April 2006 e-BULLETIN

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- PRAC @ Inta – Toronto 2006 PRAC Members Gathering – Sunday, May 7 (see Member Events)
- Thailand 2006 Conference – May 13-19, 2006 (advance materials on line)
- San Diego 2006 Conference – October 14 -18, 2006
- Los Angeles 2006 Follow on Program – October 18 -19, 2006
- PRAC @ IPBA / IBA - Reception and Dinner Hosted by Clayton Utz - April 30

Tools to Use
- PRAC Contacts Matrix & Email Listing –Update (members' version only)
- Directory 2006 Member Firms now **available** at PRAC web site
- Expert System available at PRAC web site Private Libraries (members only)
- Intellectual Property & Licensing Capabilities Survey – (members only)

PRAC e-Bulletin is published monthly
Visit us on line at www.prac.org

LUCE FORWARD HAMILTON & SCRIPPS BOLSTERS TRUSTS AND ESTATES PRACTICE

Rancho Santa Fe attorneys James M. Cowley, Steven J. Chidester, Michelle B. Graham, Kristina A. Hancock and Michael Folz Wexler joined Luce Forward's growing Trusts and Estates / Estate Planning Practice Group, effective April 1, 2006, according to the firm's Executive Committee. Cowley, Chidester and Graham will join Luce Forward as Partners, while Hancock and Wexler will join the firm as Senior Counsel.

"These outstanding attorneys are noted for their practice representing high net worth families and substantial nonprofit organizations. They bring a wealth of experience to Luce Forward, and will add to the breadth and depth of our Trusts and Estates Practice Group," said Robert J. Bell, Luce Forward's Managing Partner. "Their national practice will contribute to the firm's strategic growth, and our goal of creating the West Coast's strongest Trusts and Estates practice."

Earlier this month, ten highly-regarded trusts and estates attorneys joined Luce Forward's Los Angeles office, enhancing the strength of the firm's Trusts and Estates practice statewide.

All five Rancho Santa Fe attorneys currently practice with Holland & Knight. Cowley and Chidester formed the firm Cowley & Chidester in Rancho Santa Fe in 1992, and brought their practice to Holland & Knight in 2003.

"In order to best serve our clients, it is important to have the strength of a full service firm in San Diego. Luce Forward's presence in both downtown San Diego and Carmel Valley/Del Mar was a significant factor attracting us to the firm. We are pleased to have the opportunity to combine our practice with one of California's leading firms and the largest in San Diego County," Cowley said.

The new attorneys will practice from Luce Forward's new Rancho Santa Fe office, as well as Luce Forward's Carmel Valley / Del Mar office.

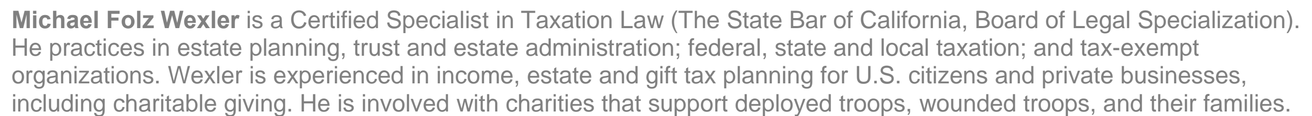
"We are proud to welcome Jim, Steve, Michelle, Kristina and Michael to Luce Forward," said Frederick R. Vandeveer, leader of Luce Forward's Trusts and Estates Practice Group. "I am confident that they will be instrumental in the success of our practice group and the success of our clients."

James M. Cowley practices in estate planning, trust and estate administration, charitable giving, and the representation of tax-exempt organizations, and has more than 30 years of experience. He is a Fellow of the American College of Trust and Estate Counsel (ACTEC), and serves on the Board of Governors and Executive Committee of the San Diego Foundation as well as the Board of Directors of the YMCA of San Diego County, where he chairs the Endowment and Planned Giving Committee. Cowley, who has written and lectured extensively in continuing legal education forums and is a co-author of Advising California Nonprofit Corporations, is listed in The Best Lawyers in America.

Steven J. Chidester also practices in estate planning, trust and estate administration, charitable giving, and the representation of tax-exempt organizations. He is experienced in executive compensation, focusing on compensation and intermediate sanctions issues for tax-exempt organizations. Mr. Chidester has represented exempt organizations in civil and probate court and before state Attorneys General. He serves on the American Bar Association's Committee on Estate and Gift Tax, Committee on Exempt Organizations of the Section of Taxation, and Real Property, Probate and Trust Law Section and is listed in The Best Lawyers in America.

Michelle B. Graham's practice focuses on estate planning and tax planning strategies for both domestic and international individuals and tax-exempt organizations. She is the Chair of the International Law Section of the San Diego County Bar Association and a member of the San Diego County Humane Society Advisory Board and the Planned Giving Committee of KPBS.

Kristina A. Hancock focuses on representation of tax-exempt organizations, charitable giving, estate planning and estate and trust administration. She is an Adjunct Professor at California Western School of Law and is the incoming Chair of the American Bar Association TIPS Animal Law Committee. She currently serves on the Board of Directors of San Diego's Spay Neuter Action Project and previously served for five years as the President of the San Diego's City Ballet, where she currently serves on the Advisory Board.



Michael Folz Wexler is a Certified Specialist in Taxation Law (The State Bar of California, Board of Legal Specialization). He practices in estate planning, trust and estate administration; federal, state and local taxation; and tax-exempt organizations. Wexler is experienced in income, estate and gift tax planning for U.S. citizens and private businesses, including charitable giving. He is involved with charities that support deployed troops, wounded troops, and their families.

For additional information visit www.luce.com

ESTUDIO MUŇIZ RAMIREZ PĖREZ-TAIMAN & LUNA-VICTORIA – INTELLECTUAL PROPERTY EXPERT JOINTS FIRM

Estudio Muñiz, Ramírez, Pérez–Taiman & Luna-Victoria Abogados announced that lawyer Bruno Mérchor Valderrama has joined the Firm´s Intellectual Property Practice Group.

Prior to joining the Firm, Mr. Mérchor served as Deputy Head of INDECOPI´s Invention and New Technology Office, completed a Master´s degree program in Corporate Law from the Catholic University School of Law, and pursued advanced law studies in Switzerland, Korea, United States, Germany, Holland, Bolivia and Cuba.

For additional information visit www.munizlaw.com

MORGAN LEWIS CONTINUES EXPANSION OF ITS LABOR AND EMPLOYMENT PRACTICE

Los Angeles, April 13, 2006 — Carla Feldman joined Morgan, Lewis & Bockius LLP as a Labor and Employment Law Practice Group partner based in Los Angeles. Carla has 20 years of litigation experience encompassing a spectrum of employment law issues including sexual harassment, gender discrimination, race and national origin discrimination, reasonable accommodation, breach of employment contract and Business & Professional Code § 17200. She has handled more than 100 jury trials.

A Southern California native, Carla will strengthen Morgan Lewis' ties with prospective clients in key industries based in the region. Her client experience has spanned major consultant, entertainment, civic and government clients. Carla is a well-respected member of the California legal community and has been named a Top Female Litigator for the last three years and a Southern California Super Lawyer for the last four years.

Carla obtained her J.D. from the University of San Diego in 1985, after receiving her B.A. from the University of California at San Diego.

Morgan Lewis' Labor and Employment Law Practice Group was acknowledged in The American Lawyer as the Litigation Department of the Year – Labor and Employment for 2006. Recently, Morgan Lewis was ranked as one of the top three labor and employment law practices by Corporate Counsel magazine's "Who Represents America's Biggest Companies." The firm has more than 230 labor and employment attorneys in the United States and Europe.

About Morgan, Lewis & Bockius LLP
Morgan Lewis is a global law firm with more than 1,200 lawyers in 20 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Irvine, London, Los Angeles, Miami, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis, please visit www.morganlewis.com.

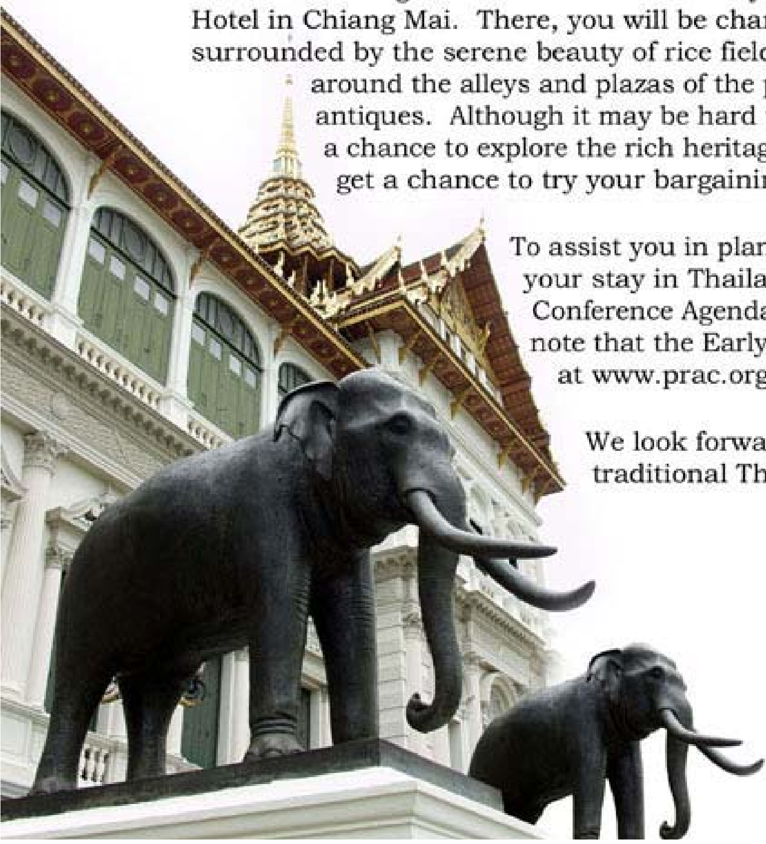
Delegates
PRAC 2006 Conference
Thailand

Sawasdee Krab! We are delighted to host the 39th Conference, to be held in sunny and exotic Bangkok and Chiang Mai from May 13 to 19, 2006.

Bangkok is a city that never sleeps. It may be a bit overwhelming by its size and intensity at first, but it is also a city whose rich variety you will discover neighborhood by neighborhood, market by market. You and your companions will marvel at the luxuriance of the Royal Palace and that of other temples in Bangkok and in nearby Ayudhaya, the ancient capital. You will stay in the world's best hotel, The Oriental Bangkok, on the shores of the busy Chao Praya River.

Our proposed business program includes a Public Seminar with an Intellectual Property theme, as well as several PRACtice group meetings which will take place over the course of the conference. TGI will also be pleased to provide an opportunity for Delegates to visit our offices located in the heart of our business center in downtown Bangkok.

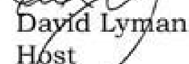
We also invite you to attend the Follow On Program in Chiang Mai, where our business program continues. Delegates and Guests will be staying at the enchanting Mandarin Oriental Dhara Dhevi Hotel in Chiang Mai. There, you will be charmed by the atmosphere of ancient Thai palaces, surrounded by the serene beauty of rice fields, and at the same time you will enjoy wandering around the alleys and plazas of the property and discover a small village full of marvelous antiques. Although it may be hard to get you to leave this exceptional hotel, you will get a chance to explore the rich heritage of Chiang Mai. You will see elephants at work and get a chance to try your bargaining skills at the famous Night Bazaar.



To assist you in planning your participation in the various offerings during your stay in Thailand, the following pages outline the Preliminary Conference Agenda and Pre- and Post-Conference Tour Options. Please note that the Early Indication Form is now available for you to complete at www.prac.org.

We look forward to seeing you in Thailand to offer you a taste of traditional Thai hospitality.

Sincerely,



David Lyman
Host

MAKING NEWS - GIDE LOYRETTE NOUEL ADVISES EURAZEO ON THE €3 BILLION ACQUISITION OF EUROPCAR

Eurazeo had reached a final agreement with Volkswagen AG regarding the acquisition of 100% of the capital of Europcar, the leading European car rental outfit, and the financing of its vehicles fleet, for more than €3 billion.

The terms of this agreement have been approved by the management board of Volkswagen AG. The completion of the transaction is subject to two conditions:

- formal ratification by the Volkswagen AG supervisory board and
- clearance from the relevant competition authorities,

which should take place during the second quarter of 2006.

Eurazeo was advised by Gide Loyrette Nouel on the structuring of the financing of this transaction and the negotiation of the financing's terms and conditions with the various banks. The Gide Loyrette Nouel transaction team was managed by **Error! Hyperlink reference not valid.** (as partner with overall responsibility), assisted by Sami Fakhoury (as lawyer in charge)

For additional information visit www.gide.com

MAKING NEWS – HOGAN & HARTSON ACHIEVES VICTORY ON BEHALF OF AMGEN, INC.

BALTIMORE, April 10, 2006 – Lawyers with Hogan & Hartson L.L.P. recently achieved a significant victory for Amgen Inc. when the Sixth Circuit Court of Appeals affirmed the denial of a motion for preliminary injunction by a judge of the Eastern District of Kentucky. The motion was filed by eight participants in a clinical trial for the drug GDNF. Due to two serious safety concerns and a demonstrated lack of efficacy, Amgen cancelled the study of the drug for treatment of Parkinson's Disease.

The plaintiffs alleged that Amgen had promised to provide them with GDNF indefinitely, and brought claims against the pharmaceutical company for breach of contract, breach of fiduciary duty, and promissory estoppel. The district court agreed with Amgen who argued that it had no contract with the plaintiffs, and that all study documents clearly stated that Amgen retained the authority to cancel the study at any time.

The Sixth Circuit concluded that the plaintiffs have little chance of success on their claims, and further stated that the district court did not abuse its discretion in reaching its decision to deny the motion.

Hogan & Hartson Baltimore partner Mark Gately argued the case at the Sixth Circuit, and the appellate brief was prepared by Washington, D.C. partner Catherine Stetson, and associates Michele Sartori and Jessica Ellsworth. At the district court level, the matter also involved Washington, D.C. partner Dave Fox and New York partner Dennis Tracey, and along with Baltimore associate Lauren Colton and Washington, D.C. associates Ellen Chung and Nancy Parsons.

For additional information visit www.hhlaw.com

MAKING NEWS – MORGAN LEWIS ASSISTS UNIVERSAL MUSIC GROUP WITH MULTIYEAR COMMUNICATIONS OUTSOURCING DEAL

New York, March 23, 2006 — Morgan Lewis is pleased to announce that it has secured an outsourcing contract for client Universal Music Group (UMG), the world's leading music company. The outsourcing deal, with Paris-based Equant, a unit of France Telecom, will allow UMG to focus its IT resources on recording-industry IT applications instead of networking needs, and to transform its current network into a fully managed IP solution.

Partner Edward J. Hansen, who led the Morgan Lewis deal team for UMG, said the transaction is an example of the firm's ability to "draw on the specialized skills of our outsourcing lawyers, and on our resources worldwide, particularly in New York, London and Paris." The transatlantic Morgan Lewis deal team also included Sol Irvine, Craig Garnett, Teresa Minger, and Ajay Ayyappan in New York; Stéphan Alamowitch, Florence Guthfreund-Roland, and Jelena Vodjevic in Paris; and Michael Cashman in London.

The five-year deal spans 48 countries and is innovative in many respects. It covers all elements of UMG's communications infrastructure, including global WAN and LAN, managed voice and IP telephony, mobility, web hosting and vendor management. UMG has about 9,000 internal users on its network, in addition to thousands of people who work for its business partners.

About Morgan, Lewis & Bockius LLP

Morgan Lewis is a global law firm with more than 1,200 lawyers in 20 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Irvine, London, Los Angeles, Miami, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis, please visit www.morganlewis.com.

MAKING NEWS – NAUTADUTILH WINS SIGNIFICANT TEST CASE FOR ABN AMRO

Banks now safe after releasing collateral

Arend-Jaap van der Lely and Teun Struycken have won a significant test case in ABN AMRO v. Van Westerveld qq (Quality Ice Cream). Where collateral is sold through a private sale, banks are usually prepared to release their security interest if the sale proceeds will be used for credit repayments. Such an arrangement is usually carried out by having the notary in charge of the sale transfer the sale proceeds to the account of the seller/ mortgagor at the bank.

In ING v. Gunning qq, the Arnhem District Court, the Arnhem Court of Appeal and the Supreme Court ruled that the payment made by the notary was a payment to the account holder. When the account holder went into bankruptcy shortly after receipt of the payment, the bank was not allowed to set off the proceeds against the client's debt. The result: no collateral and no repayments.

In ABN AMRO v. Van Westerveld qq, Arend-Jaap and Teun argued that the transfer to the client's account had a merely administrative function, and that the payment had to be considered as one to the bank.

For addtiional information visit www.nautadutilh.com

MEMBER EVENTS

PRAC Members Reception INTA Toronto 2006
Date: Sunday, May 7 - 3:30 to 5:30 pm
Place: Azure Restaurant (located inside Intercontinental Hotel connected to Metro Convention Centre)
Event: Reception (Members only event) – rsvp by May 3 online www.prac.org

PRAC Member: Clayton Utz
Date: Sunday, April 30 8:30 pm
Place: Aria Restaurant, 1 Macquarie Street, Sydney NSW
Event: PRAC Members attending IBA / IPBA are invited to attend a reception and dinner.

RSVP by April 20 to Ellicia Hayes at ehayes@claytonutz.com

PRAC Member: Tilleke and Gibbins International Ltd
Date: May 13-19, 2006
Place: Bangkok Oriental and Mandarin Dhara Dhevi (Chiang Mai)
Event: PRAC 39th International Conference
*members only event. Visit www.prac.org for details

PRAC Member: Hogan & Hartson LLP
Date: May 17, 2006
Place: Columbia Square, 555 Thirteenth Street, NW, Washington, D.C.
Event: Seminar

Navigating the Waters of E-discovery & Data Preservation

The digital age has created new challenges and obligations for lawyers. The ease with which copious amounts of information can be saved -- or deleted -- makes data preservation a priority for any in-house counsel involved in litigation or information technology. Recent court decisions have imposed heavy burdens on in-house counsel, and expense on corporate litigants, to ensure that relevant electronic information is retained, located, and produced.

This educational program is a must for any in-house lawyer or IT professional tasked with responding to discovery demands in a lawsuit or with maintaining a corporate document retention policy.

For more information about this event, including details on registration, please visit the following link:
http://www.hhlaw.com/tmp/0603_EdiscoveryDC/0603_DCediscovery_seminar.html

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PRAC Member: WilmerHale
Date: Thursday, May 4, 2006
Place: WilmerHale, 60 State Street, 26th Floor, Boston, MA 02109
Event: Conference

The WilmerHale Intellectual Property Conference: Examining the Latest Developments in Intellectual Property Law

The emergence of new challenges in the protection of intellectual property continues to reshape the domestic and global IP landscape. Protecting and leveraging your intellectual property in today's complex environment is more critical now than ever before. Join us at the 2006 WilmerHale Intellectual Property Conference, where our leading lawyers will examine some of the key issues and trends shaping intellectual property in the courts and in practice.

For more information visit http://www.wilmerhale.com/events/whEventsDetail.aspx?firmEvent=1103

John Elliott and Louise McCoach

Key Point

- Regardless of whether there is an appeal, industry players who are looking at takeover plays and institutions who may offer swaps should still exercise caution.

The use of cash-settled equity swaps in takeover activity involving Australian listed companies received considerable media attention during the events leading up to the making of a declaration of unacceptable circumstances by the Australian Takeovers Panel on 1 July 2005.

The declaration was made in relation to the non-disclosure by Glencore International Ag of cash-settled equity swaps it had entered into regarding shares in Austral Coal Limited, which was the subject of a takeover bid by Centennial Coal Limited at the time.

This article summarises the events leading up to the making of the declaration of unacceptable circumstances on 1 July 2005 and updates the position since our earlier article.

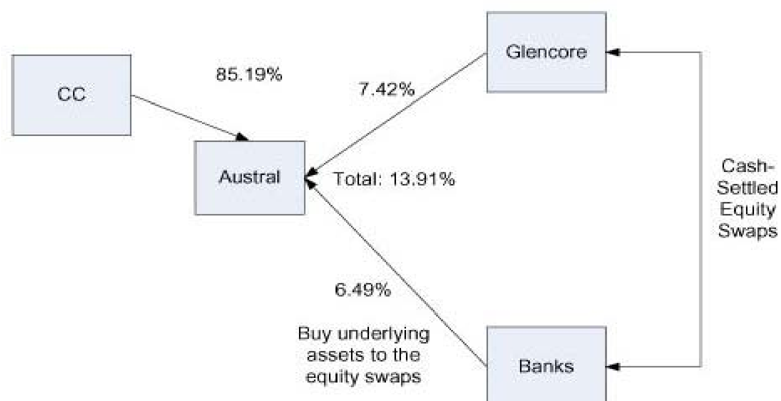
Summary of background facts

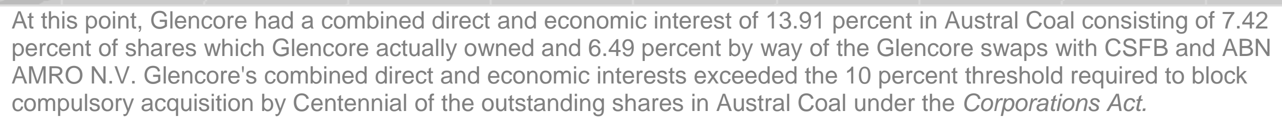
The takeover bid by Centennial for Austral Coal commenced on 23 February 2005, when Centennial and Austral Coal announced a recommended scrip bid of 10 Centennial shares for 37 of Austral Coal's shares, which valued Austral Coal shares at $1.10. The bid was conditional on 90 percent minimum acceptance (and was subsequently declared unconditional). The bid would extend to Austral Coal's 40 million convertible notes, if they converted to shares after the bid was declared unconditional.

Between 21 March and 4 April, Glencore acquired cash-settled equity swaps over shares in Austral Coal. Together with the Austral Coal shares that Glencore held, the Glencore swaps amounted to over 5 percent of Austral Coal. This "combined holding" was made public by Glencore on 4 and 5 April (by which point Glencore had physically acquired approximately 5 percent of Austral Coal and the Glencore swaps were covered by hedge shares totalling more than 5 percent of Austral Coal).

On 5 April, Centennial announced to the market that it had reached 34.34 percent of Austral Coal.

The status of the ownership of shares in Austral Coal at that time can be demonstrated by the below diagram.





At this point, Glencore had a combined direct and economic interest of 13.91 percent in Austral Coal consisting of 7.42 percent of shares which Glencore actually owned and 6.49 percent by way of the Glencore swaps with CSFB and ABN AMRO N.V. Glencore's combined direct and economic interests exceeded the 10 percent threshold required to block compulsory acquisition by Centennial of the outstanding shares in Austral Coal under the *Corporations Act.*

By early June 8, Centennial held 85.19 percent in Austral Coal but was still unable to satisfy the 90 percent compulsory acquisition requirement. If Glencore continued to hold its 5 percent stake, and the counterparties to the Glencore swaps continued to fully hedge their position, it was clear to Centennial that it would not be able to reach the 90 percent compulsory acquisition threshold.

History of earlier Panel decisions

On 3 June 2005, Centennial applied to the Panel seeking a declaration of unacceptable circumstances in relation to Glencore's use of cash-settled equity swaps. Centennial alleged that unacceptable circumstances existed in relation to the failure by Glencore to make timely disclosure of the combined holding of swaps and shares increasing beyond 5 percent of the issued voting shares in Austral Coal.

Centennial asked the Panel to unwind the Glencore swaps and to order the banks to dispose of their hedging shares either into Centennial's bid or on-market to persons other than Glencore, so that the underlying shares could be accepted into the offer.

The Panel agreed with Centennial and ruled that it had been unacceptable for Glencore not to have disclosed its combined holding of swaps and shares as soon as it equated to 5 percent of Austral Coal (ie, beginning on 21 March). The Panel ordered that:

- Glencore disclose the essential terms of the Glencore swaps to the market;
- Glencore offer to sell to any person who sold Austral Coal shares in a transaction reported to ASX which was entered into during the period that Glencore's "combined holding" had not been disclosed to the market (ie. from 9.30 am on 22 March until the opening of trading on 5 April), the same number of Austral Coal shares as the person sold in that transaction, at the same price that the person sold those shares.

The Panel also made a supplementary order that if Glencore received acceptances for more shares than it actually held, those excess acceptances were to be met by Glencore's buying the required shares from the hedging shares held by the two banks at the initial price under the swaps. The size of the equity swaps was to be reduced in proportion to the number of shares acquired from the banks.

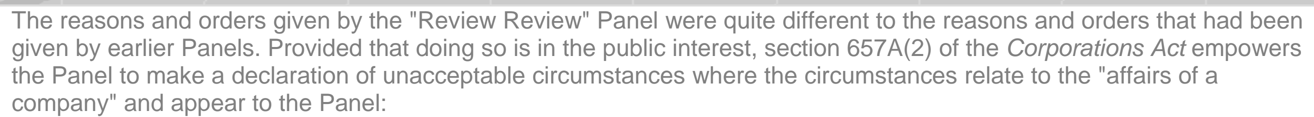
Glencore appealed the decision to a Review Panel, but the Review Panel came largely to the same conclusions. However, the Review Panel did not continue the disclosure order (apparently because the market was now sufficiently informed) and did not make the supplementary order that if Glencore did not have sufficient shares to restore the shareholders, Glencore could acquire them from the banks. Instead, the Review Panel made a similar order that Glencore sell its Austral Coal shares to anyone who had sold Austral Coal shares on the ASX during the time (between 22 March and 5 April) that Glencore's combined holding of swaps and shares had not been disclosed to the market, at the same price that the person had sold those shares.

The Review Panel also ordered the banks not to sell their shares until it was clear whether Glencore would be able to discharge its obligations under the Review Panel's orders solely by reference to Glencore's direct shareholding.

In response, Glencore applied to the Federal Court for judicial review of the Review Panel's decision, at which point the above orders were stayed, pending a review of this decision.

This application was successful. The Federal Court quashed the Review Panel's declaration and orders and sent the matter back to the Review Panel for rehearing.

On 28 October 2005, after reconsidering Glencore's application, the "Review Review" Panel announced that it had made a declaration of unacceptable circumstances in relation to the failure by Glencore to disclose its combined holding of swaps and shares between 22 March 2005 and 4 April 2005, during the takeover bid by Centennial for Austral Coal. Its reasons were published on 15 November 2005.**The "Review Review" Panel's reasons**



The reasons and orders given by the "Review Review" Panel were quite different to the reasons and orders that had been given by earlier Panels. Provided that doing so is in the public interest, section 657A(2) of the *Corporations Act* empowers the Panel to make a declaration of unacceptable circumstances where the circumstances relate to the "affairs of a company" and appear to the Panel:

- to be unacceptable having regard to their effect on:
    - the control, or potential control, of the company or another company (section 657A(2)(a)(i)); or
    - the acquisition or proposed acquisition, by a person of a substantial interest in the company or another company (section 657A(2)(a)(ii)); or
- to be unacceptable because they give rise to a contravention of Chapter 6, 6A, 6B, or 6C (section 657A(2)(b)).

The earlier Panels had held that Glencore's non-disclosure of its acquisitions of cash-settled equity swaps was unacceptable because of its effect on the control of Austral Coal. In making this finding they had relied on section 657A(2)(a)(i) of the *Corporations Act*. The decision announced on 28 October 2005 focussed instead on whether non-disclosure was unacceptable having regard to the "acquisition … of a substantial interest in" Austral Coal, this time in reliance of section 657A(2)(a)(ii) of the *Corporations Act*.

The Panel concluded that there was an acquisition of a substantial interest by both Centennial and Glencore. The repeated non-disclosure of Glencore's combined holding as it moved from 5 percent to over 10 percent was unacceptable because, on the Panel's analysis, disclosure would have pushed up the price of Austral shares. Non-disclosure, therefore, allowed both Centennial and Glencore to acquire their substantial interests more cheaply than would otherwise have been the case. The disclosure would also have reduced the liquidity of Austral Coal, as Austral Coal holders withheld their shares to see what was going to happen. Therefore, non-disclosure also allowed Centennial and Glencore to acquire their substantial interests more quickly.

Interestingly, although the Panel was quite prepared to find that Glencore's combined holding of swaps and shares constituted a substantial interest, it stopped short of finding that the combined holding constituted a relevant interest for the reason that:

"Despite the strong commercial incentive to retain the hedge shares, the exposures were not large ones for institutions as large as CSFB and ABN AMRO, it was always within their power to dispose of their hedge shares at any time during the Non-disclosure Period and they would have disposed of them, had they perceived it as being in their own interest to do so."

Another interesting aspect was the Panel's holding that Glencore and the investment banks with whom it entered into the swaps were not associates.

Under section 12(2)(b) of the Corporations Act, a person's associates include anyone with whom that person has or proposes to enter into an agreement in relation to the control of the management or affairs of another a company or its board. Under section 12(2)(c) of the Corporations Act, a person's associates include anyone with whom that person is *acting in concert* in relation to the control of the management or affairs of another a company or its board (whether or not there is a formal agreement to that effect).

The banks and Glencore were not "parties to a relevant agreement for the purpose of controlling or influencing the composition of the board or the conduct of the affairs of Austral Coal" (section 12(2)(b)) - this was because, at the relevant time, Glencore didn't intend to bid for Austral.

Section 12(2)(c) was a much more close-run thing: were the banks and Glencore "acting in concert in relation to the affairs of" Austral Coal? The Panel apparently interpreted this as meaning that the parties must share the same objective. It concluded:

"The evidence is in the end insufficient to establish that CSFB shared Glencore's inferred objective, namely to block compulsory acquisition. It was aware of Glencore's objective and that its provision of hedged swap exposure contributed materially to achieving that objective, but there is no direct evidence that CSFB agreed to assist, agreed or accepted instructions to hedge the swap with Austral Coal shares, or otherwise stepped outside the ordinary course of its business to oblige Glencore."

The "Review Review" Panel's orders

Because Centennial was now at just under 90 percent and had made an unconditional scrip bid, it was far too late to put everyone back in their starting places. Accordingly, the Panel restricted itself to calculating the price benefit that Glencore had gained by its non-disclosure. This came to just over 5 cents per share. Accordingly, the Panel ordered Glencore to pay that amount to everyone who'd sold on market during the non-disclosure period (this to be done by giving ASIC a cheque for $1.3 million and ASIC to distribute the money).

Glencore goes back to the Federal Court

Glencore appealed to the Federal Court against the new orders made by the Panel. The case was heard in February 2006 and in March this year Justice Emmett handed down his decision. Once again, he ruled that the Panel's reasons and orders were defective. There were two key elements in the Court's reasons.

(1) A substantial interest

Because the swaps were cash-settled, Glencore had no power over the hedging shares that the counterparties acquired. On this basis, the "Review Review" Panel had concluded, Glencore had no relevant interest in the hedging shares. However, the "Review Review" Panel also concluded that the swaps had given Glencore a "substantial interest" in Austral (within the meaning of section 657(2)(ii)).

Justice Emmett said that these two conclusions could not be reconciled. In his view, a "substantial interest in the company" must relate to the control of the company. This does not mean that it must be an interest in shares, but:

"it may involve the power to exercise or control voting of the shares or power to dispose of or control the disposition of shares, however ephemeral or unenforceable the power or control might be. The interest must be such that it can be a step on the path of control of the company, in the sense of having a say in the decision making processes of the company."

Glencore's holding of cash-settled equity swaps didn't satisfy this test.

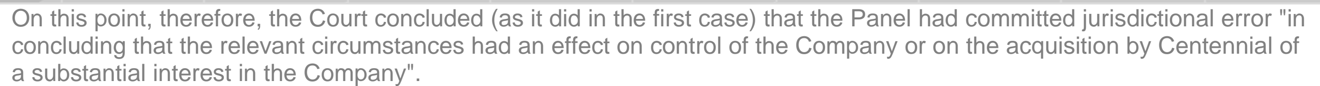
(2) The unacceptable circumstances

Section 657A allows the Panel to declare circumstances to be unacceptable having regard to, inter alia, the acquisition of a substantial interest. The Panel found that Glencore's non-disclosure of the swaps was unacceptable because:

- Centennial's bid had been successful sooner than it would otherwise have been (because earlier disclosure would have led the market to believe that Glencore was a rival bidder, and wouldn't have been quite so hasty to accept into Centennial's bid);
- Centennial's bid had been successful to a greater extent than it would otherwise have been;
- Centennial's bid was possibly successful at a lower consideration that would otherwise have been the case.

The Federal Court dismissed all three conclusions:

- bid successful sooner - the problem here was that the rate of acceptances received by Centennial had actually gone up after Glencore eventually disclosed its hand;
- bid successful to a greater extent - the problem here was there was no reasoning to explain why target shareholders would not have tipped into the Centennial bid in the end, when it became clear that Glencore wasn't going to launch a successful bid;
- bid successful at a lower offer price - earlier disclosure by Glencore may have resulted in a more informed market, but the Panel had not determined what the actual effect of non-disclosure had been on the prices paid during the non-disclosure period (a matter borne out by its reference to the bid's being "**possibly** successful at a lower consideration" (emphasis added).



On this point, therefore, the Court concluded (as it did in the first case) that the Panel had committed jurisdictional error "in concluding that the relevant circumstances had an effect on control of the Company or on the acquisition by Centennial of a substantial interest in the Company".

Conclusion

The Federal Court decision was handed down only recently, so it is too soon to say that we have closure on the issue of swaps in takeovers.

For example, the Panel may lodge an appeal. That would throw everything back into the melting pot.

However, regardless of whether there is an appeal, industry players who are looking at takeover plays and institutions who may offer swaps should still exercise caution. Even if the Court decision against the Panel is left untouched, it does not follow that the swap floodgates have been opened. The Glencore case involved two relatively unusual facts:

- although Glencore was in the market buying Austral shares, it was not a rival bidder;
- by the time that the matter came to Court (and even to the Panel), the bid was effectively over - a matter that the Federal Court indicated as being influential in its decision to hear Glencore's application in the first place.

Also, given the Panel's close scrutiny of whether Glencore and the bank counterparties were associates or had relevant interests in each other's shares, it is quite possible that a different case with slightly different facts might see a declaration that the association and/or relevant interest provisions had been triggered by a combination of swaps and understandings between the two sides of the swap.

For further information, please contact John at jelliott@claytonutz.com or Louise at lmccoach@claytonutz.com or visit www.claytonutz.com

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Tozzini Freire Teixeira e Silva Advogados

TFTS News

No 2/2006

March 3, 2006

Tax and Capital Markets

Latest Issues

- Brazil: Law Confirms the Use of Arbitration as Means of Dispute Resolution on Public Services Concession
- Brazil: Superior Court of Justice Recognizes a Foreign Arbitral Award Over Public Policy Objections
- Brazil: Carbon Credits Included in Foreign Exchange Regulations
- Brazil: New Resolution Should foster Hedge Transactionst

BRAZIL: TAX BENEFITS FOR FOREIGN INVESTORS

By virtue of a Provisional Measure issued by the Brazilian government, effective as of February 16, 2006, certain changes were made to the taxation of financial investments in Brazil.

The most relevant change was a reduction to zero of the income tax rate applied over income obtained by foreign individuals and legal entities investing in Brazilian federal debt securities.

The zero tax rate is also available to investments made through a mutual fund directed exclusively to foreign investors and with a portfolio of at least 98% in federal debt securities.

The tax benefit, however, is not extended to investors domiciled in tax haven jurisdictions, i.e., countries that do have an income tax or that impose such tax at a maximum rate lower than 20%.

With respect to investments made prior to February 16, 2006, investors may choose on or before August 31, 2006 to pay in advance income taxes already accumulated, whereas future earnings shall benefit from the zero tax rate.

Tax

Ana Cláudia Akie Utumi
Partner - São Paulo
autumi@tozzini.com.br

Fábio Rosas
Partner - São Paulo
frosas@tozzini.com.br

Jorge Henrique Amaral Zaninetti
Partner - São Paulo
jzaninetti@tozzini.com.br

Alde da Costa Santos Júnior
Partner - Brasília
alde@tozzini.com.br

Gustavo Nygaard
Partner - Porto Alegre
gnygaard@tozzini.com.br

Gladson Wesley Mota Pereira
Partner - Fortaleza
gpereira@tozzini.com.br

Capital Markets

Antonio Felix de Araujo Cintra
Partner - São Paulo
afcintra@tozzini.com.br

Ana Carolina de Salles Freire
Partner - São Paulo
afreire@tozzini.com.br

Vladimir Miranda Abreu
Partner - São Paulo
vabreu@tozzini.com.br

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January 2006

Chinese Environmental Law and Legislation on RoHS and WEEE

By Xu Ping and Liu Jingming*

I. General Introduction of Chinese Environmental Law

There are a series of laws and regulations in place that constitute the Chinese environmental law system. The major laws and regulations, include without limitation to, the following:

- *The Environmental Protection Law of the PRC*, promulgated by the Standing Committee of the 7th National People's Congress and effective on 26 December 1989;
- *The Law on Preventing Solid Waste from Polluting the Environment* ("Solid Waste Law"), adopted by the Standing Committee of the 8th National People's Congress on 30 October 1995 and revised by the Standing Committee of the 10th National People's Congress, and the revision has been effective as of 1 April 2005;
- *The Law on Promoting Clean Production* ("Clean Production Law"), promulgated by the Standing Committee of the 9th National People's Congress on 29 June 2002 and effective as of 1 January 2003;
- *The Environmental Impact Appraisal Law,* adopted by the Standing Committee of the 9th National People's Congress on 28 October 2002 and effective as of 1 September 2003;
- *The Marine Environmental Protection Law*, adopted by the Standing Committee of the 5th National People's Congress on 23 August 1982 and revised by the Standing Committee of the 9th National People's Congress on 25 December 1999, and the revision has been effective as of 1 April 2000;
- *The Administrative Regulation on Environmental Protection of Construction Projects,* promulgated by the State Council and effective on 29 November 1998;
- *The Opinion on Accelerating the Development of Recycling Economy*, issued by the State Council and effective on 2 July 2005.

Key Issues of Chinese Environmental Law

According to the *Environmental Protection Law*, the environment is defined as the aggregate of various natural elements which affect human existence and development, either existing in their native conditions or artificially affected by human activities, such as the air, land, water, ocean, mine, forest, grassland, wildlife, natural relic, cultural relic, nature protection area, scenic sites, city, village etc. The administrative authority in charge of environmental protection in China is the State Environmental Protection Administration of China ("SEPA") and its local counterparts.

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SEPA is responsible for formulating the national environmental quality standards and the pollutant discharge standards that must be complied with nationwide. The local environmental authorities may formulate local standards to the extent not regulated by national standards and file the same with SEPA for record. The local authorities can also make local pollutant discharge standards that are stricter than the national standards.

New construction of any project that may affect the environment is required to comply with the environmental requirements for new construction projects. An environmental impact report shall be prepared to evaluate the pollution to be generated by the construction project and the impacts upon the environment. It shall also regulate the preventive and corrective measures to deal with the pollution and be approved by the competent environmental authority.

Any enterprises or entities that discharge pollutants must be registered with the environmental authorities. If the pollutants discharged exceed the applicable national or local standards, a discharge fee shall be levied according to the relevant regulations. Any entities causing serious pollution to the environment are required to correct and treat the pollution within a given time. It is prohibited to import any technology and equipments in violation to the environmental protection requirements.

In the Chinese environmental law system, the *Solid Waste Law* and the *Clean Production Law* are the basis for drafting of regulations related to RoHS and WEEE. We will briefly discuss these two laws as follows:

Solid Waste Law

Under the Solid Waste Law, any manufacturer, distributor, importer or user of products shall be responsible for prevention and treatment of solid wastes generated by itself. SEPA shall formulate the national technical standards for prevention and treatment of solid wastes.

Design and manufacturing of any products or packaging materials must comply with the state regulations about clean production. Manufacturers, distributors and importers of any products or packaging materials that are listed in the Mandatory Collection Catalogue must be responsible for collecting such products or packaging materials after their usage life. However, such Mandatory Collection Catalogue has not been promulgated by SEPA or other relevant authority until now.

It is prohibited to import any solid wastes which cannot be used as raw materials or be utilized in a harmless manner. SEPA and other relevant Chinese governmental authorities shall jointly publish and amend from time to the catalogue of solid wastes that are prohibited, restricted or automatically permitted to import.

A filing and registration system is implemented for controlling industrial solid wastes. Any producers of industrial solid wastes must provide information about the type, volume, flow, storage, disposal of industrial solid wastes to the local environmental authorities at the county or above level according to the relevant SEPA rules.

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Clean Production Law

Clean production is defined as production with clean materials and energy and advanced techniques and equipment to reduce or avoid creating and discharging pollutants in manufacturing, servicing and use of the products. The state government shall make preferential financial and tax policies to promote clean production. The government shall also publish the catalogue of the techniques, process, equipment and products of clean production on a regular basis.

The State requires that old technology, process, equipment or products which cause waste of resources or serious pollution to the environment should be phased out within a given time. The government shall regularly publish a list of the technology, process, equipment and products to be phased out.

In the environmental impact evaluation for any newly constructed or expansion project, the consumption of raw materials and resources and production of pollution shall be analyzed. In any technology improvement projects, enterprises shall replace the poisonous and hazardous materials with less poisonous and hazardous ones.
The products listed in the Mandatory Collection Catalogue shall be collected by manufacturers or distributors of such products after the usage life of the products. If any entity fails to collect the products as required, it shall be requested to rectify the situation and be imposed upon a fine of up to RMB100,000 in case of failure to rectify.
Any manufacturers of poisonous or hazardous materials are required to conduct regular examination for purpose of clean production and report the examination results to the competent authority. In case of failure to conduct such regular examination or report the examination results accurately, it shall be requested to rectify the situation and be imposed upon a fine of up to RMB100,000 in case of failure to rectify.

II. Chinese Legislation on RoHS and WEEE

China has been in the process of drafting rules with respect to RoHS and WEEE, however, none of these rules has been officially promulgated and constituted legal effects. The administrative authorities responsible for the drafting of RoHS and WEEE rules include, without limitation to, SEPA, the National Development and Reform Commission ("NDRC"), and the Ministry of Information Industry ("MII").

The following three rules are being drafted with respect to RoHS and WEEE at present, a summary of which is as follows:

(1) *The Administration Regulation on Collection and Treatment of Waste and Old Electrical and Electronic Products* ("WOEE Rules")

NDRC has been responsible for the drafting the WOEE Rules, which may be issued in the name of the State Council once being finalized. The functions of the WOEE Rules are largely similar to the WEEE Directive in the

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EU. The latest draft available to the author is the one which was circulated by NDRC in September 2004 to invite public comments. NDRC has finished the drafting process and submitted the draft to the State Council for final approval.

According to the WOEE Rules, it will be applicable to any natural person, legal person and organization engaged in the manufacture, import, sale, use or repair of electrical and electronic products, and collection and treatment of waste and old electrical and electronic products ("WOEEP"). WOEEP include both waste and old electrical and electronic home appliance, including televisions, refrigerators, air-conditioners, computers and other products listed in the WOEEP Catalogue.

The WOEE Rules stress the responsibility of local governments in the implementation of the WOEE Rules. Each provincial government shall be responsible for formulating their local implementation rules of the WOEE Rules.

The WOEE Rules spell out the responsibilities of different parties related to WOEEP, including manufacturers, distributors, after-sales service providers, collectors and treatment providers of WOEEP, as well as consumers.

Manufacturers of electrical and electronic products include enterprises manufacturing and distributing the products under their own brand names, brand owners that provide their brands to OEM producers, and the importers or their agents that import electrical and electronic products into China. The responsibilities of a manufacturer include:

a) The manufacturer shall select designs that are beneficial for recycling of the products, choose materials without poison and hazard and materials easy for recycling of the products, and provide information about main materials in the user manuals;

b) The manufacturer can either collect and treat WOEEP by itself or outsource the treatment to a qualified entity; and

c) The manufacturer shall provide information to the competent authority with respect to the type of products, sales volume and export volume.

Distributors of electrical and electronic products and after-sales service providers shall have the responsibility of collecting of WOEEP. The collected WOEEP shall be delivered to a qualified treatment entity for treatment. Licensed entities for treatment of WOEEP shall inspect and classify collected WOEEP according to State standards and technical specifications and then repair, resell, disassemble and treat the WOEEP according to different classification.

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Finally consumers are required to sell or provide WOEEP to the distributors, after-sales service providers of electrical and electronic products or collectors of WOEEP. Consumers are not allowed to treat or disassemble WOEEP by themselves. Nobody may treat WOEEP through donation.

Any entities collecting or treating WOEEP must be licensed by the government authority. The provincial government shall be responsible for granting licenses to entities within the province. An entity shall meet the following qualification requirements to obtain a license for collection or treatment of WOEEP:

a) in compliance with the overall plan on WOEEP collection and treatment made by the local government;

b) being equipped with appropriate facilities for testing, disassembly and treatment of WOEEP, and using technology and techniques in accordance with the national industrial policy;

c) having professional personnel with safety, quality and environmental management qualifications; and

d) the treatment methods or poisonous and hazardous materials are in compliance with the relevant State regulations.

(2) *The Administration Measures on Preventing Electronic Information Products from Pollution* ("Preventing Measures")

MII has been responsible for drafting the Preventing Measures, the functions of which are largely similar to the RoHS Directive in the EU. The latest draft of the Preventing Measures available to the author is dated September 2004, which contains 25 clauses in total. It is reported that in 2005 the draft has been expanded to 29 clauses, however, we have not been able to locate this latest draft. It is expected the Preventing Measures will be issued in the beginning of 2006.

Electronic information products defined in the Preventing Measures include any electronic radar, electronic communication products, radios and televisions, computers, household electronic appliance, and other electronic apparatus. MII will jointly with a number of other governmental agencies, including the Ministry of Commerce ("MOFCOM"), the General Administration of Quality Supervision, Inspection and Quarantine ("GAQSIQ"), SEPA, and the State Administration for Industry and Commerce ("SAIC"), issue a Catalogue of Electronic Information Products under Special Supervision. Products listed in the Catalogue will be subject to higher requirements and more stringent supervision with respect to RoHS.

The Preventing Measures are applicable to any activities of manufacturing, selling and importing electronic information products in China, but do not apply to 1) the manufacturing electronic information products solely for export and 2) sale of electronic information products which specify the OEM producers on the products.

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Manufacturers of electronic information products include any person or entity engaged in manufacturing, selling and importing electronic information products in China. The manufacturers are required to take measures to gradually reduce and eliminate the content of lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBB), polybrominated diphenyl ethers (PBDE) and other poisonous and hazardous materials contained in electronic information products. If the poisonous and hazardous contents cannot be eliminated completely, the quantity of such contents must not exceed the relevant standards prescribed by the State. MII and other governmental agencies will jointly decide the time schedule during which the products containing the hazardous contents must be phased out. In addition, GAQSIQ and MII will publish the inspection standards for the electronic information products listed in the Catalogue of Electronic Information Products under Special Supervision.

Any electronic information products sold in the market must specify the type and quantity of any poisonous and hazardous contents contained therein and mark whether the product can be recycled. The manufactures of electronic information products are required to specify the safe use life both on the electronic information products and in the users' manuals of the products.

Manufacturers of electronic information products shall be responsible for collection, treatment and recycle of the waste products. Importers of electronic information products shall request the suppliers to specify the country of origin of the imported products. Distributors of electronic information products are prohibited from selling any electronic information products which contain poisonous and hazardous contents which are not in compliance with the State standards.

(3) *The Technical Policy of Preventing Waste Electrical and Electronic Products from Pollution* ("Technical Policy")

SEPA has been drafting the Technical Policy. However, SEPA has not published or circulated the draft Technical Policy to the public, therefore we do not have a draft of the Technical Policy. As the author was advised by SEPA, the Technical Policy will primarily regulate the technical standards for preventing waste electrical and electronic products ("WEEP") from pollution. Such technical standards will set the criteria of the poisonous and hazardous materials in electrical and electronic products, the rate of collection of WEEP, the technical criteria of recycling and treatment of WEEP.

* Liu Jingming is an associate at Corporate Group, King & Wood Beijing head office.

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COUNTRY ROUNDUP – INDONESIA – ALI BUDIARDJO NUGROHO REKSODIPUTRO – Indonesia Ratifies Investment Agreement with Singapore

Indonesia has finally ratified the agreement it signed with Singapore on 16 February 2005 concerning Investment Promotion and Protection, in its President's Regulation No. 6 of 2006 which was issued on 1 February 2006.

The Investment Promotion and Protection Agreement reflects the undertaking jointly taken by Indonesia and Singapore to create conducive investment climates for each other. Each country undertakes to afford to the other country's investments equal treatment as the treatment afforded to its own national investments. Both countries have to ensure that any investment established in one of them by the other will have all of the legal protections that are available to their own domestic investments.

The Agreement prohibits the nationalization of foreign investments made in the framework of this Agreement, except where the nationalization (i) is conducted in the interest of the nation or of the public, or (ii) is not a discrimination practice, or (iii) is conducted with appropriate, effective and prompt compensation to the respective investor. Settlements of the disputes that arise are to be achieved through negotiations and deliberations. If a mutually acceptable settlement cannot be reached within 6 months, the parties may seek the settlement of their dispute through the court, by arbitration at the ASEAN level, or by bringing it to the International Capital Investment Center or to UNCITRAL.

This Agreement comes into force 3 months following the date of its ratification. It has a validity period of 10 years with automatic renewal for another 10 years unless one of the parties gives to other party a one year written notification of its intention to terminate it. If terminated, the provisions of this Agreement will continue to be effective and valid for a period of 10 years upon the investments that have been made prior to the termination.(da)

For additional information visit www.abnrlaw.com

COMPANY ACT AMENDED TO FACILITATE REORGANIZATION

Stephen Wu - Lee and Li

On January 13, 2006, the Legislative Yuan passed the proposed amendment to certain pro-visions under the Company Act to facilitate corporate reorganization. Its key points are as follows:

•The preemptive right of shareholders and employees to subscribe for new shares no longer apply to new share issuances in con-nection with reorganization. Therefore, when a company issues new shares according to a reorganization plan, it does not need to inquire whether the employees and original share-holders would exercise such preemptive rights, and instead, can seek other subscribers, as proposed in the reorganization plan. Such amendment is aimed to provide an incentive for the company's creditors and investors to invest in the company and thus facilitate the reorganization.

•In case that there are two or more reorganiza-tion supervisors, all matters should be decided by a majority vote of such reorganization su-pervisors.

•The reorganizers must meet the requirements set forth in Article 30 of the Company Act. Article 30 of the Company Act provides that a reorganizer shall NOT:

1.have committed an offence as specified in the Statute for Prevention of Organiza-tional Crimes and subsequently adjudi-cated guilty by a final judgment, and the time elapsed after he/she has served the full term of the sentence is less than five years;

2.have committed an offence of fraud, breach of trust or embezzlement and sub-sequently punished with imprisonment for a term of more than one year, and the time elapsed after he/she has served the full term of such sentence is less than two years;

3.have been adjudicated guilty by a final judgment for misappropriating public funds during the time of his/her public service, and the time elapsed after he/she has served the full term of such sentence is less than two years;

4.have been adjudicated bankrupt, and not yet reinstated to his/her rights;

5.have been dishonored for unlawful use of credit instruments, and the term of such sanction has not expired yet; or

6.have no or only limited legal capability. Therefore, in addition to the professional capability, the reorganizer must posses integrity as well.

•A photocopy of the court's decision of the re-organization should be posted where the company posts public announcements.

•The resolution approving the reorganization plan can be adopted by a simple majority. Before the amendment, a resolution to ap-prove the reorganization plan should be adopted by two-thirds or more of the total votes of each group of interested parties.

•The court may render a judgment to terminate the reorganization if the meeting of interested parties fails to approve the reorganization plan within one year following the date when (i) the company receives

the court's decision on the reorganization, or (ii) the company receives the court judgment ordering the company to review again the reorganization plan.

This is to prompt the meeting of interested par-ties to produce a feasible reorganization plan as soon as possible, and to forestall the damage to interested parties, resulting from the uncertainty of the company's reorganization status and the legal relationship among the parties.

For Additional information visit www.leeandli.com

update

Antitrust Update

April 2006

The FTC's Use of Section 5 of the FTC Act to Condemn Public Invitations to Collude

On March 14, 2006, the Federal Trade Commission entered into a proposed consent decree with Valassis Communications, Inc., settling the FTC's allegation that Valassis publicly, during its quarterly earnings call with securities analysts, invited its only competitor, News America Marketing, to fix prices and divide the market for cooperative free-standing inserts (FSIs).[1] The Commission's complaint alleged that such action constituted an "invitation to collude" that violated Section 5 of the FTC Act. In its press release, the FTC stated that "[t]he action taken by the Commission today demonstrates that the FTC will protect consumers by challenging, in appropriate circumstances, invitations to collude before the invitations are accepted and become agreements to fix prices or divide markets."

The FTC has entered into several consent decrees during the past 15 years in cases involving invitations to collude.[2] The FTC historically has used Section 5 of the FTC Act to condemn such invitations to collude, rather than the Sherman Act, because the invitations to collude which they have condemned do not necessarily constitute explicit or implicit agreements to fix prices or divide markets.[3]

All of FTC's previous enforcement actions against invitations to collude involved private communications between the respondent and its competitor in a proverbial "smoke-filled room." Valassis is the first case in which the respondent allegedly invited its competitor to collude exclusively in a public forum – a quarterly earnings call with securities analysts.

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[1] *See In the Matter of Valassis Communications, Inc.*, File No. 051-0008, Agreement Containing Consent Order, (F.T.C. Mar. 14, 2006), http://www.ftc.gov/os/caselist/0510008/060314agr0510008.pdf.
[2] *See In the Matter of MacDermid, Inc. and Polyfibron Technologies, Inc.*, Docket No. C-3911, 2000 WL 195669 (F.T.C. Feb. 4, 2000); *Stone Container Corp.*, 125 F.T.C. 853 (1998); *Precision Moulding Co.*, 122 F.T.C. 104 (1996); *YKK (USA) Inc.*, 116 F.T.C. 628 (1993); *A.E. Clevite, Inc.*, 116 F.T.C. 389 (1993); *Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992).
[3] The Department of Justice previously has challenged private invitations to collude as an attempt to monopolize under Section 2 of the Sherman Act. *See United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985).

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Factual Background

The FTC's complaint alleges that Valassis and News America are the only two companies that publish FSIs in the United States. FSIs are the multi-page coupon booklets that consumers commonly find in their Sunday newspapers. They are distributed by hundreds of newspapers to more than 50 million households in the United States every week.

Between 1998 and 2001, according to the FTC's complaint, Valassis and News America each controlled approximately 50 percent of the market. Valassis began losing customers in June 2001 after raising its prices by 5 percent from $6.00 per page per thousand booklets to $6.30 per page. News America kept its prices at $6.00 per page and gained significant market share as a result. In February 2002, Valassis lowered its prices in an attempt to regain market share and thereby prompted a price war with News America. Prices dropped below $5.00 per page by 2004.

In July 2004, Valassis, a publicly held company, held its second quarter analyst call. During this public conference call, Valassis' president and chief executive officer reportedly announced it was time to "change the long term pricing trends" in the industry. According to the FTC, he proposed a new strategy in which Valassis would:

- cease all efforts to regain a 50 percent market share,
- seek to maintain its current (mid 40-percent) market share by offering its current customers whatever price necessary,
- observe a floor price of $6.00 per page for News America's historical customers,
- offer any price necessary to maintain its historical share of business at joint customers (*i.e.*, customers served by both Valassis and News America), but charge $6.00 per page for joint customers that wanted Valassis to take more than its current share, and
- honor its outstanding bids to News America's customers only until August 1, 2004, after which time it would quote these customers $6.00 per page.

In addition, Valassis reportedly announced that it planned to monitor News America's response for "concrete evidence" of reciprocity. Valassis also indicated that, if News America failed to reciprocate, the price war would resume.

Alleged Anticompetitive Conduct

According to the FTC's complaint, Valassis made these public statements with the intent to facilitate collusion with News America. If News America had agreed to Valassis' proposal, the FTC asserted that the alleged result would have been higher prices and reduced output.

In addition, the FTC explained in its analysis that the public statements made by Valassis went far beyond a legitimate business disclosure: "Valassis historically had not provided information of this type to the securities community, analysts had no need for the information and did not report it, and Valassis had no legitimate business justification to disclose the information." According to the FTC, this type of conduct is anticompetitive and constitutes a violation of Section 5 of the FTC Act even if no agreement among competitors results. In addition, the FTC noted that entry into the FSI market is difficult and not likely to deter or counteract this competitive harm.

Terms of the Consent Order

The Commission stated that the consent order is designed to ensure that Valassis does not engage in the anticompetitive conduct alleged in the complaint in the future. In particular, it prohibits Valassis from

communicating publicly or privately with an FSI competitor that it is willing to divide markets, allocate customers, or fix prices. It also prohibits Valassis from actually entering into, participating in, or otherwise facilitating an agreement to divide markets, allocate customers, or fix prices.

Importantly, the order contains safe harbor provisions that allow Valassis to engage in legitimate business conduct, including communicating to its actual or prospective customers that it is ready or willing to lower its prices in response to a competitor's price and communicating information that is required to be disclosed by federal securities laws.

Analysis

All of the FTC's prior enforcement actions involving invitations to collude have been settled by consent decree. In these past enforcement actions, the FTC has condemned invitations to collude where the evidence of intent was unambiguous and no legitimate business justification existed for the respondent's actions. It did so regardless of the participants' market power or whether the industry was susceptible to tacit collusion.[4] It is unknown whether allegations of an invitation to collude under Section 5 of the FTC Act would survive litigation in federal court.

Also, as discussed above, the FTC's prior enforcement actions against invitations to collude all involved privately held telephone conversations, meetings, or other communications between only the respondent (or the respondent's agent) and its competitor (or the competitor's agent).[5] In *Valassis*, however, the alleged invitation to collude was publicly communicated during a quarterly earnings call. Thus, *Valassis* illustrates that the FTC will look beyond the "arena in which the communication occurs," to the substance and context of the communication, including the intent, likely effect, and business justification. In other words, the fact that a communication is public, rather than private, is an insufficient defense in the FTC's view to an otherwise objectionable invitation to collude.

Conclusion

Will a company's public statements be viewed by the FTC as an invitation to its competitors to raise prices or divide the market? The FTC stated that it is "extremely sensitive" to the risk of chilling legitimate corporate communications, including those communications required by the federal securities laws. Even so, until the new boundaries of *Valassis* are tested, all companies – especially those that operate in highly concentrated markets – should carefully consider whether and, if so, how they might publicly disclose certain strategies involving the following:

- Pricing or discounting
- Decisions to exit certain sales territories
- Decisions to cease serving or pursuing certain customers
- Decisions to discontinue certain products or restrict output

After *Valassis*, companies should be aware that they risk violating the antitrust laws if they publicly disclose this type of information without a legitimate business purpose, especially if the disclosure is a departure from past business practices, when there is clear evidence of an intent to raise prices, divide

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[4] *See, e.g., Precision Moulding Co.*, 122 F.T.C. 104 (1997) (decision and order approving consent decree) and *Precision Moulding Co.*, 61 Fed. Reg. 32,824, 32,826 (June 25, 1996) (proposed consent decree) (condemning an invitation to collude even though the complaint did not allege market power and the FTC conceded that the "market is not conducive to prosecution under Section 2 of the Sherman Act.").
[5] *See, e.g., YKK (U.S.A.), Inc.*, 116 F.T.C. 628 (1993) (finding a violation of Section 5 of the FTC Act where an attorney for YKK asked a competitor's attorney to urge the competitor to desist from offering free installation equipment to customers).

the market, or allocate customers. Nonetheless, with the appropriate level of caution, publicly held companies, even those in highly concentrated markets, can still publicly disclose significant changes in their competitive strategies without violating Section 5 of the FTC Act.

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For more information about the matters discussed in this Update, please contact the Hogan & Hartson L.L.P. attorney with whom you work or one of the attorneys below. If you are interested in any of our other publications, please visit http://www.hhlaw.com/newsstand.

Sharis Arnold Pozen
sapozen@hhlaw.com
202-637-6948

Michaelynn R. Ware
mrware@hhlaw.com
202-637-8857

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LAW·FLASH
A CLIENT ALERT FROM THE TAX PRACTICE
Morgan Lewis
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California Protective Claim for Refund of Annual LLC Fee

April 12, 2006

In a recent California Superior Court case, *Northwest Energetic Services, LLC v. California Franchise Tax Board* (Cal. Super. Ct. No. CGC -05-437721; Mar. 3, 2006), the court held that the annual California fee based on the gross receipts of limited liability companies (LLCs) organized or doing business in California is unconstitutional. This holding does not affect the $800 minimum tax imposed on LLCs organized in or doing business in California. The Franchise Tax Board has indicated that it will appeal the court's decision.

Please click here to view a Franchise Tax Board news release setting forth the steps that taxpayers should take if they wish to file protective claims for a refund of the LLC fee for past years based on the *Northwest Energetic Services, LLC* case. Additional information regarding protective claims for a refund may be found on the Franchise Tax Board website at http://www.ftb.ca.gov/forms/misc/3556.html#proclaim.

In general, the statute of limitations for a calendar-year taxpayer's 2001 LLC fee will expire on April 15, 2006. Consequently, you may wish to alert any of your clients who have paid a California LLC fee for the 2001 calendar year to prepare and file a protective claim for refund on or before that date. The protective claim procedure set out in the news release and on the Franchise Tax Board website is self-explanatory.

Please contact any of the following Morgan Lewis attorneys for more information about the issues discussed in this Morgan Lewis LawFlash:

Los Angeles
Jeffrey L. Grausam 213.612.1172 jgrausman@morganlewis.com

San Francisco
Gary A. Herrmann 415.442.1380 gherrmann@morganlewis.com
Robert C. Livsey 415.442.1230 rlivsey@morganlewis.com

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