Government Matters

Sparke Helmore Lawyers

Issue 4 | March 2013

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Looking over the horizon

Welcome to the March edition of *Government Matters*, a publication designed for Commonwealth departments and agencies to highlight current and horizon issues and provide a summary of recent cases of note.

This issue's feature article explores the recent High Court decision in *Andrews v Australia and New Zealand Banking Group Limited*, which may be the High Court's first step in changing the law of penalties, forfeiture and freedom of contract.

Another significant case covered is the recent Supreme Court of South Australia decision in *Alstom Ltd v Yokogawa Australia Pty Ltd & Anor (No 7)*, which is the latest in a growing list of Australian decisions to expand the meaning of consequential loss. The decision highlights the danger of including a term excluding "consequential loss" without carefully defining that loss.

In other news, Sparke Helmore Lawyers is delighted to announce two new senior appointments in its Government Group.

Daniel Stewart, a Senior Lecturer at the ANU College of Law, joins the firm as a Consultant. Daniel is known for his work in the intersection of public and private law and his expertise in intellectual property. Daniel was formerly employed with the Corporate Law Economic Reform Program in the Commonwealth Attorney General's Department and was a Fellow of Law and Economics at the University of Virginia School of Law.

Professor Rick Bigwood of Bond University also joins the firm as a Consultant. Rick is known for his expertise in contract law and was formerly a Senior Solicitor with the Federal Attorney-General's Department in Canberra (Office of Commercial Law).

If there are any topics you would like us to explore in future issues, please send me an email at richard.morrison@sparke.com.au.

I hope you enjoy this issue of *Government Matters*.

Sincerely,

Richard Morrison
Head of Government Group
Sparke Helmore Lawyers

What the *Andrews* decision means for your agency's agreements

By Ashley Cahif

In *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd*, the NSW Court of Appeal invited the High Court to re-examine the law of penalties, forfeiture and freedom of contract. And, based on the transcript of the application for special leave to appeal, it appeared that the High Court was willing to do just that; however, the matter was settled before the High Court's decision was handed down.

So despite the Court of Appeal's frustration with the current law, and the High Court indicating that it was willing to revisit it, the status quo remained. That is until the recent High Court decision in *Andrews v Australia and New Zealand Banking Group Limited*, which may be the High Court's first step in changing the law in this area.

While the *Andrews* decision is of limited direct relevance, the move away from the law as stated in the *Interstar* decision, and any future High Court guidance, has implications for Commonwealth Agreements.

The *Interstar* decision

This case involved Interstar Wholesale Finance Pty Limited and Interstar Non-Conforming Finance Pty Limited (the Lender). Integral Home Loans Pty Limited and Integral Financial Pty Limited (Integral) found and introduced third party loan applications to the Lender, and, if those loan applications were successful, were responsible for servicing those loans.

To implement this arrangement, the Lender and Integral entered into two agreements on substantially the same terms. Under both agreements, Integral was paid an "originator's fee" for each loan that was settled.

The Lender believed that Integral had engaged in deceptive or fraudulent activity and exercised its right to terminate the agreements under a clause in the agreements. The Lender claimed that by exercising its right to terminate under this clause, instead of termination for breach of contract (which would have meant that Integral would still be entitled to the originator's fee), Integral was no longer entitled to receive the originator's fee. Integral argued that this clause was a penalty and unenforceable.

In overturning the decision of the trial judge, Allsop P (Giles and Ipp JJA agreeing) held:

- the originator's fee wasn't fully earned at the time of settlement of each loan, so there was no forfeiture of "fully earned" property to constitute a penalty
- the trial judge's finding that the doctrine of penalties was not limited to circumstances of breach of contract was not open on the basis of authority; however, the Court of Appeal invited the High Court to re-examine the issue, and
- even if the law of penalties applied, Integral's loss of the originator's fees was not extravagant or unconscionable compared to the damage that could be caused by deceptive or fraudulent activity.

Implications

While the *Interstar* decision did not change the law of penalties, and, in fact, one of the reasons for overturning the trial judge's decision was that the trial judge had attempted to do so, it:

- highlighted the potential effect of the law of penalties in contracts between parties
- acknowledged that the law of penalties is not limited to the payment of money, but can also apply to the forfeiture of rights or property, and
- expressly invited the High Court to re-examine the law of penalties, forfeiture and freedom of contract, despite relief against forfeiture not being pleaded in the case.

The *Andrews* decision may signal the High Court's intention to review the current law of penalties and forfeiture.

However, the *Andrews* decision has overturned one of the Court of Appeal's findings.

The *Andrews* decision

In the *Andrews* decision, the High Court held that amounts payable without a breach of contract (in this case certain bank fees) may still be penalties.

The High Court ruled that the distinction needs to be drawn between payments that are:

- in return for a service or other benefit, which are not a penalty, and
- security for the fulfilment of some condition, which may be a penalty if the payment exceeds the loss that could be suffered as a result of non-fulfilment of the condition.

What does this mean for agency agreements?

The expansion of the types of payments that may be penalties could potentially impact agency agreements. For example, it is common to have incentive and fee reductions based on performance against KPIs in long-term service agreements. Further, "standard" Commonwealth Funding Agreements generally contain a number of provisions that are triggered on breach of contract including:

- repayment of funding provisions
- transfer of property provisions, and
- withholding, deduction or retention of payment provisions (where such payments may have been fully earned).

These could potentially fall foul of the law of penalties or be subject to claims for relief against forfeiture.

Until the *Andrews* decision, it was possible to "draft around" the law of penalties, for example:

- provisions could be drafted to be triggered on certain events rather than a breach of contract, and
- payment provisions could be structured on an "milestone incentive and indulgence" model rather than according to a "pay now and claw back" model.

Greater care will now have to be taken with the nature of the payments to ensure that they are not classified as a penalty. The *Andrews* decision may also signal the High Court's intention to review the current law of penalties and forfeiture. Any future developments in this area will need to be monitored to ensure agency agreements are consistent with any changes to the law.

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Contractual good faith strengthened and consequential loss expanded again

By Rick Bigwood and Ashley Cahif

From the 2008 decision of *Environmental Systems v Peerless*, Australia has progressively moved further away from the English approach to consequential loss. The recent Supreme Court of South Australia case, *Alstom Ltd v Yokogawa Australia Pty Ltd & Anor (No 7)*, is the latest in a growing list of Australian decisions to expand the meaning of consequential loss beyond the narrow English definition.

Background

Alstom was the head contractor for the refurbishment of Playford B power station and subcontracted some of the work to a joint venture (Yokogawa). Delays and completion issues arose under the head contract, leading to Alstom paying a settlement amount to the power station owner, Flinders Power Partnership (FPP).

Alstom then sued Yokogawa for damages arising out of delay to completion and other breaches, including for the recovery of the settlement amount paid to FPP.

Issues

The decision involved the contractual construction of complex contracting arrangements and is more than 400 pages long. While the decision provides useful lessons on the complications that arise in project contracts, and the consequences of lazy drafting, this article focuses on the key issues of exclusion of consequential loss and the implication of an obligation of good faith into commercial contracts.

Exclusion of consequential loss

Alstom argued that Yokogawa caused most of the delay and completion issues, and claimed liquidated damages and other amounts under the subcontract.

Importantly, the subcontract contained the following term:

> "Notwithstanding any other Article…the Subcontractor shall not be liable for any indirect, economic or consequential loss whatsoever."

Justice Bleby rejected the English authorities equating "consequential loss" with losses covered by the second limb of *Hadley v Baxendale*, preferring the approach taken by the Victorian Court of Appeal in *Environmental Systems v Peerless*, relying on the natural and ordinary meaning of the words based on their context.

His Honour held that the term "consequential loss", unless otherwise qualified, would extend to all damages suffered as a consequence of a breach of contract (an expansion of previous Australian authorities). In the context of the subcontract, his Honour held that the exclusion clause operated to limit Alstom's remedies to those specifically contemplated by the express terms of the subcontract and excluded all others.

Implied obligation of good faith

Yokogawa argued that Alstom breached an implied obligation of good faith by not doing everything necessary to ensure that Yokogawa could perform its obligations under the subcontract, particularly by failing to provide information and preventing Yokogawa from creating and updating an effective project work program. Yokogawa asserted that, as a result, it was unable to comply with the terms of the subcontract.

Justice Bleby considered the authorities as to when a duty of good faith may be implied in commercial contracts and noted that the High Court has not definitively ruled upon these issues. His Honour also referred to Sir Anthony Mason's well-known and often-cited paper setting out three principles of "good faith" in commercial contracts, being an obligation on the parties to:

- cooperate in achieving the contractual objects (loyalty to the promise itself)
- comply with honest standards of conduct, and
- comply with standards of conduct that are reasonable having regard to the interests of the parties.

His Honour's opinion was that a duty of good faith is implied into every commercial contract, noting that some authorities disagree with this view. His Honour held, regardless of whether his view of the universal implication of a duty of good faith into every commercial contract was correct, that the duty must be implied into this contract. This was based on the complexity and interdependencies of the project demanding a high degree of cooperation and reliance upon the good faith of each party. His Honour also found there were implied terms imposing a duty to cooperate and not hinder the other party's performance.

Justice Bleby held that Alstom had breached the implied terms by not providing the information to Yokogawa, resulting in Yokogawa being unable to properly plan its works under the subcontract and to comply with its provisions. Accordingly, Alstom could not rely on the subcontract's liquidated damages regime.

Implications for agencies

This decision highlights the dangers of including a term excluding "consequential loss" without carefully defining the particular type of loss intended to be excluded. As recent Australian decisions have demonstrated, general terms such as "indirect", "consequential" or "economic", whose meanings were long thought settled, are being reinterpreted and resulting in a far broader range of losses being excluded than contemplated before the *Peerless* decision.

The decision also proposes that obligations of good faith may be implied in every commercial contract. While this question remains unsettled for commercial contractual parties, it adds further weight to the views expressed by the Supreme Court of NSW in *NSW Rifle Association Inc v Commonwealth of Australia* (see our article *How reliable is the doctrine of executive necessity?*) that the obligation is likely to be implied into all government contracts.

This decision highlights the dangers of excluding "consequential loss", without defining the particular losses.

Proportionate liability: the courts weigh in

By Richard Morrison and Stephen Coyle

Following the Standing Committee of Attorneys-General's release of the Draft Model Proportionate Liability provisions in September 2011 (see our publication on the changes proposed by the Model Provisions, *Are you paying your fair share?*), there have been several judicial developments in the area.

Does the proportionate liability regime apply to consent judgments?

On 13 December 2012, the High Court handed down its decision in *Newcrest Mining Limited v Michael Emery Thornton*, examining whether the settlement of a claim against one "several concurrent tortfeasor"[1] by a consent judgment would limit a subsequent claim brought against another "several concurrent tortfeasor" under the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA).

Section 7(1)(b) of the Law Reform Act states that a person bringing more than one action for damage suffered as the result of a tort cannot recover more than "the amount of the damages awarded by the judgment first given".

The claim involved an employee, Mr Thornton, who was injured at a mine site. Mr Thornton sued his employer, who settled by way of consent judgment with no admission of liability. Mr Thornton then sued the mine operator, Newcrest, for the same injuries as a several concurrent tortfeasor. He credited the amount of the settlement he received from his employer from the amount that he claimed from Newcrest. Newcrest argued that the consent judgment was a "judgment first given" under the Law Reform Act.

The proportionate liability landscape could face a radical change in the near future.

By a 3:2 majority, the High Court held that a consent judgment in proceedings filed solely to give effect to an agreement to settle the claim is not a "judgment first given" as it does not involve a judicial assessment.

Proportionate liability and fraud

On 12 December 2012, the High Court of Australia heard the appeal from the judgment of the NSW Court of Appeal in *Mitchell Morgan Nominees Pty Ltd & Anor v Vella & Ors*. The key issue in this case is defining a concurrent tortfeasor under the proportionate liability provisions in the *Civil Liability Act 2002* (NSW) and equivalent provisions in other Australian jurisdictions.

The matter involved a joint venture between Mr Vella and Mr Caradonna. As a result of this relationship, Mr Caradonna obtained certificates of title to properties owned by Mr Vella and used them to fraudulently borrow money for his own purposes.

One mortgage obtained was from two Mitchell Morgan companies. Mr Caradonna, with the assistance of his solicitor, Mr Flammia, forged Mr Vella's signature and made misrepresentations to Mitchell Morgan's solicitors, Hunt & Hunt, to obtain the mortgage. Hunt & Hunt negligently drafted the mortgage so that it only secured money owed by Mr Vella, but not money owed by Mr Caradonna (who actually owed the money).

Mitchell Morgan sued Hunt & Hunt, Mr Caradonna and Mr Flammia. At first instance, Young CJ found Hunt & Hunt liable to Mitchell Morgan in negligence, but reduced their liability under the Civil Liability Act's proportionate liability provisions. Given Mr Caradonna and Mr Flammia's state of bankruptcy, Mitchell Morgan appealed.

The key issue before the Court of Appeal was whether Hunt & Hunt, Mr Caradonna and Mr Flammia could all be considered concurrent wrongdoers. The Court stated the test is whether the damage caused by a

person is the same damage as that caused by another person. This is different from whether the same damages ought to be paid in compensation for both wrongs, but requires the reason for damages being paid to be the same.

The Court held that the damage caused by Hunt & Hunt was failing to secure the loan with an adequate mortgage, while the damage caused by Mr Caradonna and Mr Flammia was fraudulently inducing Mitchell Morgan to pay them money. As the damage was different, Hunt & Hunt was held liable for the total amount.

We are waiting for the High Court's decision to see whether it accepts Hunt & Hunt's argument for a broader "substance over form" interpretation to the provisions of the Civil Liability Act.

Does proportionate liability apply to arbitrations?

In *Curtin University of Technology v Woods Bagot Pty Ltd*, the WA Supreme Court considered whether the regime for proportionate liability in Part 1F of the *Civil Liability Act 2002* (WA) applies to commercial arbitrations.

The matter arose out of an arbitration of various disputes under a construction contract. Woods Bagot sought to rely on WA's Civil Liability Act to limit its liability to its proportionate share of responsibility for Curtin's losses. Curtin denied that proportionate liability applied to the arbitration.

Importantly, the referral by the arbitrator of the issue to the Supreme Court was confined a question of "pure statutory construction". Therefore, the Court did not consider issues of contractual interpretation or implied terms.

In a decision that turned on the statutory construction of the word "court", Justice Beech held that the proportionate liability regime in Pt 1F of WA's Civil Liability Act doesn't apply to commercial arbitrations.

Implications for agencies

With the proposed Model Provisions and the impending High Court decision on such a fundamental concept, the proportionate liability landscape could face a radical change in the near future. We will continue to keep agencies informed of any developments in this area.

[1] *Meaning the tortfeasors were independent tortfeasors whose acts combined to produce a single damage.*

Workplace bullying: Committee recommendations for Government

By Janice Nand

The term "bullying" is a bit like those other chameleons: "natural justice" and "privacy". Its meaning changes form depending on who is using it, and often bears little relationship to the applicable law.

Now there is a report that attempts to bring together the law and reality of workplace bullying. *Workplace Bullying: We Just Want It To Stop*, was tabled in Federal Parliament on 26 November 2012 by the House of Representatives Standing Committee on Education and Employment (the Committee).

The significance of the report is demonstrated by the fact that Safe Work Australia delayed finalising its "*Code of Practice on Preventing and Responding to Workplace Bullying*" until the report could be considered.

The report runs to 256 pages (including a dissenting report by the Coalition members of the Committee) and traverses a broad range of issues relating to workplace bullying.

Significantly, the majority of the Committee recommended that there be further regulation in this area.

The issue of workplace bullying

In its *State of the Service Employee Survey 2010-11*, the Australian Public Service Commission (APSC) found that 18% of employees reported having been subjected to harassment or bullying in their workplace during the last 12 months.

The Committee highlighted the Productivity Commission's estimate that workplace bullying costs the Australian economy between $6 billion and $36 billion annually. This reflects the difficulty in assessing the costs arising from consequent absenteeism, workers' compensation claims, reduced productivity, diversion of resources to investigate claims, legal costs, staff turnover and lower morale in the workplace.

The Committee recognised that one person's idea of bullying behaviour can be viewed as reasonable management action by another. The Committee also noted that bullying conduct is not limited to that by a manager toward a subordinate—upwards bullying by individuals or groups of employees toward a manager is just as insidious, but rarely discussed or reported.

The Committee noted the importance of having a standard definition of bullying and recommended that the Commonwealth Government promote national adoption of the following definition:

> "workplace bullying is repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety".

The intention is to have an objective basis for assessing the alleged conduct and to capture intentional or unintentional conduct ("directed" is used in a neutral way).

So much law, and yet so little

The report highlights that the concept of "workplace bullying" is not expressly made unlawful in any Australian jurisdiction. Even the widely publicised "Brodie's law" in Victoria does not use the term. It expanded the criminal offence of stalking to include certain conduct that could constitute bullying, such as making threats, using abusive words or acting in any other way that could reasonably be expected to cause physical or mental harm.

In most jurisdictions it is left to workplace health and safety (WHS) legislation to carry the primary mode of redress for conduct that exposes workplace participants to health and safety risks. However, the utility of this avenue is limited by the resources of regulatory bodies, the higher standard of proof in criminal jurisdictions and the fact that such legislation imposes criminal penalties on offenders but no form of compensation for the victim.

Independent of WHS legislation, bullying issues may also be considered indirectly under a range of other legislation, including industrial legislation, workers' compensation, anti-discrimination legislation and criminal law.

The recommendations

The report contains 23 recommendations and many of them relate to instituting services to provide advice, guidance and training to workers and employers on how to deal with bullying issues.

There are also recommendations that the Commonwealth Government trial a mediation service to deal with bullying allegations (where both parties consent) and undertake a feasibility study into the Government providing an independent investigation referral service (to assist employers find appropriate investigators).

More contentious are those recommending that the Commonwealth Government:

- seek to implement model WHS Regulations that effectively make the minimum requirements for managing the risks of workplace bullying currently in the draft "Code of Practice: Managing the Risk of Workplace Bullying" legally binding (Recommendation 5)
- implement arrangements to allow complainants a single right of recourse to an adjudicative process (Recommendation 23)
- encourage all jurisdictions to have criminal laws as extensive as "Brodie's law" and enforce criminal provisions independent of health and safety laws (Recommendation 22), and
- work with state and territory authorities to develop cross-agency protocols to allow for better information sharing and complaints referrals between safety, industrial relations, anti-discrimination, workers' compensation and criminal jurisdictions (Recommendation 14).

There is also a curious and detailed recommendation directed at the Australian Public Service (APS). The Committee recommends that the Government review how the fit for duty test under the *Public Service Regulations 1999* (Cth) is used to respond to bullying and the safeguards in place for its appropriate use (Recommendation 8). The review is to be published and the Australian Public Service Commission is to collect data regarding review applications made to the Merit Protection Commissioner about such referrals.

This recommendation relates to concerns raised that APS managers were referring employees who made complaints of bullying for fitness for duty assessments without adequate reason. The concern relates to inadequate checks on the exercise of the referral power and inadequate avenues of review. The report did not indicate the scope of the perceived problem in this area, nor detail any individual circumstances warranting the concern.

"workplace bullying is repeated, unreasonable behaviour directed towards a worker or a group of workers, that creates a risk to health and safety"

Dissenting report

The dissenting members of the Committee were opposed to any further regulatory schemes being established to deal with the issue. They preferred an approach based on promoting the positive benefits to employers of harmonious, caring and cooperative workplaces.

Implications for agencies

Many of the Committee's recommendations either require significant investment or are dependent on cooperation with state and territory jurisdictions in areas where this is historically rare.

The recommendations aimed at legislating to make bullying unlawful and simplifying the options for redress will be the subject of much debate. Ultimately such measures are only worthwhile if backed up by consistent enforcement.

Nevertheless, the report is an important review of the complex issue of workplace bullying. If the less activist recommendations to assist employers and employees are adopted that alone will be a significant outcome.

Civil penalties and the principle of deterrence

By Michael Palfrey and Will Sharpe

Civil penalties are an important compliance and enforcement tool for government agencies to manage a regulatory scheme. A recent decision of the Federal Court discusses the principles that are applied in determining an appropriate penalty, including the importance of deterrence.

The case

In *Minister for Sustainability, Environment, Water, Population and Communities v Woodley*, the Federal Court imposed pecuniary penalties under section 481 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) on the defendant and his family's company (Venture Fishing Co Pty Ltd) for a contravention of the Act that prohibited commercial fishing in a Sanctuary Zone.

The defendant was a commercial scallop and rock lobster fisherman who operated in waters around Tasmania. He admitted to entering a Sanctuary Zone in the Tasman Fracture Commonwealth Marine Reserve and setting four lobster pots. The pots were in place for approximately four hours and no lobsters had been caught when the pots were retrieved. The defendant, however, was detected by a Tasmanian Police vessel.

The defendant admitted all of the allegations made against him but argued against the severity of the penalties that were being sought. The Court heard evidence of the dire financial circumstances of Venture Fishing, including that it was in default to the bank and the company's fishing vessel had been repossessed.

Despite this, the Court imposed pecuniary penalties of $13,000 against the defendant personally and $65,000 against Venture Fishing (part of the Minister's costs of the proceedings also had to be paid, totalling $45,000). Although significant penalties, the amounts were at the lower end of the range set by the Act (the maximum penalties were $55,000 for an individual and $550,000 for a body corporate).

Principles applied in determining the penalties

The Act establishes a number of matters that must be considered in determining a penalty and they are:

- the nature and extent of the contravention
- the nature and extent of any loss or damage suffered as a result of the contravention
- the circumstances in which the contravention took place, and
- whether the person has previously been found by the Court in proceedings under this Act to have engaged in any similar conduct.

The Court noted that there had been only one contravention and no lobsters had been caught.

In addition to the mandatory requirements, the Court considered:

- the contravenor's cooperation during investigations and subsequent Court proceedings and had admitted the contraventions in full
- the contravenor's relevant prior "record", which was "unblemished records in respect of environmental matters"
- the contravenor's business arrangements and financial circumstances, and
- the remorse or contrition shown by the contravenor.

However, the Court also accepted that the principal object of civil penalty provisions is to ensure deterrence, and said that penalties imposed needed to reflect both "an element of special deterrence" and "the need for general deterrence".

Deterrence

In an extract that appears in the judgment, the object of penalties was said by French J in *Trade Practices Commission v CSR Ltd* to be "to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act".

In that vein, Her Honour said:

> "If those who contravene s 354(1) of the EPBC Act receive relatively small penalties when apprehended, there is every chance that commercial fishermen will conclude that the benefits of fishing in protected areas (given its potential for deriving significant financial rewards) far outweigh the risk of being caught committing a contravention because the risk of detection is low and the financial penalties relatively insignificant. If such conduct is undertaken, the harm to the environment is likely to be significant."

In conclusion, Her Honour found that:

> "I think that I should give significant weight to the need for general deterrence in the present case bearing in mind that the contraventions of the type with which I am dealing are extremely difficult to detect."

Lessons for agencies

Although the difficulty of effectively supervising compliance with the regulatory regime established by the Act for the Sanctuary Zone in the Tasman Fracture Commonwealth Marine Reserve was particularly acute, leading to the imposition of high penalties to deter contraventions by others, similar concerns arise in many regulatory regimes. This case shows that where non-compliance is detected, the regulator may impose penalties directed at penalising the particular contravention and also acting as a deterrent against contraventions by others, even where the penalty may have a particularly harsh outcome for the contravenor.

Recent developments

There have been a range of recent legal developments that affect Commonwealth decision-makers. Further information on these is available by clicking on the hyperlinks or online at www.sparke.com.au.

Penalty units increase to $170

Many Commonwealth laws use the concept of a penalty unit as a measure to quantify the fine imposed. For the first time since 1997, the value of the penalty unit has increased, from $110 to $170 and it applies to offences committed on or after 28 December 2012.

Privacy breaches: mandatory notification a step closer?

Should Australia introduce a mandatory privacy breach notification requirement? That is the key question posed by the Australian Government in its Discussion Paper, *Australian Privacy Breach Notification*, which was released on 17 October 2012.

The potential introduction of a mandatory notification requirement, penalties and the intention of the Privacy Commissioner to take a tougher approach means that agencies will need to monitor developments carefully and review their privacy practices to ensure that they comply with the developing legislative changes.

Privacy amendments pass with more time given

The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) was passed by Parliament on 29 November 2012.

Key features of note for agencies are the introduction of the Australian Privacy Principles and clarification of the functions and powers of the Privacy Commissioner and improving its ability to conduct investigations and resolve complaints.

Privacy: is your data secure?

In December 2012, the Office of the Australian Information Commissioner (OIAC) released the consultation draft *Guide to information security: 'reasonable steps' to protect personal information*.

The guide discusses the reasonable steps that agencies are required to take under the Privacy Act 1988 to protect the personal information that they hold. It also provides guidance on circumstances that OIAC will consider when making its assessment of an agency's actions to keep information secure, and sets out a range of suggested steps and strategies that agencies may choose to follow.

Pape, *Williams* and the rules of standing

The High Court's decisions in *Pape v Federal Commissioner of Taxation* and, more recently, in *Williams v Commonwealth* have caused consternation throughout the Commonwealth Government. An unusual aspect of these two decisions is that the challenge to the Commonwealth's ability to make the payments in question came from plaintiffs who were ostensibly "beneficiaries" of the payments.

Stick to the script: the High Court emphasises adherence to the text in statutory interpretation

A recent decision of the High Court has given Chief Justice French and Justice Hayne an opportunity to restate the basic principles of statutory interpretation. Although they speak of context, it is the need to adhere to the text of a statute that is the real lesson to be taken from *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross*.

AGIMO releases updates to the SourceIT suite of model contracts

While the updated model contracts don't represent a significant change to the default positions in the previous version, they do impose some additional requirements on ICT suppliers.

About the contributors

Ashley Cahif, Special Counsel

Ashley is a commercial lawyer in Canberra and specialises in advising Commonwealth departments and agencies on major projects and corporate governance.

Rick Bigwood, Consultant

Rick is an internationally renowned expert on contract law with broad experience advising on commercial law matters. He is also a professor at Bond University, where he focuses his teaching and research on areas relating to contract law.

Richard Morrison, Partner

Richard is a commercial lawyer specialising in major projects in our Canberra office and has acted on many high profile initiatives undertaken by the Commonwealth over the past 17 years.

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Michael advises the Commonwealth on administrative and public law issues, including statutory interpretation and the development of legal policy and legislation, and is based in Canberra.

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Janice specialises in employment law and has over 20 years' experience in providing legal services in private practice, government and corporate environments.

Will Sharpe, Special Counsel

Will practices in public law, including FOI and privacy, statutory interpretation and good decision-making, and represents agencies in the AAT and Federal Court.

Stephen Coyle, Lawyer

Stephen has just joined the Government team in Canberra after relocating from Perth. He regularly appears as trial counsel and has a background in commercial litigation with expertise in liability matters.

Want to know more?

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