November 2009 e-BULLETIN

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BAKER BOTTS EXPANDS WITH NEW IP PRACTICE IN LONDON

LONDON, November 9, 2009 -- Peter Taylor, who has extensive experience in intellectual property litigation matters including patents, trade marks, designs, copyright and trade secrets, has joined Baker Botts L.L.P. as a partner in Intellectual Property. He will head the development of a new IP practice in the firm's London office.

Taylor has practiced intellectual property law for nearly 25 years, including managing cases before the English High Court as well as appeals to the Court of Appeal, the House of Lords and the Privy Council. He has also handled cases before the UK Intellectual Property Office, the European Patent Office (including the EPO Board of Appeal), the EC Community Trade Mark Office and the European Court of First Instance. Prior to joining Baker Botts, he was a partner at Clifford Chance in London.

"The international experience Peter brings to us in the intellectual property litigation area continues our commitment to building a strong global IP practice," said Baker Botts Managing Partner Walt Smith. "The complex technology issues that confront many of our clients today are being addressed in legal venues around the world. Peter will provide additional depth to our IP team in managing these matters for our clients."

Taylor has coordinated multi-jurisdictional proceedings for clients, acting on behalf of many large multi-national companies based in the United States, Europe and the Far East. His representations covered a broad range of industries, including health care, oil and gas, telecommunications, electronics, computer software, transport, consumer goods, sports and leisure and media/entertainment sectors.

"We have been looking for a senior lawyer to be based in London and lead our IP efforts both in the UK and throughout Europe," said Bart Showalter, chair of the firm's IP Department. "Peter brings a renewed energy to our international initiatives. His practice is diversified, sophisticated, and a great fit for our group."

Tony Higginson, Partner in Charge of the firm's London office, said that "London has been wanting to develop an IP practice for some time, and we are delighted to have secured someone with Peter's experience to lead that effort."

Taylor was educated at Clifton College and graduated from Birmingham University (LLB Hons). He is a member of a number of professional organizations, including AIPPI, ECTA, IPO, Marques and INTA.

"I am delighted to be joining a firm that has such a strong and well regarded IP practice," Taylor said. "With my experience, this should provide a great platform for developing the firm's IP practice in the UK, and I'm looking forward to the challenges and opportunities ahead. Baker Botts has a real commitment to international expansion both in IP and other areas and I'm excited to be joining them in this period of growth."

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About Baker Botts L.L.P.
Baker Botts L.L.P., dating from 1840, is a leading international law firm with offices in Abu Dhabi, Austin, Beijing, Dallas, Dubai, Hong Kong, Houston, London, Moscow, New York, Palo Alto (California), Riyadh and Washington. With approximately 800 lawyers, Baker Botts provides a full range of legal services to international, national and regional clients. For more information, please visit www.bakerbotts.com.

DAVIS WRIGHT ADDS TO EMPLOYMENT AND LABOR TEAM

Ryan D. Derry has joined Davis Wright Tremaine's California employment and labor team, where he will focus his practice on defending employers in single plaintiff and class action matters, including wage-and-hour, discrimination, wrongful termination and retaliation claims.

"We're excited to bring Ryan on board," said John LeCrone, who heads the employment practice in Los Angeles and is vice chair of the firmwide practice group. "His litigation skills and employment law experience align perfectly with the existing strengths of the team in California."

Derry joins Davis Wright Tremaine's Los Angeles office and continues a growth trend for the firm in its core practices in California. Along with the addition of John Post in mid-September, the firm now has 14 employment and labor attorneys in California. Top-tier lawyers have also recently joined the firm in San Francisco and Los Angeles to bolster several other core practices in health care, energy, intellectual property and life sciences.

Derry most recently practiced with Paul, Hastings, Janofsky & Walker LLP in Los Angeles. He is licensed to practice in the state of California. Derry received his J.D., with honors, from George Washington University Law School and his B.S. in resource economics, summa cum laude, from the University of Massachusetts.

About Davis Wright Tremaine

Davis Wright Tremaine LLP is a national full-service law firm with approximately 550 attorneys in nine offices: Seattle and Bellevue (Wash.), Portland (Ore.), Los Angeles, San Francisco, New York, Washington, D.C., Anchorage (Alaska), and Shanghai, China.

For additional information visit www.dwt.com

FRASER MILNER CASGRAIN NEW CEO ANNOUNCED

Chris Pinnington Appointed CEO at Fraser Milner Casgrain

October 21 2009 - Toronto
Current Toronto Managing Partner will assume new mandate

Fraser Milner Casgrain LLP (FMC), one of Canada's leading business and litigation law firms, announced today that Chris Pinnington has been appointed as its CEO, commencing February 1, 2010. Michel Brunet, the firm's current CEO, who earlier announced his intention to step down at the end of his term, will return to his practice full-time in FMC's Montréal office.

Under his new mandate, Chris Pinnington, currently the Managing Partner of FMC's Toronto office, will build on the vision set out by FMC's Strategic Plan, and will lead the implementation of the firm's strategic objectives going forward. He will continue to ensure that FMC responds effectively to clients' needs, and exceeds their expectations of service and value in today's demanding economic environment.

"Chris has a great sense of the legal industry and what it takes to manage and lead an organization of this size and complexity," says Michel Brunet. "He is a strong example of what a leader should be, with a deep commitment to our clients' interests, FMC's culture and corporate citizenship."

"At FMC, we are committed to our clients, our people and our communities," says Chris. "I am proud to be given the opportunity to lead our team as we drive FMC forward to client service excellence and being a workplace of choice."

Chris has held a number of senior leadership positions in the firm. He has served as a Managing Partner of the FMC Toronto office, played an instrumental role in the development and implementation of the firm's National Strategic Plan, and was previously a member of the National Partnership Board and Toronto Executive Committee. A respected commercial real estate lawyer, he has also served as a senior executive and general counsel of a leading Canadian real estate company.

For additional information visit www.fmc-law.com

HOGAN & HARTSON FORMER DIRECTOR OF FERC ENFORCEMENT JOINS ENERGY PRACTICE IN WASHINGTON, D.C.

WASHINGTON, D.C., November 3, 2009 – Hogan & Hartson LLP announced today that Susan J. Court, former Director of the Federal Energy Regulatory Commission's (FERC) Office of Enforcement, has joined the firm's Washington, D.C.,* office as a partner in the energy practice group. She will focus her practice on FERC's existing enforcement program and the rapidly growing area of North American Electric Reliability Corporation (NERC) compliance.

As FERC Director of the Office of Enforcement, Court managed a staff of 170 lawyers, auditors, accountants, economists, and other staff responsible for enforcing Federal energy laws and regulations to prevent market manipulation and abuse of market power, and to ensure compliance with tariffs, licenses, and reliability and other standards. Court was instrumental in establishing the regulatory framework for NERC, and recently appeared at a NERC Compliance Conference in Salt Lake City, Utah, on enforcement of the mandatory reliability standards. Court is scheduled to present a FERC Enforcement Update at a Utilities and Energy Compliance and Ethics Conference in March 2010, in Houston, Texas.

Court was also FERC's senior natural gas counsel during the agency's restructuring of its natural gas regulations. While she subsequently took on other responsibilities at the agency, including serving as Deputy Solicitor, Agency Ethics Officer, and Chief of Staff, Court continued her work in the natural gas area, and recently spoke and participated as a panelist at the 24th World Gas Conference in Buenos Aires, Argentina, which was attended by more than 1,000 members of the world natural gas industry. Court will continue her work in global natural gas matters as a committee member preparing for the 25th World Gas Conference in Kuala Lampur, Malaysia, in October 2012. Her participation in these conferences reflect her involvement in international energy matters stemming from her assignment at one of the European Union's Energy Regulatory Authorities in 2005.

"I am delighted to join Hogan & Hartson after my years at FERC," said Court. "Working in every area of FERC's jurisdiction has provided the opportunity for me to establish a solid platform on which to continue and expand my practice of energy law. I look forward to contributing my knowledge on energy-related matters and working alongside this solid group of attorneys."

"We are very fortunate to have Susan join us," said Kevin Lipson, Director of the firm's energy practice group. "Her knowledge of the industry and regulatory environment in which our clients operate is unparalleled. She will be a great asset to our firm and the firm's clients."

Lee Alexander, a partner with the firm's energy practice in Washington, D.C., added, "I have known Susan for many years and her reputation for excellence is well deserved. She has mastered every aspect of FERC and NERC regulation and our clients will be the ultimate beneficiaries of that experience."

A 2008 recipient of the Presidential Rank Award for Meritorious Executive Service, which honors high-performing senior career employees for "sustained extraordinary accomplishment," Court received her law degree from the Salmon P. Chase College of Law, Northern Kentucky University. She earned a master's degree in European history from University of Cincinnati and a bachelor's degree from Thomas More College.

* Court is currently licensed to practice only in Kentucky.

About Hogan & Hartson

Hogan & Hartson is an international law firm founded in Washington, D.C., with more than 1,100 lawyers in 27 offices worldwide.

Hogan & Hartson has offices in Abu Dhabi, Baltimore, Beijing, Berlin, Boulder, Brussels, Caracas, Colorado Springs, Denver, Geneva, Hong Kong, Houston, London, Los Angeles, Miami, Moscow, Munich, New York, Northern Virginia, Paris, Philadelphia, San Francisco, Shanghai, Silicon Valley, Tokyo, Warsaw, and Washington, D.C.

For more information about the firm, visit www.hhlaw.com.

SIMPSON GRIERSON WELCOMES FIVE SPECIALISTS

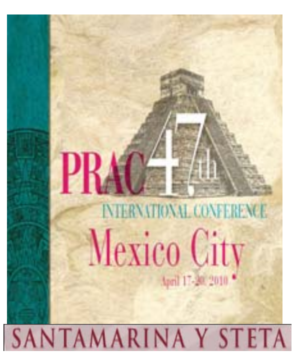
Senior associate Nina Blomfield is welcomed back to the firm's commercial litigation group in Wellington. Nina first joined Simpson Grierson in 2002 and returns after working for leading litigation firms Herbert Smith and Barlow Lyde & Gilbert in London.

The firm's Auckland commercial litigation group welcomes Australian associate Annette Quesado. Annette spent the last two and a half years in the media and commercial litigation team at Olswang in London. Prior to that, she was at Freehills in Melbourne.

Simpson Grierson's securities enforcement and finance litigation group is further strengthened with the addition of associates Philip Shackleton and Lina Lim. Both come from Auckland-based law firms, where Philip specialised in insolvency and mortgagee sales and Lina specialised in debt recovery and insolvency. Philip and Lina have regularly appeared in the District and High Courts, and will be providing advice on all aspects of banking, finance and insolvency litigation, and dispute resolution.

The firm's Auckland construction group welcomes Craig Wheatley, a specialist construction lawyer with a Masters in Construction Law from the University of Strathclyde. Craig comes from Semple Fraser LLP, a leading commercial law firm in Scotland.

For additional information visit www.simpsongrierson.com



PACIFIC RIM
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47th International PRAC Conference
Mexico City
April 17—20, 2010
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Registration open to all PRAC Member Firms
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KOCHHAR & CO LAUNCHES WORKPLACE DISCRIMINATION AND SEXUAL HARASSMENT PRACTICE

Kochhar & Co. has recently pioneered a specialized Workplace Discrimination and Sexual Harassment practice.

Rapidly evolving harassment laws in India have cast several obligations on Indian employers. Such laws demand non-discriminatory practices to be followed in workplaces as well as increased sensitivity towards the rights of women workforce. Very few legal domains are as important as the identification, prevention and resolution of discrimination and harassment in the workplace. Yet, very little expertise or know-how is available to properly guide employers, senior management and human resource departments. With the launch of the Workplace Discrimination and Sexual Harassment practice desk, Kochhar & Co. has become the first law firm in India to recognize and address this requirement in a comprehensive and specialized manner.

The Supreme Court of India has imposed several obligations upon employers to prevent or deter the commission of acts of sexual harassment in the workplace including adoption and publication of workplace policies against sexual harassment and setting up complaint committee(s) within the organization to address complaints from women employees. Failure to abide by the Supreme Court's directions, which under the Constitution of India have the force of law, could result in serious adverse consequences for employers. The Supreme Court has even imposed exemplary costs upon an employer for not following the policy and procedures laid down in its judgment. Such policy and procedures have also been incorporated in various existing Central and State labour legislations and a specific legislation on prevention of sexual harassment of women at the workplace which is in the making.

Kochhar & Co.'s Delhi and Gurgaon offices, which cater to the legal needs of Northern India, the Workplace Discrimination and Sexual Harassment practice desk is headed by **Devika Singh** who can be contacted at **devika.singh@kochhar.com**. Devika's detailed experience profile is included in the attachment. In the south of India, this practice desk is headed by **Shanthala Rao** who is a partner in Kochhar & Co.'s Bangalore office and can be contacted at **shanthala.rao@bgl.kochhar.com**. The expertise of Kochhar & Co. in this field therefore spans across the country.

The Workplace Discrimination and Sexual Harassment practice desk offers a very wide range of services which include, amongst other things, conducting gender audits, advising on legal compliances, drafting anti-harassment and discrimination workplace policies, setting up organizational complaint committees and providing litigation support to clients in various sectors. With full service offices in six major cities in India - Delhi, Mumbai, Chennai, Bangalore, Gurgaon and Hyderabad, a branch office in Atlanta, Georgia, USA and a foreign law office in Singapore; the firm is well positioned to serve client interests in this practice domain.

For additional information contact delhi@kochhar.com

KING & WOOD

CHINA'S MOFCOM APPROVES PFIZER'S ACQUISITION OF WYETH

September 30, 2009

The PRC Ministry of Commerce has approved Pfizer Inc.'s $68 Billion acquisition of Wyeth Pharmaceuticals. The Head of King & Wood's Antitrust & Competition Practice, Susan Ning, was the leading PRC counsel.

For additional information visit www.kingandwood.com

MUNIZ

ACTS FOR FALCONE GROUP IN US$10MILLION DOLLAR CAPITAL STOCK PURCHASE

October, 2009

Muniz Ramirez Perez-Taiman & Olaya acted in the purchase of 100% of the capital stock of Consultora Integral de Inversiones y Negocios and Pesquera Santa Claudia by the Falcone Group. The transactions amounted to US$ 10 million. We acted as legal counsels to the purchaser.

For additional information visit www.munizlaw.com

GIDE LOYRETTE NOUEL

ADVISES SPIE ON THE ACQUISITION OF BRITISH FIRM EI.WHS LTD.

The Paris and London offices of Gide Loyrette Nouel have advised SPIE, owned by private equity firm PAI Partners since 2006, on the acquisition of the British firm EI.WHS Ltd. This build-up operation forms part of SPIE's European growth strategy and strengthens its UK presence following the 2007 acquisition of Matthew Hall.

Owned by British group Staveley Engineering Services, EI.WHS is a leading mechanical, electrical, instrument & industrial company working in different sectors including energy production (power stations), oil and gas (on-shore and off-shore platforms), and cutting-edge industry.

EI.WHS boasts wide expertise and provides a full range of technical services including project management, design, installation, roll-out, maintenance and ATEX inspection. Principal long-standing clients include Alstom Power, Conoco Philips and Rolls Royce. EI.WHS employs 326 people and annual turnover to 31 May 2009 stood at EUR 56.5 million and is set to rise significantly over the current financial year.

European leader in building services, facilities management, fire engineering, and energy management, SPIE provides its local authority and business customers with multi-technical and support services from initial mechanical and electrical design, through installation commissioning to long-term maintenance of facilities.

With 400 locations in 30 countries and over 29,000 employees, SPIE recorded turnover in 2008 of EUR 3.75 billion and operating profits of EUR 172.9 million.

Legal counsel to Spie:
Gide Loyrette Nouel: Christophe Eck, Edgard Nguyen and Sandra Lee from the Paris Office, assisted by the London Office for tax issues (Anthony Davis, David Klass and Gérard Bracken) and due diligence.

For additional information visit www.gide.com

CLAYTON UTZ

M&A AND ECM TEAMS INSTRUCTED ON HIGH PROFILE, COMPLEX TRANSACTION FOR MACQUARIE MEDIA GROUP

October, 2009

It is rare that a company announces a fundamental restructure of so many facets of its business on a single day - capital raising, debt pay-down, corporatisation, internalisation, board and management changes. On top of that the client also needed to cover: (a) an Annual General Meeting; (b) a trading update; and (c) advise of a covenant breach by its US subsidiary.

We have advised on all aspects of the transaction including an innovative capital raising structure – a single bookbuild accelerated pro-rata renounceable entitlement offer, only the second of its kind to be introduced to market – and a unique corporate restructure involving destapling the Macquarie Media Group entities and implementing rolling them up under a single Australian company, using a Bermudan scheme of arrangement and trust scheme.

For additional information visit www.claytonutz.com

HOGAN & HARTSON

SUCCESSFULLY DEFENDS FRENCH CHAMPAGNE HOUSE'S RIGHT TO ITS "CRISTAL" TRADEMARK IN RUSSIA

MOSCOW, November 2, 2009 – Hogan & Hartson successfully represented French champagne house, Champagne Louis Roederer, in a dispute with the Russian Federal state-owned enterprise Soyuzplodoimport, a vodka manufacturer, relating to the elite champagne trademark "Cristal." The decision was made by the Moscow Arbitration Court on Oct. 26, 2009.

Cristal Louis Roederer Champagne originally was produced specially for Russian Emperor Alexander II in 1876. In 1949 the trademark was internationally registered and in 1995 it obtained legal protection in Russia. However, on April 6, 2009, the Russian Chamber for Patent Disputes ceased the legal protection of the "Cristal" trademark in Russia. Soyuzplodoimport, being the rights-holder of the Russian trademark "Kristal" vodka (registered in Russia in 1973), stated that the "Cristal" and "Kristal" trademarks were confusingly similar and ordered the French company to pay royalties for the imported champagne.

On July 06, 2009, the Louis Roederer Company challenged the chamber's decision in the Moscow Arbitration Court. At the opening sitting, the Rospatent (Russian Agency for Patent and Trademarks) acknowledged that the French company was right and the decision of the chamber was erroneous. The representative of Rospatent agreed with the Louis Roederer Company argument that Soyuzplodoimport had missed the period for challenging the trademark registration which is five years from the date of publication of the information on legal protection grant to Cristal trademark. The court affirmed the legal protection of the "Cristal" trademark and reversed the decision of the Russian Chamber for Patent Disputes. Cristal Champagne will freely continue to be imported into Russia.

The matter was led by Hogan & Hartson Moscow counsel Julianna Tabastajewa.

For additional information visit www.hhlaw.com

BAKER BOTTS

KARA TECHNOLOGY INCORPORATED WINS REVERSAL ON APPEAL

NEW YORK, September 30, 2009 -- On Thursday, September 24th, the United States Court of Appeals for the Federal Circuit handed Firm client Kara Technology a victory in its patent and contract dispute with defendant Stamps.com.

Stemming from confidential meetings that took place back in May, 2000, Kara alleges that Stamps.com breached a non-disclosure agreement (NDA) and infringes two of its patents covering Stamps.com's Netstamps internet postage feature. The trial court had dismissed Kara's breach of contract claim on summary judgment, construed the claims of the patents narrowly, and after a three week trial in June, 2008, entered the jury's verdict of non-infringement of the Kara patents.

The appeals court, however, reversed, finding that the trial court had improperly granted summary judgment and improperly construed the patents' claims. The appeals court therefore vacated the judgment of non-infringement, and ordered a new trial on Kara's counts of breach of contract and patent infringement, under the correct, broader claim construction.

Baker Botts represented Kara Technology in this case, with Robert Scheinfeld and Eliot Williams as the lead partners.

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For more information, please visit www.bakerbotts.com

FRASER MILNER CASGRAIN

CASCADES INC. ACQUIRES ATLANTIC PACKAGING PRODUCTS LTD'S TISSUE DIVISION ASSETS

On August 28, 2009, Cascades Inc. (CAS on the Toronto Stock Exchange), a leader in recovery and in green packaging and tissue paper products, through its wholly owned subsidiary, Cascades Canada Inc., completed the acquisition of the tissue division of Atlantic Packaging Products Ltd. The estimated value of the transaction is approximately $60 million. This acquisition will enable Cascades to increase its annual production capacity by 55,000 short tons of recycled paper and its converting capacity by approximately 70,000 short tons adding close to $100 million in sales per year.

Cascades Inc. was represented in-house by Robert F. Hall, Catherine Papineau and Jérôme Nadeau, and by Fraser Milner Casgrain LLP with a team comprised of Charles R. Spector (Corporate/Commercial and Securities), Neil Katz, Philipp Park, Seon Kang and Ted Shoub (Corporate/Commercial), Paul Shantz (Real Estate/Environmental), Ron Goldenberg (Real Estate), Charles Rich (Financial Services), Wendy Brousseau and Zahra Nurmohamed (Tax), Kristin Taylor (Employment and Labour), and Barbara Grossman (Litigation and Dispute Resolution). Brouillette Charpentier Fortin represented Cascades Inc. on Competition matters.

For additional information visit www.fmc-law.com

NAUTA DUTILH

IPO OF DELTA LLOYD N.V. ON EURONEXT AMSTERDAM

NautaDutilh advised the syndicate of underwiters, consisting of Goldman Sachs International, Morgan Stanley, BofA Merrill Lynch, J.P. Morgan, RBS Hoare Govett, ABN AMRO Bank and Rabo Securities, in a joint effort with Davis Polk & Wardwell LLP in connection with the offering of 63,5 million ordinary shares in the capital of Delta Lloyd N.V. to retail investors in the Netherlands and to institutional investors in the Netherlands and certain other jurisdictions.

The ordinary shares were offered by the indirect 100% holder of the ordinary shares in the capital of Delta Lloyd N.V., Aviva, plc. As a result of the IPO, the indirect interest of Aviva, plc. decreased with approximately 38.3%. All ordinary shares in the capital of Delta Lloyd N.V. will be admitted to listing and trading on Euronext Amsterdam by NYSE Euronext, the regulated market of Euronext Amsterdam N.V., on an if-and-when-issued basis as per 3 November 2009 and unconditionally as per 6 November 2009 for a price of EUR 16.00 each. The total proceeds of the IPO amount to EUR 1,02 billion.

Delta Lloyd Group is a financial services provider offering life insurance, general insurance, fund management and banking products and services. Delta Lloyd Group's target markets are the Netherlands and Belgium. In the medium term, Delta Lloyd Group aims to become one of the three largest insurance companies in the Dutch market and one of the five largest insurance companies in the Belgian market. Delta Lloyd Group expects that the IPO contributes to achieving these ambitions.

The NautaDutilh consisted of Petra Zijp, Leo Groothuis, Antonia Netiv en Anne Hakvoort. They were assisted by a due diligence team, consisting of specialists from several practice groups within NautaDutilh.

For additional information visit www.nautadutilh.com

RODYK

ACTS FOR GOLD CAPE INVESTMENT IN S$247.55 MILLION SALE OF KATONG MALL

RODYK is acting for Golden Cape Investment, a wholly owned subsidiary of developer Tuan Sing Holdings, in the sale of Katong Mall to Perennial Katong Retail Trust, a private property trust comprising of a consortium of corporate/institutional investors. The sale price for this retail shopping mall at the East Coast is S$247.55 million, and is reported as one of the largest investment sale transactions in Singapore this year. The transaction is expected to be completed end January 2010.

Partner Lee Liat Yeang is leading this deal, assisted by partner Low Boon Yean and senior associate Alex Chow.

For additional information visit www.rodyk.com

TOZZINI FREIRE

ACTS FOR PRINCIPAL FINANCIAL IN MEMO OF UNDERSTANDING WITH BANCO DO BRASIL

Assistance to Principal Financial in the negotiation of a Memorandum of Understanding with Banco do Brasil to continue their pension and long-term asset accumulation joint venture in Brazil, BrasilPrev Seguros e Previdência S.A. (BrasilPrev).
Under the terms of the Memorandum, and following completion of all necessary approvals and transactions, BrasilPrev will have, for 23 years, the exclusive right to distribute pension and other long-term asset accumulation products within the Banco do Brasil network. Other key elements of the Memorandum include:

Co-management of the joint venture, with Principal Financial owning 50.01 percent of BrasilPrev common stock and Banco do Brasil owning 49.99 percent;

Economic interests (sharing of profits) of 25.005 percent to The Principal and 74.995 percent to Banco do Brasil; and

The intent to negotiate BrasilPrev's acquisition of the pension portfolio of Mapfre Nossa Caixa.

For more information, please access Principal Financial's press-release: http://phx.corporate-ir.net/phoenix.zhtml?c=125598&p=irol-newsArticle&ID=1347098&highlight=

Tozzini Freire legal team was led by Marcio Baptista – partner; Marta Viegas – partner and Maria Beatriz Nunes – associate; Bruno Sbardellini Cossi – associate

For additional information visit www.tozzinifreire.com.br

WILMERHALE

CISCO SYSTEMS ACQUIRES STARENT NETWORKS

October 14, 2009

Starent Networks Corporation has agreed to be acquired by Cisco Systems Inc. for $2.9 billion.

Cisco has agreed to pay $35 per share in cash in exchange for each share of Starent Networks (Nasdaq: STAR). The deal has been approved by the boards of directors of both companies and is expected to close during the first half of 2010. Once the sale is complete, Starent will become the new Mobile Internet Technology Group under Cisco.

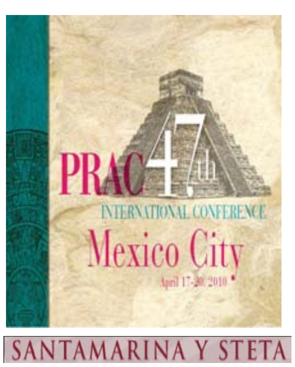
WilmerHale represented Starent Networks in this matter. The WilmerHale team was led by Partners Mark Borden, Jay Bothwick, Jeffery Hermanson and Lia Der Marderosian and included James Burling, Michael Bevilacqua, Michael Diener, Jeffrey Johnson, Scott Kilgore, Roger Ritt, Kevin Smith, Jay Urwitz, Wendy Terry, Kimberly Wade, Benjamin Brown, Joseph Conahan, Kari Jorgenson, Kavitha Kadambi, Kirath Raj and Elizabeth Tammaro.

For additional information visit www.wilmerhale.com

MEMBER CONFERENCES & EVENTS

Upcoming Events:

April 17—20, 2010 - PRAC Mexico City Conference - Hosted by Santamarina y Steta
May 23, 2010 PRAC Members Gathering @ INTA Boston
October, 2010 PRAC Members Gathering @ IBA Vancouver
October 16 - 19, 2010 PRAC Kuala Lumpur Conference - Hosted by Skrine



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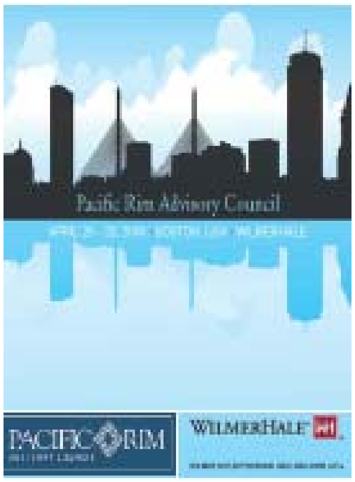

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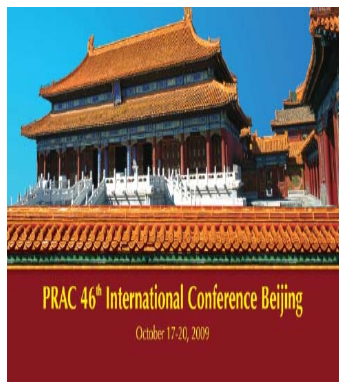
Available online at www.prac.org

PRAC CONFERENCE 2007
Bogotá - Cartagena, Colombia

BRIGARD & URRUTIA

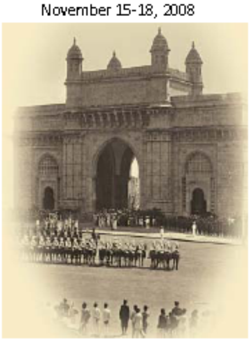


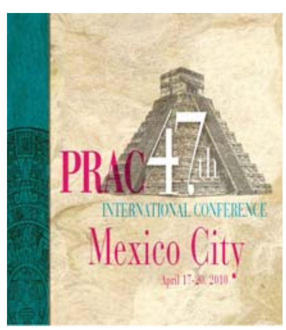
金杜律师事务所
KING & WOOD
PRC LAWYERS

Gide Loyrette Nouel

Mulla & Mulla
& Craigie Blunt & Caroe
Advocates, Solicitors and Notaries

Mumbai , India
November 15-18, 2008





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Historic reforms to telecommunications regulation

Summary of the Telecommunications Legislation Amendment (Competition And Consumer Safeguards) Bill

The Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (**Bill**) introduces a package of legislative changes aimed at:

a) Telstra's vertical and horizontal integration;

b) streamlining the access and anti-competitive conduct regimes; and

c) strengthening consumer safeguard measures such as the Universal Service Obligation (USO), the Customer Service Guarantee (CSG) and priority assistance.

A key feature is the way in which the Bill seeks to encourage Telstra to voluntarily commit to structural separation, by preventing Telstra from controlling spectrum in specified bands and restricting its ability to acquire spectrum for advanced mobile/wireless broadband services unless the ACCC has accepted voluntary undertakings from Telstra that Telstra will:

a) structurally separate its fixed line business;

b) divests its hybrid fibre coaxial cable network; and

c) divests its interests in Foxtel.

It is assumed that if Telstra gives such an undertaking, those assets will form part of the National Broadband Network (**NBN**). The effect of structural separation of Telstra would therefore be to establish the NBN as the monopoly provider of those services. Whether Telstra gives such an undertaking or not, the streamlined access and anti-competitive conduct regimes, which give the ACCC a new power to determine the terms and conditions of access up front, will apply.

A brief summary of some of the key elements of the Bill is set out below.

Telstra's Vertical and Horizontal Integration

The Bill does not mandate structural separation of Telstra, but does:

a) impose restrictions on Telstra's ability to acquire spectrum for advanced mobile/wireless broadband services unless Telstra agrees to structurally separate its fixed line business (and divest of certain other assets) voluntarily; and

b) require functional separation.

Restrictions on Telstra's ability to acquire spectrum for advanced mobile/wireless broadband services

Proposed amendments to the Radiocommunications Act 1992 and the new Part 10 of Schedule 1 to the Telecommunications Act 1997 (**Telco Act**) will impose a new licence condition on Telstra to prevent Telstra from controlling spectrum within specified bands unless the ACCC has accepted voluntary undertakings from Telstra that Telstra will:

a) structurally separates its fixed line business;

b) divests its hybrid fibre coaxial cable network; and

c) divests its interests in Foxtel.

We note in particular the following:

a) The specified bands of spectrum are frequencies between 520Mhz up to 820Mhz (currently within the broadcasting services bands) and frequencies between 2.5Ghz to 2.69Ghz (the IMT-2000 extension band), and any further spectrum designated by the Minister (section 577H). That is, the Bill does not propose to restrict Telstra from retaining or seeking to obtain spectrum that is currently allocated to mobile carriers (unless the Minister otherwise determines), but would prevent Telstra from seeking to acquire additional spectrum which is earmarked for advanced wireless broadband services.

b) The criteria to be taken into account by the ACCC in considering whether to accept or reject an undertaking from Telstra are not set out in the Bill, but may be determined by the Minister (section 577A). There is no express requirement in the Bill for the ACCC to engage in any form of public consultation in respect of a voluntary undertaking submitted by Telstra.

c) It is clear from the Explanatory Memorandum that structural separation may, but does not need to, involve the creation of a new company by Telstra and the transfer of its fixed-line assets to that new company. Alternatively it may involve Telstra progressively migrating its fixed-line traffic to the NBN over an agreed period of time and under set regulatory arrangements, and sell or cease to use its fixed-line assets on an agreed basis.

d) The date for the undertaking to come into effect must be 1 July 2018 or another date specified by the Minister. Therefore, the Bill appears to anticipate a fairly long lead time before Telstra would be required to implement the obligations in any accepted undertaking.

e) In respect of Foxtel and the HFC Network, the Bill provides scope for the Minister to remove those requirements if the Minister is satisfied that Telstra's structural separation undertaking is sufficient to address concerns about the degree of Telstra's power in telecommunications markets.

If Telstra does not elect to structurally separate, the restrictions proposed in the Bill would be likely to significantly advantage other mobile carriers to obtain access to spectrum for advanced mobile/wireless broadband services.

Functional Separation

If Telstra does not voluntarily implement structural separation, the Bill requires the functional separation of Telstra.

The proposed functional separation framework will be implemented through legislative amendment to Part 9 of Schedule 1 to the Telco Act with more detailed requirements to be set out in a determination to be made by the Minister. Therefore, further significant detail in respect of the functional separation regime is yet to come.

Telstra will be required to submit undertakings to the Minister concerning the implementation of functional separation, and ongoing commitments to functional separation. These undertakings will be contained in a draft Functional Separation Undertaking (FSU). Those undertakings must be directed at achieving key principles and objectives of functional separation and must include specific matters set out by the Minister in a requirements determination.

The Minister will consider the draft FSU submitted by Telstra, hold a public review and consult the ACCC. The Minister will then approve, vary or replace the draft FSU. It then becomes a final FSU.

Unlike the existing operational separation regime, Telstra will be required to comply with the final FSU with compliance being a carrier licence condition.

Telstra will be required to establish an oversight and equivalence board to monitor and support Telstra's compliance with the final FSU and report to Telstra's Board and the ACCC about that compliance. The Explanatory Memorandum also indicates that there will also be provisions for the establishment of a new independent telecommunications adjudicator, to provide a practical way to enable access providers and access seekers to resolve non-price equivalence and service level issues. However little detail is provided in the Bill in respect of the proposed new adjudicator.

More detailed requirements of the functional separation undertaking to be addressed by Telstra will be set out in a written determination to be made by the Minister within 90 days of the commencement of the legislation.

The functional separation obligations on Telstra would cease in the event that Telstra submits an enforceable undertaking acceptable to the ACCC to structurally separate.

Streamlining the access and anti-competitive conduct regimes

The Government has proposed significant changes to the access regime contained in Part XIC of the Trade Practices Act, in order to lead to greater certainty, fewer disputes and more timely and efficient outcomes. The new regime is intended to be more broadly consistent with the access regimes that operate in other key infrastructure industries in Australia, such as gas and electricity, and the role of the telecommunications regulator and other international jurisdictions.

New ACCC powers

The Bill abolishes the negotiate-arbitrate model, under which the terms and conditions of access to declared services were determined by negotiation between the service provider and access seeker, or by ACCC arbitration if the parties were unable to reach agreement.

In its place, the ACCC is given the ability to make upfront determinations on price and non-price terms of access as follows:

a) the ACCC may determine upfront price and non-price terms and conditions to apply in general for a 3 to 5 year period;

b) the Access Determination would apply to all access providers and access seekers of the declared service;

c) the ACCC will have the power to determine fixed principles to apply for a stated period which may extend beyond the duration of the Access Determination;

d) the ACCC will have the power to make binding rules of conduct for the supply of declared services which would apply either in addition to or as a variation of an Access Determination (such rules could address particular issues as they arise);

e) there will no longer be ordinary exemptions from access obligations and no ordinary access undertakings;

f) the ACCC will have the power to request a party that lodges a special access undertaking to vary the undertaking without having to lodge a new undertaking; and

g) merits review would not be available for ACCC decisions under Part XIC.

Access Determinations

The ACCC may make a written determination relating to access to a declared service.

The terms and conditions that are specified in an Access Determination must include terms and conditions relating to price or a method of ascertaining price, which provides the ACCC with flexibility in how it addresses pricing issues. An Access Determination may also provide for the ACCC to perform functions or exercise powers over a period of time.

In making an Access Determination, the ACCC must take into account the following matters:

a) whether the determination will promote the long-term interests of end users;

b) the legitimate business interests of a carrier or carriage service provider;

c) the interests of all persons who have rights to use the declared service;

d) the direct costs of providing access to the declared service;

e) the value to a person of extensions or enhancement of capability whose cost is borne by someone else;

f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility; and

g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

The ACCC may also take into account the characteristics, the costs associated with, the revenues associated with, and the demand for, other eligible services supplied or capable of being supplied by a carrier or carriage service provider.

There are specified restrictions on access determinations, and provision for the payment of fair compensation if an access determination deprives a person of a pre-determination right.

An Access Determination may include a fixed principles provision. The determination must provide that a specified date is the nominal termination date for the fixed principles provision and that date may be later than the expiry date for the determination itself. The fixed principles provision may also carry over into replacement Access Determinations if the nominal termination date has not expired. For example, a fixed principles provision as to how depreciation is treated could carry over into the next Access Determination.

The ACCC must not make an Access Determination unless it has held a public inquiry about a proposal to make the determination and has prepared a report about the inquiry and the report was published during the 180 day period ending when the determination was made.

A carrier licence held by a carrier is subject to a condition that the carrier must comply with any Access Determinations that are applicable to the carrier. A carriage service provider must comply with any Access Determinations that are applicable to the provider.

An access seeker, carrier or carriage service provider may enforce compliance with an Access Determination by making an application to the Federal Court of Australia.

Binding rules of conduct

The ACCC may make written rules relating to access to a declared service which may:

a) specify the terms and conditions on which a carrier or carriage service provider is to comply with any or all of the standard access obligations applicable to it;

b) specify any other terms and conditions of an access seeker's access to the declared service;

c) require a carrier or carriage service provider to comply with any or all of the standard access obligations applicable to it in a manner specified in the rules;

d) require a carrier or carriage service provider to extend or enhance the capability of a facility by means of which the declared service is supplied;

e) impose other requirements on a carrier or carriage service provider in relation to access to the declared service;

f) specify the terms and conditions on which a carrier or carriage service provider is to comply with any or all of those other requirements;

g) require access seekers to accept, and pay for, access to the declared service;

h) provide that any or all of the obligations referred to in section 152AR are not applicable to a carrier or carriage service provider either conditionally or subject to conditions or limitations specified in the rules; and

i) restrict or limit the application to a carrier or carriage service provider of any or all of the obligations referred to in section 152AR.

Binding rules of conduct may be of general application or they may be limited to particular carriers or classes of carriers or particular access seekers or classes of access seekers.

The ACCC is not required to observe any requirements of procedural fairness in relation to the making of binding rules of conduct.

A carrier licence held by a carrier is subject to a condition that the carrier must comply with any binding rules of conduct that are applicable to the carrier.

An access seeker, carrier or carriage service provider may enforce compliance with an Access Determination by making an application to the Federal Court of Australia.

Ability of access provider to set or influence access terms and conditions

The access provider has only a limited ability to set or influence the terms and conditions of access to declared services under the new regime.

The new regime recognises that access providers and access seekers may agree on the terms and conditions of access. If the parties enter into an access agreement and register that agreement with the ACCC, the access agreement prevails over any ACCC determination or rule of conduct to the extent of any inconsistency.

The new regime removes the access provider's ability to lodge a standard access undertaking with the ACCC (that is, an undertaking as to the terms and conditions of access to a declared service). The new regime retains the special access undertaking provisions, under which an access provider can lodge a special access undertaking in connection with the provision of a service that is not an active declared service. However, the ACCC is given the power to refuse to consider a special access undertaking if the access provider has previously lodged a similar special access undertaking that has been rejected by the ACCC.

The access provider does not have a right to request that the ACCC make a binding rule of conduct or an access determination, or to put a proposal to the ACCC for its consideration. This is quite different to the gas and electricity access regimes in Australia. While both those regimes provide for upfront determination of price and other terms and conditions of access by the regulator, the service provider puts forward their proposed pricing and access terms and conditions, which the regulator then assesses against specified criteria.

By contrast, under the new regime, the ACCC has the power to make an access determination or binding conduct rule of its own initiative. The access provider may participate in the public inquiry process. The ACCC is able to draw upon existing information and prior submissions of parties in making access determinations.

Merits review of decisions under Part XIC will no longer be available. Judicial appeal processes will still be available however for parties wishing to appeal a point of law.

Anti-competitive conduct

Part XIB prohibits telecommunications carriers and carriage service providers from engaging in anti−competitive conduct. While the anti-competitive conduct that is prohibited under Part XIB is similar to that which is prohibited by Part IV of the TPA, Part XIB makes provision for the issue of competition notices by the ACCC if it believes the service provider is engaging in anti−competitive conduct in the telecommunications markets in breach of the competition rule.

These provisions are intended to achieve a timely resolution of allegations of anti-competitive conduct. However, the effectiveness of the Part A Competition Notice procedure has been questioned, because of the obligation for the ACCC to engage in a consultation process and the scope for legal challenge on procedural fairness grounds. The reforms address these concerns by removing the consultation requirement.

The Government also proposes to clarify that Part XIB applies to content services, in order to increase regulatory certainty and reduce the risk of protracted legal disputes on this issue. The Explanatory Memorandum notes that advances in technology have increased the capacity for carriers and CSPs to provide content of services. It notes that the offering of bundled packages (often involving the supply of voice, internet and television) is common place and that bundled packages involving the supply of content services by carriers and carriage service providers may have anti-competitive consequences, if a provider's market power can be levered to gain advantage in the market for another service.

The Explanatory Memorandum gives as an example a vertically integrated carrier acquiring premium content on an exclusive basis could be a source of significant market power which could be used to stifle investment in new telecommunications infrastructure. In those instances, if the ACCC believes the relevant conduct breaches the competition rule, the Explanatory Memorandum states the ACCC must be able to take enforcement action without doubts over the application of Part XIB to content services.

Strengthening existing consumer protection regulations

The Bill strengthens existing legislative requirements in respect of the Universal Service Obligation, the Customer Service Guarantee and Priority Assistance. There are also measures to improve the effectiveness of the regulating body, the Australian Communications and Media Authority (**ACMA**), through enhanced regulatory powers.

Universal Service Obligation

Part 4 of Schedule 1 to the Bill amends the Consumer Protection Act to include new requirements for the universal service provider (Telstra) to supply, on request, standard telephone services with characteristics and to performance standards determined by the Minister. The Explanatory Memorandum indicates that it is intended that performance standards will include maximum periods of time for new connections and fault rectification and reliability standards. There are also new provisions providing minimum performance benchmarks that the universal service provider must meet in fulfilling its responsibilities.

The Bill also provides the Minister with the power to specify, by written determination, rules and performance standards to which a primary universal service provider must adhere in relation to the supply, installation, maintenance and location of payphones. In addition, there will be new requirements in relation to public consultation and notification of proposals to remove payphones and ACMA will have new powers to direct the universal service provider not to remove payphones.

Customer Service Guarantee

The CSG requires telephone companies to meet minimum performance standards or provide customers with financial compensation when these standards are not met.

Part 5 of Schedule 1 to the Bill amends the Consumer Protection Act to provide for the Minister to establish minimum CSG performance benchmarks. While failure by a service provider to meet a CSG standard is not subject to a civil penalty under the Telco Act, failure to meet the minimum CSG new performance benchmarks will be.

In addition, the Bill provides for the Minister to establish new CSG timeframes for connections and repair that will apply to wholesale providers to assist retail providers of CSG services meet CSG service quality standards.

The Bill seeks to limit the ability of service providers to require customers to waive their CSG rights by providing that:

a) an customer's waiver must be express;

b) a customer waiver of the CSG must include a statement that summarises the consequences of the customer waiving the CSG;

c) a waiver must not be set out in the standard form of agreement formulated by a carriage service provider for the purpose of section 479 of the Telco Act;

d) the CSG cannot be waived for a telephone service that is supplied in fulfilment of the Universal Service Obligation.

Priority Assistance

Part 6 of the Bill introduces a new service provider rule in Schedule 2 of the Telco Act requiring service providers to either offer a priority assistance service in accordance with the Communications Alliance code on priority assistance or to inform any prospective customers of a standard telephone service of providers from whom they can purchase such a service if they require it.

Telstra will remain bound by its current carrier licence condition requiring it to have priority assistance services.

Enforcement

Part 7 of Schedule 1 to the Bill inserts a new Part 31B into the Telco Act which provides expanded powers for ACMA to issue infringement notices.

For further information, please contact Katrina Groshinski, Kirsten Webb or Justine McCarthy.

Insurance and Reinsurance

BRAZIL: NEW REGULATIONS FOR INSURANCE TRANSACTIONS IN FOREIGN CURRENCY AND THE PURCHASE OF INSURANCE ABROAD

The Brazilian Superintendence of Private Insurance (*Superintendência de Seguros Privados* – SUSEP) issued new regulations regarding foreign currency insurance transactions issued in Brazil and the purchase of foreign insurance by Brazilian residents.

Insurance Transactions in Foreign Currency

The new regulation lists the risks that can be covered by policies issued in foreign currency in Brazil by Brazilian insurance companies, including: (i) export credit; (ii) aeronautics; (iii) satellites; (iv) international transportation; (v) certain sea hulk risks; (vi) oil risks; (vii) D&O risks associated with Brazilian companies that issued depositary receipts or debt instruments abroad, etc. In general, an insurance policy may be issued in foreign currency whenever it involves risks abroad.

In certain cases, foreign currency policies related to risks not listed in the regulation may be issued if, based on the relevant coverage, there is a specific justification for the use of foreign currency. The insurer must keep the documentation supporting the selection of foreign currency for five years and present it to SUSEP whenever requested.

Similarly, foreign currency policies issued prior to the new regulation can be renewed as long as there is a justification for the use of foreign currency.

Insurance Purchased Abroad by Brazilian Residents

The purchase of insurance abroad by Brazilian residents is restricted to certain situations established by the National Council of Private Insurance (*Conselho Nacional de Seguro Privado* - CNSP), including (i) risks not covered by Brazilian insurers; (ii) risks taking place during the stay of a Brazilian resident abroad; (iii) certain sea hulk and civil liability risks for vessels, etc.

The new regulation created a control mechanism regarding insurance policies purchased abroad by Brazilian residents where the insured party and/or insurance broker must keep certain types of evidence to the effect that the coverage purchased abroad was either denied by Brazilian insurance companies or does not exist in Brazil.

The renewal of insurance policies written before January, 2007 (when Supplemental Law No. 126 was published regulating insurance transactions in foreign currency) is subject to the same requirements above. Therefore, the insured party and/or the insurance broker must keep evidence that the risks covered at the time of renewal of such insurance policies were denied or still do not exist in Brazil.

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IN THIS ISSUE

OCTOBER 2009

BUZZ ABOUT A NEW NATIONAL PENSION PLAN: WHAT'S IT ALL ABOUT?

BY HEATHER DI DIO

If you have seen press reports lately about the possibility of a new national pension plan, you may be wondering what it is all about.

In short, federal and provincial finance ministers have launched a task force to evaluate the Canadian retirement system and make recommendations on how to improve it. Among the many alternatives being canvassed, the proposals gaining the most publicity are the overhaul of the Canada Pension Plan (CPP) and the creation of a new national pension plan. It is noteworthy that so many premiers across the country appear to be serious about this change.

Discussion surrounding the topic of pension reform is not new. However, as the number of employers in financial trouble rises, and uncertainty over the security of pensions grows, retirement issues are now front and centre in the minds of many Canadians. As a result, governments across Canada are taking an active role in re-evaluating the Canadian pension system. What has long been a main concern for workers and the pension regulators seems to have become a priority for cabinet ministers at the provincial and federal levels.

Canadians are just not saving enough when it comes to retirement income. It is estimated that only two in ten employees in the private sector have a company pension plan, and the number of private sector pension plans is declining. Adding to that, the majority of those who are fortunate enough to participate in a private sector plan have been hurt by the financial crisis and have seen the value of their retirement savings drop.

So it seems there is agreement that a major problem exists. The question that needs to be answered is, "how do we fix it?"

In July 2009, ministers from the governments of British Columbia, Alberta, Manitoba, Ontario and Nova Scotia met in Vancouver and decided to immediately begin a formal review to create a national solution to improve retirement incomes. The review was supported by representatives from the other five provinces and two of the three territories, who participated in the meeting by telephone. However, a report is not expected to be completed until December.

Various other reports conducted by pension task forces in British Columbia, Alberta, Ontario and Nova Scotia last year all recommended some type of pension reform. Even the head of the CPP Investment Board, David Denison, recently spoke about the need for change. He suggested that policymakers consider new regional or national pension plans, which could be based on the CPP model, intended to help those who don't have company pension plans.

A consensus is forming that Canada needs a public pension plan covering all workers. One way to achieve this is to expand the CPP. Another alternative would be to allow those without a pension plan to buy supplemental CPP coverage. A third option would be to create regional pension plans covering workers in defined geographical areas, or better yet, create a national pension plan to provide retirement income for all Canadian workers.

The three most western provinces, British Columbia, Alberta and Saskatchewan, seem determined to move forward with developing a regional pension plan on their own, if talks to create a national retirement program fail.

The federal-provincial pension task force plans to reconvene in Whitehorse in December 2009 to discuss their findings on the Canadian retirement system. What will come of their discussions and what will be implemented is yet to be known.

The Pensions | Benefits Group at FMC will continue to monitor this topic and report on any future developments.

CONTACT US

For further information, please contact a member of our Pensions | Benefits Group

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Counter-Suit for Damages Actions in Malicious Litigation

Malicious litigation is broadly thought to be using a legal right to litigate to protect an interest when no substantive right has been violated. Currently, Chinese law does not provide any specific provisions on how to determine whether a party has abused its right to litigate, nor does the law define the concept of malicious litigation. Moreover, Chinese law does not provide specific remedies for a victim of malicious litigation to repair the damages suffered from a malicious litigation.

By Xu Jing, Partner at King & Wood's Intellectual Property Group

In 2006, however, the Nanjing Intermediate People's Court heard the patent infringement case of Yuan Lizhong v. Yangzhou City Tongfa Air-Raise Actuator Factory & Yangzhong City Tongfa Industry Co. Ltd. This case was the first counter-suit for damages action brought as a reaction to malicious litigation. In March, 2009, the Supreme People's Court promulgated the Opinions of the Supreme People's Court on Several Issues Regarding the Implementation of the National Intellectual Property Rights Strategy (Fafa [2009] No. 16) ("Opinion") which provides that: "The courts shall accept where appropriate and adjudicate cases that seek declaratory judgments of non-infringement and litigations that seek counter-suit for damages in claim of malicious litigations."

The Opinion provides practical guidance to the people's courts in counter-suit for damages actions if in the face of malicious litigation.

Definition of Malicious Litigation and How to Determine "Malice"
When a party initiates litigation in the PRC, it must adhere to the "Honest and Credit" principle. Otherwise, the party will be considered to be abusing its right to litigate under the Chinese law. Based on this principle and general understandings described in academic research papers, we believe the definition for malicious litigation refers to "a groundless civil action filed without a violation of substantive rights or without factual basis and other justifiable reasons to pursue litigation and which will result in damages to the interests of the alleged parties". Among the elements referred to above, the key element is to determine if the party that initiated the groundless civil litigation is acting with "malice" towards the other party.

Counter-Suit for Damages Actions

Although the Opinion issued by the Supreme People's Court allows counter-suits for damages, it did not specify details on the application of such a practice. Since the counter-suit for a damages action is a type of litigation where a plaintiff prays for compensation for damages suffered from a malicious litigation, the proceeding at its core is a civil suit regarding infringement of rights and with the corresponding remedy for compensation.

Legal Trends for Counter-Suit for Damages Actions

Though there are not yet explicit provisions regarding malicious litigation in Chinese law, a basic legal mechanism for preventing malicious litigation is now being formed, particularly in the field of intellectual property. It is foreseeable that the people's courts will set stricter criteria for accepting such cases and impose tighter controls over granting interim injunctive measures.

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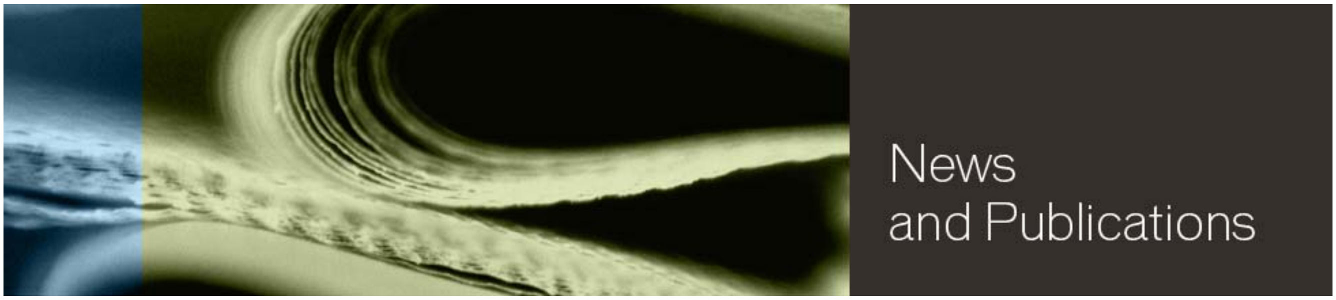

29/10/2009

Relevant Markets Guideline Under Anti Monopoly Law

The Commission for the Supervision of Business Competition (the "Commission", also known by its Indonesian acronym "KPPU") recently issued its Regulation No. 3 of 2009 regarding Guidance with respect to the Relevant Market as meant in Anti Monopoly Law (Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition ("Regulation No. 3/2009").

The guidance provided by Regulation No. 3/2009 is not about how the KPPU is conducting the examination in the framework of ensuring the upholding of the laws and regulations, but is specifically to ensure the clear and correct understanding as to what is meant by "relevant markets" in the underlying Law No. 5 of 1999, for the ultimate purpose of achieving sound business competition environments. As such, the guidance attempts to present clearer and more defined scopes and limitations in the matters that are related to the said relevant market in 5 chapters, as follows:

Chapter I : Background
Chapter II : Aim and Scope of the Guidance
Chapter III : Rules with respect to the Relevant Market
Chapter IV : The Relevant Market concept and case examples
Chapter V : Conclusion

Pursuant to the guidance, in a relevant market with a very narrow scope a business operator who gained control over a certain product may be assessed as the holder of a dominant position whereas a relevant market with a very wide scope, business operator having control over a certain product may not come out as the holder of a dominant position, hence the definition of the relevant market is of very strategic importance for the analysis of the factual conditions in the ultimate determination of whether the competition environment is sound.

This Regulation No. 3/2009 enters into force as of 1 July 2009. [Ayik Candrawulan Gunadi / Luh Putu Adinda Martatilova]

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Practical Implications of the RMA Amendments for Councils

Introduction

The goal of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (**RMAA**) is to simplify and streamline processes under the Resource Management Act 1991 (**RMA**). Some of the amendments are inconsequential and others require more significant departures from existing processes.

This FYI outlines what Councils need to do to comply with the amended provisions on a day to day basis and to ensure that staff are familiar with the new processes.

The RMA amendments have immediate implications for Council processes, and also provide a useful opportunity for spring cleaning

Essentials

Delegations and warrants

- Update delegations to staff, committees and hearings commissioners to ensure that those persons have the necessary powers under new RMA provisions (especially notification, Council's role on direct referral, and projects of national significance). It is also a good time to rethink who should be doing what. For example, who should be responsible for:
  - (a) Expressing the Council's opinion to the Minister about whether the Minister should refer a matter to the Environment Court or a board of inquiry?
  - (b) Suggesting members for a board of inquiry?
  - (c) Deciding an applicant's request for direct referral of an application to the Environment Court?
  - (d) Providing a discount on administrative charges if consent processing timeframes are not met?
  - (e) If submitters request independent commissioners, estimating how much a councillor hearing would have cost for the purpose of dividing the cost between the applicant and the submitters who made the request?
  - (f) Applying to the Environment Court for an order that a proposed rule has legal effect from the date of notification, or recommending to the Council which rules only have legal effect once they are operative?
  - (g) Determining whether the Council's plan or proposed plan duplicates or conflicts with a NES and, if so, that the plan or proposed plan requires amendment?
- If enforcement officer warrants refer to specific sections and subsections, check the warrants to ensure they still cover the appropriate powers following the subtle changes to section 332.

Consent processing

- Understand the new notification and service requirements and adapt processes and templates for notification and service decisions. The old test presumed public notification unless the activity's effects would be minor; the new test starts from a neutral position and requires full notification if the effects will be more than minor (or in other specific situations, including the refusal of a section 92 request or where the plan or a NES requires full notification). This is a subtle change and only time will tell whether it makes any difference in practice, but Councils will need to word their notification decisions carefully to ensure they reflect the new test.

- Update templates for officer reports. The templates need to guide officers through the correct process for considering consent applications.

- Update templates for standard letters. Again, these will need to reflect the amended provisions, tests, and timeframes.

- Update internal policies, processes and workflows to reflect the new timeframes in the RMA (especially the curtailed ability to stop the clock while waiting for further information). Councils will need to ensure their initial requests for further information are comprehensive, and consider carefully the distinction between deficient applications which should be rejected under section 88(3), information needed for notification, and information needed prior to the hearing or officer decision.

- Consider how the Council will practically identify and filter out submissions that relate to trade competition. A trade competitor or their surrogate can only make a submission or be a section 274 party if they are "directly affected" by an adverse environmental effect that does not relate to trade competition or its effects.

- Be aware that once a consent applicant has exercised the right of reply, the hearing must be concluded within 10 working days. The hearing cannot be adjourned indefinitely to allow extra time for writing the decision (however the right of reply need not be exercised immediately).

- Be aware of the modified requirements for what a resource consent decision must contain. In particular, decisions can cross-reference other documents instead of repeating them, and decisions on non-notified applications must still be in writing but only have to state the reasons for the decision rather than cover matters such as plan provisions and issues in contention.

Plans and plan changes

- Understand the timing of when rules have legal effect. In general, the default date is the date of notification of the Council's decisions on submissions (unless delayed by the Council or brought forward by Court order). Rules protecting particular resources (eg water, soil, significant vegetation or historic heritage) take effect as soon as the proposed plan is notified.

- Amend plans or proposed plans to remove rules that duplicate or conflict with provisions contained in a NES, or include any provisions as directed by a NPS. This can be done without using the usual processes under Schedule 1, but amendments based on a NES must be made as soon as practicable after the NES comes into force.

- Review district plan tree protection rules. Rules can no longer prohibit or restrict the felling, trimming, damaging or removal of trees in an urban environment unless the trees are specifically identified in the plan or the trees are in a reserve or conservation management area.

- Understand the changes to the First Schedule process. For example, further submissions may only be made by persons who have standing, submissions based on trade competition are barred at all stages, and appeals may not seek withdrawal of the whole proposed policy statement or plan.

- Consider when and how the Council will complete a compulsory 10 year review for its plans. A "full review" is no longer required, but Councils must review each provision at least once every 10 years. This can be done by whatever means Councils choose (eg a rolling review or plan changes). If full reviews are not proposed, Councils will need to keep track of the date of the last review of each provision.

Transitional provisions

- Be aware of the transitional provisions in the RMAA. The new and amended RMA provisions do not apply to matters arising before 1 October 2009 (consent applications, notices of requirement, proposed plans, plan changes and variations lodged before that date, as well as enforcement proceedings for offences arising before that date). One exception is applications for restricted coastal activities, which are processed under the new provisions if they had not been notified as at 1 October 2009. The transitional provisions are also relevant to Councils' update of their delegations (discussed above) because the pre-October 2009 delegations will need to remain in place alongside the updated delegations until all transitional matters have been concluded.

Optional

- Adopt a policy for discounting administrative charges where consent processing timeframes are not met and the Council is at fault. Adopting a policy is not compulsory, and regulations under section 36AA will act as a default policy unless Councils choose to adopt a more generous position in their own policy. The Minister must consult with Councils about the proposed regulations, so Councils will have a chance to comment on the regulations before they come into force.
- Use the RMA amendments as an opportunity to spring clean existing processes and templates.
- Train staff and councillors about the amended RMA to help the Council to better meet its obligations.

Summary

The amendments to the RMA are intended to simplify and streamline processes and reduce costs, delays and administrative burdens. The extent to which that actually occurs remains to be seen, but in the meantime immediate changes are required.

Training and education will help Councils to better meet their obligations under the Act, and changes to internal reports, templates, and processes will be useful tools to help achieve the desired results.

Our Local Government and Environment teams in Auckland, Wellington and Christchurch are familiar with the amendments and their implications, and are ready to help Councils with the transition.

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SCOPE OF DESIGNATED INDUSTRIES UNDER ARTICLES 8 AND 9 OF THE SOIL AND GROUNDWATER POLLUTION REMEDIATION ACT EXPANDED

◎Jason Chou

The Environmental Protection Administration (EPA) promulgated an amendment to Articles 8 and 9 of the Soil and Groundwater Pollution Remediation Act on July 27, 2009, by which the scope of the designated and officially announced industries is expanded. The amendment will come into force on January 1, 2010.

According to Article 8 of the Act, the transferor of land used by designated and officially announced enterprises shall provide soil pollution inspection data; a land transferor that fails to provide the required data shall bear the same responsibility as that of the landowner if such land is officially announced as a pollution control site or a pollution remediation site.

According to Article 9 of the Act, before filing applications with the competent authorities of the industries concerned for establishment, or suspension or termination of operations, enterprises in the designated and officially announced industries shall submit to the local competent authorities for recordation the soil pollution inspection data regarding the land used or to be used by the enterprises.

The EPA found that it is highly likely that the land used by some enterprises not included in the designated and publicly announced enterprises was also contaminated, and that the 17 designated and publicly announced industries under Articles 8 and 9 of the Act can no longer cover all the enterprises having contaminated sites. Therefore, the scope of the designated and officially announced enterprises was expanded by adding 13 industries to the list of designated and officially announced industries. The designated and officially announced industries added are as follows:

- Lumbering industries
- Fertilizer manufacturing industries
- Paint, varnish, dye, pigment manufacturing industries
- Steel and iron casting industries
- Aluminum smelting industries
- Aluminum casting industries
- Copper smelting industries

- Copper casting industries
- Metal heat treatment industries
- Passive electronic component manufacturing industries
- Optoelectronic material and component manufacturing industries
- Waste Disposal Industries
- Storage and transportation yards for petroleum industries

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INTELLECTUAL PROPERTY REPORT

Articles

New Challenges In Software Law And Policy, And Continued Open Source Complications, Challenge High Tech Market

Paul Ragusa*

I. Introduction

Although computer software is pervasively used in our information economy, software developers, their end users and legal practitioners continue to struggle to apply existing law to software-related innovations. One of the hotbeds of legal and commercial disputes has been the field of free and open source software ("OSS"). OSS is software whose author dedicates it to the public, for free use and adaptation or enhancement. But it is not that simple.

OSS originators are free to set forth certain contractual limitations on this free use and adaptation by including or invoking a license that is made effective by the end user's choice to use or modify the code. One of the most famous OSS platforms is the Linux operating system, the use of which is governed by the well-known GNU General Public License (the "GPL"). It and other OSS-related agreements can require OSS adopters to publish and/or dedicate to the public the entirety of the source code of a product incorporating or adapting OSS code. This is obviously of concern to a company that does not want to publish the entire source code for its proprietary software application simply because a programmer incorporated a (potentially small) segment of OSS code in the commercial product.

These and other problematic terms in the GPL and other OSS-related agreements have led to disputes, litigation and proposed changes in the law. This article discusses some of these concerns and suggests some best practices for those evaluating possible risks and rewards from the use or improvement of OSS content.

II. Imposing New Warranty Obligations On Vendors Of Software?

The American Law Institute ("ALI") recently approved the final draft of its Principles of the Law of Software Contracts (the "Principles"), which seek to present normative legal guidelines to assist courts in deciding disputes involving transactions in software and to guide those drafting software contracts. The Principles, however, are not binding law and neither courts nor practitioners are under an obligation to uphold the Principles as presented. Even so, the Principles have been staunchly opposed by a number of industry-leading software players, including the arguably-odd pair of Microsoft and the Linux Foundation (which promotes the free use of OSS applications that frequently compete with software that Microsoft seeks to sell at a profit).

Microsoft and the Linux Foundation have joined together to draft a letter to the ALI requesting that the ALI delay adoption of the Principles until additional time for public comment has passed. Specifically, they point to Section 3.05(b) of the Principles, which creates a non-disclaimable warranty of no material hidden defects:

> A transferor that receives money or a right to payment of a monetary obligation in exchange for the software warrants to any party in the normal chain of distribution that the software contains no material hidden defects of which the transferor was aware at the time of the transfer. This warranty may not be excluded.

Section 3.05(b) appears to have no counterpart in existing commercial law. No similar provision appears in the Uniform Commercial Code ("UCC"). In fact, the UCC permits disclaimer of all implied warranties if the proper steps are taken. Nor does Section 3.05(b) contain any requirement that the transferor have intended to mislead the recipient of the software.

Such an automatic and non-waivable, strict liability warranty for hidden material defects (which term is not clearly defined), if implemented as a rule, would subject the software industry to restrictions that do not apply to other industries: software vendors would arguably lose much of their freedom to contract and would be exposed to a large financial risk should they accept payment for their products. Section 3.05(b) has the potential to push many vendors out of the software industry and to force others to develop alternative distribution schemes, wherein payment is not derived directly from the distribution of software.

The automatic and non-waivable warranty would also pose problems for companies that sell or deliver software only as an ancillary part of their goods and services. Such companies will have fewer internal resources to evaluate the "defect free" nature of this ancillary software, especially if it is obtained from third party sources.

While the ALI's Principles appear to promote "free" software, in the sense that they provide affirmative liability-avoidance bases for not demanding "payment of a monetary obligation" for their software, this is not one of the freedoms sought by such prominent open source advocates as the Free Software Foundation ("FSF"), which administers the GPL, or, more generally, the broader OSS community. OSS seeks to encourage innovation through use, modification and distribution of good software code, both for free and for profit purposes, but the Principles seem to stifle innovation by creating a looming fear of a warranty claim as to any for-profit software sale.

Under the GPL, a software vendor may accept payment for its software, even though the buyer is free to use, modify and distribute the software in any way. If a defect is discovered, it encourages the vendor to develop a solution. Subsequently, the vendor can further profit by selling the updated software, such that any additional innovation potentially leads to greater profit. Conversely, under the approach taken by the Principles, a software vendor would not be able to profit by developing a solution to any defects in its software that fall under Section 3.05(b).

An additional and serious potential for liability that is peculiar to the for-profit modifier or adopter of OSS code is that Section 3.05(b) would require him to investigate, or blindly vouch for, the quality of every previous contributor to the OSS code he uses or modifies. By the very nature of the OSS model, it is almost certain that the modifying vendor will be in no position even to identify, much less reliably vouch for the quality, of each of the various legacy components in the particular OSS code he uses or modifies.

The Principles also create an interesting discrepancy. Software, such as a Linux distribution, that can be downloaded free-of-charge over the Internet is often available for purchase on a CD or DVD as well. Under the Principles, this would create a situation in which the warranty of no material hidden defects applies to the same software in some instances and does not apply to others. Additionally, the Principles would not mandate a warranty to software sold wherein the vendor receives indirect revenue only based on transactions incidental to or following on from distribution, such as advertising. Each of these scenarios demonstrates why some argue that the Principles put form over function rather than solving a fundamental problem, how to ensure adequate protection for buyers of a product for which it is not always particularly easy to kick the proverbial tires.

By contrast, the GPL takes a blanket approach, treating all software in the same manner, no matter how it is distributed — the vendor loses control after the first sale. This method provides facial equality in the software industry and provides both software vendors and software users with the freedom to use, modify and distribute the software in any way — if they are willing to live with the terms of the GPL.

III. The Future Of The GPL

The FSF actively enforces compliance with the terms of the GPL. Due to the FSF's diligence, almost all controversies surrounding the GPL have been handled outside of the courts. The few OSS license-related controversies that have made it into U.S. courts have been settled. Most recently, the FSF settled a dispute with Cisco over several Linux components embedded in one of Cisco's Linksys routers. The agreement resulted in Cisco appointing a Free Software Director for its Linksys subsidiary to supervise Linksys's compliance with the GPL and other free software licenses and to periodically report to the FSF regarding these compliance efforts. These results demonstrate the FSF's commitment to defending and enforcing the GPL.

Because of the FSF's diligence, the GLP has not been vetted in U.S. courts. Interestingly, a German district court has upheld Version 2 of the GPL as valid and in accordance with the German Civil Code. However, this civil law decision provides little insight into how U.S. courts will view any version, including the current Version 3, of the GPL.

The fundamental question concerning the GPL remains to be decided in the U.S. — is the license valid at all? Copyright law is generally intended to secure exclusive rights to a work for an author for a limited time so as to encourage development and expression of new ideas. So-called "Copyleft" licenses, as some describe many OSS licenses, however, are designed to ensure that no one may claim exclusive rights to any work that is a "derivative work" of the copyleft-licensed code and requires that any such derivative work be given away for free to everyone. Some have contended that these requirements may constitute "copyright misuse," that is, using a copyright to try to advance goals in contravention of the public policy established under the copyright laws. Lothar Determann, *Dangerous Liaisons* —

Software Combinations as Derivative Works? Distribution, Installation, and Execution of Linked Programs Under Copyright Law, Commercial Licenses, and the GPL, 21 BERKELEY TECH. L.J. 1421, 1493 (2006). Additional patent-related requirements in Version 3 of the GPL add further relevance to these arguments.

Regardless of whether the GPL is eventually upheld, a serious examination of the potential risks is necessary for any company contemplating using GPLv3-licensed code in its products in some form. In a worst-case scenario, the entire product might have to be distributed without any restrictions on further copying and distribution by the recipients. Not only copyright, but patent rights as well are at potential risk. This is so because all patent rights over the software could also be waived, as a license would have to be issued not only to customers who obtained the software directly from the company, but also to anyone who received the software from them or anywhere else. Further, if the product was developed under a patent license from another party, the company would need to ensure that the licensor would allow extension of the license to cover anyone who received the product or to cease distributing the product altogether.

The “viral” nature of the GPL — so called because it can “infect” the I.P. rights even of far-distant and unwitting recipients or end users of software containing OSS code — and the lack of clarity regarding what constitutes a derivative work make any inclusion of GPL-licensed code in commercial software a gamble. Companies are increasingly taking this issue seriously and developing detailed and thoughtful policies for use of OSS, as well as undertaking machine-assisted audits of the code they distribute commercially, in order to minimize their risk of an unwanted lawsuit, especially when their own proprietary code and/or patent rights may be put at risk by inadequate diligence regarding OSS in an evolving software market and legal environment.

* Law Clerk Chad Cullen contributed substantially to the preparation of this article.

Davis Wright Tremaine LLP

City and County Governments Authorize Permit Extensions for Active Development Projects

11.05.09

By Clayton P. Graham and Thomas A. Goeltz

Landowners and developers in Washington state should be aware of a spate of recent legislation aimed at prolonging the life of active land development permits. Developers who request these extensions in a timely manner could effectively extend the life of their development approvals—including certain building permits, use permits, subdivision and other land use approvals—and may be able to save themselves the hassle and expense of having to restart the entitlement process for stalled development projects.

Financial difficulties faced by many developers in the state have prompted a number of cities and counties to adopt ordinances that authorize extensions to certain permit expiration dates. These ordinances apply to a variety of development approvals and permits, and a few of them implement automatic permit extensions.

For example, code amendments under Clark County's Ordinance 2009-06-15 provide that a number of development approval types "are hereby granted a six-month extension," subject to certain conditions and requirements. However, the vast majority of these ordinances require some action by the owner or developer in order for the extension to be granted. Following are a few examples of ordinances authorizing these extensions:

- King County Ordinance 16515 establishes an extension schedule for certain building permits, preliminary plats and other land use approvals.
- Snohomish County Ordinance 09-108 authorizes the planning department to grant extensions to preliminary subdivision approvals.
- Seattle's Ordinance 123072 allows extension of certain Master Use Permits (initiated by written request of the project applicant).
- Redmond Ordinance 2468 extends the approval period for certain single-family residential subdivisions.
- Pierce County Ordinance 2008-115s authorizes extension of certain submittal requirements, and includes provisions relating to certain development permits, vesting of development rights, and subdivision/plat processing.

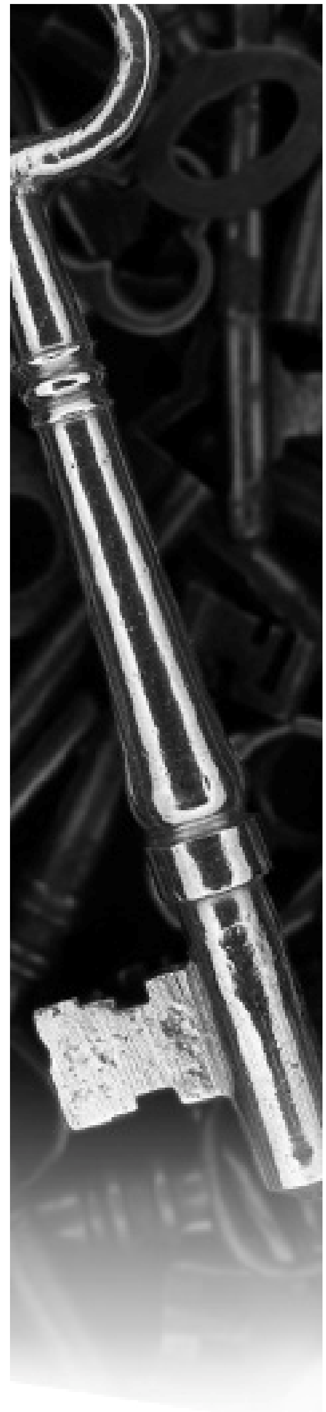
At least a dozen other jurisdictions—many of them in the Puget Sound area—have passed or are considering similar extension ordinances, including the cities of Kirkland, Issaquah, Renton, Auburn and Everett.

This legislation could save developers the expense and hassle of repermitting projects that may have stalled due to a lack of financing or other economic factors. However, a case-by-case evaluation is needed to determine the eligibility of a particular project. The ordinances contain threshold requirements that limit the projects for which an extension may be granted. In many cases, a separate application and discretionary land use approval is required for a permit to be extended, or the project applicant must submit specific documentation to justify an extension request.

Other critical factors, such as deadlines and additional application requirements, vary a great deal by jurisdiction. For this reason, landowners and developers should consult an attorney to determine whether they are eligible for an extension under any of these ordinances.

Disclaimer

INTELLECTUAL PROPERTY UPDATE



FTC Issues Guidance on Blogging-for-Pay, Testimonial Disclaimers, and Celebrity Endorsements in First Revision of Endorsement Guides in 29 Years

One of the privacy features of blogging is that bloggers can keep certain information about themselves private (while blogging on topics they choose). The FTC recently issued guidelines that will disallow bloggers from keeping private their affiliation to the makers of products receiving the bloggers' endorsements. On October 5, the FTC issued the final revisions to its Guides Concerning the Use of Endorsements and Testimonials in Advertising ("the Guides"), last revised in 1980, which are designed to assist businesses and others in conforming their endorsement and testimonial advertising practices to the requirements of Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices. The Guides are advisory in nature and reflect situations in which the FTC may exercise its prosecutorial discretion to enforce Section 5. The revisions made a number of changes to provide guidelines for modernized advertising practices, including blogging, and here we'll highlight the most noteworthy changes.

"Word of mouth" endorsements through blogs and other online social media

In its revisions, the FTC specifically addressed the phenomenon of "word of mouth" marketing, by which individual endorsers are compensated for communicating with consumers on a direct and personal level, including through blogs, online message boards, and other social media. An example of this phenomenon are so-called "mom bloggers," whom some marketers have especially sought due to their perceived authenticity. Emphasizing that such endorsements are no different than those made through more traditional media, the FTC stated that in these situations advertisers are responsible for any representations made, and that the endorsement must disclose any compensation received in consideration for the endorsement.

Somewhat controversially, the Guides indicate that word-of-mouth endorsers — using bloggers as an example — are required to disclose that they received a product or service for free prior to giving a positive endorsement, even if the advertiser did not specifically direct the blogger to recommend it. In these situations, advertisers must also ensure that the statements by bloggers are substantiated, even if the advertiser does not direct the exact content of the endorsement. In doing so, the FTC placed an obligation on advertisers to advise bloggers of their disclosure obligation and to monitor their endorsements, and if the blogger makes unsubstantiated claims or does not make the required disclosures, to cease supplying free products. In either of these scenarios, the FTC

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would consider both advertiser *and* the blogger to have violated the FTC Act, though in the Federal Register Notice accompanying the Guides and subsequent interviews, the FTC indicated that its law enforcement activities will focus on advertisers.

The FTC acknowledged that bloggers and other word-of-mouth endorsers may be subject to different disclosure requirements than reviewers from traditional media outlets, which do not ordinarily need to disclose that they received a reviewed product for free, citing consumers' relative expectation that traditional media outlets (even online) receive products they review for free.

While these policies have (understandably) stirred the blogosphere, they seem just to apply familiar concepts to endorsements utilizing new media. The touchstone of the FTC disclosure requirement is that compensated endorsers must divulge the fact that they are compensated in the advertisement, if not otherwise apparent to the audience. The FTC has made a judgment that blogging and other word-of-mouth marketing techniques don't clearly demonstrate this link, and through these revisions to the Guides has announced its intention to prosecute advertisers who don't require their word-of-mouth endorsers to play by the FTC's rules.

Other disclosures of material connections

The revised Guides provide some other notable examples of material connections between advertisers and endorsers to clarify when such connections need to be disclosed. Regarding celebrities and experts, the revisions maintain the general presumption that consumers will expect a celebrity or expert appearing in an advertisement will receive payment or royalties, and that therefore such compensation need not be disclosed. However, if the celebrity or expert endorser has other unexpected financial interests in the endorsed product or service, such as an ownership interest in the company, that connection must be disclosed. The Guides also add examples of certain contexts in which celebrity endorsements would require disclosure of the connection between the advertiser and celebrity, such as when the celebrity is paid to endorse a product in interviews, on talk shows, or on a fan blog or Web site.

Another significant connection that the revisions require to be disclosed is the situation in which an advertiser pays the expenses of an outside organization that conducts a study later touted by the advertiser in substantiating the effectiveness of its product. The FTC would require this disclosure, proposed by a coalition of state attorneys general, regardless of whether the research was completely controlled by the outside organization.

Disclosure of "generally expected results"

Prior to the revisions, the Guides stated that endorsements describing results not representative of those attained by most users of an advertiser's product would otherwise be acceptable if qualified by a disclaimer stating that "results may vary," or "results are not typical." The revised Guides no longer consider such a disclaimer acceptable; instead, they require advertisers making atypical representations to "clearly and conspicuously disclose the generally expected performance in the depicted circumstances."

This is a significant change in the FTC's enforcement policy, as an advertiser making claims quantifying the effectiveness of a product must now be aware of the generally expected performance achieved through use of the product, rather than the mere fact that its claim of effectiveness is not typical. Addressing the criticism that it is often difficult or expensive to determine the generally expected performance, the FTC noted that it is acceptable to reasonably extrapolate the expected performance from clinical trials and accepted scientific principles. In the alternative, it advises advertisers to make non-quantitative statements of effectiveness (e.g., "This product is the best!"), or to simply not make claims of effectiveness at all.

Ultimately, the revisions to the Guides propagate the familiar FTC themes of disclosure and substantiation when it comes to endorsements and testimonials. With these revised Guides, the FTC has given notice that endorsements and testimonials are squarely on its radar, and advertisers must be diligent in complying with the new rules in order to stay out of the enforcement spotlight.

About the Intellectual Property Update

For more information about the matters discussed in this Update, please contact any Hogan & Hartson attorney with whom you regularly work or one of the authors listed below.

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Congress Poised to Provide Real Estate Industry Tax Relief

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On November 4, 2009, the Senate passed the Worker, Ownership and Business Assistance Act of 2009 ("Act") which includes two important provisions that benefit the real estate industry. The House is expected to take up the Act next week.

First, Congress would extend and modify the first time homebuyer credit. Second, Congress intends to expand the 5-year carryback of net operating losses.

Under existing law, a first time homebuyer is allowed a refundable tax credit equal to the lesser of $8,000 ($4,000 for married filing separately), or 10% of the purchase price of a principal residence. The credit is due to expire on December 1, 2009. The credit phases out for individual taxpayers with adjusted gross income between $75,000 and $95,000 ($150,000 and $170,000 for joint filers). An individual is considered first time homebuyer if he or she did not own a principal residence during the 3-year period prior to the purchase of the home. For homes purchased on or before December 31, 2008, the credit is recaptured ratably over 15 years beginning in the second year after the taxable year in which the home is purchased. For homes purchased in 2009, the credit is only recaptured if the taxpayer disposes of the home within 36 months of the date of purchase.

The Act extends the first time homebuyer credit to April 30 2010 and creates a second credit for long-term residents of the same principal residence. If an individual has maintained the same principal residence for any 5-year period during the 8-year period ending on the date of purchase of a new home, he or she is entitled to a reduced credit of $6,500 ($3,250 for married individual filing separately). The Act also raises the income limits to qualify for the credit. The credit phases out for individual taxpayers with adjusted gross income between $125,000 and $145,000 ($225,000 and $245,000 for joint filers). No credit is allowed for any residence if the purchase price exceeds $800,000.

The Act also expands the carryback of net operating losses incurred in either 2008 or 2009. Taxpayers can elect to carry a loss back up to 5 years if the loss is incurred in either 2008 or 2009. The amount of a loss that may be carried back to the 5th preceding year is limited to 50% of the taxable income for that year.

The Act also suspends the 90% limitation on the use of an alternative tax NOL deduction attributable to the carryback period.

The Act eliminates this year's Stimulus Bill requirement that the 5-year carryback is only available to a taxpayer having less than $15 million of gross receipts. The taxpayer must make the election whether to carryback the 2008 or 2009 loss by the extended due date of its 2009 return and the election, once made, is irrevocable.

If you would like any additional information on either of these provisions, please contact Phil Jelsma at 619.699.2565 or e-mail pjelsma@luce.com.