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Australian Disputes Year in Review 2015

KEY COMMERCIAL CASES AND AREAS TO WATCH FOR 2016

February 2016

Contents

Overview

Welcome to the Ashurst *Australian Disputes Year in Review* for 2015.

This publication recaps the most important developments of 2015 across commercial disputes and identifies some areas to watch in 2016.

This Overview provides a snapshot of key developments and trends which are discussed in more detail in the five sections which follow.

There are links at the end of many of the articles to relevant updates, and for more information please contact your usual Ashurst contact or any of the partners listed on the back page.

I hope you find this publication useful, particularly if you find yourself navigating commercial disputes in 2016.

Mark Elvy
Regional Practice Head – Dispute Resolution

CONTRACT AND TORT

CONTINUED UNCERTAINTY ON CONSIDERATION OF SURROUNDING CIRCUMSTANCES

The High Court declined an opportunity to resolve the ongoing controversy about whether there must be ambiguity on the face of a contract before surrounding circumstances can be used to interpret it. However, comments from the Court suggested that it might be open to rejecting the ambiguity requirement in an appropriate case. There are also lessons in the case for parties to mining royalty agreements about defining the scope of the relevant land and considering how the royalty obligation is affected by changes in title to the land.

COMMERCIAL PURPOSE AT THE HEART OF CONTRACT DISPUTES

A number of cases illustrated that where a contract is ambiguous, courts will take a highly practical approach, informed by its commercial purpose. Several of those cases concerned joint ventures and also suggest that joint venture disputes are increasingly being litigated, which highlights the importance of joint venturers ensuring that the contracts between them are clear and workable (and then scrupulously performed).

GOOD FAITH NEGOTIATION COMES INTO SHARPER DEFINITION

A series of cases emphasised that an obligation to negotiate in good faith is only likely to be enforceable when spelled out in a binding contract, and likely only to require honesty rather than reasonableness so that a party may still take a hard line in protecting its own commercial interests. This is likely to be an ongoing trend and you should think carefully about whether to include express obligations of good faith and whether they provide adequate protection.

PENALTIES AND LIQUIDATED DAMAGES

2015 saw the continued working out of the implications of *Andrews v ANZ*, which held that sums payable other than on breach of contract could still be unenforceable penalties. The Full Federal Court held that certain bank fees were not penalties, but rather charges for alternative modes of performance. It also held that whether a clause is a penalty does not depend on whether the potential loss was actually estimated when the contract was entered. The UK Supreme Court also emphasised that analysis should focus on whether the payment is commercially justified. The area will be considered by the High Court in February 2016, with potential implications for all businesses which charge different amounts depending on how a contract is performed.

NUISANCE AND NEGLIGENCE CLAIMS FOR IMPINGING ON YOUR NEIGHBOUR'S ECONOMIC INTERESTS

The Western Australian Court of Appeal considered landowners' legal responsibility to neighbours who engage in sensitive uses of land, holding that a farmer was not liable when his harvesting methods caused a neighbour to lose organic certification. The case highlights the continuing uncertainty concerning the scope of duties of care to avoid pure economic loss, which may be considered again by the High Court in 2016.

CLASS ACTIONS

CAN "FRAUD ON THE MARKET" PROVE CAUSATION IN SHAREHOLDER CLASS ACTIONS?

A number of recent decisions have indicated, without deciding, that the "fraud on the market" theory of causation is arguable in Australian shareholder class actions based on breaches of continuous disclosure requirements and misleading or deceptive conduct. A more authoritative decision – at least in respect of continuous disclosure claims – may be imminent.

REFUSAL OF PRELIMINARY DISCOVERY TO INVESTIGATE SPECULATIVE CLASS ACTION

The Federal Court refused an application for preliminary discovery to assist an applicant to decide whether to bring a shareholder class action, as the applicant had not demonstrated that it held an objectively reasonable belief as to the existence of a claim. The decision illustrates the high threshold for obtaining documents before proceedings are commenced, and contains important lessons for plaintiffs and defendants at the pre-action stage of a class action.

GROUP FUNDING ORDER REJECTED FOR OPEN CLASS

The Federal Court rejected an application early in the *Allco* shareholder class action seeking to impose the terms of a litigation funding agreement on members who had not signed it. The decision may affect the approach to such applications in other contexts (particularly following settlement of class actions), and may also prompt calls for litigation funding reform.

GROUP MEMBERS NOT PRECLUDED FROM RUNNING INDIVIDUAL DEFENCES IN A RELATED CASE

In debt recovery proceedings connected to the failed *Timbercorp* class action, defendants who were group members in the class action were allowed to raise matters which could have been raised in the class action, but were not. The decision raises questions about the conclusive nature of an "open" class action, and is seemingly at odds with decisions made in similar proceedings arising from the collapse of the Great Southern agricultural investment group.

FINANCIAL SERVICES AND REGULATORY DISPUTES

ASIC ENFORCEMENT: KEY TRENDS

ASIC's stated intention to take a more aggressive approach to its investigatory and enforcement role was apparent not in the frequency with which ASIC used its powers, but in the manner in which they were used in key areas of focus including the conduct of financial advisers and financial benchmarks. These areas will continue to be a focus in 2016, along with corporate culture, gatekeepers' conduct, consumer credit, and intermediaries' use of confidential information and conflicts of interest. Developments in ASIC's funding model and policy on cost recovery may also affect the types of cases where it is prepared to take enforcement action.

We also highlight some key trends in regulatory enforcement in the United Kingdom and Hong Kong, because of their potential influence on developments in Australia.

HIGH COURT RECONFIRMS RIGHT TO AGREE CIVIL PENALTIES IN REGULATORY PROCEEDINGS

In May this year, the Full Federal Court held that parties to a regulatory enforcement proceeding were not permitted to make joint submissions regarding an agreed civil penalty amount or range, a decision which could have had a chilling effect on settlements. The High Court has now overturned that decision, holding that there is considerable scope for regulators and respondents to agree on a civil penalty amount to be proposed to the court – thereby giving greater certainty to parties regarding the outcome of a settlement.

BRIBERY AND CORRUPTION

The work of state-based independent commissions against corruption had a high profile in 2015, partly because of a High Court decision which narrowed the jurisdiction of the NSW Independent Commission against Corruption (and triggered significant legislative changes and further litigation), but also due to several high profile investigations into public sector corruption. A number of criminal investigations into alleged foreign corruption by Australian companies are also understood to be ongoing, and the AFP has established a Fraud and Anti-Corruption Centre.

CIVIL PROCEDURE, PROPORTIONATE LIABILITY AND PRIVILEGE WAIVER

UNCERTAINTY ON REACH OF PROPORTIONATE LIABILITY REGIME RESOLVED BY HIGH COURT

The High Court has resolved the uncertainty caused by conflicting Full Federal Court decisions on the *Corporations Act* proportionate liability regime, by holding that it applies only to claims specifically designated by statute and not to other causes of action based on the same facts.

THE CONTINUING QUEST FOR EFFICIENT CASE MANAGEMENT

The Federal Court's development of a National Court Framework has the potential to significantly improve its efficiency and cost and make ADR more central to the court process – but there will be lessons as practitioners and judges begin to operate under the new regime. In addition, the increasing acceptance of technology-assisted review has the potential to reduce the cost and burden of discovery.

PROTECTING AGAINST UNINTENTIONAL WAIVER OF PRIVILEGE IS INCREASINGLY CHALLENGING

Recent cases illustrate the increasing readiness of the courts to find waiver of privilege based on the deployment of material derived from legal advice and unilateral waiver of privilege by one joint privilege holder.

ALTERNATIVE DISPUTE RESOLUTION

ARBITRATION IN AUSTRALIA

The Australian courts' embrace of arbitration continued in 2015, with a number of pro-enforcement decisions emphasising the high threshold to challenge an arbitral award on grounds of inconsistency with public policy or natural justice. The courts are also prepared to enforce arbitration agreements in complex situations, such as where some of the relief claimed cannot be granted by the arbitrator. Legislation also made international arbitrations in Australia confidential (on an opt-out basis) and expanded the statutory enforcement regime for foreign arbitral awards.

INTERNATIONAL ARBITRATION

Three key trends in 2015 were the rise of third party funding, debate over arbitration as an investor-state dispute settlement mechanism, and the move towards greater transparency. The Singapore International Arbitration Centre (SIAC) is also an increasingly popular forum for arbitrations involving Australian parties, and we highlight developments there relating to mediation in arbitrations, the Singapore International Commercial Court, and the SIAC rules.

WHEN IS AN EXPERT DETERMINATION FINAL AND BINDING?

Expert determination is often viewed as a quick and cheap method of resolving disputes, but a New South Wales Court of Appeal case indicates that, absent clear words, expert determination clauses may not empower experts to finally resolve questions of law. The case emphasises the importance of carefully drafting expert determination clauses to reduce the scope for litigation over the correctness of the expert's decision.

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Contract and Tort

CONTINUED UNCERTAINTY ON CONSIDERATION OF SURROUNDING CIRCUMSTANCES

There is an ongoing controversy, discussed in our Australian *Disputes Year in Review 2014*, over whether the courts can only consider surrounding circumstances in interpreting a contract if first satisfied that the contract is ambiguous.

The High Court had the opportunity to consider this issue in *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37, but declined to resolve it as their Honours considered that the relevant agreements were ambiguous so the issue did not arise. However, all members of the Court said that the reasons given by Gummow, Heydon and Bell JJ in refusing special leave in *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45 – which were to the effect that the ambiguity requirement remained applicable – had no precedent value. This suggests that in an appropriate case the Court may be open to taking a different view.

While the issues of interpretation were particular to the mining royalty agreements in issue, the case also indicates that:

- defining an area in a royalty agreement by reference to particular legal rights (such as temporary reserves) may not mean that the size of the area changes if the legal rights change – they may simply identify the fixed land area; and
- royalty obligations where title to the area is derived "through or under" rights to an area may not require strict succession of title if there is a practical causal connection between the original title and that under which profits were earned.

These are important practical issues for consideration in reviewing or negotiating mining royalty agreements. The issues are discussed further in our 19 October 2015 *Contract Update*.

COMMERCIAL PURPOSE AT THE HEART OF CONTRACT DISPUTES

A number of cases also illustrated that where a contract is ambiguous, courts will take a highly practical approach to its interpretation, informed by the commercial purpose of the contract. Two important cases concerned joint ventures. It seems that joint venture disputes are more frequently being litigated, which makes it important that joint venturers ensure the contracts between them are clear, workable and (on their side) scrupulously performed.

The first case, *Santos Offshore Pty Ltd v Apache Oil Australia Pty Ltd* [2015] WASC 242, related to contractual notices which Apache was obliged to give Santos (the minority participant) arising from an anticipated change of control. The notices triggered Santos' pre-emptive right to acquire Apache's interest.

The Court found that the notices were invalid, including because the notices sought to impose conditions on Santos which were irrelevant to the commercial object of the pre-emptive rights regime (putting a proper cash value on the sale). Apache was obliged to reissue valid notices and give Santos an opportunity to exercise its rights.

The second case, *Apache Oil Australia Pty Ltd v Santos Offshore Pty Ltd* [2015] WASC 318, considered the circumstances in which Santos was entitled to remove one of the Apache subsidiaries as operator of the joint venture. The operator's removal was sought because it had engaged in development activities without prior approval of the decision-making body for the joint venture. The joint venture contract was not clear on whether prior approval was required.

The Court held that Santos was entitled to remove the operator. The failure to obtain prior approval deprived other venture participants of influence on budgets, contract awards and project timing, and so as a commercial matter, the parties must have intended that prior approval be obtained.

We discuss the significance of both the pre-emptive rights case and the operator removal case in more detail in our October 2015 *Energy & Resources Alerts*.

GOOD FAITH COMES INTO SHARPER DEFINITION

A series of cases suggested that a duty to negotiate in good faith will generally arise only when expressly created by contract, and that the contract must be a concluded one.

In *Caves Beachside Cuisine Pty Ltd v Boydah Pty Ltd* [2015] NSWSC 1273 and *Mushroom Composters Pty Ltd v IS & DE Robertson Pty Ltd* [2015] NSWCA 1, the NSW courts indicated that they would rarely, if ever, imply an obligation to negotiate in good faith into what was otherwise an unenforceable agreement to agree. That is because to imply a term there must first be a valid contract containing all of its essential terms.

In *Baldwin v Icon Energy Ltd* [2015] QSC 12, McMurdo J held that a memorandum of understanding which stated that the parties would negotiate in good faith to conclude a gas supply agreement by August 2008, but only contained a "non-binding indication" of the terms and conditions of supply, was not enforceable. In the absence of any criteria, the Court could not fill the gaps by enforcing the obligation or assessing damages based on what ought to have been agreed. Agreements lacking criteria by which good faith can be assessed may be unenforceable.

By contrast, in *Harold R Finger & Co Pty Ltd v Karellas Investments Pty Ltd* [2015] NSWSC 354 it was held that, where the parties had agreed to be bound by heads of agreement which contained the critical terms, with further subsidiary terms to be negotiated based on contractual criteria and one party's standard documentation, there was an implied obligation to reasonably cooperate to conclude the agreement.

The trend in the 2015 cases is also to view an obligation to act in good faith as being only to act honestly, and not reasonably, such that parties may pursue their own commercial interest and take a hard line in negotiations: see *Caves, Baldwin, Karellas* and also *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd* [2015] FCAFC 127.

This narrow approach to agreements to negotiate in good faith is likely to be an ongoing trend, and you should think carefully whether to include express obligations of good faith and whether they provide adequate protection or need to be supplemented with more detailed obligations.

NUISANCE AND NEGLIGENCE CLAIMS FOR IMPINGING ON YOUR NEIGHBOUR'S ECONOMIC INTERESTS

It is increasingly common for commercial or agricultural activities to impact economically on neighbouring landowners, without causing physical damage to land. This raises important questions concerning the extent of landowners' legal responsibility to neighbours engaging in sensitive uses of land, and more generally the circumstances in which a duty of care to avoid pure economic loss arises.

In *Marsh v Baxter* [2015] WASCA 169, the Western Australian Court of Appeal considered whether a farmer who grew genetically modified canola (Baxter) was liable to his neighbour (Marsh) where he harvested his crops in a way which spread genetically modified material onto Marsh's farm and caused it to lose official organic certification.

The majority (Newnes and Murphy JJA) held that no duty of care arose. Farmers were not ordinarily required to contemplate risks of harm to neighbours in choosing between harvesting techniques, but rather could pursue their own legitimate agricultural and financial interests. Moreover, Marsh was not vulnerable because there were practical steps he could have taken to prevent the spread of genetically modified material. There was also no liability in nuisance because of the abnormal sensitivity of the organic farming operations.

In dissent, President McLure would have upheld both Marsh's negligence and nuisance claims. Her Honour considered that a duty of care was appropriate because it would protect the organic farmers against de-certification without causing appreciable prejudice to Baxter's interests.

The divergent approaches in these judgments highlight the continuing uncertainties regarding when liability for pure economic loss arises. Marsh has applied to the High Court for special leave to appeal, so there may be further developments in 2016. See our 3 November 2015 *Dispute Resolution Update* for more information.

PENALTIES AND LIQUIDATED DAMAGES

2015 saw the continued working out of the implications of the changes to the doctrine of penalties wrought by *Andrews v ANZ* (2012) 247 CLR 205, which held that sums payable other than on breach of contract could still be unenforceable penalties. The cases reduce some of the uncertainty about the potential breadth of the doctrine following Andrews, but a number of issues remain to be resolved.

The most significant development was the Full Federal Court's decision in the ongoing bank fees class action: *Paciocco v ANZ* [2015] FCAFC 50. The Full Court held that honour, dishonour and overlimit fees were not penalties since they were not triggered by a breach of contract by the customer, nor were they "collateral stipulations" imposed to enforce a "primary stipulation". Rather, they were charges for an alternative mode of performing the contract.

The Full Court also held that late payment fees charged on consumer credit cards were not penalties. The Court reasoned that:

- Whether the fees were "extravagant and unconscionable", having regard to the greatest loss the bank might suffer, remained central to the doctrine.
- This should be assessed on a forward-looking basis, rather than based on the actual costs and losses suffered.
- It was not necessary to show that ANZ had actually estimated its potential losses when setting the fees.
- Provisioning and regulatory capital costs could be taken into account in assessing the potential losses.

The High Court will hear an appeal against the decision on the late payment fees aspect of the decision in February 2016.

That appeal is likely to also consider this year's UK Supreme Court decision in *Cavendish Square Holding BV v El Makdessi* [2015] UKSC 67, which held that the long-standing authority of *Dunlop Pneumatic Tyre Co* [1915] AC 79 has been applied in an unduly narrow manner in the UK. Mark Clarke, a London Dispute Resolution Partner, comments on the significance of the decision:

> "The Makdessi decision provides welcome clarification on penalty clauses under English law. The previous test of a genuine pre-estimate of loss will no longer apply. Rather, the courts will now be concerned with whether the clause in question imposes a detriment on the contract breaker "out of all proportion to any legitimate interest of the innocent party". This means the wider commercial context of a transaction will be considered such that, even if the amount required by a clause bears no relationship to the loss actually attributable to the breach, it will not necessarily be a penalty if it can be shown that there is a legitimate reason why compensation for the actual loss suffered would not be sufficient."

For example, where a shopping centre car park operator provided free parking for a period but charged a fee to overstayers, it suffered no direct loss, but the fee was commercially justifiable in order to influence people to abide by the time limit and promote greater customer traffic.

It will be interesting to see to what extent the courts are influenced by the decision in 2016.

Class Actions

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CAN "FRAUD ON THE MARKET" PROVE CAUSATION IN SHAREHOLDER CLASS ACTIONS?

Almost all shareholder class actions are based at least partly on the "fraud on the market" theory of causation (also known as market-based causation). That is, individual shareholders do not need to show that each trading decision was made directly in reliance on the alleged wrongful conduct of the company. Instead, once it is established that the market for the securities was efficient and the alleged conduct affected the share price, there is a rebuttable presumption of reliance for each shareholder.

Continuing the trend discussed in our *2014 Year in Review*, a number of decisions in 2015 considered whether market-based causation is arguable in Australia. None has authoritatively decided the issue.

First, in *Grant-Taylor v Babcock & Brown Limited (in liquidation)* [2015] FCA 149, Perram J rejected a group shareholder action against Babcock & Brown Ltd (in liquidation) (BBL). The applicants had alleged that they were misled by BBL's failure to disclose certain information prior to its collapse in 2009, in breach of the ASX Listing Rules and the continuous disclosure provisions of the Corporations Act. Despite rejecting the applicants' claims on other grounds, Perram J observed, without deciding, that a claim for breach of continuous disclosure obligations did not require a pleading of direct reliance, and that fraud on the market is therefore arguable. Precisely what Perram J meant is unclear – in *Bonham v Iluka Resources Limited* [2015] FCA 713 (discussed in more detail below) Kerr J doubted whether his Honour endorsed market-based causation or merely raised it as a possible measure of loss. There is continuing uncertainty about the status of the doctrine.

The applicants have appealed Perram J's decision to the Full Court. Judgment is currently reserved. The decision may probe the issue in more detail, at least in relation to continuous disclosure claims.

Secondly, in *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94, the applicants sought and were granted leave by the Full Federal Court to amend the statement of claim to introduce fraud on the market claims for misleading or deceptive conduct relating to disclosure documents. The majority (Gilmour and Foster JJ) held that market-based causation is arguable even where claimants participated in an IPO prior to trading on the market.

For more detailed discussion of *Grant-Taylor v Babcock & Brown*, see our March 2015 *Restructuring & Insolvency Alert*; and of *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94, see our 14 September 2015 *Class Action Update*.

REJECTION OF PRELIMINARY DISCOVERY TO INVESTIGATE SPECULATIVE CLASS ACTION

In *Bonham v Iluka Resources Limited* [2015] FCA 713, the Federal Court rejected an application for preliminary discovery to enable the applicant to decide whether to commence a shareholder class action following a downgraded profit forecast.

Preliminary discovery may be ordered where the applicant has an objectively reasonable belief that there is a potential claim against the defendant, and the documents would assist in deciding whether to pursue the claim. The Court rejected the application principally on two related bases:

- First, the applicant failed to demonstrate the facts or circumstances giving rise to an objectively reasonable belief in the existence of a claim. The material put forward was no more than conjecture, suspicion or speculation.
- Secondly, there was no evidence that the necessary belief was held by the applicant (as opposed to its solicitors).

The Court held that preliminary discovery will not be available where the applicant is in a state of complete uncertainty about whether a claim exists. There must be a specific basis for a reasonable belief that all of the material facts necessary for relief may be made out.

The case has important implications for the way potential plaintiffs and defendants behave prior to the commencement of shareholder class actions, including in relation to informal requests for access to documents.

Kerr J would have also declined the application as a matter of discretion, because at the same time as seeking preliminary discovery, the applicants' lawyers were promoting the class action in terms which indicated that they had already decided to commence.

For further information, see our 23 July 2015 *Class Action Update*.

GROUP FUNDING ORDER REJECTED FOR OPEN CLASS

In *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq)* [2015] FCA 811, the applicants sought (at an early stage in the proceeding) orders imposing the terms of a litigation funding agreement on all group members. The result would have been that if any judgment or settlement sum was obtained, all group members who did not opt out (including those who did not have agreements with the funder) would have to pay the funder about one-third of their share of any proceeds, and contribute to reimbursement of legal costs.

This would have been a significant development: such orders have previously only been made in uncontested applications to facilitate settlement of class actions, and even in that context have been the subject of negative comments (for example by Gordon J in *Modtech v GPT Management* [2013] FCA 626). It was widely thought that if the orders were made, it would encourage more class actions by making them more attractive to funders.

Wigney J refused to make the orders, considering them neither appropriate nor necessary to ensure justice is done. However, his Honour expressly left open whether such orders might be made later in the proceeding.

The decision discussed the matters that should be considered before such orders could be made (such as the percentage of commission, potential recoveries to which the commission would be applied, the nature and complexity of the case and the risk taken by the funder), and it will be interesting to see whether such consideration is now formally required in consent applications in the settlement context. The decision also highlights the relatively unregulated nature of class action funding in Australia, and could prompt calls for reform.

For further discussion, see our 10 August 2015 *Class Action Update*.

GROUP MEMBERS IN CLASS ACTION NOT PRECLUDED FROM RUNNING INDIVIDUAL DEFENCES IN A RELATED CASE

Class actions typically focus on claims common to all group members, but group members may have additional individual claims. In the interests of finality and certainty, settlements typically seek to extinguish all claims by group members and, subject to the issues raised in *Allco* (see above), the courts have been prepared to open classes to facilitate final settlements. In *Clarke v Great Southern Finance* [2014] VSC 569; [2014] VSC 516, the Victorian Supreme Court accepted that individual claims or defences not raised in the class action could not be raised subsequently by individual group members who had not "opted out".

A note of uncertainty about the finality of class actions was, however, introduced by Robson J's decision in *Timbercorp Finance Pty Ltd (In Liq) v Collins and Tomes* [2015] VSC 461. Following a failed class action which challenged the validity and enforceability of loan agreements associated with collapsed investments, individual group members sought to raise new defences in debt recovery proceedings based on those loan agreements. The defences could have been raised in the class action.

Timbercorp argued that the individuals were precluded from running new defences on the basis of abuse of process or estoppel. Robson J rejected those arguments. His Honour considered that the individuals were not parties to the class action and could not practically have advanced the defences earlier (or sought directions that they be dealt with separately after the determination of the common issues). His Honour considered that the class action regime merely *permitted*, but did not *require*, that all issues arising out of the same circumstances be adjudicated in the group proceeding.

The decision raises questions about the conclusive nature of an open class action involving mainly passive group members. It will be interesting to see whether other courts take up this approach in 2016 and whether the ability to take new points is limited to points taken as defences.

For further discussion, see our 9 September 2015 *Class Action Update*.

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Financial services and regulatory disputes

ASIC ENFORCEMENT: KEY TRENDS

ASIC began the year signalling its intention to take a more aggressive approach to its investigatory powers and enforcement action. In terms of numbers of notices to produce documents, search warrants, and other investigatory tools, ASIC's approach does not appear to have changed significantly – its 2014/2015 annual report shows only a slight increase in the exercise of ASIC's powers.

ASIC has, however, targeted a number of areas for intensive surveillance and enforcement activity.

One focus is financial advisers, including through ASIC's Wealth Management Project which focuses on standards of financial advice in larger providers. ASIC is increasingly electing to address conduct issues with financial advisers and other intermediaries by seeking banning orders before an ASIC delegate (subject to review in the AAT). Fifteen financial advisers were banned in 2015.

ASIC continues to emphasise the interaction between product design and the quality of advice, and will welcome the Government's acceptance of the Financial System Inquiry recommendations for new product intervention powers and product design requirements on distributors and issuers.

Another ASIC focus is the potential manipulation of financial benchmarks (arising out of global concerns about BBSW and other benchmark rates). ASIC released a report in July 2015 on the systemic importance of benchmarks and at the same time warned institutions to take steps to ensure that the benchmarks were not manipulated. Investigations are taking place in this area, and given the concerns which have been raised by the UK Financial Conduct Authority and others about the potential for similar activity in commodities markets, conduct in a range of different markets may be a focus in 2016.

ASIC's Corporate Plan 2015-2016 states that these issues will continue to be a focus in 2016, as well as gatekeepers' conduct, consumer credit, and conduct risk in relation to intermediaries' use of confidential information and conflicts of interest. The concept of corporate/licensee culture remains an important touchstone for ASIC in assessing conduct in these and other areas.

ASIC is also seeking to move to an industry levy funding model, which will potentially affect the types of cases where it takes enforcement action in future. In the meantime, ASIC has signalled that it will seek to recover its legal costs more frequently from targets when investigations result in a court decision that the target has contravened its obligations.

INTERNATIONAL FINANCIAL SERVICES REGULATION

Given the increasing collaboration between global financial services regulators, trends in the UK and Hong Kong may influence or reinforce developments in Australia.

United Kingdom

> "In the UK, 2015 has been the year when the Financial Conduct Authority and Prudential Regulation Authority have set out to define their approach (taking effect in some cases from next April) towards individual accountability in banks, introducing a more stringent senior managers regime, a new certification regime for those below senior manager level, and new rules of conduct which will apply to almost all employees of banks. It is now proposed to extend this regime beyond banks and across the whole of the financial services industry. The aim is apparently to address the difficulty of holding individuals, rather than firms, to account."

David Capps, Dispute Resolution Partner, London

Hong Kong

Hong Kong's Securities and Futures Commission (SFC) has continued with its robust approach to enforcement issues in 2015.

- The SFC has continued to target licensed employees, not just the institutions they work for, where misconduct is established. Individuals are considered fair game in the quest to bring cultural change in the securities industry.
- Failures by firms to promptly self-report misconduct that has been identified in respect of their employees or systems and control failures are treated seriously, with significant fines levied on firms where employees were permitted to leave Hong Kong before the SFC was able to interview or discipline them.
- With a number of failed IPOs in recent years, the SFC has signalled that it will investigate investment banks for shortcomings in the due diligence they carry out as sponsors of listing applicants. The SFC has highlighted that sponsors are not merely paid advisers, but must act as gatekeepers to equity markets and assist in identifying listing applicants that do not meet stock exchange criteria.

For more information about global trends in financial services regulations, see the first, second and third editions of the 2015 Ashurst Regulatory Radar.

HIGH COURT CONFIRMS RIGHT TO AGREE CIVIL PENALTIES IN REGULATORY PROCEEDINGS

It has traditionally been common for regulators and respondents to "settle" regulatory enforcement proceedings by making joint submissions to the court on an agreed penalty amount or range.

Our *2014 Year in Review* noted that the courts had re-emphasised that they will carefully scrutinise agreed penalties and form their own view on the appropriate outcome. In May this year the Full Federal Court took this trend a significant step further. In *Director, Fair Work Building Industry Inspectorate v CFMEU* (2015) 229 FCR 331, the Court held that it could not even receive submissions from parties on an agreed penalty or range, although it could receive submissions as to penalty more generally, including on penalties in analogous cases.

This reasoning was subsequently applied in cases involving the ACCC and Fair Work Ombudsmen, and had the potential to apply to all regulators and make the outcome of a "settlement" process much more uncertain.

In an outcome welcomed by regulators and respondents alike, the High Court overturned the decision in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 and held that the parties could propose an agreed penalty amount or range to the court. This is a return to relative certainty, although you should bear in mind that to be effective the submissions must be carefully prepared to assist the court in determining that the agreed penalty amount is appropriate in the circumstances. More detailed discussion of the High Court's decision can be found in our 10 December 2015 *Regulatory Update*.

BRIBERY AND CORRUPTION

Anti-bribery and corruption continued to be a focus in Australia in 2015, mainly through the work of inquiries and commissions.

The High Court in *Independent Commission Against Corruption (ICAC) v Cunneen* [2015] HCA 14 held that alleged criminal conduct in in a private capacity, albeit designed to mislead a public official in relation to the honest exercise of his or her functions, was not within ICAC's jurisdiction. This led the NSW Parliament to amend the law to ameliorate the effects of the decision, including to restore ICAC's jurisdiction to investigate collusive tendering for government contracts and fraudulently obtaining government mining leases.

NSW and Victorian authorities continue to be active in holding public examinations in relation to corruption of public officials and wrongdoing in public office. Victoria's Independent Broad-based Anti-corruption Commission (IBAC) held a significant investigation into alleged corruption in the Education Department. NSW Police charged senior company officers in relation to payments made to staff responsible for the procurement of motor vehicles.

In the criminal sphere, there are reports that a number of anti-bribery and corruption investigations are ongoing, principally in relation to activities in foreign countries. The Securency prosecutions have continued, with suppression orders originally made for the purpose of protecting Australia's international relations partly lifted in 2015 following the publication of material by WikiLeaks.

Prompted by a Senate inquiry spearheaded by the Greens and cross-bench senators, the Australian Federal Police (AFP) is under renewed pressure to investigate and prosecute foreign bribery offences. The Federal Government reported in its update to the OECD Working Group on Bribery that it has made good progress in the area, as shown by the AFP's establishment of a Fraud and Anti-Corruption Centre including the ATO, ASIC, ACCC, DFAT, APRA and others.

One point the Senate inquiry is considering is the unavailability of "deferred prosecution agreements" (DPAs) in Australia – a mechanism which effectively enables the settlement of potential criminal proceedings by companies which come forward at an early stage and cooperate. These are well-established in the USA and were recently introduced, in a different form, in the UK.

THE FIRST DPA UNDER THE UK BRIBERY ACT

> "On 30 November 2015, the Southwark Crown Court in England approved the Serious Fraud Office's (SFO) first ever DPA, which was concluded with ICBC Standard Bank plc. A DPA is similar to a US style plea bargain, but with a higher level of judicial involvement. This decision was particularly significant because it also concluded the SFO's first corporate corruption case under section 7 of the UK *Bribery Act 2010* (the corporate offence of failing to prevent bribery by an associated person). The case provides some guidance on the factors the court will take in to account when deciding whether to approve a DPA. In particular, early self-reporting and the high level of co-operation with the SFO during the investigation by the bank and its lawyers were significant. The decision also highlights that DPAs are not an "easy option". The SFO has warned companies not to assume that DPAs will be offered in every case. There still remains a serious risk that even if a company self-reports it will be prosecuted, particularly where there is a high level of corporate culpability or failure to co-operate. This is demonstrated by the SFO's announcement on 9 December 2015 that it is prosecuting Sweett Group, a construction company, for a section 7 offence."

Angela Pearson, Dispute Resolution Partner, London

This provides an indication of what may happen in Australia if DPAs are introduced, and is also important given the broad extra-territorial reach of the UK Bribery Act.

4 Civil procedure, proportionate liability and privilege waiver

UNCERTAINTY ON REACH OF PROPORTIONATE LIABILITY REGIME RESOLVED BY HIGH COURT

Proportionate liability provides a partial defence when multiple persons are responsible for the one loss suffered by a plaintiff, in that the liability of each defendant is limited to its share of responsibility for the loss. This can create significant risks for the plaintiff, particularly where a potential defendant is insolvent.

However, not all causes of action which could apply to the same conduct are expressly subject to proportionate liability. For example, claims based on misleading or deceptive conduct are expressly apportionable, whereas those for intentionally false or misleading statements are not.

A significant controversy over the past year (arising from conflicting Full Federal Court decisions in 2014) has been whether proportionate liability applies only to those claims specifically designated by statute, or also to other causes of action based on the same facts. The High Court settled this controversy in *Selig v Wealthsure* [2015] HCA 18, holding that proportionate liability applies only those causes of action specifically designated. While the decision was based on the provisions of the *Corporations Act*, the reasoning would appear to apply to other legislation (and in *Williams v Pisano* [2015] NSWCA 177, Justice Emmett suggested that the same result would apply to the similar regimes in the *Competition and Consumer Act 2010* (Cth) and *Australian Consumer Law*).

The result is that defendants will continue to see alternative claims based on non-apportionable causes of action, which typically involve an allegation of more conscious wrongdoing. For more discussion on these developments, see our 13 May 2015 *Dispute Resolution Update*.

THE CONTINUING QUEST FOR EFFICIENT CASE MANAGEMENT

Although the Productivity Commission made far-reaching recommendations for the reform of civil procedure in late 2014, there has been little progress with legislative reform in 2015. The focus has been on incremental reforms by the courts themselves and developments in technology which facilitate case management.

> *We are using predictive coding technology more and more. For cases of a certain size it is an excellent way of reducing lawyer-review costs.*
>
> **London Dispute Resolution Partner, James Levy, who has used predictive coding technology in a number of matters before the English High Court**

The Federal Court has introduced the new National Court framework which seeks to encourage the use of standard case-management techniques adapted for particular types of dispute, but preserves flexibility for docket judges to vary the procedures where appropriate. Key features include holding an early scheduling conference, the Court seeking more actively to facilitate alternative dispute resolution at all stages of the process, and bringing matters to trial more quickly. Whilst many details of the new regime are subject to consultation, it is hoped that it will have a significant impact on the efficiency and cost of Federal Court litigation. As with all new case management regimes, a cultural shift may be required of practitioners, so there will be further developments in 2016 as the regime is implemented.

There is also increasing interest in ways to use technology to limit the cost and burden of discovery. The Supreme Court of Ireland approved the use of technology assisted review (which uses predictive and other technologies to reduce the burden of manual review) to comply with discovery obligations in *Irish Bank Resolution Corporation Limited v Sean Quinn* [2015] IEHC 17. While there is no decision yet on the issue in Australia, technology has the potential to reduce the costs associated with discovery without compromising its effectiveness.

PROTECTING AGAINST UNINTENTIONAL WAIVER OF PRIVILEGE IS INCREASINGLY CHALLENGING

The 2015 cases on waiver of privilege show that privilege may be waived by conduct which is very much unintended and incidental – and, in the case of joint privilege, not engaged in by one of the privilege holders.

In *ASIC v Park Trent Properties Group Pty Ltd* (2015) 105 ASCR 565, the NSW Supreme Court found that voluntary disclosure of a compliance manual to ASIC constituted a waiver of privilege over legal advice in relation to the manual. That was because the content of the manual had been settled on the basis of legal advice, and it was "deployed" in aid of the party's position in an ASIC investigation and subsequent proceedings. The Court held that, by seeking to take advantage of that course of conduct in its defence, Park Trent disclosed the effect of the legal advice, thus waiving privilege. The case highlights that, when relying on policy documents prepared or settled by lawyers, consideration needs to be given to whether there could be a waiver of privilege. For more detail, see our 31 August 2015 *Privilege Update*.

Similarly, in *Krok v Commissioner of Taxation* [2015] FCA 51, privilege was waived by the communication of the gist of legal advice from Mr Krok's foreign lawyers in affidavits filed in Australian proceedings. Having sought an advantage by deploying that material, Mr Krok was required to disclose the full advice. This is a more orthodox decision, but highlights the care which must be taken to avoid inadvertent waiver through court documents. For more information, see our 19 February 2015 *Tax Alert*.

Finally, in *Jess v Jess* [2015] FAMCA 822, the Court held that the Uniform Evidence Law which applies in Federal, NSW, Vic, ACT and NT proceedings has changed the law so that a jointly held privilege could be waived unilaterally by one privilege-holder. This means that where joint venturers or other parties with a common interest obtain joint legal advice, one party may subsequently be able to waive the privilege in its perceived interests, to the detriment of the other. Given the risk of unilateral waiver, you should think carefully about when and whether joint advice is appropriate.

PRIVILEGE ABROAD

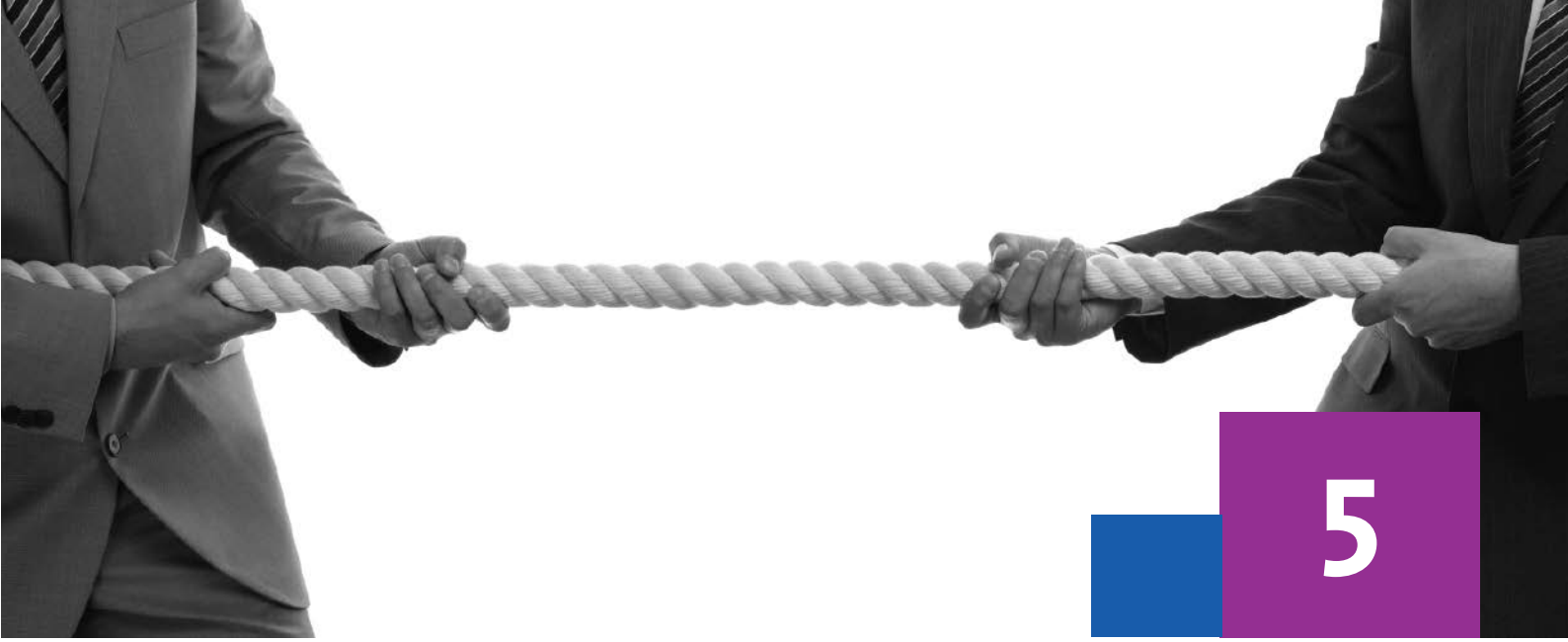
Hong Kong rejects narrow definition of "client"

The Australian law of privilege differs in important respects from that in England and other common law countries. Companies and lawyers with operations across several countries need to be aware of these differences and the risks which they create.

One risk is that, at least under English law, a very narrow definition of the "client" will be applied in assessing whether communications are lawyer-client communications attracting legal advice privilege. This arises from the controversial decision of the English Court of Appeal in *Three Rivers (No 5)*.

Helpfully, a 2015 decision from the Hong Kong Court of Appeal, *Citic Pacific Ltd v Secretary for Justice* (CACV 7/2012, 29 June 2015), rejected the narrow definition. The Hong Kong Court held that it is impractical to treat only a small subset of employees of a corporation as the "client" for the purposes of privilege. It was instead held that "*the client is simply the corporation and the question is really one of which its employees should be regarded as being authorized to act for it in the process of obtaining legal advice.*" A "dominant purpose" test, similar to that applied in Australia, was instead adopted in Hong Kong for the first time.

The decision brings the law of Hong Kong closer to Australian law, where communications with employees of a client for the purposes of litigation or legal advice are generally capable of being privileged. Those likely to be involved in cross-border litigation should be aware of the different tests that will apply.



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Alternative Dispute Resolution

ARBITRATION IN AUSTRALIA

Our *2014 Australian Disputes Year in Review* noted a run of cases that confirmed Australia's status as an arbitration friendly jurisdiction. That trend has continued this year.

Claims that arbitral awards were contrary to public policy have been rejected in several cases. In *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 735 and [2015] NSWSC 829, Hammerschlag J rejected a challenge as "a disguised attack on factual findings dressed up as a complaint about natural justice" which disclosed "no, let alone real, unfairness or practical injustice". There were similar views about the high threshold for public policy challenges in *Aircraft Support Industries v William Hare UAE LLC* [2015] NSWCA 229; *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163; *Giedo van der Garde v Sauber Motorsport AG* [2015] VSC 80; [2015] VSCA 37 and *ALYK (H.K.) Ltd v Caprock Commodities Trading* [2015] NSWSC 1006, and *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] USC 724.

A number of decisions showed that the courts will strive to enforce the parties' agreement to arbitrate. In *John Holland Pty Limited v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451, Hammerschlag J enforced an arbitration clause notwithstanding that there were related disputes with sub-contractors that did not fall within the arbitration clause.

In *Robotunits v Mennell* [2015] VSC 268, Croft J held that matters arising out of the *Corporations Act* are capable of arbitration and that it is not necessary to show a reasonable prospect of success on the merits to enforce an arbitration clause.

In the matter of *Ikon Group Limited (No 2)* [2015] NSWSC 981, Brereton J held that an arbitration clause would be enforced even if the arbitrators could not grant all of the relief sought – the parties could return to court after the award to determine whether any further relief should follow from it.

The Commonwealth also passed legislation in September 2015 to make international arbitrations in Australia confidential (on an opt-out basis) and extend the pro-enforcement regime to a wider range of foreign awards. These developments confirm Australia's commitment to developing a best-practice regime for international arbitration.

The Australian developments are complemented by those in Singapore and other jurisdictions. For example, in *Tomulugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57, the Singapore court took a similar approach to Australia in relation to the arbitrability of shareholder oppression disputes and the avoidance of parallel proceedings for disputes involving issues both within and beyond the arbitration clause. Courts increasingly look to overseas authority in arbitration matters and a common international jurisprudence is developing.

INTERNATIONAL ARBITRATION

Our January 2016 *International Arbitration Year in Review* discusses a number of key trends, including:

2015 saw increasing interest in the third party funding of international arbitration. A number of Australia-based and international funders are seeking greater involvement in the area. The ICC Commission Report *Decisions on Costs in International Arbitration* indicated that third party funding is not uncommon but is relatively unregulated and typically regarded as a private matter for the funded party – although in June 2015 an ICSID tribunal required disclosure of the identity of a third party funder in the interests of transparency. Some countries still prohibit third party funding: Hong Kong is consulting on legislative change due to doubts about whether it is currently permissible. It remains unlawful in Singapore.

There was continued debate about the use of arbitration as an investor-state dispute settlement (ISDS) mechanism, with public concern that it limits states' ability to regulate in the public interest. Australia nonetheless agreed to arbitration mechanisms in the China-Australia Free Trade Agreement and the Trans-Pacific Partnership, but both contain clauses which seek to limit the scope for foreign investors to claim compensation for regulatory changes. The ChAFTA provisions are discussed in our 23 June 2015 *Arbitration Alert*. Australia's recent success in the plain packing arbitration with Philip Morris – albeit on jurisdictional grounds – may also allay public concerns about ISDS mechanisms. By contrast, Europe is pushing for a European Investment Court, with an appeal mechanism, rather than arbitration, in negotiations over the Transatlantic Trade and Investment Partnership.

"2015 saw increased efforts to address the perceived need for greater transparency in international arbitration. The London Court of International Arbitration (LCIA) published data on the average costs and duration of LCIA proceedings, while the International Chamber of Commerce produced a detailed report on how costs are awarded in arbitration proceedings. An independent project – Arbitrator Intelligence –sought to collate arbitration awards not previously in the public domain to enhance understanding of international arbitration practice. The move towards greater transparency is likely to continue."

Tom Cummins, Dispute Resolution Partner, London

THE VIEW FROM SINGAPORE

Singapore is an increasingly important centre for arbitrations involving Australian parties: since 2011, the Singapore International Arbitration Centre ("SIAC") has recorded a rise in the number of Australian parties involved in the arbitrations it administers.

The international arbitration landscape in Singapore has changed significantly in 2015. First, the Singapore International Mediation Centre has been established and, with SIAC, has introduced an "Arb-Med-Arb" protocol. Under the protocol, arbitration proceedings can be stayed to allow mediation, with any settlement being recorded as a consent arbitral award. Parties wishing to take up this option should include the standard Arb-Med-Arb clause available on the SIAC website in their arbitration agreements.

Secondly, the Singapore International Commercial Court ("SICC") was launched. The SICC is intended to combine the best features of international arbitration (consensual and confidential) and court litigation (joinder of third parties, third party document disclosure and costs orders). It potentially offers a good alternative to international arbitration. See our January 2015 update for further details .

Finally, SIAC announced that it is reviewing the SIAC Rules, including likely changes to the mechanisms for consolidation, joinder and intervention. The revised rules are expected in May 2016.

WHEN IS AN EXPERT DETERMINATION FINAL AND BINDING?

Expert determination is generally viewed as a fast and cost effective method for resolving disputes. The courts will generally enforce binding expert determinations, subject to limited rights of review.

A common basis for challenging an expert's determination is a claim that the expert failed to perform the task required by the contract or otherwise exceeded his or her instructions. However, *Australian Vintage Limited v Belvino Investments No 2 Pty Ltd* [2015] NSWCA 275 highlights that a challenge to the expert's interpretation of the contract can erode the benefits of speed and efficiency as the matter proceeds to protracted litigation.

Belvino concerned a "final and binding" expert determination under a lease, concerning whether a natural disaster had caused production capacity on the land to fall by more than 50% of average production capacity.

The expert found it had not. The losing party challenged that determination in court. At first instance the judge found that determination could not be challenged in court, having regard to the expert's role. In any event, the outcome was held to be correct (albeit for different reasons).

Almost a year after the expert's original decision, the NSW Court of Appeal held that both the expert and the judge had misconstrued the lease, and that the construction of the lease was an objective legal issue that the parties did not intend the expert to finally determine. The matter was remitted to the expert to make a determination on the basis of the Chief Justice's construction of the lease.

The decision demonstrates the importance of carefully drafting contractual dispute resolution provisions to make the scope of the expert's task clear and limit the scope for challenges to his or her determination.

For a more detailed discussion, see our 25 September 2015 *Dispute Resolution Update*.

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