

Inhouse counsel

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The new duty implied into employment contracts

Nick Ruskin and Alex Manos
DLA PHILLIPS FOX

Practical implications

- The potential existence of an implied duty of good faith and an implied duty of mutual trust and confidence in all employment contracts cannot be ignored.
- Employers should make every attempt to comply with internal policies, treat employees equitably, and thoroughly investigate misconduct claims to the extent that the employer's resources permit in order to comply with such duties.
- These implied duties apply to conduct short of dismissal but may include the point of termination.

A single judge of the NSW Supreme Court recently confirmed the existence of an implied duty of trust and confidence and an implied duty of good faith in employment contracts. Implied terms of this nature are well established in employment contracts in the UK. For the first time, they may be considered to be part of Australian employment contracts as a result of *Russell v Roman Catholic Church*.¹

Background

Mr Russell was the part-time Director of Music for the Roman Catholic Church and had held this post since 1976. He had no written contract of employment. He was dismissed in 2003 following an investigation alleging sexual misconduct. Mr Russell commenced proceedings in the NSW Industrial Relation Commission for reinstatement in his employment. The dismissal was found to be harsh, unjust and unreasonable and the Commission ordered restitution of all wages and reinstatement to his original position.

Mr Russell instigated proceedings in the NSW Supreme Court claiming

damages for breaches by his employer of the implied obligations to act in good faith and not to conduct itself, or not to conduct itself without reasonable and proper cause, in a manner so as to damage or destroy the relationship of trust and confidence between employer and employee. Mr Russell claimed that the failure of the employer to interview a key complainant face-to-face breached the implied terms. He conceded that only actions prior to termination could have potentially breached the implied terms.

Implied duties

Rothman J undertook an analysis of the duty of good faith in commercial contracts to see if the rationale for such an implication is appropriate in an employment setting. His Honour found that the duty of good faith was well established in commercial contracts because, among other things, it was reasonable and equitable. He went on to say that it was impossible for contracts to operate without a duty of good faith and that such a proposition was not foreign to employment relationships. In applying this duty, his Honour found that both the employer and employee need to exercise their rights under the contract:

... honestly and reasonably, with prudence, caution and diligence and with 'due care to avoid or minimise adverse consequences' to the other party that are inconsistent with the agreed common purpose and expectations of the parties to the contract.²

His Honour went on to say that the rationale for the existence of a duty of good faith applies equally to the existence of a duty of mutual trust and confidence. He agreed with the employee's description of the implied term, namely that there was:

... a duty not, without reasonable and proper cause, to act in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.³

Both implied terms were found to apply to all conduct in the relationship except for that amounting to termination, although it could apply at the point of termination.

His Honour found that the Church's failure to interview a key complainant face-to-face, taking into account the size of the employer and the resources available to it, amounted to a breach of the duty of good faith. However, it could not be said that if Mr Russell had had the opportunity to cross-examine that the result would have been any different. The breach of the duty resulted in no damage and therefore was not compensatable.

Analysis

The introduction of WorkChoices may have, in some ways, led employees to look elsewhere for remedies in employment. However, this particular case is not one that emanates from the removal of a right available before the introduction of WorkChoices. Testing the common law is a double-edged sword for plaintiffs: unsuccessful applicants may face costs orders, while successful ones stand to claim significant sums due to an uncapped damages jurisdiction. As we have seen in *Nikolich v Goldman Sachs JB Were Services Pty Ltd*⁴ and *Walker v Citigroup Global Markets Australia Pty Ltd*⁵ (both cases discussed in (2006) 9(10) *INC*), high-net-worth employees can receive sizeable compensation payments in common law claims.

These three cases demonstrate the importance of the contract



of employment and the terms of, and adherence to, policies, and the significant consequences if they are breached. The issue has not been addressed by an appellate court yet and we can expect to see the matter receive more judicial attention in coming years. It is nevertheless an issue that must be taken into account by employers when

dealing with issues surrounding potential dismissal. ●

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Endnotes

1. *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104; BC200700695.
2. At [118].
3. At [120].
4. [2006] FCA 784; BC200604574.
5. [2006] FCAFC 101; BC200604603.

practice notes

Revisiting directors' duties and responsibilities

William Khong
HALL & WILCOX LAWYERS

On 15 February 2007, the Australian Securities and Investments Commission (ASIC) commenced civil penalty proceedings in relation to James Hardie Industries NV (James Hardie), including against a number of former and current directors and former executives. Undoubtedly, a few inhouse counsel will have had a knock on the door from their respective directors inquiring about the implications of ASIC's actions.

This practice note revisits the duties that directors face today when discharging their responsibilities.

James Hardie case

On 16 February 2001, James Hardie made an announcement to the Australian Stock Exchange (ASX) that the foundation it had established to compensate sufferers of asbestos related diseases, and to fund medical research aimed at finding cures for these diseases, would have sufficient funds to meet all legitimate compensation claims. In fact, this turned out not to be the case.

ASIC alleges that a number of former and current directors and former executives did not act with requisite care and diligence because they failed to query the draft announcement. In ASIC's view, they neither believed as individuals that funding was sufficient, nor did they have adequate information

before them to justify such a belief. In addition, Peter MacDonald, who was the chief executive officer at the time of the announcement, was also charged with a failure to act in good faith in the best interests of the company and for a proper purpose.

Position at law

Directors of a corporation have a duty:¹

- to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise;
- to exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose;
- not to improperly use their position, or use information acquired from their position in the corporation, to gain an advantage for themselves or someone else or cause detriment to the corporation; and
- to disclose to other directors any material personal interest in a transaction.

In a recent address to the Australian Institute of Company Directors, ASIC Chairman Jeffrey Lucy AM stated that ASIC does 'not take enforcement action against those who make honest and reasonable efforts to comply with their legal duties as directors'.²

However, ASIC will take strong action where that action is warranted.

ASIC may commence civil penalty proceedings against a careless or negligent director. In some circumstances, it may also take administrative action, such as disqualifying the director.³ If the director is reckless or intentionally dishonest, and ASIC has sufficient evidence, ASIC will refer the matter to the Commonwealth Director of Public Prosecutions for criminal prosecution. In certain circumstances, ASIC may commence civil penalty proceedings against a reckless or intentionally dishonest director if it is not confident that it will succeed in a criminal prosecution.

In ASIC's view:

... you will be reckless where you are aware of substantial risk that a transaction is not for a proper purpose or to be entered into in good faith or not otherwise justifiable, but you are determined to proceed indifferent to the consequences.⁴

It is interesting that Mr Lucy noted that the community's reasonable expectations appear to be for strong punishment and cited the civil penalty proceedings against Steve Vizard in 2005. In that case, the court banned Mr Vizard from being a director for 10 years although ASIC had only asked for five years.

Defence

Fortunately it is not all doom and gloom for directors. They still have a defence in the ‘business judgment rule’ which provides that directors will meet their statutory duty of care and diligence if they:

- make ‘business judgments’ in good faith for a proper purpose and do not have a material personal interest in the subject matter;
- inform themselves about the subject matter to the extent they reasonably believe to be appropriate; and
- rationally believe that the judgment is in the best interests of the company.⁵

It is important to note that this only applies to the statutory duty of care and diligence (and their equivalent duties at common law and in equity) — but not to the other statutory duties referred to above. However, the federal government is currently reviewing the possibility of including a general protection for directors by providing a consistent defence to relieve directors of liability for decisions made where they act:

- in a bona fide manner;
- within the scope of the company’s business;
- reasonably and incidentally to the company’s business; and
- for the company’s benefit.⁶

It is unclear whether this general defence will ever see the light of day, but at least the government seems to recognise that the shoes of a director are becoming harder and harder to fill these days.

Conclusion

ASIC’s action against James Hardie should serve as a reminder to all directors (executive and non-executive) of the importance of the decisions they make. As recommended by Mr Lucy, directors should:

- ensure that they read and understand the documentation upon which they are asked to make a decision, or which they are asked to execute; and
- ask questions of management when documentation presented to them is not readily comprehensible or, by reason of their past knowledge and experience, questions arise as to the veracity of the decision they are asked to take.

Mr Lucy emphasised that it is the duty of directors to make further inquiries when appropriate so that they are able to come to independent views on matters and not merely act as a ‘rubber stamp’ on decisions that have wider ramifications.

If directors keep in mind and act upon their statutory duties and Mr Lucy’s words of wisdom, they will go far in preventing themselves from becoming the subject of an action by ASIC. ●

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Endnotes

1. See ss 180 to 183 and s 191 of the *Corporations Act 2001* (Cth). There are equivalent duties at common law and in equity.

2. ‘Directors’ responsibilities: the reality versus the myths’ 17 August 2006, Melbourne.

3. Section 206F of the *Corporations Act*.

4. See note 2 above.

5. Section 180(2) of the *Corporations Act*.

6. Paragraph 4.3 of the *Corporate and Financial Services Regulation Review — Consultation Paper* (7 April 2006) and Ch 3 of the *Review of Sanctions in Corporate Law* (5 March 2007).

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Increase of approval thresholds for foreign investment in Australia

Lis Boyce DIBBS ABBOTT STILLMAN

Overseas companies, and local companies with overseas parents, will be interested to know that the thresholds for the value of local companies and businesses subject to Australia's *Foreign Acquisitions and Takeovers Act 1975* (Cth) approval process were increased at the beginning of this year.

Background

The Act is definition-driven and rather convoluted. In essence, it allows the Treasurer of the Commonwealth of Australia to refuse permission to certain acquisitions by foreign interests on 'national interest' grounds. In practice, the Treasurer acts on advice from the Foreign Investment Review Board (FIRB), which sets out guidelines for making applications on its website <www.firb.gov.au>.

Until recently, any acquisition of an Australian company or business with gross assets of \$50 million or more needed to be approved by the Treasurer. According to the explanatory statement issued with recent changes to the *Foreign Acquisitions and Takeovers Regulations 1989* (Cth), in the year 2005 no application relating to a business valued between \$50 and \$100 million was declined on the grounds of national interest. It was therefore decided to increase the threshold so as to reduce the regulatory burden on business, while still ensuring that larger acquisitions were submitted to a national interest assessment.

What has changed

Due to the combination of various definitions, offshore acquisitions having an indirect impact on Australian assets and companies must still be submitted to the FIRB. However, under the changes, where

there is a takeover of a foreign corporation by another foreign interest, and the target has more than half of its assets outside Australia and less than \$200 million of its assets in Australia, no screening is required. This is an increase from the previous threshold of \$50 million.

The threshold for direct acquisitions of interests in Australian corporations and businesses has been increased from \$50 million to \$100 million.

There are special exemptions for investors from the US, reflecting the Australia-US Free Trade Agreement — the threshold for non-sensitive sectors is currently A\$871 million and is an indexed figure so will continue to rise over time. The threshold for investments in sensitive sectors by US investors has now been increased from \$50 million to \$100 million (which will be indexed in future).

What has not changed

Notwithstanding the increases of some approval thresholds, some transactions by overseas interests, such as acquisitions of vacant land and residential real estate, still require approval regardless of size.

The time periods under the Act remain the same — where proposed transactions must be submitted for approval there is a 30-day period (which can be extended in exceptional circumstances) for the Treasurer to examine transactions on national interest grounds. There is a further 10-day period for notification of a decision. If no decision has been communicated within the 40-day period, the acquisition will be deemed to have been approved. ●

Main points

- As the Act is rather complicated, foreign investors and local companies with overseas shareholders should always consider the Act when transactions have an Australian element.
- Even where there is a re-organisation within the same company group, consent can be required.
- However, the amendments will allow a greater number of transactions to proceed without needing to wait for FIRB approval.

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contributions

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The foundations of good consumer protection policy

Graeme Samuel

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

In 2007, one of the key challenges for business, consumers and government will be to examine the Australian consumer policy framework to ensure that it meets the needs of a modern economy.

One of the most important cornerstones of our consumer protection regime is the *Trade Practices Act 1974* (Cth) (the Act). Its broad scope, flexibility and adaptability have served Australia well over the last three decades and it continues to be a highly effective foundation for protecting the rights of Australians in many areas.

But much has changed since 1974, and issues such as online fraud have emerged that did not even exist when the legislation was originally drafted. For our legislation to remain relevant to a new century, it is necessary to put it under the microscope and consider how it can be enhanced or modified, where necessary.

Scope for future improvements

The broad scope and flexibility of the law is one of its key strengths, which makes it well suited to its task. The institutional framework established by the Act also enables the Australian Competition and Consumer Commission (ACCC) the flexibility to respond to changing market conditions and issues. It does this through its selection of enforcement matters and its ability to engage in a broad range of activities to promote compliance, including liaison, education and information and research.

Nevertheless, there are a number of potential areas where improvements could be made and that are key to the effectiveness of consumer policy in Australia.

Civil pecuniary penalties

The first issue is the need for the introduction of civil pecuniary penalties into the Act. Currently, penalties for wrongdoing can only be obtained through criminal proceedings. The ACCC is committed to taking criminal actions where the conduct warrants such a response. However, criminal actions are slow and require significant resources, not to mention the need to meet a very high standard of proof to achieve a result.

The ability to obtain civil pecuniary penalties, declarations, injunctive relief, and other measures, such as corrective advertising, within a single action would significantly enhance the ability of the ACCC to obtain effective outcomes and provide a higher degree of deterrence.

Consumer redress

The second issue is the need for the ACCC to have the ability to seek court orders to obtain consumer redress for large numbers of consumers. Currently, the ACCC can only obtain consumer redress in relation to persons who provide written consent. This limits the ability of the ACCC to obtain such redress, due to the administrative difficulties associated with locating relevant consumers before taking an action. In cases involving large numbers of consumers over a broad geographic region — exactly the type of case the ACCC is best placed to take, and increasingly likely to arise as markets become more national and international in character — the difficulties of obtaining written consent from thousands of consumers are prohibitive.

The ACCC can still obtain consumer redress where the trader offers a s 87B undertaking to the ACCC. While this



can provide a speedy and flexible result, it will not provide a satisfactory outcome in all cases. Accordingly, it would greatly enhance the effectiveness of the Act if the ACCC were given the ability to seek orders for redress for consumers. This would increase deterrence against wrongdoing, and provide consumers the ability to gain redress, particularly in situations where many consumers may have lost small amounts.

Uniformity of fair trading laws

The third issue is the need to reduce the level of inconsistency between state, territory and Commonwealth fair trading laws. Since the introduction of the current form of state and territory fair trading laws during the 1980s, the benefits of uniformity have been well recognised by all parties concerned. In June 1983 agreement was reached at a meeting of federal and state consumer affairs ministers that there should be uniform fair trading law throughout Australia.

However, in practice, uniformity has been difficult to achieve. Some of the areas of inconsistency include:

- unfair contract terms legislation in Victoria;
- different standards for what constitutes harassment or coercion;
- different requirements in relation to the conduct of door-to-door and telemarketing activities;
- different definitions of pyramid-selling schemes;
- different jurisdictions with different enforcement powers — for example, some have the power to issue public-warning statements, issue infringement notices in certain circumstances and issue notices requiring a trader to substantiate published claims or representations.

At the same time as the level of divergence between laws appears to be increasing, the need for uniformity is becoming more urgent. The costs of increasing lack of uniformity are significant. For business, there are costs associated with meeting different requirements in different jurisdictions. While business may be able to minimise its costs by complying with the jurisdiction with the highest level of protection, there may be considerable 'hidden' costs associated with this — because business is taking on the burden

of meeting a standard that perhaps the majority of Australian jurisdictions do not even believe to be necessary.

The current system also imposes an increased burden on consumers to be aware of the different standards that may exist between jurisdictions, and can raise false expectations that protections that may exist in their home jurisdiction apply when dealing with traders in other jurisdictions.

There is also a cost for governments and regulators in developing laws separately rather than pooling resources. As markets become more national and global in nature, the costs for business and consumers in particular are increasing. Australia is not the only jurisdiction to recognise this. For example, in the European Union (EU), it has been identified that a significant proportion of EU retailers surveyed think harmonisation of consumer protection laws within the EU should have a positive effect on their cross-border sales, and that consumers are less confident about making purchases from businesses located abroad. For these reasons, the EU has developed a strategy to develop a uniform approach across the EU.¹

There are of course benefits associated with a federal system for fair trading laws, including the advantages of sharing government's and regulators' ideas and experiences to develop appropriate laws, and the advantages of entrusting administration of laws to regulators operating at different levels. The issue will be to craft a model for uniformity that retains these key benefits of the federal approach.

It may be argued that a non-uniform legislative approach has the benefit of allowing a particular law to be 'test driven' in one jurisdiction. However, there are some drawbacks with that approach, particularly in today's market environment. Because many businesses now operate on a national scale, there is no such thing as a small experiment in one state or territory. If a law is introduced in one area, business is bound to apply the requirements of that law to avoid the burden of dealing with diverse regulatory requirements in various jurisdictions.

Developing a uniform legislative approach does not necessarily mean that the good ideas that a particular

jurisdiction may have will not be heard. Rather, the model for developing uniformity should continue to draw on ideas and experience from each jurisdiction to deliver the best national, uniform legislation for Australia.

Within a uniform legislative framework, there is still a fundamental role for national, state and territory regulators. The primary role of the ACCC is to promote compliance by taking up systemic issues of national significance that are causing widespread detriment to consumers. But many consumer issues arise on an individual or local basis, whether the issue is one of breach of the law, or resolvable misunderstandings between consumers and traders. In aggregate, these issues are no less important to the overall well-being of consumers. Accordingly, within a uniform legislative framework, there is still an important role for state and territory fair trading agencies, particularly in dealing with local issues, and assisting consumers to obtain fast, effective justice in individual cases.

Conclusion

For our laws to remain relevant they need to address concerns including ensuring consistency across jurisdictions, applying the appropriate level of penalties to allow for a swift response to arising problems and being able to respond effectively on behalf of a large group of consumers that may be affected by particular conduct.

The flexibility the Act provides to the ACCC in how it undertakes its role has allowed it to remain a successful tool in protecting the welfare of consumers.

With the appropriate changes, it will continue to be an effective safety net for consumers and allow consumer protection agencies like the ACCC the ability to deal with issues quickly and decisively. ●

*Graeme Samuel, Chairman, ACCC.
Edited extract of his speech to the
National Consumer Congress,
15 March 2007.*

Endnote

1. Commission of the European Communities, Green Paper on the Review of the Consumer Acquis, COM (2006) 744 Final, 8 February 2007, Brussels.

Tenant leasing strategies — improving your position

David Drobner and Edgel C Lester Jr CARLTON FIELDS, PA

Corporate legal departments are often asked to review and/or negotiate property leases on behalf of the company. That puts inside counsel in the position of managing a highly specialised transaction.

Many inhouse counsel may have little expertise in property leasing. To complicate matters, most commercial leases use language that is biased in favour of landlords. However, there are ways to temper the bias and gain significant advantages for the company.

Approach adopted

Lease situations may vary, but there are many ways to improve a company's position without altering a landlord's perception of the deal. The key is to understand and negotiate potentially costly fine-print issues beforehand. Some examples follow.

- Negotiating a 'last chance' renewal notice at the outset forces the landlord to notify you directly if your option to renew is due to expire. Missing the deadline by even one day could allow an unscrupulous landlord to impose a substantial rent increase. Renewal notice is crucial, especially if your company spent \$1 million on building renovations.
- Capping traditional 'pass-through' expenses — additional monthly fees for everything from landscaping and outdoor lighting, to common area maintenance and real estate taxes — can save substantial dollars over the life of a commercial lease. If it is a new lease and the landlord will not negotiate, consider another site.
- Establishing less restrictive assignment or sublet rights in advance is important, but often overlooked. There should be as much flexibility here as possible. A company may grow quickly and need more space. If forced to move, it will need the right to assign the lease or at least sublet the

space for the remainder of its lease. If it is not agreed on beforehand, the landlord may unfairly restrict your opportunities.

- Negotiating 'buy-out' rights in advance gives a retail chain the option to close an under-performing store and terminate the lease early. The chain will have to pay penalties, but the cost will be substantially less than the entire lease obligation.

Measuring success

Over time, the financial advantages gained from the contract become more apparent to company leaders and inside counsel.

Future issues to consider

Negotiating and managing property leases is completely different from buying property. Seemingly minor leasing issues may not become noteworthy until years later. Inhouse counsel will need to review and update certain issues and anticipate changes, in both the legal environment surrounding a lease and the non-legal business developments that might affect it. ●

Implementation steps

- Gather all information and list key lease terms, including size in square metres, proposed rent, duration of lease and renewal options.
- Thoroughly analyse options with regard to venue, usage and potential future use, including the need to expand or move.
- Analyse the impact a major event — such as a change in company ownership — would have on the lease. What could transpire that would conflict with the proposed terms?
- Develop a letter of intent with the prospective landlord.
- Turn to outside counsel or consultants as needed for specific advice and expertise. A brief review to identify key points can help contain costs and increase efficiency.

David Drobner and Edgel C Lester Jr, Carlton Fields, Florida, USA.

Edited extract from *Counsel to Counsel*, Martindale-Hubbel LexisNexis, January 2007.



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Climate change — risks and opportunities for Australian business

Corin Millais THE CLIMATE INSTITUTE

In recent months, climate change has become a front-page story, sparking a political debate across Australia. The issue has reached a tipping point. So how should the Australian business community respond?

Climate change represents an enormous, yet under-appreciated, risk to the Australian business community. The principal driver of risk is the global and national need to respond.

Risks to business include physical impacts, regulation, competition, changing markets, investment, effects on the price of energy, energy infrastructure, litigation and shareholder activism. All sectors will be affected. But the sectors likely to have the highest exposure are:

- finance;
- property;
- insurance;
- agriculture;
- energy infrastructure;
- tourism;
- property; and
- energy users.

These risks arise from the physical impacts of climate change itself and the responses of governments, investors, shareholders, competitors, customers, consumers, the public and the media.

Regulatory uncertainty

Regulatory uncertainty is one of the greatest risks. Australian business faces greater uncertainty over future climate policy and regulation than perhaps any other Organisation for Economic Co-operation and Development (OECD) country. Current Government commitments under Kyoto to limit greenhouse gases only extend to 2012. Beyond that, the situation is unclear, but it is 'inevitable' that there will be 'increasing and uniform regulatory action to reduce greenhouse gas emissions' according to AMP Capital's

Head of Investment Strategy and Chief Economist, Shane Oliver.¹

Future climate policy will inevitably affect a wide range of business activities, including increased electricity prices; tradable emission permits and carbon taxes; technology transformations; mandatory emission and energy standards; and targets to reduce emissions. In capital-intensive industries, where turnover for replacing equipment can take decades and cost hundreds of millions of dollars, this lack of long-term regulatory certainty raises questions of sovereign risk to investments and stranded assets. This uncertainty will grow in the future, as debate on how to tackle the problem intensifies, and emissions reductions beyond the first commitment period of the Kyoto Protocol remain unknown.

This issue is particularly acute in the electricity sector, where uncertainty about the future direction of climate-change policy and future carbon-pricing mechanisms impedes and delays optimal decision-making on the new infrastructure that is needed to meet growing electricity demand. A delay in new electricity infrastructure development has economy-wide implications.

The lack of a nationally consistent regulatory framework to respond to climate change is driving various levels of governments to pursue different and changing policies, creating multiple compliance costs to businesses. As the climate issue becomes of greater concern across community, political and media circles, governments are moving to introduce an even greater variety of initiatives, responses, inquiries, programs, funding and research and development schemes — this patchwork only increases regulatory complexity and costs to business.

Physical impacts of climate change

As a hot, dry country with environmental extremes, Australia is more vulnerable than most developed nations to the physical impacts of climate change, affecting all investors — from institutional to personal — who face significant risk in measuring the security of their assets. This is most readily apparent in agriculture, with the significant impact of the recent drought. Australia has also seen recent flow-through effects to the food supply chain from crop damage caused by tropical cyclone Larry.

Every major mainland city in Australia already faces water stress and this will be exacerbated by climate change. This is likely to create increased competition for an increasingly scarce resource and significant restrictions on water use. In addition, the tourism sector is likely to face severe impacts as climate change damages prime destinations such as the Great Barrier Reef, Kakadu and the highland regions of north-eastern and south-eastern Australia.

Opportunities

As climate change has emerged as a business risk, the move to a carbon-constrained global economy is ushering in opportunities. There is a growing consensus among global companies that taking concerted action on climate change represents strategic opportunities — such as building new markets, corporate positioning, gaining regulatory intelligence, and competitive advantage. An example is the recent explosion of multi-billion-dollar opportunities in carbon trading and clean energy markets. These two sectors have a combined global annual market in excess of A\$100 billion.

For the business sector, climate change has moved beyond a neutral issue and is creating winners and losers. As the

Inhouse counsel

world's economy becomes carbon constrained, our rate of restructuring and market-based experience in emission reductions lags behind that of other countries, which could place our businesses at a competitive disadvantage globally.

In Australia, few companies appear strategically well-positioned to manage and capitalise on the risks and opportunities of climate change. Business dialogue with government over climate policy formation and implementation has largely been restricted to a small

group of large companies and their industry associations. Given the broad range of impacts which will affect business, there is an acute need for all industries and sectors to be active participants in the debate.

Increasingly, the Australian business community is recognising that it can no longer afford to be a back-seat passenger in what has been described as one of our greatest challenges. A proactive stance is now necessary in strategic and operational decision-making, and for the Australian economy as a whole. ●

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Edited extract from Climate Change: Risks and Opportunities for Australian Business, a report by The Climate Institute, November 2006.

Endnote

1. Oliver S 'Global warming — can't be ignored by investors' *Oliver's Insights* 26 October 2006.

Federal legislation update

Bills introduced

Governance Review Implementation (Treasury Portfolio Agencies) Bill 2007

This Bill (introduced on 1 March 2007) forms part of the government's response to the 2003 Uhrig review (*Review of the Corporate Governance of Statutory Authorities and Office Holders*). It applies the *Financial Management and Accountability Act 1997* (Cth) to three statutory authorities: the Australian Securities and Investments Commission, the Corporations and Markets Advisory Committee and the Australian Prudential Regulation Authority.

Under the new regime, the three agencies will hold money and property on behalf of the Commonwealth, rather than in their own right. This reflects their status as agencies that are largely budget-funded, in contrast to agencies that raise funds from commercial activities.

Pending legislation

Corporations Amendment (Takeovers) Bill 2007

This Bill (introduced on 14 February 2007) amends provisions of the *Corporations Act 2001* (Cth)

(the Act) that relate to the Takeovers Panel (the Panel).

Two decisions relating to the Panel, *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495 and *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77 (the *Glencore* cases), have interpreted the limits of the jurisdiction of the Panel, as set out in the current legislation. As a result of those cases, concerns were raised that it may be open to read the Panel's powers and jurisdiction in the current legislation in a way that is too narrowly formulated to enable the Panel to perform its role effectively.

In particular there were concerns that:

- the interpretation of the term 'substantial interest' in the decisions, based on existing defined provisions, may prevent the Panel from being able to deal with new and developing interests and tactics in relation to takeovers;
- the Panel may not be able to act to prevent the effects of unacceptable circumstances (even if clearly apprehended), but rather, may need to wait until those effects, and the consequent harm, have actually occurred;
- the Panel may not be able to address all the circumstances which impair or affect the efficient, competitive and

informed market for control of voting securities in companies; and

- under the interpretation set out in the *Glencore* cases, the Panel's power to make orders to protect the rights or interests of persons affected by unacceptable circumstances may be too confined, with the result that the Panel may not be able to properly address the effects that the circumstances have on the interests of those persons.

The Bill responds to those concerns and also addresses concerns about the limits of the orders the Panel can make and the time-limit for concluding a review of a Panel decision.

The Bill passed the Senate on 29 March 2007.

Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006

This Bill (introduced on 30 November 2006) amends the *Safety, Rehabilitation and Compensation Act 1988* (Cth) to ensure the financial viability of the Commonwealth workers compensation scheme, by amending the definitions of 'disease' and 'injury' and making changes to improve the administration and provision of benefits. It also increases the maximum funeral benefits payable and makes a similar amendment to the *Military Compensation and Rehabilitation Act 2004* (Cth).

The Bill was received in the Senate on 6 February 2007. ●

Source: *Senate Bills List (Abstracts), Explanatory Memoranda and Explanatory Statements.*



Month in review

Trade Practices Act, Pt IIIA — ACCC guidelines

The Australian Competition and Consumer Commission (ACCC) has issued guidelines concerning changes to arbitration processes resulting from recent amendments to the *Trade Practices Act 1974* (Cth) (TPA).

The guidelines give effect to amendments to Pt IIIA that provided the ACCC with mechanisms to defer arbitration of an access dispute and backdate a final determination.

The guidelines are available on the ACCC website <www.accc.gov.au>.

30 March 2007, ACCC MR 087/07

Joint bids — ASIC policy amendments

The Australian Securities and Investments Commission (ASIC) has announced amendments to its Policy Statement 159 to incorporate its policy on joint takeover bids. Joint bids involve bidders who together have more than 20 per cent voting power in the target company.

ASIC is willing to facilitate joint bids provided that the other shareholders of the target are not disadvantaged by the block created when two or more bidders come together to make the bid. The conditions ASIC imposes on this relief are designed to address the risks that the increased pre-bid stake of the joint bidders could discourage rival bids and any auction for control of the target.

The amended policy statement is available on the ASIC website <www.asic.gov.au>.

28 March 2007, ASIC IR 07-13

Foreign scrip takeovers — ASIC proposals for relief

ASIC has released a policy proposal paper on relief from the requirement to

prepare a prospectus or product disclosure statement (PDS) when securities are offered as consideration under a foreign regulated takeover.

Granting relief from the requirement to prepare a prospectus or PDS could allow Australian members to receive the same offer as their foreign counterparts.

The proposed relief is subject to conditions, including that Australian residents hold no more than 10 per cent of the target securities, and the target securities are quoted on an approved foreign market.

The paper is available on the ASIC website. The closing date for comments is 4 May 2007.

28 March 2007, ASIC IR 07-12

Financial services review — draft Corporations Regulations amendments

The Treasury has released draft Corporations Amendment Regulations. The draft Regulations enable financial service providers to incorporate information by reference to other documents that the client has been provided with, to produce more concise disclosure documents for consumers. The draft Regulations also contain several other measures to streamline disclosure requirements.

The proposed Regulations are available from the Treasury website <www.treasury.gov.au>. The closing date for submissions is 23 April 2007.

26 March 2007, Treasury No 015

Ribena Vitamin C claims 'may have misled consumers'

Claims about the Vitamin C content of Ribena blackcurrant fruit drink products may have misled consumers, its manufacturer GlaxoSmithKline Australia

Pty Ltd has admitted. The company has self-reported the discrepancies to the ACCC and provided court enforceable undertakings.

21 March 2007, ACCC MR 075/07

Infringement notices — Promina pays \$100,000 fine

Listed general insurer, Promina Group Ltd (Promina), has paid a \$100,000 fine following an investigation by ASIC into an alleged failure to comply with its continuous disclosure obligations.

Promina agreed to pay the fine after ASIC issued an infringement notice on 21 February 2007. This notice, and payment of the penalty by Promina, is the first involving a company with a market capitalisation greater than \$1000 million.

ASIC issued the notice because it believed Promina had contravened the continuous disclosure provisions of the *Corporations Act 2001* (Cth) by failing to inform the Australian Stock Exchange that it had received a proposal from Suncorp-Metway Ltd to acquire all the ordinary shares of Promina.

20 March 2007, ASIC MR 07-69

Enforceable undertakings — ASIC guide

ASIC has launched a guide clarifying its approach to accepting enforceable undertakings. Enforceable undertakings are generally accepted by ASIC as an alternative to civil or administrative action. ASIC plans to release sample enforceable undertaking templates on its website in the near future as a supplement to the guide.

13 March 2007, ASIC MR 07-62

Collective bargaining — ACCC forum

The ACCC has issued its *Collective Bargaining* forum DVD which examines recent amendments to the TPA that

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allow for new notification processes for small businesses looking to collectively negotiate with suppliers or customers.

The forum examines the collective bargaining notification process from the perspective of small business collectives and the big businesses that may be the 'target' of those collectives. It also outlines the ACCC's role in assessing applications seeking immunity from legal action to engage in collective bargaining.

The forum is available on the ACCC website <www.accc.gov.au>.

6 March 2007, MR 058/07

Infringement notices — consultation paper

The Treasury has released a consultation paper initiating a review of ASIC's power to issue infringement notices for breaches of the continuous disclosure provisions in the *Corporations Act 2001* (Cth). The paper asks about experiences with infringement notices, whether their issue has affected compliance generally, and the usefulness and fairness of the mechanism.

The consultation paper is available on the Treasury website. The closing date for submissions is 1 June 2007.

5 March 2007, *Treasury*

Sanctions in corporate law — consultation paper

The Treasury has released a consultation paper forming the basis for a review of civil and criminal sanctions in Australia's corporate law.

The recent Taskforce on Reducing

Regulatory Burden on Business recommended that the government review penalties for breaches of directors' duties to ensure that they strike an appropriate balance between promoting good behaviour and ensuring business is willing to take sensible commercial risks.

This review seeks to establish the extent to which sanctions under corporate law may be unduly influencing business decisions. It invites submissions from the community about situations where sanctions (or the absence of sanctions) under corporate law influenced a decision to engage in a certain business activity.

The review identifies two types of reform that could be considered to address concerns about sanctions that may be imposed under corporate law.

- Reforms that expand the types of sanctions imposed for breaches of corporate law. The review seeks comments on whether there could be greater use of civil and administrative sanctions for certain types of offences. Specific issues are raised about strict liability criminal offences, imprisonment, procedures for civil penalty proceedings, and the magnitude of civil penalties.
- Reforms that clarify the circumstances in which a sanction could be imposed under corporate law. The review seeks comment on whether a consistent defence should be introduced for company officers. Specific issues are raised about the test of good faith, reliance on advice, the obligation to keep financial records, the drafting of offence provisions generally, and market manipulation.

The consultation paper is available on the Treasury website

<www.treasury.gov.au>. The closing date for submissions is 1 June 2007.

5 March 2007, *Treasury*

Insider trading — consultation paper

The Treasury has released a consultation paper setting out the government's position on many of the recommendations in the *Insider Trading Report* released by the Corporations and Markets Advisory Committee.

The government is seeking comment on focusing the prohibition on insider trading. The way the law applies in relation to certain areas, such as over-the-counter transactions, has significant implications for some groups.

The paper is available on the Treasury website <www.treasury.gov.au>.

The closing date for submissions is 2 June 2007.

2 March 2007, *Treasury No 009*

UK sets ambitious environmental targets

The UK government could become the first in the world to entrench emission reduction targets in law. The Climate Change and Sustainable Energy Bill, published on 13 March 2007, sets a target of reducing carbon emissions by between 26 and 32 per cent by 2020 and by 60 per cent by 2050.

A new independent statutory body, the Committee on Climate Change, could also be formed and the Bill includes enabling powers which will allow the UK Government to introduce carbon-trading schemes through secondary legislation.

March 2007, CSA <www.csaust.com> ●

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