LexisNexis™ Butterworths

Inhouse counsel

THE MONTHLY LEGAL BRIEFING FOR CORPORATE LAWYERS AND BUSY SENIOR EXECUTIVES

Information contained in this newsletter is current as at July 2007

Volume 10 Number 8

Print Post Approved 255003/00772

Contents

LexisNexis™ Butterworths

PRIVILEGE

'Without prejudice' privilege — traps for young (and old) players

Mary Still and **Timothy Webb**
CLAYTON UTZ

The phrase 'without prejudice' appears on a startling array of legal correspondence. In some disputes, every email and letter received from a party or its legal advisers is emblazoned with the words. Perhaps such use is not surprising. In contrast to legal professional privilege, the privilege governing settlement negotiations — in which context the term 'without prejudice' arises — is not widely discussed and understood. This article thus provides a refresher on the privilege for inhouse counsel and examines four common misconceptions.

Privilege in relation to settlement negotiations

At common law, evidence of admissions by words or conduct made by parties in the course of genuine negotiations to settle an existing dispute is privileged unless all parties to the negotiations agree to the contrary.

The rationale for the privilege is that parties should be free to explore settlement of disputes, and make admissions in the course of those discussions, safe in the knowledge that if the negotiations break down, any admissions made will not be tendered against them later in court.

In most jurisdictions, the common law is supplemented by legislation. For example, in NSW, the ACT and the federal courts, s 131(1) of the *Evidence Act 1995* (NSW & Cth) provides as follows:

> Evidence is not to be adduced of:
> (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
> (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

This provision only applies to the adducing of evidence, whether at an interlocutory hearing or trial. The common law continues to operate in relation to evidence-gathering (but not adducing) processes, such as discovery, notices to produce and subpoenas.

Many people, including solicitors, believe that the use of the words 'without prejudice' will make a communication privileged.

Use of the words 'without prejudice' is neither necessary nor sufficient to attract the privilege

Many people, including solicitors, believe that the use of the words 'without prejudice' will make a communication privileged. Wells J

vividly described this view in *Davies v Nyland* (1975) 10 SASR 76 at 89:

> [I]n some quarters of the community there is a belief, amounting almost to a superstitious obsession, that the expression 'without prejudice' is possessed of virtually magical qualities, and that anything done or said under its supposed aegis is everlastingly hidden from the prying eyes of a Court.

Of course, this belief is incorrect. Whether communications are covered by the privilege depends not on whether the words 'without prejudice' have been used, but upon the intentions of the parties to be ascertained from the nature of the communications. While the words are a relevant factor in determining the relevant intention, it is the situation of settlement negotiation that is critical to the operation of the privilege.

A mere reference to settlement negotiations does not attract the privilege

The common law privilege applies only to 'admissions' by words or conduct. In contrast, s 131(1) of the *Evidence Act* prevents the adducing of evidence of any communication in connection with an attempt to negotiate a settlement of the dispute. The words 'in connection with' are capable of extending wider than the common law. Do they mean that any document that refers to settlement negotiations cannot be adduced?

The answer is no, at least according to the recent decision of *CJ Redman Constructions Pty Ltd v Tarnap Pty Ltd* [2006] NSWSC 173. Campbell J held that the expression 'in connection with' does not always refer to a connection of any kind between two subject matters. In the particular context of s 131(1) of the *Evidence Act*, his Honour found that the words require a sufficient nexus between the correspondence and a genuine attempt to negotiate a settlement of a dispute.

Privilege can only be waived with the consent of all parties

It is sometimes asserted that the privilege can be waived by the party to whom it applies. For example, if this view was correct, 'John' — who had previously made a 'without prejudice' settlement offer to 'Helen' — could waive the privilege covering the offer to enable him to argue that if Helen had accepted the offer, her losses in the form of interest by way of damages (that is, *Hungerfords* damages) would have been less than the total amount claimed in respect of this head of damage as at the date of trial.

Unfortunately for John, the weight of authority suggests that all associated parties must consent to waive the privilege in relation to settlement negotiations (this is in stark contrast to legal professional privilege, which can be waived by a person who would otherwise be entitled to the benefit of the privilege). There is no requirement that all parties give their consent at the same time. If one party consents to waive the privilege before trial, the other party may rely upon that consent at a later date, even if the first party resists such use at that time.

Privilege is not absolute and does not apply for certain purposes

There are various exceptions to the applicability of the privilege.

At common law, the privilege does not prevent communications from being admitted to show that a settlement agreement was actually reached or to establish the terms of such an agreement. Reference may also be made to privileged communications to rebut allegations of delay, laches, acquiescence, want of prosecution or lack of diligence. Further, the privilege cannot be used to circumvent s 52(1) of the *Trade Practices Act 1974* (Cth) and evidence can be tendered of misleading or deceptive conduct that occurred in the context of settlement negotiations.

Section 131(2) of the *Evidence Act* has codified many of the common law exceptions, plus introduced other exclusions. For example, the privilege will not prevent the adducing of communications or documents:

- to contradict or qualify evidence that is likely to mislead the court (s 131(2)(g));
- relevant to determining liability for costs (s 131(2)(h));
- affecting a right of a person (s 131(2)(i)); or
- made or prepared in furtherance of the commission of a fraud or an offence (s 131(2)(j)) or a deliberate abuse of power (s 131(2)(k)).

The exception in relation to costs is particularly interesting. In the decision of *Silver Fox Co Pty Ltd v Lenard's Pty Ltd (No 3)* (2004) 214 ALR 621, Mansfield J held that the effect of s 131(2)(h) is to expose genuine settlement negotiations when costs issues are to be resolved. His Honour considered that:

> … [t]here is no apparent public interest in permitting a party to avoid such exposure by imposing terms upon the communication, whether by the use of the expression 'without prejudice' or by a mediation agreement.

Accordingly, even if a settlement offer is expressed to be 'without prejudice' instead of 'without prejudice save as to costs' (that is, the usual basis of a *Calderbank* offer), such an offer may still be admissible on the question of costs. Similarly, even if the terms of a mediation agreement do not permit evidence to be adduced of offers made in the course of the mediation, such offers can — notwithstanding the parties' agreement — be adduced in determining liability for costs. ●

Tips for inhouse counsel

- **Just because correspondence is marked 'without prejudice' and refers to settlement negotiations does not necessarily mean that it is privileged.**
- **Unlike legal professional privilege, the privilege which applies to settlement negotiations can only be waived with the consent of all parties.**
- **There are various exceptions to the applicability of the privilege. In particular, settlement offers may — even if the parties agree to the contrary — be adduced in determining liability for costs.**

Mary Still, Partner, <mstill@claytonutz.com>; and Timothy Webb, Senior Solicitor, <twebb@claytonutz.com>, Clayton Utz, Sydney.

LITIGATION

Class actions in the NSW Supreme Court – O'Sullivan v Challenger

Vanessa McBride, Michael Legg and **Stuart Clark**
CLAYTON UTZ

The recent decision in *O'Sullivan v Challenger Managed Investments Ltd*[1] marks an important shift in the Federal and Victorian Supreme Courts' away from the traditional opt-out class action procedure to an opt-in approach.

An opt-out class action is commenced without the group members' consent but includes all those who fall within the group definition. The group members are given an opportunity to opt out of the proceedings at a later date and they will be bound by the outcome of the action if they do not exclude themselves. In contrast, the opt-in procedure requires an entity to affirmatively consent to being a group member to be able to participate. The opt-in approach is being driven by class action promoters who wish to control group membership so that only those who have entered funding and retainer agreements can participate in the proceedings and 'free-riders' can be eliminated.

Principles

In September 2006, Barbara O'Sullivan commenced a quasi-class action under the *Uniform Civil Procedure Rules 2005* (NSW) (the UCPR), r 7.4 (Rule 7.4 proceedings) to recover $145,000 that she had invested in a property trust. The proceeding was commenced as an opt-in proceeding with Mrs O'Sullivan as the representative party for 31 group members, with an intention to have another 50 or so investors join the action.

On 24 April 2007, White J delivered his decision on the defendant's application for an order to dismiss the proceedings, or strike out part of the statement of claim. White J's decision will have significant ramifications for the future conduct of Rule 7.4 proceedings and analogous rules in other jurisdictions as he held that:

- the relief claimed must be 'beneficial to all' — common questions of law and fact are not sufficient to commence Rule 7.4 proceedings;
- Rule 7.4 proceedings will not be appropriate for damages claims where loss must be demonstrated by each individual;
- declaratory relief is a legitimate basis for Rule 7.4 proceedings;
- the limitation period in respect of a claim for damages may continue to run notwithstanding the commencement of Rule 7.4 proceedings seeking declaratory relief;

> … the relief claimed must be 'beneficial to all' — common questions of law and fact are not sufficient to commence Rule 7.4 proceedings …

- r 7.5(1) of the UCPR was interpreted to ensure that all group members are bound by an order or judgment in Rule 7.4 proceedings; and
- joinder of parties under r 6.19 of the UCPR may be an available alternative for damages claims.

Background

Mrs O'Sullivan and each of the group members subscribed for units in the Challenger Howard Property Trust (the Trust) for the Penrith Mega Homemaker Centre Sydney.

Mrs O'Sullivan alleges that the prospectus issued on 27 November 2002 to invite applications for units in the Trust involved misleading or deceptive conduct in contravention of the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Fair Trading Act 1987* (NSW). Further, the misleading and deceptive conduct is alleged to have caused Mrs O'Sullivan and the group members to subscribe for units in the Trust, as a result of which each of them suffered loss or damage. Mrs O'Sullivan and the group members sought declaratory relief and damages or compensation.

Challenger Managed Investments Ltd, as the responsibile entity for the Trust, disputes the allegations and is actively defending the proceedings.

Supreme Court decision

Relief that is 'beneficial to all'

Rule 7.4 of the UCPR provides:

> This rule applies to any matter in which numerous persons have the same interest or same liability in any proceedings.

White J interpreted the High Court decision in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (which had interpreted the predecessor to r 7.4) to hold that it is not sufficient to show that Rule 7.4 proceedings give rise to some question of law or fact in which all represented persons have a common interest. Rather, to show that all such persons have the 'same interest' in the proceedings, relief must be claimed which is 'beneficial to all'.[2]

White J held that Rule 7.4 proceedings were not appropriate in relation to the claim for damages because the relief claimed is not 'beneficial to all'. Damages is a form of relief beneficial only to the individual who receives damages, and the amount of damages and the evidence of loss will be distinct for each group member.

However, it was held that declaratory relief is a legitimate basis for a Rule 7.4 proceeding because the relief is beneficial to all in the sense that it would not only act in the public interest to penalise misleading and deceptive conduct, but it would also resolve issues that are central to each group member being entitled to their own relief. The argument that declaratory relief is mere surplusage and should not disguise the fact that the real claim was for damages was dismissed.[3]

Joinder

White J also held that the legislative drafter had made a mistake in drafting r 7.5(1) of the UCPR, and his Honour construed the provision to mean that the legal principle of *res judicata* applied to bind all group members who had opted in to the action to any order or judgment made in the proceedings.[4]

If the declaratory relief sought against the defendant is successful, each of the group members will still be required to commence their own actions in order to recover damages, either in separate proceedings or as co-plaintiffs under the rules for joinder (r 6.19 of the UCPR). Alternatively, the group members may choose to discontinue the Rule 7.4 proceedings immediately and proceed under the joinder rules.[5]

White J identified a number of differences between Rule 7.4 proceedings and joinder under r 6.19. First is the liability of the group members or plaintiffs to pay costs. In Rule 7.4 proceedings, White J noted that group members are not parties to the proceedings and therefore cannot be subject to a costs order.[6] However, where plaintiffs are joined in proceedings under r 6.19, each plaintiff would potentially be liable for an order for costs.[7]

Second is the ramifications for settlement. In Rule 7.4 proceedings, settlement negotiations are conducted between the defendant(s) and the representative party (in this case Mrs O'Sullivan). Although the representative party is required to negotiate a settlement that takes into account the interests of the group members, the defendant(s) is not required to obtain consent from each group member. By contrast, where plaintiffs are joined under r 6.19, each person is a party to the proceedings and their individual claims can only be settled on a case-by-case basis with the relevant plaintiff's consent.[8]

Finally, White J considered the statute of limitations and the question of whether or not the limitation period continues to run in relation to damages claims notwithstanding that Rule 7.4 proceedings are commenced. The general rule provided in *Fostif* in the Court of Appeal is that where Rule 7.4 proceedings are properly engaged, limitation periods cease to run for the whole of the represented group.[9] However, in a case where the Rule 7.4 proceedings can only legitimately seek declaratory relief, the limitation periods for damages claims by the group members may continue to run. White J did not give a final determination on this question but he noted that 'it is at least seriously arguable that limitation periods will continue to run'.[10] In proceedings subject to joinder under r 6.19, the limitation period ceases to run once a claimant becomes a party to the proceedings.

Implications

Class actions in Australia are entering a new phase as class action promoters seek to bring proceedings that are the most advantageous to their business model. *Challenger* marks an important shift away from the opt-out class action procedure in the Federal and Victorian courts to an opt-in approach facilitated by the UCPR.

The effect of the decision in *Challenger* will be either:

- a substantial decrease in the number of Rule 7.4 proceedings due to the inability to seek damages and uncertainty over the operation of the statute of limitations; or
- a bifurcated approach whereby a declaration is sought through Rule 7.4 proceedings to protect group members from an adverse costs order, followed by the pursuit of individual damages by way of joinder. ●

Class actions in Australia are entering a new phase as class action promoters seek to bring proceedings that are the most advantageous to their business model.

Vanessa McBride, Solicitor, Michael Legg, Senior Associate, <mlegg@claytonutz.com>; and Stuart Clark, National Managing Partner, Litigation and Dispute Resolution, <sclark@claytonutz.com>, Clayton Utz, Sydney.

Endnotes

1. [2007] NSWSC 383; BC200703448.
2. *Challenger* at [41] citing *Campbell's Cash & Carry Pty Ltd* v *Fostif Pty Ltd* (2006) 80 ALJR 1441 at [57]–[59] (Gummow, Hayne and Crennan JJ).
3. *Challenger* at [53] and [63].
4. *Challenger* at [53], [58] and [60].
5. *Challenger* at [21]–[27].
6. *Challenger* at [63] and [64].
7. *Challenger* at [68].
8. *Challenger* at [68].
9. *Challenger* at [68].
10. *Fostif Pty Ltd v Campbell's Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 214–215 and 246 (Mason P).
11. *Challenger* at [53].

WORKPLACE RELATIONS

Workplace relations law on the move

Nick Ruskin and **Alex Manos**
DLA PHILLIPS FOX

Workplace relations law reform has become a matter of keen debate in the community, including the business community, in the lead-up to the federal election.

This article outlines the federal government's fine-tuning of its Work Choices legislation and analyses the workplace relations policy of the Australian Labor Party (ALP), 'Forward with Fairness'.

Federal government's fairness test

The Work Choices legislation enabled an employer to make an individual or collective agreement which could have cut out entitlements to overtime and penalty rates and other non-'protected' conditions without compensation.

The federal government has now introduced into Parliament amendments to the *Workplace Relations Act 1996* (Cth) that set a higher benchmark against which to measure the fairness of a workplace agreement. Under this new 'fairness test', where a workplace agreement removes entitlements such as to overtime or penalty rates that were in an award, there must be compensating benefits in the workplace agreement of either a monetary or non-monetary kind. Whether the compensation is fair will be assessed by the Workplace Authority. Non-monetary compensation could include car parking spaces, childcare spaces or shares in the employer's business, but the explanatory memorandum to the bill specifically excluded meals at the end of a shift.

This fairness test does not apply to Australian Workplace Agreements where the base salary of the workplace agreement is more than $75,000 per year for a full-time employee (pro rata for a part-time employee).

ALP policy

The ALP policy maintains the national system of industrial relations that was introduced through Work Choices. The policy will beef up minimum conditions of employment which are provided under the Work Choices legislation so as to include community service leave, public holidays, redundancy pay and long service leave. It will continue to maintain awards as a safety net, whereas the federal government's Work Choices legislation ultimately would have led to the demise of the industrial award.

Importantly, the ALP plans to reintroduce collective bargaining and beef up obligations for employers to bargain 'in good faith' with their employees or with unions. Under Labor, if a majority of employees at a workplace want to bargain collectively, the employer will be required to bargain collectively and in good faith. This is different from the system which has been in operation for a decade where an employer was never compelled to bargain with its employees or with a union if it did not want to (but it could suffer the consequences of industrial action by failing to do so). The introduction of good faith would open the door for parties to view the books of an employer (subject to the protection of commercially sensitive information), and require parties to attend and participate in meetings, give genuine consideration to requests, and refrain from capricious or unfair conduct.

The great controversy of the ALP policy is its proposed abolition of individual agreements which have statutory status, that is, Australian Workplace Agreements. Labor has indicated that it will provide a mechanism for individual arrangements to be put in place, but has yet to put forward a definitive proposition.

Under this new 'fairness test', where a workplace agreement removes entitlements such as to overtime or penalty rates that were in an award, there must be compensating benefits in the workplace agreement of either a monetary or non-monetary kind. Whether the compensation is fair will be assessed by the Workplace Authority.

It will create a new statutory body called Fair Work Australia which will be a 'one stop shop'. It will have separate divisions which will provide the functions of providing information, settling disputes, enforcing workplace laws, approving agreements, simplifying industrial awards and setting a minimum national wage.

The unfair dismissal laws will no longer exclude employers of 100 or less employees (including employees of

related bodies corporate). Instead, an employer with fewer than 15 employees will not be covered by the unfair dismissal laws in the first year of the employee's employment whereas for all other employers, the qualifying period will be six months. The other exclusions from the unfair dismissal laws — such as probationary and fixed-term employees and employees earning more than $98,200 who are not covered by an award or agreement — will continue to apply. The process will be different in that Fair Work Australia will conduct an inquisitorial type investigation where cross-examination or formal submissions will not feature; rather, Fair Work Australia will reach an early conclusion as to the rights of the parties. Further, it will develop a Fair Dismissal Code which will be designated to educate employers on what constitutes a fair dismissal and where the code has been followed, it will be assumed the dismissal is fair.

The ALP will continue the requirement that lawful industrial action (other than for health and safety issues) can only take place for the purpose of pursuing a workplace agreement and only after a ballot of staff has been taken to approve the industrial action. It has also announced that it will continue the Australian Building and Construction Commission, which is a strong compliance body in the building and construction industry, contrary to the wishes of many unions.

Conclusion

The federal government's fairness test amendments certainly modify Work Choices in terms of agreement making. The ALP's policy does retain some elements of Work Choices such as the national system of workplace relations and a strong compliance arm.

The strengthening of collective bargaining and the removal of Australian Workplace Agreements proposed by the ALP has created much concern in the business community about the focus back upon collectivity compared to individuality and the potential for third parties, namely unions, to re-emerge at the workplace.

Workplace relations law is in a flux. Inhouse counsel are encouraged to consider the implications of either model of workplace relations, as both models beyond 2007 provide opportunities and significant risks in the management of workplace relations. ●

Nick Ruskin, Partner, <*nick.ruskin@dlaphillipsfox.com*>*; and Alex Manos, Lawyer,* <*alex.manos@dlaphillipsfox.com*>*, DLA Phillips Fox, Melbourne.*

INTELLECTUAL PROPERTY

Ambush marketing — change is in the air

Kellech Smith
BLAKE DAWSON WALDRON

Victoria and Queensland recently introduced legislation designed to reduce so-called 'ambush marketing' at major sporting events. The Commonwealth Government is also currently undertaking a review of the *Olympic Insignia Protection Act 1987* (Cth) to determine whether it has been effective in prohibiting or controlling ambush marketing.

New Victorian legislation

The *Major Events (Aerial Advertising) Act 2007* (Vic) came into force on 9 May 2007. Its stated purpose is to 'provide for the regulation, management and control of aerial advertising at major events in Victoria'. For the purpose of the Act, 'aerial advertising' includes skywriting, a banner towed behind an

aircraft, advertising displayed on an aircraft (other than usual markings), and laser or digital projections. 'Aircraft' includes blimps and hot air balloons.

The Act provides that it will be an offence to display commercial aerial advertising without authorisation within the sight of a 'specified venue' where a 'specified event' is being conducted, such that its content can be seen by the human eye (s 10). A penalty of over $250,000 will apply in the case of a corporation committing the offence. An action may be commenced for an injunction to restrain a breach of s 10 by the relevant Minister, the 'Secretary' under the legislation (being the person who is the then Department Head of the Department for Victorian Communities under the *Public Administration Act 2004* (Vic)) or the event organiser. In addition, any person who suffers loss, injury or damage because of a breach of s 10 may commence an action for damages within three years. Proceedings for an offence may only be brought by the Secretary or someone authorised by the Secretary.

An application for authorisation to display aerial advertising must be made to the Secretary. The Secretary must consult with the event organiser before giving an authorisation. The authorisation may be subject to any terms and conditions which the Secretary believes are reasonable.

Specified events and venues are listed in the Act and include the AFL Grand Final and Boxing Day Test (MCG), Australian Open Tennis (Melbourne Park) and the Melbourne Cup Carnival (Flemington Racecourse). The list of specified events also includes any other event to which an 'event Order' applies. An event Order may be made by the Governor in Council, on the recommendation of the relevant Minister, by an Order published in the Government Gazette which declares an event to be a 'specified event'. For an event Order to be made in relation to an event, certain criteria must be met, including that the event 'is a major event at the international or national level'. The AFL has already requested that the protection of the Act be extended to all AFL football games held in Victoria, including the pre-season grand final.

Changes in Queensland

The Queensland legislation is of similar effect to the new Victorian legislation, except that it also extends to advertising on buildings within sight of major sports facilities during 'a declared period'. The *Major Sports Facilities Amendment Act (No 2) 2006* (Qld) commenced on 7 December 2006 and inserts new Pt 4B into the *Major Sports Facilities Act 2001* (Qld).

A declared period is declared by the Governor in Council, by a gazette notice, and relates to the site or facility at which a 'declared event' is being staged. Declared events are also determined by the Governor in Council. An authorisation to display an advertisement in airspace, or on a building or other structure, within sight of a major sports facility during a declared period, must be sought from the Major Sports Facilities Authority which can grant the authorisation subject to any conditions it considers appropriate.

Commonwealth legislation under review

Amendments made in 2001 to the *Olympic Insignia Protection Act 1987* (Cth) (OIP Act), created a class of 'protected Olympic expressions'. This class includes the words 'Olympic Games', 'Olympic', 'Olympiad' and their plurals. The effect of Ch 3 of the OIP Act is that no-one, other than the AOC, its licensed users and some exempted individuals and organisations, can use the protected expressions in advertising or promotion, in ways that suggest sponsorship of any of the major Olympic bodies, the games themselves, or Olympic teams or individuals.

In past Olympic years, many well known brands have engaged in ambush marketing. Examples include Nike's billboard advertising during the Atlanta Olympics and Holden's give-away of a Holden motor car to gold medal winners during the Barcelona Olympics. While the OIP Act may prevent the most overt ambush marketing which features Olympic expressions or logos, it does not prevent the type of advertising engaged in by Nike or Holden where sponsorship was only implied because of other factors.

With these issues in mind, the Commonwealth government, through IP Australia and IPRIA, is conducting a review of Ch 3 of the OIP Act. The purpose of the review is to consider whether Ch 3 has been effective to prohibit or control ambush marketing and also whether there have been any other, perhaps unintended, impacts of the legislation. The review also covers the *Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2005* (Cth). Submissions were sought from the public in a March 2007 issues paper and the closing date for submissions was 20 April 2007. The Commonwealth government is in the process of completing the review, however, it is unlikely that the results will be released before the election. ●

Practical tips

- Recent changes to the law in Victoria and Queensland place tighter controls on corporations and individuals wishing to advertise at major sporting events, and in particular those corporations using aerial advertising on aircraft such as blimps and hot air balloons.
- The Commonwealth Government's review of the *Olympic Insignia Protection Act 1987* is likely to lead to tighter controls over advertising associated with Olympic games, athletes and Olympic games teams.

Kellech Smith, Senior Associate, Intellectual Property and Communications,
Blake Dawson Waldron, Melbourne,
<*kellech.smith@bdw.com*>.

Federal legislation update

Enactments

Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Bill 2007

This Act (No 85 of 2007) received assent on 21 June 2007. It amends the *Corporations Act 2001* to:

- establish a mutual recognition regime for the issue of securities and interests in managed investment schemes; and
- provide for the mutual recognition of companies.

It also amends the *Radiocommunications Act 1992* and the *Trade Practices Act 1974* to:

- enable the Australian Competition and Consumer Commission (ACCC) to share information with Australian and foreign agencies and bodies; and
- protect from unauthorised use or disclosure information given to or obtained by the ACCC, including from a foreign government body.

Governance Review Implementation (Treasury Portfolio Agencies) Act 2007

This Act (No 74 of 2007) received assent on 5 June 2007. It forms part of the Government's response to the 2003 Urhig review (*Review of the Corporate Governance of Statutory Authorities and Office Holders*). It applies the *Financial Management and Accountability Act 1997* to 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.

Bills introduced

Trade Practices Legislation Amendment Bill (No 1) 2007

This Bill amends the *Trade Practices Act 1974* to:

- create a second Deputy Chairperson position at the Australian Competition and Consumer Commission; and
- clarify the operation of the misuse of market power and unconscionable conduct provisions.

The Bill also makes consequential amendments to the *Australian Securities and Investments Commission Act 2001* in relation to the application of the unconscionable conduct rules to the supply and acquisition of financial products and services.

The Bill was introduced in the House of Representatives (HR) on 20 June 2007. The report of the Economics Committee into the provisions of the Bill is due on 1 August 2007.

Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007

Introduced with the Corporations (Fees) Amendment Bill 2007 and Corporations (Review Fees) Amendment Bill 2007, the Bill amends the *Corporations Act 2001*, *Social Security Act 1991*, *Veterans' Entitlements Act 1986* and *Income Tax Assessment Act 1936* to simplify and streamline Australia's corporate and financial service laws, particularly in regard to regulation, company reporting obligations, auditor independence, corporate governance, funds raisings, takeovers, and compliance.

The Bill was introduced in the HR on 24 May 2007. The report of the Joint Statutory Committee on Corporations and Financial Services was tabled on 19 June 2007.

Corporations (Review Fees) Amendment Bill 2007

Introduced with the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 and Corporations (Fees) Amendment Bill 2007, the Bill amends the Corporations (Review Fees) Act 2003 to provide companies with the option to pay annual review fees in advance.

The Bill was introduced in the HR on 24 May 2007. The report of the Joint Statutory Committee on Corporations and Financial Services was tabled on 19 June 2007.

Communications Legislation Amendment (Content Services) Bill 2007

The Bill amends the *Broadcasting Services Act 1992* to establish a new regulatory framework for internet content hosts, content services delivered over convergent devices including live streamed content services, mobile phone-based services and services that provide links to content.

The Bill was introduced in the HR on 10 May 2007. Senate amendments were agreed to by the HR on 21 June 2007.

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

Month in review

Decision in ASIC v Citigroup

The Federal Court has found on the two key issues in *ASIC v Citigroup Global Markets Australia Pty Ltd*, that Citigroup:

- did not engage in insider trading; and
- did not contravene the conflict of interest provisions of the *Corporations Act 2001* (Cth).

In this case, which followed a referral from the Australian Securities Exchange, the Australian Securities and Investments Commission (ASIC) alleged that price-sensitive or inside information passed from one area of Citigroup working on the Toll bid (private side) to a proprietary trader working in the interests of Citigroup (public side). Such a passing of inside information, in ASIC's view, amounted to insider trading.

The court did not agree with ASIC. It found that the necessary knowledge did not pass to, or the necessary supposition was not made by, the proprietary trader. The court clarified important aspects of insider trading law, for example, the operation of 'Chinese walls' and the passing of sensitive information.

Fiduciary duty and conflict of interest

The court also clarified when the law will imply the existence of a fiduciary duty. ASIC contended that Citigroup owed Toll a fiduciary duty, and Citigroup should not, therefore, have engaged in proprietary trading (trading on its own behalf) without Toll's informed consent. ASIC further alleged that Citigroup did not have the necessary informed consent.

The failure to obtain that informed consent, in ASIC's view, gave rise to a conflict of interest which contravened s 912A of the *Corporations Act*.

The court did not agree with ASIC. It found that in the circumstances of the case, there was no fiduciary duty and, even if such a duty were implied, there was informed consent. Therefore the court found that Citigroup was not in breach of s 912A.

28 June 2007, ASIC MR 07-171

ASIC releases updated policy on tracing beneficial ownership

ASIC has released updated *Policy Statement 86: Tracing beneficial ownership*. This statement provides guidance on how the agency will exercise its powers under the beneficial ownership tracing provisions (Pt 6C.2) of the *Corporations Act*. The amended policy statement is available at <www.asic.gov.au>.

27 June 2007, ASIC IR 07-29

ASIC updates licensing requirements for AFS licensees

ASIC has released updated versions of *Policy Statement 166: Licensing: Financial requirements* and *Pro Forma 209: Australian financial services licence conditions*. ASIC has also withdrawn three guides for Australian financial services (AFS) licensees given clarifications to its policy and guidance. Copies are available at <www.asic.gov.au/fsrpolicy>.

25 June 2007, ASIC IR 07-28

Court of Appeal reduces penalty for former GIO CFO

The NSW Court of Appeal has ordered that Geoffrey William Vines, a former chief financial officer (CFO) of GIO Australia Holdings Ltd (GIO), pay a pecuniary penalty of $50,000 for his conduct during a takeover bid by AMP Ltd for GIO in late 1998.

In 2006, Austin J ordered that Mr Vines be disqualified from managing a corporation for three years and pay a $100,000 pecuniary penalty.

The Court of Appeal held that, given the seriousness of the contraventions and Mr Vines' partially successful appeal in April this year, a $50,000 pecuniary penalty was appropriate.

The Court of Appeal also held that Mr Vines was a fit and proper person to manage a corporation and therefore, under the law that applied at the time, it declined to disqualify him, and set aside Austin J's disqualification order.

Section 1317EA of the *Corporations Law*, which dealt with the disqualification of directors at the time of Mr Vines' conduct, was repealed with effect from 13 March 2000 and replaced by s 206C of the *Corporations Act*. The difference between the two provisions is that under the old law the court could not disqualify a person it considered fit and proper to manage a corporation. Under the new law, the test is broader and the court can disqualify a person if it is satisfied that the disqualification is justified.

22 June 2007, ASIC MR 07-166

Former HIH executive jailed

Mr Dominic Fodera, the former finance director and CFO of HIH Insurance Ltd (HIH), has been sentenced to three years imprisonment to commence from 10 May 2007, following his conviction on criminal charges laid by ASIC. Mr Fodera is to be released after two years upon entering into a recognisance.

On 4 April 2007 Mr Fodera was found guilty of authorising, on 26 October 1998, the issue of a prospectus by HIH Holdings (NZ) Ltd to raise up to $155 million of converting notes, that contained a material omission. The prospectus omitted to disclose the effect of a transaction entered into at the same time between HIH and Societe Générale Australia Limited (SGAL). This transaction involved SGAL taking up a priority allocation of the notes in the

approximate sum of $35 million in exchange for HIH depositing approximately the same sum with SGAL and entering into a swap arrangement.

The effect of the transaction was that HIH in fact bore the financial risk on the $35 million of converting notes rather than SGAL, as the prospectus suggested. The purpose of the issue of converting notes under the prospectus was to assist HIH in funding the takeover of the FAI Insurance Group.

7 June 2007, ASIC MR 07-155

ASIC issues further updated fees and costs disclosure guide

ASIC has issued a further updated guide for product issuers to help them comply with the *Corporations Amendment Regulations (No 1) 2005*.

The revised *Enhanced fee disclosure regulations: Questions and Answers — an ASIC Guide* answers commonly asked questions about compliance with the regulations. It also incorporates some questions and answers released during 2005. The guide is available at <www.asic.gov.au>.

30 May 2007, ASIC IR 07-20

ACCC submission to inquiry into Australia's consumer policy framework

The Australian Competition and Consumer Commission (ACCC) has lodged a submission to the Productivity Commission's inquiry into Australia's consumer policy framework. Its recommendations include:

- introducing civil pecuniary penalties and banning orders for breaches of the consumer protection and fair trading provisions of the *Trade Practices Act 1974* (Cth);
- amending the Act to reduce administrative burdens associated with obtaining redress for consumers;
- enhancing the ACCC's investigative tools, in particular by enabling it to issue notices to traders requiring them to provide substantiation of advertising claims, and allowing it to use its existing s 155 investigation and evidence gathering powers in certain circumstances; and
- developing uniform consumer protection and fair trading laws across the states, territories and the Commonwealth and improving the level of cooperation between their agencies in administering those laws.

The ACCC submission is available at <www.accc.gov.au>.

29 May 2007, ACCC MR 133/07

ASIC releases technical updates

ASIC has released technical updates to three policy statements, a guidance paper, and a number of class orders relating to financial services providers to ensure users of its policy publications are working with the most current information.

The updated policy statements are:

- PS 168 *Disclosure: Product disclosure statements* (and other disclosure obligations)
- PS 175 *Licensing: Financial product advisers – Conduct and disclosure*
- PS 182 *Dollar disclosure*.

The updated guidance paper is titled *Licensing: The Scope of the Licensing Regime: Financial Product Advice and Dealing — an ASIC Guide*. A list of the revised class orders is provided in the attachment to ASIC IR 07-19.

28 May 2007, ASIC IR 07-19

PUBLISHING EDITOR: Virginia Ginnane BA/LLB MANAGING EDITOR: Eleanor O'Connor PRODUCTION: Christian Harimanow
SUBSCRIPTION INCLUDES: 10 issues per year plus binder and index SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia TELEPHONE: (02) 9422 2222 FACSIMILE: (02) 9422 2404 DX 29590 Chatswood www.lexisnexis.com.au virginia.ginnane@lexisnexis.com.au

ISSN 1326-8945 Print Post Approved PP 244371/00043 Cite as (2007) 10(8) *IHC*