

JOHNSON WINTER & SLATTERY



REVIEW

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WELCOME

Welcome to this annual review of key developments, industry highlights and significant assignments within our key practice groups.

As we approach our 25th year of operation, we are again privileged to represent many Australian and international corporations on major transactions, disputes and complex legal affairs within Australia.

Our capability to undertake the most challenging and complex legal work across Australia is well established and is recognised by awards and rankings in local and international directories and, of course, through the strong relationships we maintain with our clients and a global network of independent law firms.

The work illustrated in this review serves to underscore the quality of our client relationships and our standing as a leading independent Australian law firm.

Many of our engagements involve us working cooperatively with financial advisors, financiers and banks, law firms, economists, experts in various fields and teams from within client organisations. We appreciate that the best outcomes are typically achieved through a collaborative approach, so to everyone with whom we have an association, we thank you for your support and we look forward to working with you in future.

ALDO NICOTRA
Chairman

PETER SLATTERY
Managing Partner



ALDO NICOTRA



PETER SLATTERY

FIRM PROFILE

Johnson Winter & Slattery occupies a unique place in the Australian legal market. We combine top-tier capabilities with a service delivery model that promotes the close, hands-on involvement of senior lawyers on each assignment.

This service delivery model distinguishes us from other major law firms. We maintain a higher ratio of senior to junior lawyers than our rivals and focus on assignments that are well suited to this 'low leverage' structure. The close involvement of senior lawyers is favoured by clients seeking the superior and more efficient outcomes achieved through senior lawyer engagement.

With more than 60 partners across offices in Sydney, Perth, Melbourne, Brisbane and Adelaide, we are positioned to manage our clients' strategic legal requirements throughout Australia.



OUR APPROACH

An appropriate blend of legal know-how and commercial acumen lies at the heart of effective and valuable legal counsel. Through working closely with clients and their in-house counsel, getting to know their business and appreciating both their commercial parameters and objectives, we ensure our approach is tailored to deliver cost-effective commercial outcomes.

OUR DIFFERENCE

Our higher ratio of senior lawyers means clients engage more directly with the tactical minds and industry expertise required to succeed in complex and high-stakes deals and disputes. A partnership ethos of service, technical excellence and collaboration ensures the most relevant specialist expertise and experience is brought to bear on every assignment.

Independent industry recognition and positive client feedback is testament to the quality of our legal advice and service to clients.

RECOGNISED LEADERS

Our lawyers and teams are ranked regularly as leaders in their field by major local and global directories, including Chambers Global (with 30 leading individual rankings for 2017), Best Lawyers and the Asia Pacific Legal 500. We were also recognised by the 2017 AFR Client Choice Awards as the best professional services firm (\$50–\$200 million), the best law firm (\$50–\$200 million) and the best value firm.

Clients comment frequently on Johnson Winter & Slattery's technical excellence, responsive service, and ability to provide commercially relevant and cost-effective counsel.

COMPETITION

DEVELOPMENTS

There have been a number of important developments in competition/antitrust law in Australia over the previous 12 months.

First, the much-anticipated changes to competition laws proposed by the Harper Panel are likely to become law in 2017. The key changes include the introduction of:

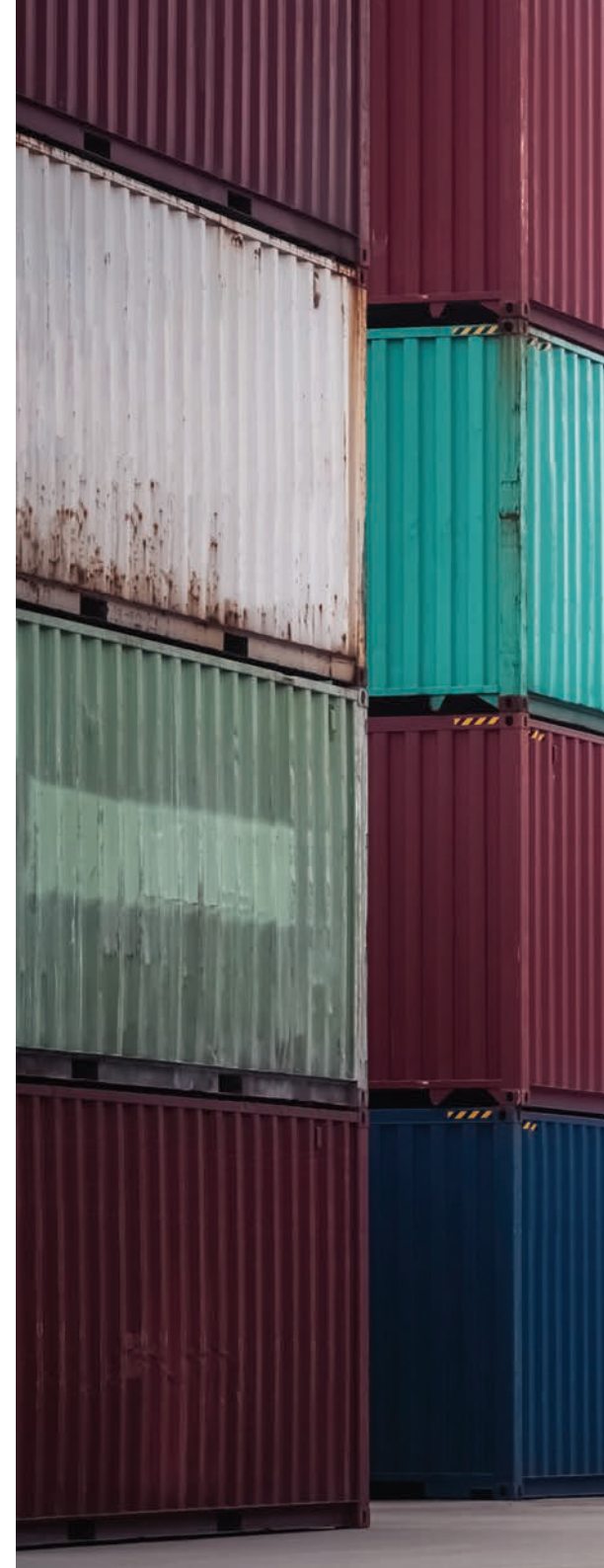
- an “effects” test to the misuse of market power prohibition – despite widespread commentary that this change will have significant ramifications on decisions made by big business, we believe that the “effects” test will only result in increased rigour being applied to decisions of competitive significance by those businesses without having a material impact on those decisions.
- a “concerted practices” prohibition 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 but it remains to be seen whether the law will operate in a manner that is consistent with international jurisdictions.

Second, the Australian Competition and Consumer Commission (ACCC) has continued its vigorous enforcement of international and domestic cartel conduct. This has led to the Commonwealth Director of Public Prosecutions commencing the first ever case for criminal cartel conduct (seven years after the laws came into effect). The ACCC has explicitly stated that it anticipates investigating one to two criminal cartel cases every year in future.

Third, the ACCC continues to take a robust approach to the enforcement of the Australian Consumer Law by all businesses – big, medium, small and both domestic and international companies. In addition to the many cases brought by the ACCC (for misleading claims, unconscionable conduct and product safety issues), a new unfair terms regime commenced in November 2016, which prohibits unfair terms in standard form small business contracts.

Fourth, the ACCC has become more vocal in raising its concerns about the monopoly pricing conduct of successful bidders following the acquisition of essential government facilities such as utilities. While the ACCC has in the past considered that privatisation results in more efficient operation of infrastructure, it is concerned that high sale prices for assets are being recouped through monopoly pricing practices to the ultimate detriment of Australian consumers.

Finally, in August 2016, the Chairman of the ACCC, Rod Sims, was reappointed for a further three years. In light of the ACCC’s successes over the previous 12 months, we anticipate that the ACCC will – with the increased confidence brought by a second Sims term – continue its vigorous investigation and enforcement of competition and consumer laws in Australia for years to come.



KEY ASSIGNMENTS

BAYER AG

Advised on Australian competition clearance for US\$66 billion acquisition of Monsanto.

BROOKFIELD

Advised on the resolution of ACCC merger clearance issues associated with acquisition of Asciano.

JETSTAR AIRWAYS

ACCC misleading or deceptive conduct proceedings regarding the Jetstar Booking and Service Fee for online sales.

PRYSMIAN GROUP

Successfully defended ACCC cartel prosecution alleging Australian cables cartel, including bid-rigging allegations.

Defended ACCC cartel prosecution alleging international cartel in Australia by European and Asian companies.

RURALCO

Advised on competition clearance for acquisition of TP Jones.

UNILEVER

Immunity applicant in ACCC cartel prosecution against Colgate-Palmolive, PZ Cussons and Woolworths.

DAY-TO-DAY COMPETITION & CONSUMER LAW ADVICE

3M

Baiada Poultry

Bauer Media

Beiersdorf

Blackmores

Brickworks

David Jones

Duet

Flinders Ports

Ramsay Health Care

St Vincent's Healthcare

The Walt Disney Group

Uber

Unilever

V8 Supercars

Vittoria Coffee

MEDIA

KEY ASSIGNMENTS

BAUER MEDIA

Defended four leading national magazines in defamation proceedings brought by Rebel Wilson.

MICROSOFT

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

SEVEN NETWORK

Acted for Channel 7 Sydney in Supreme and District Court defamation proceedings including securing a verdict and costs in proceedings brought by Edward Kang.

YAHOO!

Brought an action to strike out proceedings brought in the Supreme Court of Victoria by Milorad Trkulja, and defence of Supreme Court of New South Wales proceedings brought by Tosson Hussein Mahmoud.

YAHOO!7

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

SPOTLIGHT ON...

TAXATION

ANNUS HORRIBILIS?

The current corporate tax environment in Australia

The past year could well be described as an *annus horribilis* – a year of disaster or misfortune – from the perspective of corporate taxpayers.

At a domestic level, the buzzword has been “transparency”, with the Australian Taxation Office’s (ATO) release in December 2015 of the first tranche of (limited) tax data for over 1800 public, foreign and large private groups with a turnover in excess of \$200 million. This led to something of a media frenzy, with a focus on those groups that paid no tax or had marked discrepancies between their turnover and tax paid.

The Board of Taxation also released its report on a Voluntary Tax Transparency Code in February 2016, which has already been taken up by over 70 corporate groups. We have witnessed increasing pressure on other listed companies and multinational groups to sign up.

On the international front, Australia has been at the forefront of the “base erosion and profit shifting” debate.



After executives from over 25 Australian and foreign multinationals were grilled by the Senate inquiry on corporate tax avoidance (which is continuing in 2017), the government saw fit to introduce the multinational anti-avoidance law (MAAL) that became operative from 1 January 2016, with some 175 taxpayers potentially having arrangements within its scope.

As a result, it is inevitable that we will see tax litigation increase over the next 12 to 18 months and a need for corporate groups to prepare accordingly.

When these tax changes are coupled with the recent tightening of Australia's foreign investment laws – in many cases including the imposition of “standard tax conditions”

“...the ATO is using these new weapons to force taxpayers to resolve complex transfer pricing matters quickly...”

Further, the government announced the introduction of a broader diverted profits tax (DPT) from 1 July 2017, which will impose a penalty rate of 40% on corporate profits “diverted” by significant global entities to jurisdictions with a tax rate below 24%. This has been accompanied by an increase in ATO staffing and renewed vigour in the approach being taken by the ATO in their audits of such groups.

It is already apparent that the ATO is using these new weapons to force taxpayers to resolve complex transfer pricing matters quickly, in a manner that is most favourable to Australia's revenue base, notwithstanding the potential for double taxation as Australia effectively abandons international consensus.

as a precondition to the granting of approval, and the introduction from 1 July 2016 of a foreign resident capital gains withholding regime – the impact on Australia's attractiveness as a destination for foreign capital remains to be seen.

The only real light on the hill is the proposed reduction in the corporate tax rate from its present 30%, down to 25% over the next 10 years. However, even if this gets through the Senate, it still compares unfavourably to the rates adopted by many of our Asian neighbours, and the mooted corporate tax reductions in the UK and the US.

REGULATORY

KEY ASSIGNMENTS

GAS INFRASTRUCTURE & MARKETS

Advised and assisted in the drafting of regulatory submissions and the conduct of an appeal to the Australian Competition Tribunal, challenging the regulator's revenue allowance.

Advised on issues arising under the Australian Energy Market Commission's (AEMC) review of the east-coast gas market and gas transmission frameworks and on further development of the Australian Energy Market Operator's (AEMO) gas supply hub at Wallumbilla, Queensland.

ELECTRICITY INFRASTRUCTURE & MARKETS

Advised on the preparation of United Energy's electricity revenue proposal for the period 2016–2020 and conduct of an appeal to the Australian Competition Tribunal in respect of the Australian Energy Regulator's (AER) decision. In Western Australia, we assisted with the expected transition to regulation under the AEMC's National Electricity Rules from the existing arrangements under the Code (now on hold).

Advised on system security issues and related regulatory developments arising from the changing generation mix in South Australia.

RAIL & PORT INFRASTRUCTURE

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

In the Northern Territory, advised on port access at the now-privatised port and elsewhere on the development of a third-party port access regime.

CORPORATE

DEVELOPMENTS

MARKET

We continued to see solid merger and acquisition activity in 2016. However, deal volumes and values were lower than in 2015 due in part to uncertainty arising from the Australian and US elections, Brexit and softer economic growth in China.

The transport, infrastructure (primarily privatisations), health and leisure industries led the fray, with foreign investors continuing to take advantage of the lower Australian dollar and US investment accelerating.

Deal activity throughout 2017 is expected to be robust, with infrastructure, private equity (and other) investors cashed-up and keen to strike deals.

FOREIGN INVESTMENT

In December 2015, the government made significant changes to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and related legislation, including introducing application fees for applications to the Foreign Investment Review Board (FIRB) and expanding the range of proposals that trigger mandatory or voluntary notification. The effect of these changes filtered through the merger and acquisition sector over the last year.

The relatively new rules have created some issues when dealing with the new regulations. The Treasury has recognised this and we may expect some changes to the regulations this year, which are anticipated to ease some of the administrative burdens that have been encountered.

While there were no objections to most foreign investment applications since the changes came into effect, the Treasurer blocked the long-term lease of Ausgrid to either of China's State Grid Corporation or Hong Kong's Cheung Kong Infrastructure, as well as the sale of the S. Kidman

cattle station to China's Shanghai CRED Real Estate. These assets were subsequently acquired by, or in conjunction with, domestic acquirers.

There is, however, a growing trend for the Treasurer to attach conditions to no objection letters. For example, conditions may be imposed to address matters relating to national security, payment of tax, arm's length pricing of commodities, sensitive infrastructure and utilities, or to impose foreign ownership caps.

This is coupled with additional regulatory scrutiny from the ACCC and the ATO because FIRB consults with those regulators as part of its assessment of foreign investment applications. Considered and proactive engagement by investors with regulators is key to achieving successful transactions.

Despite the additional regulatory scrutiny, Australia continues to remain an attractive destination for foreign investment.

KEY ASSIGNMENTS (CORPORATE)

APOLLO EDUCATION GROUP

Acted in relation to Apollo Global Management's bid for Apollo Education.

BLACKMORES

Acted on the acquisition of 100% of Global Therapeutics. Acted on its 50/50 partnership with Bega Cheese.

MICROSOFT CORPORATION

Advised on the acquisition of assets of Event Zero.

MYOB MANAGEMENT SHAREHOLDERS

Advised in relation to the MYOB IPO and ASX listing.

SEVEN NETWORK

Advised on the acquisition of a substantial interest in iSeekPlant.

TEVA PHARMACEUTICAL INDUSTRIES

Acted on the Australian corporate aspects of its global acquisition of Allergan Generics from Allergan plc.

TRAILSTONE UK & TRAILSTONE UK II

Acted on its investment in Southern Cross Goldfields.

TYRRELLS POTATO CRISPS

Advised on its acquisition of Yarra Valley Snack Foods.

KEY ASSIGNMENTS (ECM)

AIRXPANDERS

Advised on all Australian legal aspects of its placement underwritten by Canaccord Genuity (Australia).

BIONOMICS

Advised on all Australian legal aspects of its share placements to four US institutional investors.

ELEMENTAL MINERALS

Advised Sociedad Química y Minera de Chile S.A. (SQM) in the placement to a consortium including SQM by ELM.

IMPEDIMED

Advised on all Australian legal aspects of its two-tranche placement underwritten by Canaccord Genuity.

OSPREY MEDICAL

Advised Osprey on all Australian legal aspects of two-tranche placement underwritten by Canaccord Genuity and Bell Potter.

PRIVATE EQUITY

KEY ASSIGNMENTS

ARCHER CAPITAL

Acted for Archer Capital in relation to the financing of Crick Auto Group and in relation to a number of bolt-on acquisitions for Aerocare.

AURORA CAPITAL GROUP

Acted for Aurora on the acquisition of Commercially Retail.

BAIN CAPITAL

Acted for Bain in relation to the acquisition of Only About Children.

CALERA CAPITAL

Acted for Calera in its acquisition of Transaction Services Group.

CYARA SOLUTIONS

Acted for Cyara in relation to the investment in it by PeakSpan Capital and Greensprings Associates.

DISCOVERY PARKS

Acted on Discovery Parks' successful contested, hostile takeover bid for the Aspen Parks Property Fund.

EXPONENT PRIVATE EQUITY

Acted for Exponent's portfolio company, Big Bus Tours, in its acquisition of Sydney Explorer.

GETTHEWORLDMOVING

Acted for the sellers of Global Corporate Challenge in relation to the sale of the business to Virgin Pulse.

M.H. CARNEGIE & CO

Acted for Carnegie in its investment in Renew Medical.

SEWELLS GROUP

Acted for Sewells Group in its acquisition of MSX International, including the coordination of related transactions in Australia, China, India, Indonesia, Malaysia, the Philippines, Singapore, South Africa, the United Arab Emirates and Vietnam.

SK CAPITAL PARTNERS

Acted for SK on the acquisition of Johnson & Johnson's global narcotics business comprising Tasmanian Alkaloids.

FINANCE

KEY ASSIGNMENTS

ABACUS PROPERTY GROUP (APG)

Negotiated, advised on and closed six major construction facilities for significant residential developments, including through joint venture arrangements with overseas investors.

Ongoing advice on all finance related aspects of APG's business, including its primary debt facilities (\$400 million) and investments through mezzanine debt and joint venture structures.

AUSTRALIAN GAS NETWORKS (AGN)

Ongoing advice on all aspects of AGN's \$1.8 billion secured debt program, including advice on new bilateral debt facilities, consent issues, US private placement (USPP), swaps and debt capital markets.

AUSTRALIAN UNITY INVESTMENTS

Provided advice on leveraged financial products, leading to Australian Unity issuing legal proceedings, which are ongoing against Standard & Poor's (US) for incorrectly rating structured products, namely synthetic collateralised debt obligations (CDOs) and constant proportion debt obligations (CPDOs). We continued to act as borrower's counsel for debt finance transactions for the Australian Unity Diversified Property Fund.

BAYCORP

Advised Baycorp on all aspects of its debt facilities, including a significant refinancing.

FLINDERS PORTS

Acted for Flinders Ports on a refinancing of its bank debt out of a secured debt program incorporating separate bilateral facilities and USPP.



INVESTMENT FUNDS

KEY ASSIGNMENTS

ALLIANCE BERNSTEIN INVESTMENT MANAGEMENT AUSTRALIA

Acted on the negotiation of its custody arrangements for its suite of registered funds to comply with new regulatory requirements applicable to the appointment of external custodians.

CCI ASSET MANAGEMENT

Advised on the establishment of an individual managed account product, including Australian Securities and Investments Commission (ASIC) relief for various exemption licensing.

DISCOVERY PARKS & ALLEGRO FUNDS

Acted as sole legal advisor on all aspects of Discovery Parks' successful, contested, hostile takeover bid for the Aspen Parks Property Fund.

ASSET MANAGEMENT DIVISION OF INTERNATIONAL INVESTMENT BANK

Advised on the internal reorganisation of the bank's business, including obtaining ASIC relief to facilitate the change of responsible entity on registered schemes.

INTERNATIONAL INVESTMENT BANKS

Advised on forestry schemes and offtake agreements.
Advised on establishment of funds targeted at Significant Investor Visa (SIV) investors.

Advised on the retirement of a responsible entity of schemes where it was impossible to pass an extraordinary resolution due to the voting policies of platforms and the composition of the members of the schemes.

Advised on trust law issues arising from the collapse of an investment manager appointed by a responsible entity and the subsequent illiquidity of some registered schemes.

TAX

KEY ASSIGNMENTS

AIRXPANDERS

Acted as Australian tax counsel in relation to the initial public offering (IPO) of AirXpanders on the ASX.

AIRPORT LINK HOLDINGS

Represented the company in relation to an appeal regarding income tax deduction claims concerning the right to future income provisions within Australia's corporate tax consolidation rules.

BAIN CAPITAL

Advised Bain Capital on Australian tax issues associated with its acquisition of a majority interest in Only About Children.

DISCOVERY PARKS

Advised on stamp duty issues associated with takeover of Aspen Parks Property Fund and subsequent integration of its portfolio of 21 holiday parks located across Victoria, New South Wales, Queensland, Western Australia and South Australia.

MCDONALD'S AUSTRALIA

Advised on income tax and nationwide stamp duty issues relating to its Australian franchising options.

MICROSOFT CORPORATION

Acted as Australian tax counsel on acquisition of technology assets underlying the UC Commander product suite from Event Zero.

SENTIENT GROUP

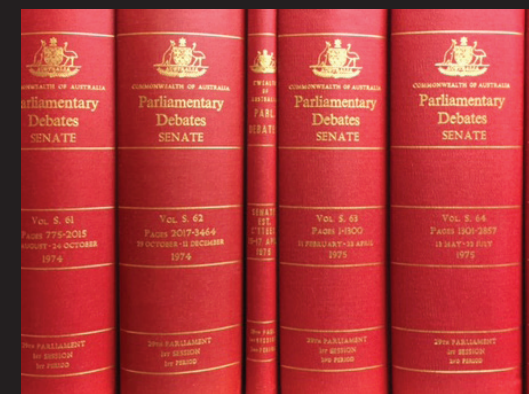
Advised on a major cross-border restructure.

SPINFEX PHARMACEUTICALS

Advised on employee incentive tax issues associated with the sale of Spinifex Pharmaceuticals to Novartis International AG.

SENATE INQUIRY INTO CORPORATE TAX AVOIDANCE

JWS assisted a number of large multinationals in the pharmaceutical, technology, and fast-moving consumable sectors in preparing for appearances before the Australian Senate Economics Reference Committee's inquiry into corporate tax avoidance, and has been representing those clients in their interactions with the Australian tax authorities.



DISPUTE RESOLUTION

DEVELOPMENTS

While 2016 saw less general commercial litigation activity than in previous years (lower number of Court filings), the decrease was, in part, offset by an increase in funded litigation – in particular, class action activity – and an increase in regulatory actions (ASIC, the ACCC, the AFP and the ATO).

The Courts continue to seek to make themselves more relevant for commercial dispute resolution by becoming more efficient and cost effective, including through greater judge-controlled case management, the adoption of specialist judges and lists in the Federal Court, and through adoption of smart technology to assist in the discovery process, thereby significantly reducing the high cost of this aspect of litigation. Private arbitrations also continue to be on the increase for reasons related to lower costs, jurisdiction and confidentiality.

Insolvency litigation featured prominently in the early part of 2016, but, with the banks holding off on taking more drastic actions for fear of a threatened Royal Commission, there was a slowdown in appointments and insolvency litigation towards the second half of the year.

The funded litigation environment improved for funders, with more funders, including those with foreign capital, entering the market. Three significant decisions assisted funders: one permitting foreign security for costs, one allowing a common fund approach, and one deeming the Court free to review and potentially change the funder's remuneration in relation to settlement approvals. More funders may mean more actions – possibly actions at the more speculative end of the scale – but more funders may also lead to pressure to lower their commission rates.

We also saw funders becoming more involved in subrogated insurance claims, acting in the interests of insurers on recovery actions. This trend will continue.

Some funders are looking to target only institutional investors in securities class actions and not the retail investors. This is expected to lead to a change in dynamics and a push for earlier resolutions.

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 2016 ASIC began proceedings against three major banks in relation to interest rate rigging. The cases are the largest ever brought by ASIC. But, unlike other regulators, such as the SEC or the DOJ in the US, where significant settlements are extracted through plea bargains at an early stage, ASIC's actions are being hard fought and will continue for some time. It will be interesting to see if ASIC brings other similar "rigging" or "collusion" proceedings as we have seen overseas in areas such as the commodities, forex and currency markets.

Finally, the ATO, with significant resources behind it, is ramping up examination of offshore financial structures, with transfer pricing by multinational groups and anti-avoidance practices being challenged. This increased focus of activity coincides with the Australian Government actively looking at the introduction of a Commonwealth deferred prosecution agreement scheme for financial crimes.



STATE OF VICTORIA, TABCORP & TATTS

Successfully acted for the State of Victoria in Supreme Court proceedings commenced separately by Tabcorp Holdings and Tatts Group for more than \$1.5 billion in compensation. The litigation involved numerous complex issues related to government contracting and licensing generally, and, in particular, the regulation of gaming in Victoria during the period from 1994 through to 2012. The outcome of this case will be regarded as significant for businesses seeking to enter into contractual and statutory licensing arrangements with governments in Australia.

KEY ASSIGNMENTS

DDH GRAHAM CLASS ACTION

Defended class action in the Federal Court of Australia over loss of money market deposit investments due to third party fraud.

GROOTE EYLANDT ABORIGINAL TRUST

Sought (and will continue to seek in 2017) recovery of \$50 million, fraudulently misappropriated from the trust, in claims against its professional advisors KPMG, Deloitte and MinterEllison.

GUNNS LIQUIDATION

Successfully acted for the liquidators in more than 100 preference claims involving over \$70 million, and a \$160 million claim.

LIGHTHOUSE CORPORATION & TIMOR-LESTE ARBITRATION

Acted for the claimants in an international arbitration with the Democratic Republic of Timor-Leste. This was the first arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States involving Timor-Leste since it ratified the convention in 2002.

LINC ENERGY

Acted for the liquidators (PPB) in groundbreaking proceedings concerning the interaction between insolvency and environmental laws in Australia, with respect to an estimated \$30 million environmental clean-up liability arising from Linc Energy's former underground coal gasification operations in Queensland. The case has broader implications for the insolvency industry and State/Federal Governments in relation to companies undertaking environmentally hazardous activities.

METAGENICS

Successfully defended Federal Court proceedings and a consequential Full Federal Court appeal involving a dispute about the sale of the speciality pharmaceutical business with a damages claim in the order of \$175 million.

RIVERCITY MOTORWAY GROUP PROCEEDINGS

Acted for the liquidators (PPB) of the RiverCity tunnel infrastructure project in \$300 million insurance arbitration in Amsterdam and successfully settled the one of the largest class actions in Australia for \$121 million.

STANDARD & POOR'S GLOBAL CLASS ACTION

Acted for institutional investors in complex class action proceedings against Standard & Poor's to recover losses based on claims that Standard & Poor's were negligent in their rating and modelling processes and issued misleading credit ratings for a range of complex leveraged financial products.

TAMAYA RESOURCES

Successfully acted for a number of former directors and officers in the collapse of Tamaya Resources in Federal Court proceedings that included a class action and a claim against the former auditors, Deloitte Touche Tohmatsu.

SPOTLIGHT ON...

INDUSTRIAL RELATIONS

The industrial relations focus for most employers in 2017 will continue to be on ways to increase workplace flexibility and how to motivate employees to accept flexibility as being key to the business' success.

In 2016, faced with restrictions embedded in existing enterprise agreements and the general starting position in negotiations that any new agreement builds upon existing terms and conditions, some employers, including AGL Loy Yang and Esso, used the termination of agreement provisions in the *Fair Work Act 2009* to reset the negotiating base.

The year also brought, perhaps as a result of the Coles situation, an increased focus by the Fair Work Commission on the enterprise bargaining approval process, including the content, form and delivery of notice of employee representational rights (NOERR) and whether employers were satisfactorily demonstrating that employees were in fact "better off overall" under proposed

enterprise agreements compared with the relevant award – particularly where non-standard working hours or flat rates of pay are used.

With a Full Bench majority finding in *Uniline Australia Limited [2016] FWCFB 4969* that a failure by an employer to issue the correct form of the NOERR within the required 14 days meant that an agreement could not be approved, many employers echoed the thoughts of VP Watson:

"Far from these circumstances indicating that the legislature could not have intended any other consequence of the late provision of a notice than invalidity, I would contend the opposite. In legislation in which enterprise bargaining is a centrepiece and the legislature intends to have a simple, flexible and fair framework for agreement making and approval, how could the legislature have intended to push the parties into such a senseless morass?"

In late 2016, two key pieces of workplace relations legislation were finally passed – the *Fair Work (Registered Organisations) Act 2014* (RO Act) and the *Building and Construction Industry (Improving Productivity) Act 2016*.

The RO Act creates the Registered Organisations Commission, the regulator for federally registered unions and employer associations. Unexpectedly, part of the negotiations for passing the RO Act included amendments by Senators Hinch and Xenophon, intended to increase the protections for whistleblowers.

The Government has also agreed to establish a parliamentary inquiry to examine the whistleblower amendments to the RO Act with a view to

implementing similar provisions "in the corporate and public sectors".

The *Building and Construction Industry (Improving Productivity) Act 2016* came into effect 29 November 2016, which, among other things, re-established the Australian Building and Construction Commission and provides for additional prohibitions on unlawful action. Shortly thereafter, the Minister for Employment issued the Code for the Tendering and Performance of Building Work 2016, which seeks to regulate industrial behaviours on building sites and projects by requiring building industry entities to be compliant with the code, or otherwise face being ineligible for Commonwealth funded building work.

“...(some employers) used the termination of agreement provisions in the *Fair Work Act 2009* to reset the negotiating base.”

KEY IR THEMES FOR 2016

GENERAL PROTECTIONS CLAIMS

Employers continued to experience high levels of general protections claims, including from middle to senior managers and often in the context of employers seeking to negotiate exit arrangements with individuals.

FITNESS FOR WORK

An increased focus on mental health as a key aspect of fitness for work processes.

DOMESTIC VIOLENCE LEAVE

A continued push for domestic violence leave in enterprise bargaining, although the numbers of such leave requests by employees are, at least at this stage, low.

RESTRUCTURING & INSOLVENCY

KEY ASSIGNMENTS

BLACK OAK MINERALS

Advised PPB Advisory as receivers and managers appointed to Black Oak Minerals and its related entities including:

- on the sale of various mines, mining tenements (and disputes) and related assets
- generally and in relation to various creditors
- in relation to various other disputes
- on investigations being conducted by the relevant authorities on contamination issues.

GUNNS GROUP

Acted for PPB Advisory as the liquidators of the Gunns Group, in matters including numerous unfair preference claims, a claim against its auditors and another claim against its directors.

LINC ENERGY

Advised PPB Advisory as administrators and liquidators in relation to:

- the sale of various assets (including IP and related coal tenements)
- a dispute with the QLD Government in relation to disclaimed tenements
- potential contamination issues and environmental notices pre-appointment
- the US Chapter 11 proceedings of the company's US based subsidiary.

MARIA'S FARM VEGGIES

Advised KordaMentha as administrators in relation to:

- the sale of assets, which included a going concern sale of a glasshouse
- the recovery of potentially false transactions undertaken by the directors
- the potential contamination on site
- the administration generally and in respect of third party contractors.

MCALEESE GROUP

Acted for the McAleese Group on the restructuring of its syndicated bank debt facilities. Following the Group entering into voluntary administration, we acted for the founder and major investor on the restructuring and recapitalisation of the Group's core businesses through multiple, related deeds of company arrangement (DOCAs), culminating in the creation of the newly formed Rivet Group which emerged from the DOCA process.

OCTAVIAR

Acted for Bentleys Corporate Recovery Services as liquidators of Octaviar and Octaviar Administration in Australia's largest auditor negligence case arising out of the collapse of the MFS/Octaviar Group.

PRIMESPACE

Acted for McGrathNicol as liquidators of the PrimeSpace Northbourne Trust as joint venturer in a significant property development in Canberra.

RIVERCITY

Acted for PPB Advisory as the liquidators of the financially collapsed RiverCity tunnel project in Brisbane including an international arbitration and significant Australian based litigation.

ROYAL WOLF HOLDINGS

Advised on the restructuring of Royal Wolf's material contracts with the Titan Energy Services Group and subsequently on the take-out of senior debt to the Titan Group and enforcement of securities.

STATE GOVERNMENT OF SOUTH AUSTRALIA

Advised on all aspects of the administration, deed administration and potential restructure of Arrium.

25 INVESTORS IN LEHMAN BROTHERS CDOs

Represented 25 investors who have claims against Lehman Australia for significant losses incurred through investment in collateralised debt obligations (CDOs).

AUSTRALIAN PROPERTY CUSTODIAN HOLDINGS (APCHL)

Acted for PKF Melbourne as liquidators of APCHL against its auditors, Pitcher Partners, in proceedings in the Supreme Court of Victoria and in relation to claims for:

- breaches of fiduciary duties and knowing assistance in breaches of trust and fiduciary duties by a former director of APCHL
- breaches of fiduciary duties and knowing involvement in breaches of fiduciary duties by solicitors to APCHL
- knowing involvement in breaches of fiduciary duties by corporate advisors to APCHL
- knowing receipt of trust property obtained by reason of breaches of trust and fiduciary duties.



ENERGY & RESOURCES

DEVELOPMENTS

The Australian energy and resources sectors have continued to weather the storm caused by a decline in commodity prices, particularly in oil and iron ore. A decade of investment in “mega projects” appears to be over, with very few new greenfield projects in new areas of investment on the horizon. There is some silver lining, with miners enjoying historically high gold prices in the face of global economic uncertainties and new gold projects in the pipeline.

The electricity sector has been under intense scrutiny, with heightened concerns about system security in the National Electricity Market due to the changing generation mix, and questions about whether the renewable energy target will be met.

The following snapshot of the key events in energy and resources in the last 12 months demonstrates the challenges being faced by the industry, as well as new opportunities that are being generated.

BAN ON ONSHORE UNCONVENTIONAL GAS EXPLORATION & DEVELOPMENT

Bans have been put in place in Victoria and the Northern Territory, with Victoria taking the unprecedented step of placing a moratorium on drilling conventional gas plays onshore.

WITHDRAWAL FROM MAJOR PROJECTS

Examples of major project withdrawals include BP’s cancellation of its exploration campaign in the Great Australian Bight; Hess Corporation putting its Equus Liquefied Natural Gas (LNG) project on hold; and deferral of the Browse LNG project final investment decision.

CONTINUED CORPORATE RESTRUCTURING ACTIVITY

Restructures have taken place due to pressure on commodity prices and debt levels, with the most recent announcement being Origin Energy’s plans to float its conventional upstream petroleum business, and a proposal by Santos to spin off some of its upstream petroleum assets into a new entity.

CONTINUED PRIVATISATION EFFORTS BY STATE GOVERNMENTS

Privatisation efforts by state governments continue, with the long-term lease of TransGrid and Ausgrid in New South Wales and also Darwin Port in the Northern Territory, and the Government of Western Australia announcing the float of Western Power if it is re-elected in 2017.

SOME SURPRISE ROAD BLOCKS

There were some surprise decisions in relation to continued foreign investment in Australian energy and resources sectors, with the Treasurer blocking the long-term lease of Ausgrid to State Grid Corporation of China on grounds of national interest.

A PERFECT STORM IN SOUTH AUSTRALIA

A perfect storm in South Australia caused widespread blackouts in the state, sparking debate about the role of traditional coal and gas-fired base load generation vs renewables in the National Electricity Market.

TWO MAJOR REVIEWS OF THE EAST COAST GAS MARKETS

Reviews have been undertaken by the Australian Competition and Consumer Commission (ACCC) and the Australian Energy Market Commission (AEMC), resulting in proposals for market reform and further action by the ACCC on competition concerns.

CONTINUING REFORMS IN WESTERN AUSTRALIAN ELECTRICITY MARKET

Reforms continue, with uncertainties in their implementation and direction due to the potential change of government in 2017.

SUPPLY CONSTRAINTS IN EAST COAST GAS MARKET

Gas producers are still seeking to take advantage of the supply constraints in the east coast domestic market, with continued exploration and development in the Cooper Basin, offshore Victoria and onshore Queensland.

KEY ASSIGNMENTS

Provided advice and assistance (including document preparation, negotiation and agreements) on various matters across industry sectors including the following:

DOWNSTREAM GAS, ELECTRICITY & RENEWABLES

Participation and trading in gas, electricity and environmental product markets in eastern Australia, Western Australia and the Northern Territory.

Gas and electricity market developments, including the east coast gas market review, and market reform in Western Australia.

Power station and gas pipeline developments, including connection agreements, network access contracts, Wholesale Electricity Market bilateral contracts, operation and maintenance, and fuel supply.

Long-term power and large-scale generation certificates (LGC) purchase agreements to support development of solar power stations.

Domestic gas sales and transportation agreements in both the east coast gas market and Western Australia, including Australia Pacific LNG's 20-year gas transportation contract with APA Group to support the construction of a gas transportation pipeline from Reedy Creek to the Wallumbilla Gas Hub.

Acquisition and sale of downstream energy assets, including windfarm assets.

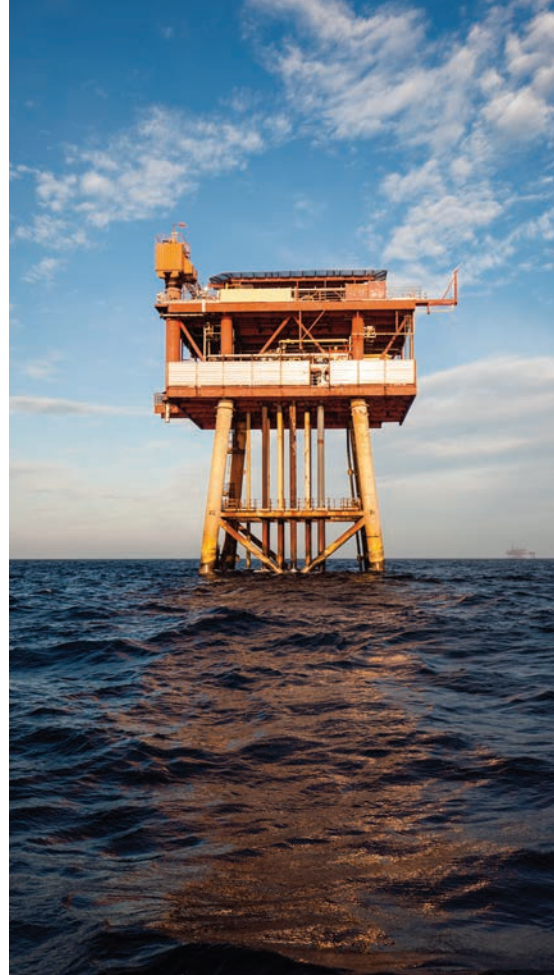
MINING

Acted for minerals producers and explorers, including capital raising, acquisitions and divestments, farm-ins and joint ventures.

Construction and procurement contracts for various mining projects in Papua New Guinea, Africa, Western Australia and New South Wales.

Project approvals, land access, mining tenement grant and native title.

Commodity sales/offtake and transportation agreements.



UPSTREAM OIL & GAS

Acquisition and sale of upstream petroleum assets and gas storage facilities in the Cooper Basin, Western Australia, Queensland and Victoria, including associated due diligence, capital raising and financing.

Ongoing conventional and unconventional upstream oil and gas exploration and development work (both onshore and offshore), including underground gas storage projects.

Joint ventures, joint operating agreements, permit obligations in Australia and Papua New Guinea.

KEY CLIENTS

APLNG
AEMC
BC Iron
Beach Energy
Conocophillips
Cooper Energy
Gold Road Resources
Hess Corporation
Horizon Power
Infrastructure Capital Group
Mitsubishi Corporation
Murphy Oil Corporation
Newmont Mining
Northern Minerals
Northern Star Resources
Osaka Gas
Origin Energy
Perseus Mining
Power And Water Corporation Nt
Senex Energy
Subsea 7
Total E&P
Total Gas & Power
Wesfarmers
Western Power

PROJECTS & CONSTRUCTION

KEY ASSIGNMENTS

BASE TITANIUM

Advised Base Titanium on contracts for the expansion of the Kwale Mineral Sands project in Kenya.

HERON RESOURCES

Prepared and negotiated an engineering procurement and construction (EPC) contract for the tailings and ore processing plant associated with Heron's Woodlawn Zinc-Copper Project in New South Wales. The EPC contract incorporates specific and complex requirements the parties specified in respect of procurement of key equipment and management of certain subcontractors.

PERSEUS MINING

Prepared and advised on engineering procurement and construction contracts and coordination agreements to develop a gold processing facility in Côte d'Ivoire.

SYDNEY ZOO

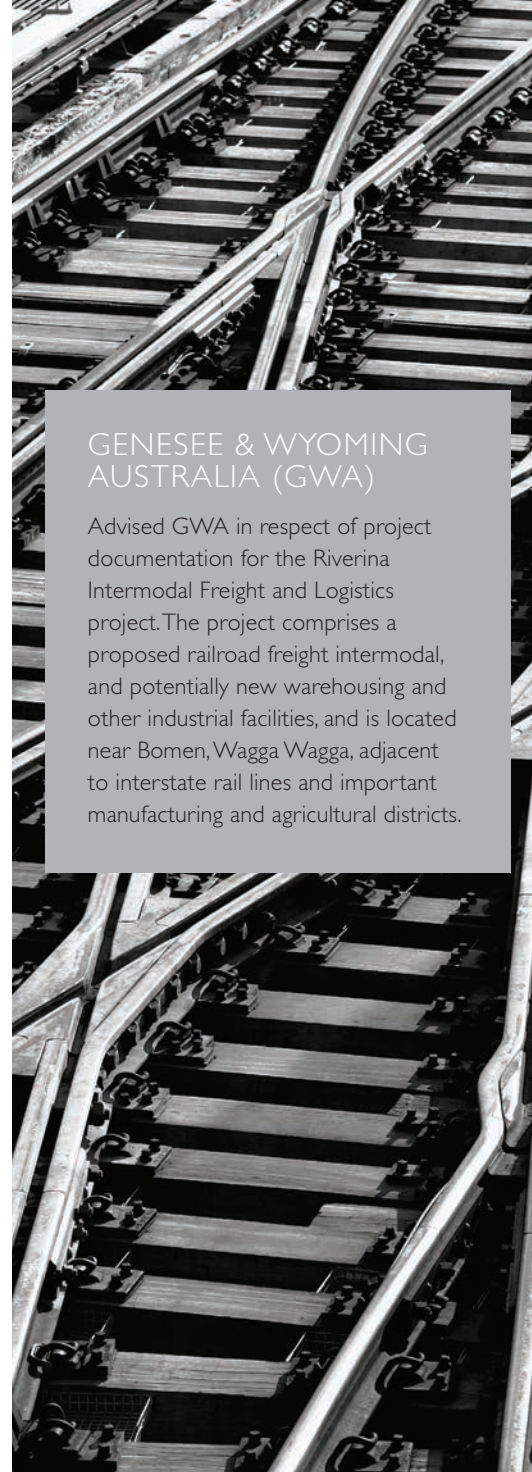
Prepared design and construct contracts for the development of a new 'Sydney Zoo' wildlife park in Western Sydney, including tender documentation for prospective bidders for the design and construct scope of work.

THE UNIVERSITY OF ADELAIDE

Assisted the University of Adelaide with the development of its new Health and Medical Sciences Building in the South Australian Health and Biomedical Precinct, and advised on the procurement of specialist equipment for incorporation into the building, and on contract management issues.

VEOLIA WATER AUSTRALIA

Advised Veolia on the structure and contracts associated with the rebuild and rectification of the Sydney Desalination Plant, which suffered substantial damage caused by a tornado in December 2015. The project includes inspection to verify the cause of damage, design and construction of rebuild or repair works, services supporting the rebuild and repair works and interface arrangements with those parts of the plant that were not damaged.



GENESEEE & WYOMING AUSTRALIA (GWA)

Advised GWA in respect of project documentation for the Riverina Intermodal Freight and Logistics project. The project comprises a proposed railroad freight intermodal, and potentially new warehousing and other industrial facilities, and is located near Bomen, Wagga Wagga, adjacent to interstate rail lines and important manufacturing and agricultural districts.

SPOTLIGHT ON...

REGULATORY DEVELOPMENTS

ENERGY NETWORKS & MARKETS

The Council of Australian Governments (COAG) Energy Council and industry regulators are continuing to drive an extensive program of market and regulatory reform in the east coast energy sector.

Following the first Australian Competition Tribunal decisions made under the new limited merits review framework in the National Gas and Electricity Law, the COAG Energy Council undertook a review, concluding that it was failing to meet its policy intent and reaching in-principle agreement for significant and immediate reforms to be implemented in 2017.

INFRASTRUCTURE ACCESS

In the broader infrastructure sector, port privatisations included the Darwin Port and the award of a 50-year lease for the Port of Melbourne, accompanied by new access or price monitoring regimes.

In May 2016, the Australian Competition Tribunal “declared” the shipping channel service provided by the Port of Newcastle as an open-access facility under Part IIIA of the *Competition and Consumer Act 2010* (Cth). The decision is significant because the Tribunal’s interpretation of criterion (a) under Part IIIA – that access promotes a “material increase in competition” – lowers the threshold faced by access seekers.

Although this approach may ultimately change as a result of proposed legislative reform to Part IIIA or due to an ongoing Federal Court judicial review application, it theoretically means access seekers are currently in a better position to bring access applications, where access to the relevant facility is essential to compete in an upstream or downstream market.

ELECTRICITY MARKETS

In the electricity sector, the headline issue of the year has been system security.

The system operator AEMO has for some time been analysing potential system security issues arising from the increased penetration of renewable generation and the closure (or mothballing) of large synchronous generators. The AEMC has also initiated a system security review.

Following a statewide blackout in South Australia in September 2016, the COAG Energy Council initiated an independent review of the future security of Australia’s National Electricity Market, led by Australia’s Chief Scientist, Dr Allen Finkel AO. The review’s final report is due in 2017.

At the retail level, COAG has responded to the opportunities offered to customers by emerging technologies such as battery storage and microgrids, consulting on regulatory frameworks and related consumer protection issues.

The Australian Energy Regulator has, in turn, reviewed its ringfencing rules for regulated networks, with a view to removing potential barriers to entry and creating a level playing field.

In late 2016, the AEMC initiated a review of the impact of new technology on the operation and regulation of electricity distribution networks.

In Western Australia, the market and system operation role was transferred to AEMO.

However, after years of intensive effort to bring network regulation in the South West Interconnected System (SWIS) under the National Electricity Rules, the necessary legislation to support the reform ran out of time. For the moment, the transition plans are on hold.

In the Northern Territory, a modified version of the National Electricity Rules took effect from 1 July 2016 – part of the ongoing reform of the power sector over recent years.

GAS MARKETS

In the east coast gas markets, the ACCC and the AEMC delivered their reports.

The ACCC focused on competition through the gas supply chain. Among its recommendations were further action in relation to joint marketing, and changes to the threshold test for economic regulation of pipelines.

The latter champions an approach that is likely to produce an expansion of gas infrastructure regulation. Its approach was noteworthy not only on its own account, but also because it highlights

an ongoing policy debate regarding the appropriate role of economic regulation for non-vertically integrated infrastructure, including certain port, rail and airport assets.

The COAG Energy Council referred the recommendation for further consideration and, in late 2016, Dr Michael Vertigan AC delivered his report, recommending changes to enhance transparency and negotiation arrangements but no change to the coverage test for the foreseeable future.

The AEMC reviewed gas market and gas transmission frameworks. It recommended extensive changes to the structure and operation of the facilitated gas markets (the Short Term Trading Market – STTM – and the Declared Wholesale Gas Market – DWGM) and measures to improve access to short-term transmission capacity to support gas commodity market development.

The Gas Market Reform Group has been established by COAG to pursue the market reform program recommended by the AEMC, and its work is expected to continue into 2017 and beyond.

“...after years of intensive effort to bring network regulation ...under the National Electricity Rules, the necessary legislation to support the reform ran out of time.”

EMPLOYMENT

KEY ASSIGNMENTS

LARGE INTERNATIONAL CREDIT INFORMATION COMPANY

Successfully defended the managing director of our client in post-employment restraint of trade proceedings commenced against him by his former employer for injunctive relief in the Supreme Court of NSW. The decision is significant as it is one of the few cases that consider the enforceability of geographic areas in post-employment restraint provisions.

LARGE VENTURE CAPITAL FUND

Represented a large venture capital fund in threatened proceedings under the *Independent Contractors Act 2006* and a contractual dispute with its former partner, who claimed to be an employee and made a claim over fund entitlements.

LEADING UNIVERSITY

Successfully defended a leading university in Federal Circuit Court proceedings, and subsequent Federal Court appeal proceedings, regarding adverse action, breach of contract, misrepresentation, breach of industrial instruments and discrimination on the grounds of political opinion.

LEADING UK SNACKFOOD MANUFACTURER

Provided advice in relation to employment issues arising from its acquisition of an Australian food manufacturer, including advice regarding contracts of employment to new employees and independent contractor arrangements and termination of employment issues. We successfully represented the employer before the Fair Work Commission in opposing an application for a majority support determination made by the Australian Manufacturing Workers' Union.

INTERNATIONAL MEDICAL RESEARCH COMPANY

Advised in relation to the termination of employment of two of its scientists for unsatisfactory performance, serious misconduct, research misconduct and threatened manipulation of research data following allegations by them of bullying by their supervisor. We also acted in the subsequent unfair dismissal claim brought by one of the scientists in the Fair Work Commission.

LEADING AGED CARE PROVIDER

Advised on the potential implications of an enterprise agreement with its nursing staff and the union's rights to enter the workplace and conduct meetings with the staff. We also appeared before the Fair Work Commission to oppose an application for a majority support determination made by the NSW Nurses and Midwives' Association.

LEADING INTERNATIONAL ELECTRONIC GOODS MANUFACTURER

Advised in relation to a large-scale restructure across their Australian operations, including preparing outsourcing arrangements and labour supply agreements, as well as implementing redundancies and managing termination claims.

LEADING TELEVISION NETWORK

Acted for a leading national television network in a high-profile matter in which we successfully obtained an injunction against a former employee for breach of confidentiality and other obligations as well as related sexual harassment proceedings following a workplace relationship and a fraud investigation.



CONTACT

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