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## ***Australian Law Update – August 2011***

### ***Corporate***

#### **Directors Duties and Annual Reports – The Centro Decision**

In late June 2011, the Australian Federal Court was asked to look at the scope of a director's duties when signing off company accounts and the annual reports. The Australian Securities and Investment Commission ("ASIC") sued the directors of Centro Properties Limited, Centro Property Trust and Centro Retail, on the basis that they had breached the Corporations Act 2001 (Cth) when they failed to notice "significant errors" in the consolidated financial statements of this group. The directors claimed to have relied on the work done by their auditors, PWC, in signing off on the accounts and report. The court looked at the degree to which a director is required to critically review financial statements, so as to essentially form an educated independent opinion as to the accuracy of the accounts –

the court held that directors must have sufficient financial literacy to understand financial statements and the relevant accounting standards to be followed, and it was not possible for directors to delegate these obligations to management or auditors. The court also concluded that the directors had contravened sections 180 and 601FD(3) of the Corporations Act, by failing to "take all reasonable steps" to ensure compliance with the Act, and failed to exercise the necessary degree of care and diligence required when reviewing the accounts and reports. Directors of Australian companies are strongly urged to keep this decision in mind when reviewing the accounts and annual reports for their companies – directors need to ensure that they maintain a working knowledge of the relevant accounting

standards involved, and ensure that they carry out a critical/probative examination of the accounts and reports so that an independent view can be established. Of course, a prudent director will ensure that they also maintain records sufficient to prove that they have worked through such processes.

### ***Intellectual Property and Technology***

#### **Apple Stops Sale of Samsung's Tablet**

Earlier this month, Apple Inc. was applied to the Australian Federal Court for an injunction stopping Samsung from promoting or selling its new "Galaxy Tab 10.1" in Australia – Apple submitted that the Samsung product infringed ten registered Australian patents involving screen touch technology, as well as the "look and feel" of the iPad. During a break in the hearing, legal counsel for Apple and Samsung reached a temporary settlement regarding the dispute, with Samsung agreed to stop advertising the Tab 10.1 in Australia, and to undertake not to sell the product in Australia without court approval or Apple's consent. A close analysis of Apple's patents and the Tab 10.1, shows that Apple's claims are well founded and that the most sensible approach for Samsung, will be to substantially alter how the Tab 10.1 works, or to look at trying to negotiate some kind of licensing arrangement with Apple for some of the key technology used in the Tab 10.1. Similar cases are pending in the US, Korea, Japan and Germany – the relevant patents in these countries and legal principles involved could mean that Samsung could be successful in some countries, whilst unsuccessful in others, leading to some kind of worldwide settlement agreement.

#### **Cybercrime Legislation Amendment Bill**

A new cybercrime bill has been passed by the House of Representatives and will undergo debate in the Senate later this year.

The bill is aimed at bringing Australia into line with the "European Convention on Cybercrime", which has been ratified by more than 40 countries including the US, Canada, the UK and Japan. The bill allows the authorities to issue "preservation notices" to telecommunications companies, requiring them to preserve all communications and online activities of a target for up to 90 days, whilst the police look at obtaining a formal warrant for accessing that data. The bill also allows for greater information sharing between governments that are party to this convention – it is this development that is drawing heat from the Greens and civil liberty advocates – it is likely that a number of exceptions to the international information sharing obligations will make their way into the bill in order for it to be passed by the Senate. The bill, if passed, will amend various laws, including the Criminal Code (Cth) and the Telecommunications (Interceptions and Access) Act (Cth).

### ***Competition***

#### **Metcash Wins Takeover Approval from Federal Court**

The Australian Competition & Consumer Commission ("ACCC") commenced legal action against the retailer, Metcash (who owns IGA, Mitre 10 and others), in December 2010, after Metcash announced that it was going to proceed with its AU\$215m purchase of fellow distributor, Franklins. The Australian Federal Court rejected the ACCC's application to restrain the acquisition on the basis that it would not contravene the Competition & Consumer Act 2010 (Cth). It seems that the key issue in this case, like so many other similar competition law cases, was the definition of the relevant market to be considered – the ACCC submitted that the relevant market should be defined as "the wholesale supply of packaged groceries to independent supermarkets". The court rejected this,

preferring a wider definition based on the grocery retail market in general – in doing so, it meant that it would be very difficult to conclude that the consolidation of Metcash and Franklins would lead to a “substantial lessening of competition” in the relevant market, due to the intense competition offered by the major supermarket stores. In concluding that the proposed acquisition would not contravene section 50 of the Competition & Consumer Act, the court said that “it was quite likely that the acquisition of Franklins by Metcash will strengthen the capacity of independent retailers operating under the IGA banner to compete more vigorously with the major supermarket chains”. It is not known whether the ACCC is planning on appealing this decision.

## **Tax**

### **R&D Tax Credit Program**

After two years of drafting and negotiations, the new national R&D Tax Credit program commenced operation on 1 July 2011. The R&D Tax Credit is aimed at “encourage [ing] industry to conduct research and development activities that might otherwise not be conducted because of an uncertain return from the activities, in cases where the knowledge gained is likely to benefit the wider Australian economy.” The new program differs significantly from the former R&D Tax Concession program – the new program allows for a 45% refundable R&D tax offset for taxpayers with annual turnover at less than AU\$20m, and a non-refundable tax offset of 40% for all others. Although the eligibility requirements for claiming R&D activities have been tightened, there is more opportunity for businesses to claim for R&D activities taking place outside of Australia under the new program. The Australian biotechnology industry in particular has largely welcomed the new

program. Full details of the program are available from our office.

## **Property**

### **Rescission of a House Purchase Contract**

The January 2011 Australian floods have led to significant litigation involving insurers and property vendors and purchasers. Earlier this month, the Queensland Court of Appeal looked at whether a purchaser who had signed a contract to purchase an apartment, could rescind that contract on the basis that the apartment was flooded and uninhabitable. Interestingly, the same purchaser had tried to get the contract set aside prior to the floods affecting the apartment, on the basis that the apartment was not as high off the ground as she thought it would be, and was also not as private – that application was denied and specific performance was ordered. The Queensland Court of Appeal, unanimously declared that the purchaser had validly rescinded her contract with the property developer on 28 January (after the floods had affected the property and made it uninhabitable) – developers and sellers are reminded of their obligation (which would seem to be an implied obligation under this decision) to ensure that their properties are habitable on the date of completion, and any failure to meet this obligation will provide a chance for a purchaser to refuse to complete the transaction. It is hoped that the Real Estate Institute of Queensland will clarify this obligation in the next edition of its standard land contract.

*This newsletter is intended to provide clients with a summary of major or interesting Australian legal developments. All readers of this newsletter should seek formal legal advice prior to relying on any statements or opinions in this newsletter.*