.

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 in relation to contracts for the supply of goods and services. The report of the Economics Legislation Committee was tabled on 29 October 2003.

Employee Protection (Employee Entitlements Guarantee) Bill 2003

Introduced into the HR on 3 March 2003, 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.

Public Interest Disclosure (Protection of Whistleblowers) Bill 2002

Introduced into the HR on 11 December 2002, this Democrats Bill provides a comprehensive Commonwealth public sector whistleblowing scheme.

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 5 December 2003 the Bill was read a third time in the HR and sent to the Senate for concurrence.

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 August 2002.

Workplace Relations Amendment (Transmission of Business) Bill 2002

Introduced into the HR on 21 March 2002, this Bill empowers the Australian Industrial Relations Commission 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. The Bill, along with Senate amendments rejected in the HR, was returned to the Senate on 19 August 2003. ●

Month in review

Final MDA policy

On 6 January 2004 the Australian Securities and Investments Commission (ASIC) finalised its policy approach to the regulation of managed discretionary account (MDA) services. Operators of MDA services will be exempted from the managed investments provisions in Ch 5C of the *Corporations Act 2001* (Cth) and the product disclosure provisions in Pt 7.9. See IR 04-01 at <www.asic.gov.au>.

FSR relief

On 23 December 2003 ASIC published six class orders (COs)

providing temporary relief from the financial services licensing regime (see IR 03-43 at <www.asic.gov.au>). ASIC also published CO 03/1092 permitting two or more product issuers to prepare a joint PDS (see IR 03-42). It announced COs relieving some wholesale foreign financial services providers from the requirement to hold an Australian financial services licence where their home jurisdiction regulation is sufficiently similar to Australia's (see IR 03-41). And it extended interim relief for foreign collective investment schemes until

31 March 2004 to allow additional time to issue revised PS 65 (see IR 03-40). ASIC has also granted conditional relief to financial counselling agencies (see IR 03-39).

Cash needs requirements

On 23 December 2003, ASIC announced that entities within a corporate group will be able to satisfy their cash needs requirement under Policy Statement (PS) 166 without completing individual cash flow projections. See IR 03-44 at <www.asic.gov.au>.

Socially responsible investment

On 17 December 2003 ASIC released its guidelines for the inclusion of information relating to labour standards and environmental, social and ethical factors in the product disclosure statements of investment products. The guidelines have been developed following *Corporations Act* (s 1013DA) reforms. See IR 03-405 at <www.asic.gov.au>.

Soft dollar payments

On 16 December 2003, the Investment and Financial Services Association (IFSA) and the Financial Planning Association of Australia (FPA) released their Draft Code of Conduct on Alternative Remuneration that regulates certain industry remuneration practices and that will be adopted by members of each Association. See <www.ifsa.com.au>.

Rural Press appeal

On 11 December 2003 the High Court handed down its decision in *Rural Press Ltd v ACCC* [2003] HCA 75; BC200307578. The Court overturned the decision of the Full Federal Court (FFC) and found that an arrangement or understanding between Rural Press, Bridge Printing and Waikerie Printing House contained an exclusionary provision. The Court affirmed the FFC's findings that the arrangement or understanding had the purpose or effect of substantially lessening competition in the relevant market, and that Rural Press and Bridge Printing did not breach the

misuse of market power provisions of the *Trade Practices Act 1974*.

US anti-spam law

On 16 December 2003 the *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003* (CAN-SPAM Act) was signed into law in the US. The Act establishes a framework of administrative, civil, and criminal tools to help combat unsolicited commercial email. Senders of email must place warning labels on messages containing sexually oriented or pornographic material.

UK auditing Bill

On 3 December 2003 the UK Government introduced the Companies (Audit, Investigations and Community Enterprise) Bill to the House of Lords. The Bill aims to improve the reliability of financial reporting and auditors' independence, and to strengthen the powers of company investigators. It also includes the provisions relating to the new 'community interest company'.

Guidance on ASX Principle 7

The Australian Stock Exchange Corporate Governance Council has provided supplementary guidance to its interpretation of Principle 7 ('recognise and manage risk') to assist listed entities in implementing the recommendations. See <www.asx.com.au>. The Group of 100 has released a 'Guide to Compliance with ASX Principle 7' (prepared by Deloitte) available at <www.group100.com.au>. ●

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