JOHNSON
WINTER &
SLATTERY

Review

A summary of recent developments, insights and assignments

Contents

Welcome

IN 2018 WE ARE DELIGHTED TO CELEBRATE OUR 25TH ANNIVERSARY - 25 YEARS OF CLIENT SERVICE AND BUSINESS DEVELOPMENT.

The relationships we have with clients, other professional service firms in Australia and offshore, members of the Bar and alumni, are central to the firm's success and we thank all who have made a contribution to the development of the firm over the past 25 years. Members of the firm today remain committed to the development of close client relationships and the provision of high value commercial legal services.

In the competitive Australian legal market we continue to develop and build our reputation for high quality legal work, partnering with leading Australian companies, investors, multinational businesses, government agencies and regulators who trust us with their most challenging and complex legal requirements.

Our market reputation as a leading independent Australian firm has grown, with numerous significant projects and the appointment of new partners in specialist areas. Winning and maintaining the support and trust of our clients, peers and the broader market requires dedication to service, commercial acumen and persistence. We are therefore both delighted and encouraged by the client accolades and feedback we receive concerning the quality and value of our work.

This edition of Review focuses on the key legal issues for your business, and profiles some of our recent significant engagements.

We look forward to supporting our clients over the next 25 years!

April 2018

Aldo NICOTRA
Chairman

Peter SLATTERY
Managing Partner

Competition/Antitrust

KEY DEVELOPMENTS

Developments throughout the last 12 months strongly reinforce one notion: compliance is king.

In 2017, Australian antitrust/competition law experienced some of its most significant changes in the last 25 years. These changes included the introduction of:

- An "effects test" in relation to the misuse of market power prohibition. Despite widespread commentary that this change will "chill" decision-making by big business, we believe it will simply result in increased economic and legal rigor being applied to such decisions.
- A new "concerted practices" law, which prohibits cooperation between firms that replaces the uncertainty of rivalrous behaviour, where such conduct has the purpose or effect of substantially lessening competition. This new prohibition is likely to catch conduct that previously fell short of existing prohibitions. However it remains to be seen whether the law will operate in a manner that is consistent with international jurisdictions.
- A new merger control regime that makes the Australian Competition & Consumer Commission (ACCC) the primary decision-maker for all regulatory approvals. Parties will now have three avenues from which to choose if they wish to seek regulatory approval for a transaction: the existing informal clearance merger process; authorisation via a competition test; or authorisation via a net public benefits test.
- The Commonwealth Director of Public Prosecutions (CDPP) successfully prosecuted its first ever criminal cartel case this year (seven years after the laws came into effect). This landmark case has resulted in the ACCC establishing a criminal cartels unit to investigate and enforce international and domestic cartel conduct going forward. We expect that the ACCC will investigate and the CDPP will prosecute at least 1-2 criminal cartel cases every year.
- The ACCC continues its robust approach to the enforcement of the Australian Consumer Law (ACL) by all businesses – both domestic and international. It has brought an increasing number of cases against companies whose terms and conditions unlawfully limit the statutory rights and remedies of consumers under the ACL or are "unfair" in dealings with small businesses.
- The ACCC and some members of the judiciary called for higher penalties for contraventions of competition is starting to take force. While the highest penalty for cartel conduct is still dwarfed by international comparisons, companies that contravene the law are likely to face new penalty highs in the coming years.

KEY CHANGES IN COMPETITION LAW

	Objective	Forecast
The effects test	To prohibit companies with substantial market power from engaging in conduct that has the purpose or effect of substantially lessening competition.	Unlikely to chill decision-making by big business but increased legal and economic rigor in relation to such decisions.
The 'concerted practices' law	To prohibit cooperation between firms that removes competitive uncertainty and substantially lessens competition.	Companies will need to be more careful if communicating with competitors (for instance at industry meetings).
The merger control regime	To make the ACCC the primary decision-maker for all merger approvals.	Parties will consider whether informal clearance or authorisation has better prospects of success and what public benefits and detriments arise from the merger.

KEY MATTERS

ACCC
Acted in the proposed acquisition of Ten Network by Illyria Nominees Television and Birketu.

BAYER AG
Acted in the ACCC clearance for $66 billion proposal to acquire Monsanto.

PRYSMIAN GROUP
Defended civil penalty proceedings brought by the ACCC in the Federal Court concerning allegations of cartel conduct.

QANTAS
Assisted with re-authorisation of price and capacity fixing by various airlines under the Jetstar brand.

RACING.COM
Opposed the merger of Tatts and Tabcorp in the Australian Competition Tribunal.

RAMSAY HEALTH CARE
Defended an ACCC prosecution for misuse of market power and exclusive dealing.

RURALCO
Advised on acquisitions of Irrigation Tasmania, TP Jones and 50% JV interest in Ausure Consolidated Brokers.

THE A2 MILK COMPANY
Advised in proceedings against Lion Dairy & Drinks before the Federal Court of Australia concerning allegations of misleading and deceptive conduct.

UNILEVER
Obtained informal clearance from the ACCC in relation to the acquisition of Weis.

WALT DISNEY (AUSTRALIA)
Advised in relation to ACCC collective bargaining application by organisation representing independent exhibitors.

Corporate

KEY DEVELOPMENTS

FOREIGN INVESTMENT

The FY18 Federal Budget featured a number of proposed changes to Australia's foreign investment regime, such as the Foreign Investment Review Board (FIRB) approval process. The intention? To streamline and simplify a number of foreign investment laws effected in 2015. Some of these changes additionally (and beneficially) removed some unintended consequences, particularly in relation to transactions regarded by FIRB as 'low risk'.

The Critical Infrastructure Centre (CIC) was established in January 2017 after widespread criticism regarding bid rejections in the 2017 sale of state-owned electricity assets. The CIC aims to centralise government expertise, so any national security risks to Australia's critical infrastructure can be identified and managed jointly by government, owners and operators.

Foreign investors take note: the CIC advises on government decision-making regarding inbound investments. In particular, four priority high-risk sectors reflect (and benefit from) this added layer of protection: telecommunications, electricity, water and ports.

Risk minimisation is at the heart of this approach, specifically to prevent malicious foreign actors gaining control of critical assets.

Importantly, the CIC doesn't modify the existing foreign investment framework. Rather, it provides timely advice to FIRB so parties can engage more reliably with FIRB on national security issues ahead (or in the early stages) of the FIRB approval process.

Proposed changes to Australia's foreign investment regime... (are intended) to streamline and simplify a number of foreign investment laws.

MARKET

Private equity deals flourished in 2017, with solid merger and acquisition activity throughout the period. Significant offshore capital was deployed on inbound acquisitions, perhaps shaping soft local equity capital markets and a number of IPOs being placed on hold.

Complex transactions generally took longer to execute due to a range of factors such as funding constraints, foreign investment rules, and increased shareholder and institutional activism slowing progress. The mining, technology, consumer, real estate, and utility and energy markets remained strong.

Private equity and venture fundraising hit a 10 year high, assisted by a number of new buyout funds and contributions by superannuation/pension funds and high net worth individuals.

On the cards for 2018? We're expecting year-long robust deal activity.

CHANGES TO FIRB APPROVAL PROCESS

1

Simplifying the fee regime

2

Increasing the threshold for notification of offshore transactions

3

Broadening the availability of exemption certificates

KEY MATTERS

A.A. SCOTT
Acted in the merger of the business of Scott's Transport Industries into K&S Corporation.

AIRXPANDERS
Advised on Australian legal aspects of two ASX capital raisings.

BAIN CAPITAL
Acted in the acquisition of 80% of the securities of Only About Children.

BIONOMICS
Acted in capital raising in a share placement to four US institutional investors with attaching warrants.

BLACK RIVER AG
Acted in the acquisition of a majority interest in Glenroy Plains.

BLACKMORES
Acted in the acquisition of Global Therapeutics.

COOPER ENERGY
Acted in a share placement and entitlement offer, and advised on entry into a series of agreements to acquire the Victorian gas assets of Santos.

Assisted in equity raising of approximately $151 million by way of a fully underwritten placement and non-renounceable entitlement offer.

FLIGHT CENTRE
Acted in its acquisition of majority interests in its Buffalo Tours destination management joint venture with Thien Minh Group.

GAZAL CORPORATION
Acted in the reorganisation of the configuration of Gazal Corporation's controlling shareholders, and sale of its Trade Secret off-price retail business to The TJX Companies.

Acted in the sale of Bisley Workwear business, and associated selective share buy-back of a 16.8% stake in Gazal.

MACMAHON HOLDINGS
Acted in the issue of 44.3% of issued capital of Macmahon to a subsidiary of PT Amman Mineral Nusa Tenggara (AMNT) and award by AMNT to Macmahon of a US$2.9 billion life-of-mine mining services contract at AMNT's Batu Hijau copper-gold mine in Indonesia.

NATIXIS
Acted in the acquisition of 51.9% of the share capital of Investors Mutual.

TEVA PHARMACEUTICAL INDUSTRIES
Acted in a $40 million block trade by Teva's wholly owned subsidiary, Cephalon International Holdings, of an 8% shareholding in Mesoblast.

UNILEVER
Acted in the acquisition of the Weis Frozen Foods business (including the land and manufacturing facilities in Toowoomba).

Dispute Resolution

KEY DEVELOPMENTS

WHISTLEBLOWER PROTECTIONS

Whistleblower protections were carefully considered this year to encourage greater disclosure of corporate misconduct. The Australian Government has published a draft Bill proposing substantial reforms to enhance protection and compensation rights for whistleblowers, with greater penalties for those who retaliate against whistleblowers or who disclose their identity. These reforms echo a common theme across 2017: a focus on corporate ethics and corporate culture where sustainable ethical business conduct is promoted and unethical corporate conduct is not only frowned upon, but actively discouraged.

Reforms echo a common theme: a focus on corporate ethics and corporate culture.

FUNDED LITIGATION

Three main themes emerged in the funded litigation environment.

1. Judges continued to insist the Courts had ultimate control in class actions in terms of decisions about "common fund" orders (making all class members pay a funding commission even if they did not sign up with a funder) controlling competing class actions and determining the ultimate commission funders may get in any particular settlement, even if that is different from the funding agreement commission. These developments had both positives and negatives for funders.

   We continued to see an influx of new domestic and international funders into the Australian market, including at the lower claim value level.

2. Funders are proactively approaching business with proposals to take over and manage recovery claims in a way that gives business greater flexibility in running such claims while preserving and releasing their cash flows. There has been a trend of funders from the UK seeking to make investments in Australia.

ASIC

ASIC continues to pursue a higher profile in targeting corporate misconduct.

Following on from similar proceedings taken by regulators in the US and Europe, in 2017 ASIC won a major director duty case arising out of the Australian Wheat Board saga (regarding the payment of kickbacks on wheat sales to Iraq in the 2000s).

ASIC also secured a settlement of proceedings against two (of three) major financial institutions in relation to interest rate rigging, while one case continues. The cases are very significant claims brought by ASIC.

ASIC also undertook investigations into the wholesale spot foreign exchange businesses of the major financial institutions to identify misconduct within those businesses, as well as to consider the adequacy of their systems and controls. ASIC closed its investigations by accepting enforceable undertakings from National Australia Bank, Commonwealth Bank of Australia, Westpac Banking Corporation, Australia and New Zealand Banking Group and Macquarie Bank.

ASIC is also seeking substantially greater penalties, such as imprisonment and fines, for a large range of Corporations law offences to help deter financial and corporate misconduct.

FOREIGN BRIBERY

In the commercial crime arena, the Australian Federal Police secured its first foreign bribery convictions in September 2017, with three company officers imprisoned for four years with fines, each of AU$250,000.

Money laundering laws have returned to the top of the agenda. The Australian Transaction Reports and Analysis Centre (AUSTRAC), as the Australian Anti-Money Laundering (AML) regulator, secured an agreed $49 million fine against Tabcorp Holdings for systemic breaches of Australia's AML laws, while the Commonwealth Bank of Australia faces an ongoing investigation in Australia and overseas, and an Australian civil penalty prosecution where it is alleged to have not reported in excess of 53,000 suspicious transactions, with some involving allegations of funding for offshore organised crime and/or terrorism, arising from its introduction of modern "smart" ATM machines.

This increased focus of the Australian Taxation Office's activity coincides with the Australian Government actively looking at the introduction of a Commonwealth deferred prosecution agreement scheme for taxation, financial and other serious crimes to encourage Australian business to voluntarily report misconduct rather than waiting for misconduct to emerge in the media, often through whistleblower disclosures.

KEY MATTERS

ASIC

Acted in civil penalty proceedings brought against ANZ and Westpac concerning alleged market manipulation and rigging of the Bank Bill Swap rate (BBSW) for financial gain.

AUSTRALIAN CABLEMAKERS ASSOCIATION

Acted for the industry association (with members including Prysmian Power Cables & Systems and Olex and others) in defence of misleading and deceptive conduct proceedings concerning compliance with Australian and New Zealand Standards.

BENTLEYS CORPORATE RECOVERY

Advised Bentleys (as liquidators of Octaviar) regarding the MFS Ltd/ Octaviar Group $1 billion collapse, including complex issues related to accounting, loss and damage, Committee of Inspection, court approval applications and the late introduction of litigation funding.

CALLIDE C POWER STATION

Acted in a long running dispute concerning the supply of coal from the Callide Coal Mine, involving claims for approximately $3.25 billion for damages and over $100 million for related claims.

DDH GRAHAM

Acted for it as one of two defendants in a $60 million class action brought by depositors defrauded by third party financial advisers.

DICK SMITH

Commenced acting for institutional investors in a funded shareholder class action against Dick Smith. Complex case management issues include a second, similar class action and two additional actions related to common experts, single legal representation and a single hearing.

GROOTE EYLANDT ABORIGINAL TRUST

Prosecuted claims arising from fraud, breaches of trust, and financial irregularities which caused losses of over $30 million.

LEHMAN BROTHERS AUSTRALIA INVESTORS

Acted for 25 separate investors in preparing and submitting claims in the liquidation of Lehman Brothers Australia for significant losses incurred through investments in complex structured financial products, known as synthetic collateralised debt obligations (SCDOs), in aggregate in excess of approximately $140 million.

STANDARD & POOR'S CLASS ACTION

Acted for the applicants (Lifeplan Australia Friendly Society & Ors) in a class action commenced in the Federal Court of Australia against Standard & Poor's (S&P) for losses arising from investments in SCDOs in reliance on ratings assigned by S&P.

STATE GOVERNMENT OF VICTORIA

Acted in proceedings commenced by Tabcorp Holdings and Tatts Group in the Supreme Court of Victoria, with appeals to the Court of Appeal and the High Court of Australia.

Energy & Resources

A CASE STUDY

We advised on a number of elements in South Australia's $520 million Energy Plan, announced in March 2017. Our team worked closely with key agencies and individuals from the SA Crown Solicitor's Office and the SA Department of Premier and Cabinet to successfully implement key aspects of the plan.

BATTERY PROJECT

We developed and executed tailored project documentation in a compressed timeframe for the world's largest grid-connected lithium ion battery energy storage system. The 100 MW/129 MW-hour battery is the first project of this scale in Australia to be connected to the National Grid, and has attracted significant industry and international attention. Almost 100 expressions of interest were received and the contract was awarded to French renewables company Neoen and US energy company Tesla. The battery system will assist in managing power system security in the South Australian grid, which relies on a significant level of renewable generation and the Heywood Interconnector to maintain power supply and grid stability. The system is to be located at Neoen's Hornsdale Wind Farm near Jamestown, South Australia.

SOLAR THERMAL PROJECT – POWER PROCUREMENT

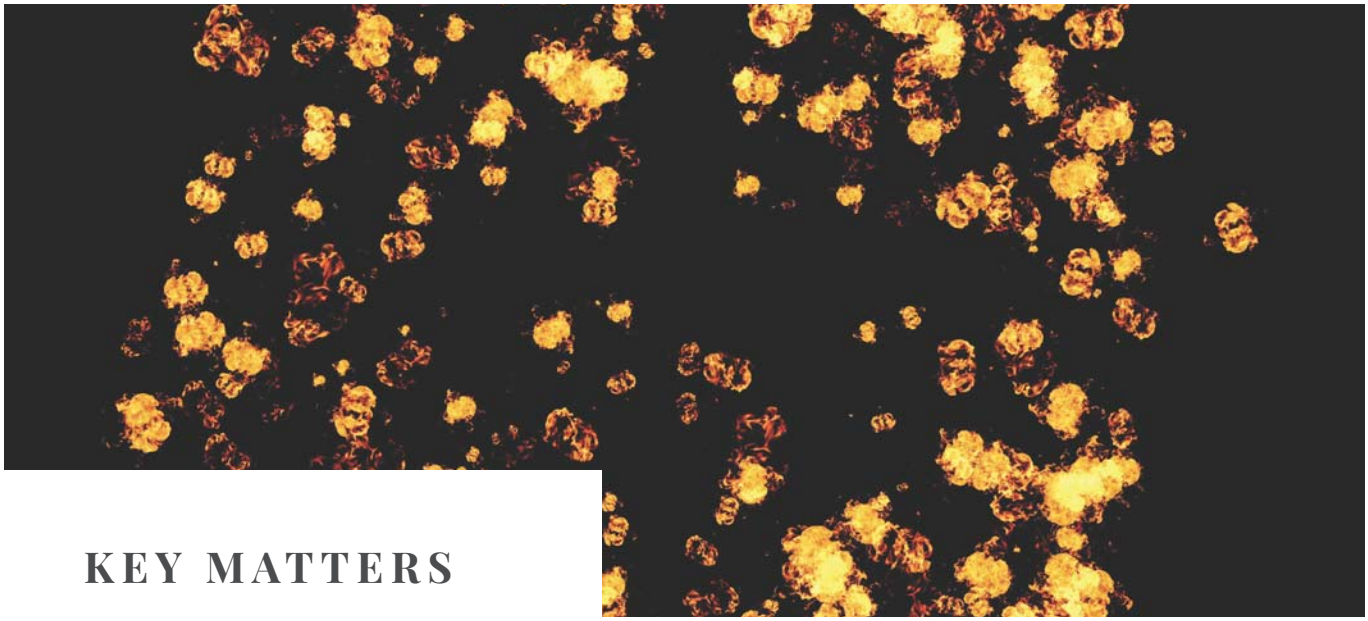
We supported the Crown Solicitor's Office and the Department of Premier and Cabinet with the Government-wide power procurement process for a solar thermal plant. The project will deliver a $650 million, 150 MW plant – the largest of its kind in the world. Solar Reserve were awarded the contract and the plant will be located near Port Augusta in regional South Australia.

EMERGENCY GENERATION

We advised on a third project in the energy plan. To resolve instances of load shedding across the state, a proposed solution included emergency generation equipment to better manage peak demand or supply constraints. The matter also featured an option to relocate the equipment to a permanent site, which will cement the longer-term generation facility announced in the Energy Plan.

We advised on the procurement of 276 MW capacity equipment to supplement generation capacity. This procurement was executed by the government through the South Australian distribution network service provider, SA Power Networks. The equipment included mobile modular aero-derivative generation units, which will be located at Lonsdale and the former Holden site.

The 100 MW/129 MW-hour battery is the first project of this scale in Australia to be connected to the National Grid, and has attracted significant industry and international attention.



KEY MATTERS

BLUEWATERS POWER STATION II

Acted in Supreme Court proceedings regarding urgent declaratory relief related to Western Australian Wholesale Electricity Market Rules and outage of Bluewaters Power Station.

COAL MINE ASSETS

Acted for a seller of coal mine assets in Queensland and New South Wales.

COOPER ENERGY

Advised on the Sole Gas Project, including an asset sale and processing agreement with APA Group, and a share placement and entitlement offer equity raising of approximately $151 million by way of a fully underwritten placement and non-renounceable entitlement offer.

DARLING DOWNS PIPELINE

Advised a bidder on a bid to acquire the Darling Downs Pipeline system in southwest Queensland (including due diligence and sale and purchase agreement).

GAS MARKET REFORM GROUP

Advised on various reforms proposed to the National Gas Rules, and establishing capacity trading platforms and day-ahead auction mechanism.

GOLD ROADS RESOURCES

Advised on the tender process and project documents for the development of a 45 MW gas-fired power station and lateral gas pipeline to the Gruyere Gold Project.

INFRASTRUCTURE CAPITAL GROUP

Advised on pre-emption rights and acquisition of 50% interest in Mumbida Wind Farm in Western Australia from Synergy.

NORTHERN MINERALS

Advised on the Browns Range Project including engineering, procurement and construction (EPC) contract with Sinosteel, research and development finance arrangements, and a rare earths offtake agreement.

ORIGIN ENERGY

Advised on agreements with ENGIE for the supply of gas to the Pelican Point Power Station and for Origin to gain access to 240 MW of electricity generation.

SANDFIRE RESOURCES NL

Advised on Springfield Mining Joint Venture arrangements with Talisman A and Talisman Mining.

SENEX ENERGY

Advised on the development and commercialisation of coal seam gas in the Surat Basin (Western Surat Gas Project).

SURAT BASIN ASSETS

Advised a bidder on its bid to acquire the upstream oil and gas assets of AGL Energy in Surat Basin in Queensland, including associated pipelines and gas processing facilities.

TOTAL E&P

Advised on its GLNG Project and Ichthys Project.

INSIGHT: *CORPORATE*

SECURITY FOR PAYMENT IN SCRIP TRANSACTIONS: A VIABLE OPTION?

In Australia, the concept of treasury shares does not exist; if a company repurchases its own shares those shares are cancelled. Special procedures are required for such a selective share buy-back including 75% approval by shareholders. Moreover, in Australia a company cannot take security over its own shares. These features of Australian corporate law have implications where a company seeks to be able to claw back scrip consideration.

While in some jurisdictions it is relatively straight forward to claw back scrip consideration, in Australia this is more complicated. For example, the recipients of the scrip consideration may vote against a buy-back of their shares; also, entry into a buy-back agreement results in a suspension of the rights attached to the relevant shares. We explain how a full or partial unwinding can be achieved in scrip transactions by having them sold back and cancelled upon a particular event. As a result, with novel structuring and proper care, security for payment can be achieved in scrip transactions.

SECURITY FOR PAYMENT

If a contracting party does not want to take a credit risk on its counterparty, then security for payment can be a material consideration.

For example:

(a) **A buyer may seek recourse** in the event it needs to make a warranty claim against a seller.

(b) **A seller may want comfort** that any contingent future payments will ultimately be paid by the buyer.

(c) **A contractor may seek security** for a termination payment (or an asset put option) under a services agreement.

In all of these cases, a mere payment obligation may not give a contracting party sufficient comfort that they will be paid, and they may want some form of security to ensure payment is forthcoming. Where cash is involved, this security for payment may take the form of an escrow account, cash retention, or possibly a bank or parent company guarantee.

In certain circumstances, it may also be possible to outsource the risk by obtaining an insurance bond or insurance cover. But what about instances in which the consideration for the underlying transaction takes the form of a share issue, and where there is insufficient financial headroom to also provide a guarantee or other security? In difficult times, entities are keen (or obliged) to preserve cash and pay with equity – but they also want to be sure that they are covered against downside risk.

EQUITY

The use of a company's equity as consideration can provide a number of benefits, but also presents some challenges. While the 'capital maintenance' rules have been watered down to some extent, they have not been removed altogether, which means that share capital, once issued, is hard to pay back or extinguish.

If the consideration payable under a transaction is shares rather than cash, it is not easy to unwind the transaction.

DEFERRAL

One solution to this may be to defer payment. This may include:

- **Issuing the consideration shares in tranches** – as value is earned
- **Issuing some form of converting or convertible securities** – which carry limited rights but convert into ordinary equity as (or when) value is earned
- **Issuing partly paid shares that may be credited** as fully paid upon the occurrence of certain events
- **Contractually restricting rights attaching to shares** – therefore, not allowing full voting or dividend rights until certain conditions are met.

These structures may themselves present their own complexities, and may not be acceptable to the counterparty. If the counterparty insists on being issued with full equity upfront, the same problem presents itself: can they pay it back if a future payment obligation is triggered?

SHARES

Ordinary shares in Australian companies, once issued, can only be extinguished by a capital reduction or a buy-back. They cannot be transferred back to the issuing company and held without being cancelled (unlike in some other jurisdictions that permit companies to hold 'treasury stock' in themselves, for later use). However, it is possible for a counterparty to sell the consideration shares back to the issuing party (by way of a share buy-back), and have them cancelled upon the occurrence of a particular event.

In the context of a scrip transaction, this effectively amounts to a full, or partial, unwinding of the transaction and means that the contracting party can effectively recoup some of the value paid to the counterparty.

A buy-back may therefore offer a form of security for payment for scrip transactions, but there remain some complex issues that need to be addressed.

1. A company cannot take security over its own shares (section 259B of the *Corporations Act 2001* (Cth)), so any arrangement needs to be carefully structured to ensure that the issuing company does not obtain an enforceable right to take a proprietary interest in shares in itself in the event of a default.

2. The shares need to be available (and unencumbered) **at the time of any buy-back** – any interim sale or encumbrance of shares by the counterparty would frustrate the buy-back and negate the benefits of the arrangement.

3. Once a buy-back agreement is entered into, the rights attaching to securities are suspended (section 257H(1)), which makes it more likely that any buy-back agreement should only be entered into after the relevant event has triggered a buy-back.

4. A shareholder approval will be necessary to buy back shares, and (as a selective buy-back) will need a 75% approval. This adds delay, expense and, to some extent, uncertainty to the arrangement.

05. Any buy-back will only occur if pursued by the contracting party. In circumstances where a potentially large payment of shares has been made to a contract counterparty, the counterparty may be able to exert some influence over the company and could, if it obtained board control, negate the benefits of any arrangement by causing the company not to pursue a buy-back.

A CASE STUDY:
NOVEL STRUCTURING

In appropriate circumstance, and with careful structuring, there are ways to obtain security for payment in a scrip-based transaction.

THE PARTIES

We assisted ASX-listed mining services contractor Macmahon Holdings (Macmahon) to navigate its transformational transaction with Indonesian company PT Amman Mineral Nusa Tenggara (AMNT). AMNT owns the Batu Hijau copper-gold mine in Indonesia.

THE TRANSACTION

Under the transaction, Macmahon agreed to purchase a large Indonesian-based mining fleet, which it would use to service the $3.9 billion Batu Hijau life-of-mine mining services contract to be awarded by AMNT. However, rather than pay $194 million in cash for this mining fleet, Macmahon issued shares to AMNT representing 44.3% of Macmahon's issued capital.

If, for any reason, the mining services agreement is terminated during an initial period, the agreement contains a requirement for Macmahon to transfer back the mining fleet in exchange for a 'cessation payment' from AMNT.

Macmahon was keen to ensure that it had some form of security for this cessation payment (for the benefit of Macmahon and its existing shareholders), given that 44.3% of its securities would be issued as consideration for the purchase of the mining fleet.

THE RESOLUTION

After analysing all the relevant legal issues, we put in place a novel structure whereby a third-party trustee company would hold the consideration shares for a defined escrow period. Macmahon and AMNT then entered into an escrow deed. Among other things, this contemplated that the escrow agent would be required to accept a buy-back offer made to it upon the occurrence of certain events. Restrictions on voting and other rights attaching to the consideration shares in certain circumstances also ensured that the integrity of the mechanism could be protected, despite AMNT's large interest in Macmahon.

These risk-management mechanisms ultimately provided sufficient comfort to Macmahon, its board and its shareholders so as to permit Macmahon to proceed with its transformational transaction. The transaction was approved by shareholders in July 2017 and completed in August 2017.

INSIGHT: *ENVIRONMENT*

RED TAPE AND REHABILITATION: OUTCOMES AFFECTING MINING IN 2017 AND BEYOND

WATER TRIGGER IMPACT

The Commonwealth Government is beginning to recognise the impact 'red tape' is having on the environmental assessment and approvals process, particularly in relation to water.

A Senate Inquiry Interim report on the effect of red tape on environmental approvals was recently released. The Senate Inquiry made 15 key recommendations, including that the water trigger be removed from the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*.

A special Committee is also currently undertaking an inquiry into the adequacy of the regulatory framework governing water use by the extractive industry. One of the issues being considered by the Committee is the effectiveness of the water trigger under the EPBC Act and the value in expanding the trigger to include other projects such as shale and tight gas. The closing date for submissions on this, and other issues relating to water use by extractive industries, was 15 December 2017.

It seems likely that there will be some changes to the water trigger, if it isn't removed completely, in 2018.

MINE REHABILITATION IN QUEENSLAND AND NEW SOUTH WALES

All holders of exploration, mining and petroleum production titles in Queensland (QLD) are required to lodge a rehabilitation security deposit that covers the Government's full costs in undertaking rehabilitation in the event of default by the title holder. Major changes to this system are on foot with the introduction of the *Mineral and Energy Resource (Financial Provisioning) Bill 2017* (Qld).

If passed, this new law will make major changes to the financial assurance regime, which will affect all resource projects in QLD from 1 July 2018. The new scheme will be managed by a new statutory officer, the Scheme Manager, and all resource projects will be allocated a risk category that will determine how their financial assurances can be met. In addition to cash and bank guarantees, financial assurances will also be able to be met through insurance bonds.

In the meantime, in New South Wales (NSW) in May 2017 the NSW Audit Office published the *'NSW Auditor General's Report, Performance Audit, Mining Rehabilitation Security Deposits'* which assessed whether the Department of Planning and Environment maintains adequate security deposits to cover the liabilities associated with mine closures, including rehabilitation.

The report concluded that

- the security deposits the Department holds are not likely to be sufficient to cover the full costs of each mine's rehabilitation in the event of a default; and
- security deposits also do not include sufficient contingency given the substantial risks and uncertainties associated with mine rehabilitation and closure, particularly in the absence of a detailed closure plan.

The NSW government has released updated rehabilitation cost estimation tools and guidelines, which are now in effect. Significantly, this includes new rates for calculating rehabilitation costs. The updated tool and guidelines will need to be used for future Rehabilitation Costs Estimates following a staged implementation period between June 2017 and January 2018.

A Commonwealth Senate Committee is also undertaking a review of the rehabilitation of mining and resource projects and will report on its findings in mid-2018. This may result in further changes to the mine rehabilitation landscape.

MAJOR BIODIVERSITY REFORM IN NEW SOUTH WALES

Extensive changes to NSW biodiversity laws took effect on 25 August 2017. The major change introduced by the new laws is the introduction of a single Biodiversity Offsets Scheme, which will apply to all categories of development.

Along with the new scheme is a new Biodiversity Assessment Method, which is based on a standard that there will be no net loss to biodiversity as a result of a new development. Proponents can now meet offset obligations by paying money into a newly established Biodiversity Conservation Fund. The new biodiversity scheme also overhauls voluntary private land agreements and changes the approach taken in respect to the clearing of native vegetation.

Although the changes are designed to simplify and streamline biodiversity in NSW, early indications are that the new laws will result in increased survey effort and higher offset ratios. While the Fund will provide a simpler way to meet offset obligations, early testing of the calculator indicates that this will be an expensive alternative.

Furthermore, it is not yet known whether the Commonwealth will still require additional biodiversity assessment in addition to the new NSW scheme. The full impact of the biodiversity reforms will be seen as the forms as implemented over the coming months.

COAL SEAM GAS

Activity in the coal seam gas area has slowed significantly in the second half of 2017. Since 1 March 2017, the use of coal seam gas extraction has been illegal in Victoria and no new applications can be made. Activity in NSW has also significantly reduced, although the NSW Government recently announced that it is considering releasing some new licences in the far western NSW area.

[Legislation] will include a new definition of Aboriginal heritage [and] pathways that include greater involvement of Aboriginal people.

ABORIGINAL CULTURAL HERITAGE REFORM

The NSW government is looking at reforming Aboriginal Cultural Heritage (ACH) laws in NSW to bring the laws closer to those used in other states of Australia.

The Government is currently seeking feedback on a proposed new legal framework for the management and conservation of ACH in NSW. This will involve standalone legislation, which will include a new definition of Aboriginal heritage, establish a new ACH Authority, as well as new management tools and assessment pathways that include greater involvement of Aboriginal people.

Although the legislation is likely to increase the area and scope of land with cultural significance in NSW, it is hoped that it will also provide greater certainty to proponents in terms of consultation requirements and reduce delays once a project has commenced.

INSIGHT: *RESTRUCTURING & INSOLVENCY*

REFORM AND CURTAIL: EXPLORING THE IMPLICATIONS FOR INSOLVENCY

In 2018, the focus of the insolvency and restructuring industry will remain on the implications of the recently introduced 'Safe Harbour' carve-out to the insolvent trading regime.

The *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017* introducing the Safe Harbour came into force on 19 September 2017.

The ipso facto ***reforms... it is hoped, will promote more successful restructures and allow more businesses to survive the insolvency as going concerns.***

The bill delivers on the Federal Government's commitments announced in December 2015, following an inquiry by the Productivity Commission to reform Australia's insolvency laws. In implementing these reforms, the Government aims to "promote entrepreneurship and innovation to drive business growth, local jobs and global success".

The hope is that the amendments will reduce instances of a company proceeding to a formal insolvency process prematurely and reduce the stigma of failure associated with insolvency. Under the *Corporations Act 2001* (Cth) a director can be personally liable for debts incurred by a company at a time the company was insolvent or becomes insolvent as a result of incurring that debt. The insolvent trading Safe Harbour "carve-out" applies where the directors start developing one or more courses of action that are reasonably likely to provide a better outcome for the company.

The Safe Harbour protects directors from insolvent trading liability arising from debts incurred directly or indirectly in connection with any such course of action.

A key focus will be on the proposed course of action and whether it is reasonably likely to lead to a better outcome for the company. 'Better outcome' is assessed by comparison to an immediate appointment of a voluntary administrator or liquidator. Interestingly, this means the plan could involve an insolvency process (such as a deed of company arrangement) if it ultimately achieves a better outcome.

KEY THEMES FOR 2018

ANTI-PHOENIXING

Whether the Government's proposals will indeed curtail anti-phoenixing behaviour and provide better protection to employee entitlements.

BANKS

Whether the institutional banks will continue to be passive participants in the insolvency space, especially if there is increasing distress in areas with hard assets such as property.

LAW REFORM

The implications of the introduction of the much-hyped Safe Harbour reforms to insolvent trading and the ipso facto reforms to follow in mid-2018.

The *ipso facto* reforms scheduled to be introduced into law in mid-2018 will also impact the insolvency and restructuring space. These reforms are designed to reduce value destruction or leakage in a formal insolvency scenario by creating a stay on counter parties terminating contracts as a result of the insolvency.

This, it is hoped, will promote more successful restructures and allow more businesses to survive the insolvency as going concerns.

The Government has also announced a number of reforms for consideration designed to curtail phoenix activity (especially in sectors such as the construction industry) and also toughen existing laws to prevent corporate structuring designed to reduce the assets available for employee entitlements.

In terms of market trends, the institutional banks continue to be reluctant to take enforcement action through the appointment of a receiver. This trend reflects a number of factors present in the market, including reputational concerns, low interest rates and the secondary debt markets, which provides lenders with an exit outside enforcement.

This in turn has meant an increase in restructures though the voluntary administration regime that are debtor lead. Mining services and retail continue to be areas of distress, and there is speculation relating to the property markets, particularly in Queensland.

Employment

AAL AVIATION/ QANTAS AIRWAYS

Represented a Qantas Group member in appeal proceedings before the Full Federal Court and in significant related litigation in the Supreme Court of Victoria.

EY(ERNST & YOUNG)

Advised on post-employment/ partnership restraints.

FAIR WORK OMBUDSMAN

Advised on the Cricket Australia employment contracts used for its female employees.

JEMENA

Acted on a series of industrial disputes notified by the Electrical Trades Union related to the engagement by Jemena of contractors and a series of commercial transactions including the insourcing of back office and support functions.

MACQUARIE UNIVERSITY

Defended Federal Court appeal proceedings by a former academic for breach of contract, misrepresentations and breach of the Fair Work Act.

MIND AUSTRALIA

Drafted and implemented a new industrial relations strategy that includes providing advice on award coverage and enterprise bargaining risks and opportunities.

ORIGIN ENERGY

Provided employment and industrial relations advice in respect of the separation of the upstream business (Lattice Energy).

SA POWER NETWORKS

Secured the first exemption granted by the Australian Building and Construction Commission from the *Code for the Tendering and Performance of Building Work 2016* (Code).

SEVEN NETWORK

Acted in the highly publicised Seven Network v Amber Harrison proceedings.

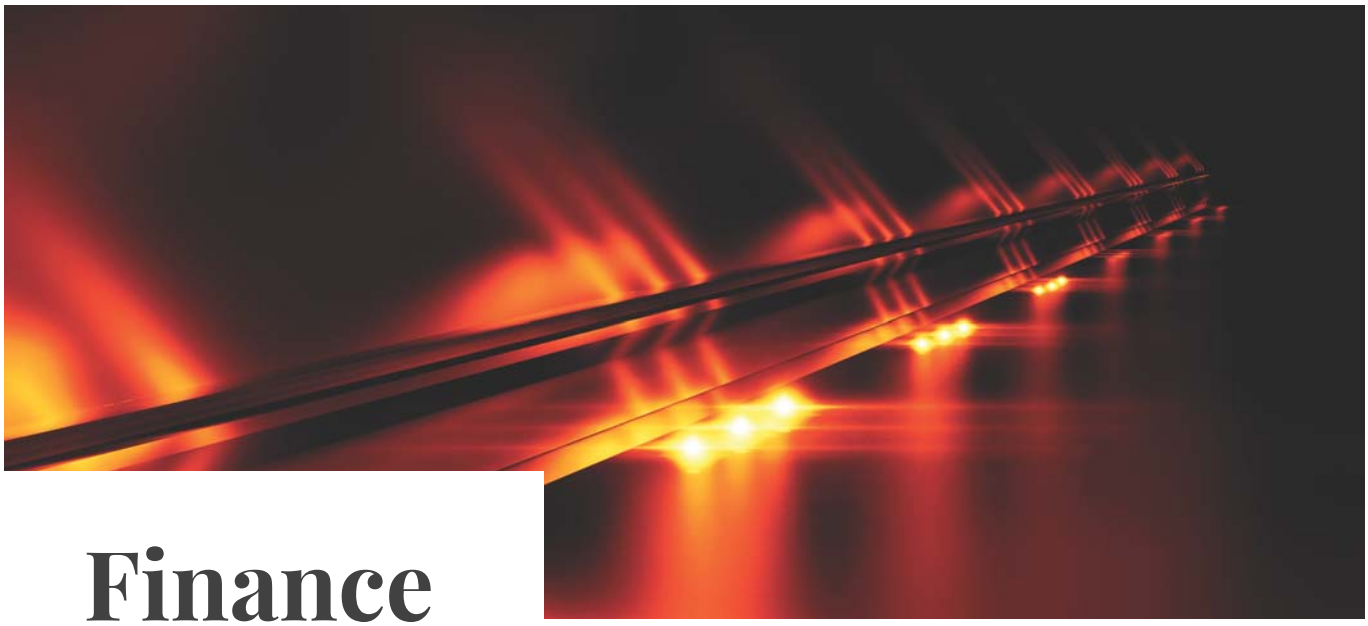
Acted in Talitha Cummins v Seven Network.

STAR CASINO

Advised on breaches by a group of its former employees of restraint of trade and confidentiality obligations.

YARRA TRAMS

Acted in the Federal Circuit Court on an application made by a current employee, following an investigation into widespread bullying.



Finance

ABACUS PROPERTY GROUP (APG)

Acted in the provision of property finance facilities (total facility limit: $121 million), and the establishment of arrangements to jointly explore additional lending opportunities.

Continued to represent APG as borrower under new construction facilities, in relation to its primary $400 million debt program, and a range of senior, mezzanine and equity investments.

ALE PROPERTY GROUP

Continued to act on the issue of $150 million medium-term notes (MTNs) under its MTN program, validating our design of a structure to enable the issuance of unsecured debt behind senior secured rated notes with shorter maturities.

ARCHER CAPITAL

Advised in relation to:

- the Autopact Group's senior acquisition and working capital facilities
- refinancing the senior acquisition facilities for its V8 Supercars business
- refinancing and restructuring LCR Group's senior leveraged debt facilities.

AUSTRALIAN GAS NETWORKS

Continued to act in respect of its approximately $2.1 billion secured debt program, including new debt facilities, and International Swaps and Derivatives Association documents, and in relation to the newly acquired sister entities Multinet and DUET.

AUSTRALIAN UNITY INVESTMENTS

Reviewed the exposure of its subsidiary Lifeplan to structured debt investments.

BAIN CAPITAL

Acted in connection with the leveraged finance facilities for its acquisition of a majority interest in Only About Children.

CHAMP VENTURES & SEA SWIFT

Acted on the refinancing of its senior debt facilities, and its acquisition of Toll's Northern Territory and far north Queensland marine freight business and assets.

L CATTERTON ASIA

Acted as lead legal counsel advising R.M. Williams and L Catterton Asia on the refinancing of the senior leveraged facilities for R.M. Williams.

ROYAL WOLF

Acted on the refinancing of Royal Wolf Group's Australian and New Zealand operations as part of a takeover bid by its major shareholder, General Finance Corporation, for 100% of Royal Wolf. Acted on the Group's subsequent delisting from the Australian Stock Exchange.

Investment Funds

ACCORD PROPERTY GROUP

Acted on the establishment of the Accord Property Development Fund and the proposed issue of financial products by the Fund.

ALLIANCEBERNSTEIN

Acted on the preparation of offer documents for the issue of interests in registered funds.

MACQUARIE INVESTMENT MANAGEMENT (MIML)

Advised in relation to:

- MIML retiring as the trustee of an unregistered fund, including matters pertaining to novation and allocation of fees
- the amendments made to the constitutions of the registered schemes for AMIT purposes
- the resolution of a dispute with a former financial services provider
- the trust law aspects of the liquidation of the Borg Fund and Bear Fund.

MASON STEVENS

Acted on the establishment of a registered fund and an unregistered fund, both of which will invest in fixed income assets.

NATIXIS GLOBAL ASSET MANAGEMENT

Advised on the acquisition of an initial 51% stake in a substantial, local financial services group by way of share acquisition.

PARSONS BRINCKERHOFF & PPB ADVISORY

Continued to act on regulatory matters in the 'mega litigation', now settled, in relation to the failure of RiverCity Motorway.

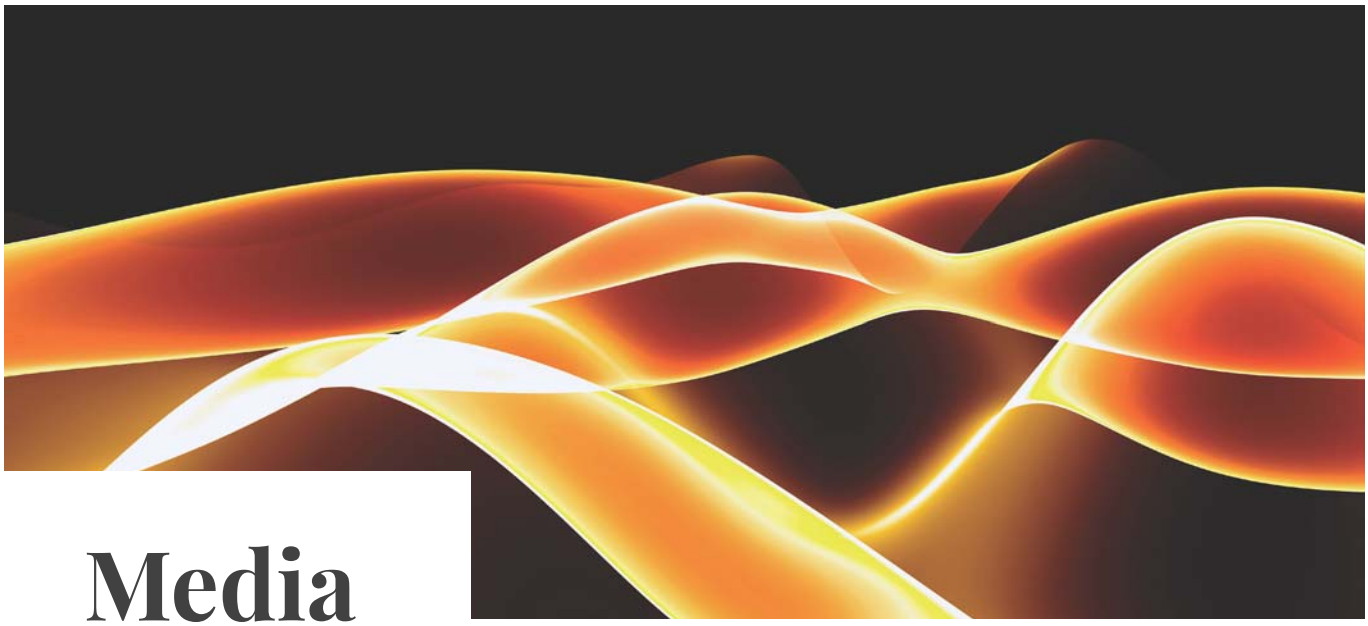
VARIOUS CLIENTS

Advised several clients on the fee disclosure requirements pursuant to ASIC Regulatory Guide 97.

Acted for an Australian equities fund manager on the establishment of a listed investment company.

Advised on the new conditional Australian Financial Services licensing and related regulatory exemptions granted by ASIC to charitable bodies.

Acted for an international accounting firm and an independent trustee on the establishment of a fund that invests in fixed income assets.



Media

ARCHER CAPITAL

Advised on the response to a union-driven media campaign against Aerocare, a company owned by Archer.

BAUER MEDIA

Defended in defamation proceedings brought against *Take 5* magazine, with an award of indemnity costs.

Represented Bauer Media in jury trial of celebrity actions brought against four leading national titles.

GOOGLE AUSTRALIA

Acted in the strike out of defamation action brought by a Melbourne solicitor against Google Australia and ongoing proceedings in the Supreme Court of Victoria.

MICROSOFT CORPORATION

Acted in Supreme Court of Victoria defamation proceedings brought by Milorad Trkulja and ongoing Supreme Court of South Australia proceedings brought by Dr Janice Duffy over search results generated by the Bing search engine.

SEVEN NETWORK

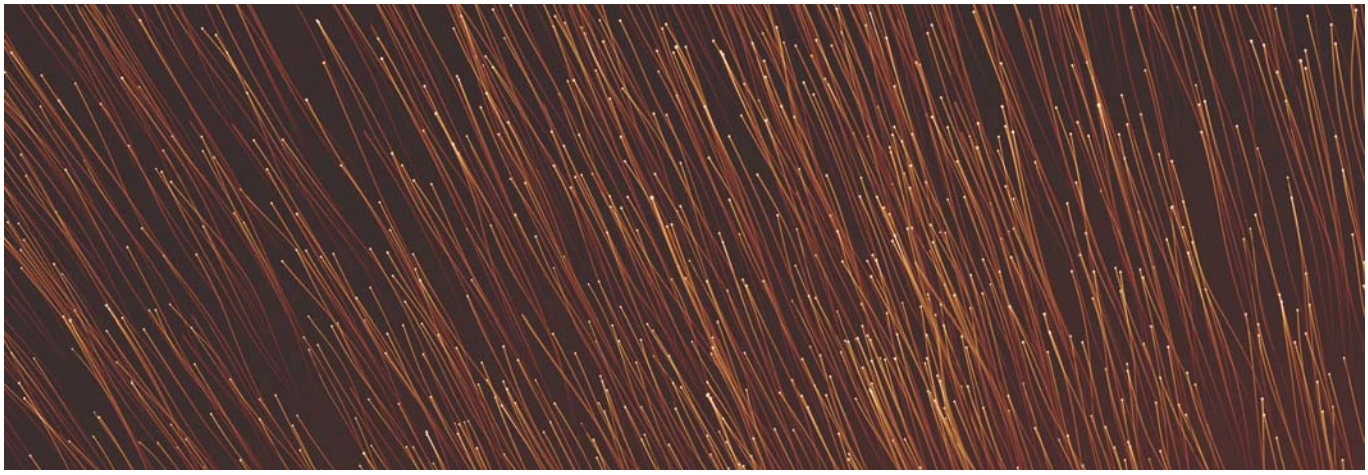
Acted in Supreme and District Court defamation proceedings, including a claim brought by Dylan Voller alleging liability for a comment posted by an unknown user on Facebook.

Acted in proceedings in the New South Wales Civil and Administrative Tribunal for a review of a decision concerning the Department of Health under the *Government Information (Public Access) Act 2009*.

YAHOO!7

Advised and acted in court proceedings alleging defamation concerning material published on Yahoo!7 and appearing in Yahoo!7 search results.

Provided prepublication clearances, training and advice in relation to defamation, contempt, copyright and statutory restrictions on publication.



Projects & Construction

BASE RESOURCES

Advised on, and prepared construction contract for, the expansion/optimisation of an existing processing plant.

Acted on to the Toliaria Mineral Sands Project, Madagascar.

BMD CONSTRUCTIONS

Prepared and negotiated documents for urban and infrastructure projects, including a proposed aquarium in Brisbane and industrial water treatment infrastructure in New South Wales.

BROOKFIELD INFRASTRUCTURE/ FLOW SYSTEMS

Drafted a project development agreement and related agreements to develop a private utility network to service '*The Orchards*', Sekisui House's large residential project in northern Sydney.

ECO ENERGY WORLD

Drafted and negotiated EPC contracts, and various other agreements with network service providers for utility-scale solar farms in Queensland.

HERON RESOURCES

Drafted and negotiated an EPC contract for the process plant and infrastructure required for its zinc-copper mine at Woodlawn.

PERSEUS MINING

Drafted and negotiated head construction contract for the Sissingue Gold project (Côte d'Ivoire).

SANTOS

Acted on to the drilling and associated services contracts for use in Santos' offshore and onshore drilling campaigns.

STATE GOVERNMENT OF SOUTH AUSTRALIA

Advised on its Energy Reform Plan, with five work streams: 100MW battery facility; temporary 200MW generation; emergency 250MW generation; 25/75 retail power procurement to underwrite new power plants; and gas procurement.

SYDNEY ZOO

Prepared contracts for the construction of a new zoo in Western Sydney, in respect of the client's lease agreement with the Western Sydney Parklands Trust.

V8 SUPERCARS AUSTRALIA

Prepared construction contracts for a new street circuit for the 'Newcastle 500' motor race.

VEOLIA WATER AUSTRALIA

Advised on the Sydney Desalination Plant rebuild and rectification, and tenders submitted to WaterNSW and TasWater.

Regulatory

ATCO GAS AUSTRALIA

Continued to assist with the preparation of its regulatory proposal to the Economic Regulation Authority (ERA) under the National Gas Rules.

AUSTRALIAN ENERGY MARKET COMMISSION

Assisted with changes to the National Electricity Rules for emergency frequency response schemes, the provision of inertia to transmission networks and maintaining system strength.

ELECTRICITY TRANSMISSION

Advised and assisted electricity transmission networks in South Australia and Victoria in the preparation of regulatory submissions, including the commencement of a merits review and judicial review applications for one network.

INDUSTRY BODY

Assisting in the Australian Energy Regulator's (AER's) Rate of Return Guideline review.

GAS DISTRIBUTORS

Advised and assisted in the drafting of regulatory submissions for a number of gas distributors in South Australia and Victoria.

GAS MARKET REFORM GROUP

Appointed to advise on new Part 23 of the National Gas Rules dealing with access to non-scheme pipelines and on the proposed mechanisms to support secondary trading of pipeline capacity.

PORT ACCESS

In the Northern Territory, advised on port access at the Port of Darwin which is the subject of a long-term lease.

POWER AND WATER CORPORATION

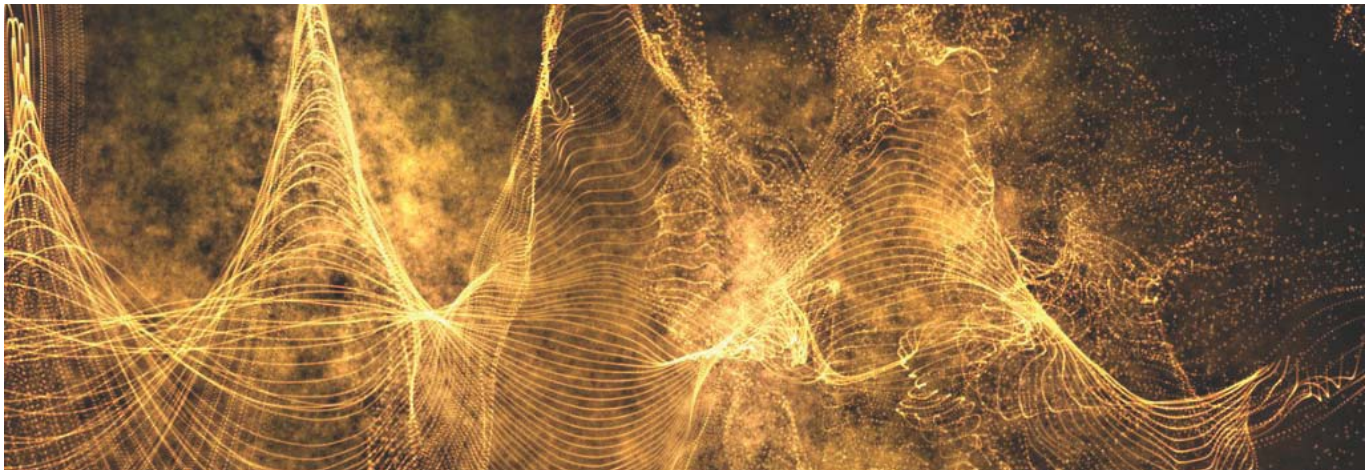
Assisted in the preparation of its first regulatory proposal to the AER under the National Electricity Rules.

RAIL NETWORK ACCESS PRICING

Advised on the determination of rail access pricing and terms and related issues for a number of declared rail networks in Queensland.

WESTERN POWER

Advised and assisted in the submissions of its regulatory proposal to the ERA under the Electricity Access Code.



Restructuring & Insolvency

ABOUT LIFE FOOD CHAIN

Acted for a US based investor in the restructure of the About Life chain of stores.

ACCC

Advised on its review of the proposed joint bid of Channel Ten by Birketu and Illyria Nominees Television.

ANGAS SECURITIES

Acted on the run-off of its $220 million debenture fund including numerous contested court hearings in the Federal Court against the trustee, Perpetual.

ARCADIA GROUP

Advised on the restructuring of its Australian franchisee Austradia (trading as Top Shop/Top Man), including arrangements with the administrators for the restructure of the business and continuity of business operations by Arcadia of the remaining Australian stores.

BENTLEYS CORPORATE RECOVERY SERVICES

Acted for it as liquidator of Octaviar Ltd (OL) and Octaviar Administration (OA), including in respect of the Garnishee Order issued by the ATO and resolution of the OL/OA intercompany debt with the court-appointed Special Purpose Liquidator.

KORDAMENTHA

Advised it as administrator of Arrium, Australian Abrasive Minerals, Maria's Farm Veggies, and Tree Minders including sale of assets, deed administration and tax matters.

MCALEESE GROUP

Acted on the restructuring of its syndicated bank debt facilities. Acted, post administration, for the founder and major investor on the restructuring and recapitalisation of its core businesses through multiple, related deeds of company arrangement, culminating in the creation of Rivet Group.

MCGRATHNICOL

Acted for it as liquidator of the PrimeSpace Northbourne Trust as joint venturer in a significant property development in Canberra, finalization of the joint venture, and in the resolution of various investor and joint venture related disputes.

PKF MELBOURNE

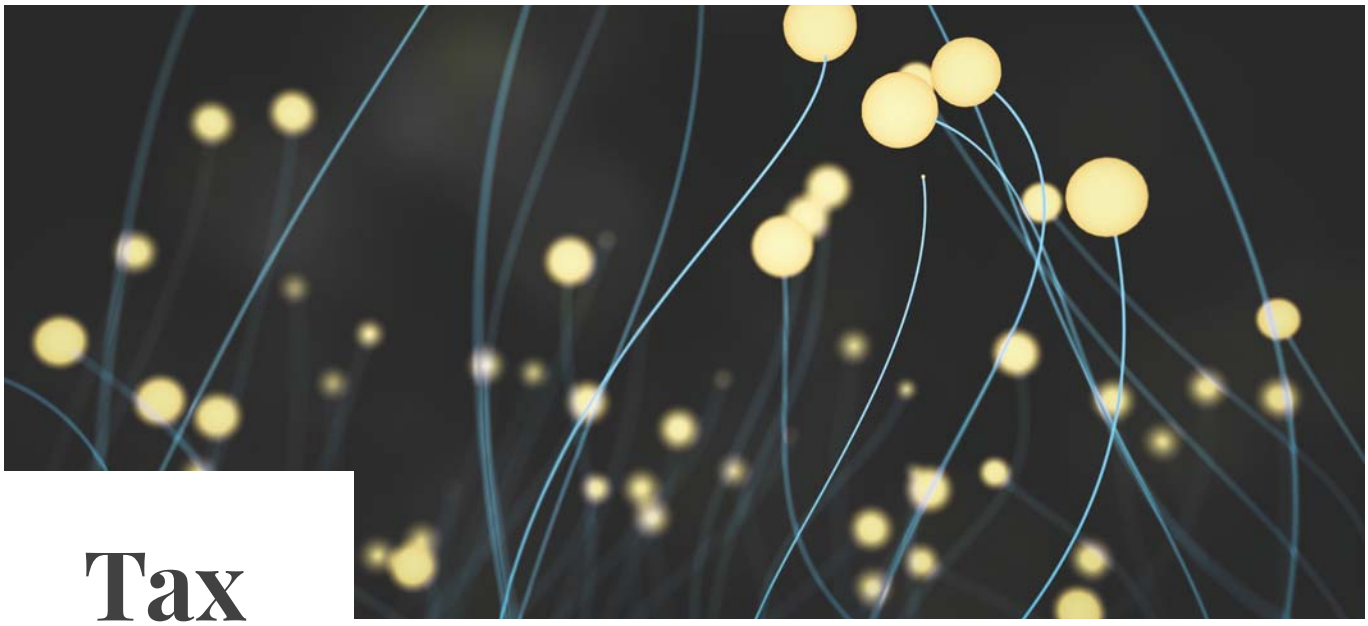
Acted for it as liquidator of Australian Property Custodian Holdings against auditors Pitcher Partners, in proceedings in the Supreme Court of Victoria and in claims for breaches of trust and fiduciary duties.

PPB ADVISORY

Advised it as receivers and liquidators for businesses including Black Oak Minerals, Gunns Group and Linc Energy.

SLATER AND GORDON

Continued to advise class members on the proposed scheme for the compromise of shareholder claims.



Tax

AB-IN BEV/CUB

Provided tax counsel on the acquisition of 4 Pines and Pirate Life craft breweries.

BATTERY VENTURES

Acted as Australian tax counsel on its acquisition of human resources SaaS provider, PageUp People.

COOPER ENERGY

Provided taxation commentary for the underwritten accelerated pro rata entitlement offer to fund Cooper Energy's acquisition of the Victorian gas assets of Santos.

FOREIGN CONSORTIUM

Advised on the stamp duty issues for the consortium bid to acquire upstream oil and gas assets of AGL Energy.

MICROSOFT

Advised on all aspects of an ATO income tax audit concerning Microsoft's Australian operations, including in respect of the audit's resolution.

NATIXIS SA

Advised on tax issues relating to the acquisition of majority interest in Investors Mutual.

STATE GOVERNMENT OF SOUTH AUSTRALIA

Advised on income tax issues arising from South Australian Energy Reform projects, including the battery and short-term generation components.

UNILEVER

Advised on tax issues related to acquisition of the Weiss ice cream business.

VISIONEERING TECHNOLOGIES

Acted as Australian tax counsel on a cross-border IPO (underwritten by Canaccord Genuity (Australia)) and ASX listing.

CELEBRATING 25 YEARS

We founded the firm in 1993 as a small, eclectic team of lawyers. At the time we appreciated commercial clients would develop long-lasting relationships with the firm if they knew our lawyers were technically strong, commercial and able to deliver legal services in a pragmatic way.

So, we sought to build client relationships by providing superior service and value for money. The focus was on clients and what we could do for them, rather than on internal financial targets or other forms of introspection. With those principles in mind, and notwithstanding a weak economy at the time, we set about building the firm by winning engagements and impressing clients.

We had ambition and a fair dose of nerve. We chased work. We probably bit off more than we could chew and always found a way to impress our clients and deliver value.

We worked together. We helped one another. We celebrated success and dusted off disappointments. The term collaboration was not bandied about, nor did we spend a lot of time encouraging people to behave in a collegiate manner. Rather, collegiate behaviour occurred naturally. Indeed from the first day of operation we projected the strength of our team under the name of the firm – not individuals.

Not surprisingly, we weren't afraid to work hard. We were hungry for success, had an entrepreneurial spirit and used our nous. We were a 1993 version of what would now be regarded as a "start-up" in today's parlance.

Of course our ambition and success meant some things had to change over time. Indeed, we've been developing and transforming almost continuously since 1993 – save for those things we've been careful to preserve: these are what we call the hallmarks of our firm.

The hallmarks of the firm which were with us at the start continue to underpin the way we work today.

These elements are lived in the day-to-day activities of everyone in the firm and include impressing the client; looking after one another; taking the long term view; and only doing things that make good business sense.

Pleasingly, the collective impact of our hallmarks is recognised by our clients and the market through the company we keep, the calibre of our work, independent industry recognition and direct client feedback.

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