Piper Alderman

Emissions Reporting: The need to consider your responsibility to report is urgent

Corporations which are required to register for reporting under the National Greenhouse and Energy Reporting Act 2007 must urgently consider their obligations under the National Greenhouse Energy Reporting Framework. Property and Projects Partner, Ashley Watson and lawyer, Christie Groves, set out the steps to consider.

Corporations which are required to register for reporting under the National Greenhouse and Energy Reporting Act 2007 (NGERA) by 31 August 2009 and fail to do so could be hit with a penalty of up to $220,000. Additional civil penalties will apply for each additional day after the deadline the company fails to register. Similar penalty levels apply for those companies which register on time but fail to report appropriately by 31 October 2009. In addition, chief executive officers and other company officers who fail to take responsible steps or who act recklessly or negligently in a manner which leads to contravention of obligations under the Act could also find themselves vicariously liable. The message is clear: companies which have not already done so must urgently consider their obligations under the National Greenhouse Energy Reporting Framework.

Step One – Know your corporate group

The task of collecting data to determine if a corporation will meet the threshold requiring it to register and report under the NGERA is not necessarily straightforward. It requires consideration of what entities might constitute a larger corporate group. This will determine which entity is deemed the "controlling corporation" required to register on behalf of the group and which emissions must be counted towards triggering the corporate group's threshold.

The NGERA and Regulations need careful consideration, as they contain detailed rules for who is to report. For example, if the threshold is met, a partnership or joint venture will need to nominate one of their number as the "responsible entity" for reporting, otherwise each member of the partnership or joint venture will be required to register and report on the whole of the partnership's or joint venture's emissions.

Step Two – Know your facilities

The second consideration is what "facilities" are under the "operational control" of this corporate group. Understanding which group of activities constitutes a "facility" may be critical because there is a lower single facility threshold which could independently trigger reporting obligations for the whole group. "Facilities" are also the primary unit against which any reporting occurs.

What activities constitute a facility can look very different depending on the industry and business model. The rule of thumb is, does it create emissions or consume or produce energy and is it a single site, a single industry or part of a single production process?

Step Three – Know what data counts

Only once these two basic premises have been considered can the process of collecting data on emissions and energy consumption or production commence in earnest. This will be easier for some industries over others. Certain industries that have previously been required to undertake some type of emissions reporting will already be familiar with the emissions terminology used in the NGERA. It is corporations which have not previously been exposed to any emissions reporting requirements which need to be most diligent.

Environmental consultants working in the sector have indicated their alarm at the lack of preparedness of many corporate groups to register and accurately report on their emissions. Companies needing external expertise to gather and organise their internal emissions data for registration and reporting may already have some trouble finding suitably experienced and skilled professionals to assist prior to the registration and reporting deadlines.

Step Four – Understand the threshold

The reporting threshold for a whole corporate group for the 2008-2009 financial year is either emitting 125 kilotonnes of greenhouse gases (measured in carbon equivalent units), or producing 500 terajoules of energy, or consuming 500 terajoules of energy. Alternatively, if a single facility under the operational control of the corporation either emits 25 kilotonnes of carbon equivalent units or produces 100 terajoules of energy or consumes 100 terajoules of energy, the corporation will also be required to register for reporting their total emissions.

Step Five – Start thinking about the future

Companies which know they will trigger the threshold this year (or in the coming three years as the threshold level decreases) must have in place organisational strategies for collecting relevant data. With the CPRS (Carbon Pollution Reduction Scheme) pending, it is relevant to think about employing more sophisticated measuring techniques now or in the future.

OSCAR (Online System for Comprehensive Activity Report) is the emissions modelling calculator on the Department of Climate Change website forming part of the Australian Greenhouse Emissions Information System (AGEIS). This system is essentially the default mechanism for estimating emissions under the NGERA. Out of the 4 methods available for estimating emissions proscribed in the Regulations under the NGERA, it is likely to be the most generous in estimating emissions.

The three other measuring techniques available under the NGERA are more accurate but involve a greater level of complexity, measuring effort and expense. All are based on international recording standards but will involve sampling and other specialised analysis to generate emissions calculations. Specialised assistance will also assist in the critical decision as to whether it will be more efficient in the medium to long term to make emission reductions or to offset or purchase permits (when a CPRS becomes a reality).

Step Six – Registering now

There is no doubt the Department of Climate Change still has a significant task ahead of it in preparing for this first year of reporting. Once an application to register is received, registration is currently taking between 2 weeks and 2 months and is likely to get longer as the deadline draws near.

At the time of writing, certain key forms, like those for nominating a responsible entity for registration and reporting on behalf of a partnership or joint venture were still not available. However, the Department was still encouraging all joint ventures or partnerships to make the election of a responsible entity and for that responsible entity to submit their application with notice of their special status.

The Department of Climate Change currently estimates around 700 medium to large corporations will be required to register for emissions reporting under the NGERA. Of these 700 corporations, around 300 will not have had previous experience with any reporting mechanisms. For these 300 corporations, the need to get on top of these reporting requirements is critical with substantial civil penalties applying for non-compliance.

The message is clear: the debate over the emissions trading scheme may still be raging in the Senate, and other quarters might be arguing about whether climate change exists at all but don't let this distract you from preparing to meet your existing obligations under the emissions reporting framework.

Footballers' management expenses deductible

Corporate Senior Associate, Dahnia Mithiran, discusses the recent High Court decision relating to football management expenses.

On 18 June 2009, the High Court unanimously upheld the taxpayers' appeals from the decision of the Full Federal Court and held that fees paid to managers were deductible under section 8-1(1) of the *Income Tax Assessment Act 1999* (Act) and were not capital expenses which were denied deductibility under section 8-1(2) of the Act.

Facts

Spriggs and Riddell (taxpayers) were professional sportsmen who derived income from playing Australian Rules football and National Rugby respectively. For the financial year ending 30 June 2005, they claimed deductions for management fees paid to their agents. However, the Commissioner of Taxation (Commissioner) disallowed their deductions on the basis that the management fees were paid for negotiating playing contracts with football clubs and as such were not deductible. The taxpayers appealed to the Federal Court where the primary judge found for the taxpayers. However, on appeal by the Commissioner to the Full Federal Court, the taxpayers were denied the deductions for management fees. The Full Federal Court found that the principles in *FC of T v Maddalena* were applicable on the basis that the management fees were paid for negotiating the playing contracts, which were said to be employment contracts and that the activities of the taxpayers did not amount to or constitute a business. From that decision, the taxpayers were granted leave to appeal to the High Court, where the appeals were heard again.

Arguments by both sides

The taxpayers submitted that the playing contracts **were not** solely contracts of employment, because the contracts contained terms and conditions upon which the taxpayers could turn their sporting prowess to account for money and to produce assessable income. Each taxpayer carried on business, which derived two types of income: "playing income" derived from playing sports and "non-playing income" derived from sponsorship, endorsements and similar or related non-playing activities carried out in conjunction with the club or independently of it. The taxpayers argued that the management fees were incurred in gaining and producing income from the taxpayers' businesses as professional sportsmen.

On the other hand, the Commissioner submitted that the playing contracts **were** contracts of employment, and following the decision in *Maddalena* and the exclusion of "occupation as employee" from the definition of business in section 995-1 of the Act, it was necessary to separate the taxpayers' playing activities from their non-playing activities. The management fees fell within the playing activities and were not incurred in the course of earning income as an employee but to obtain new employment contacts therefore were not deductible under section 8-1(1)(b) of the Act.

High Court decision

The High Court rejected the Commissioner's arguments, allowed the appeal and distinguished the case from *Maddalena.*

The High Court said that *Maddalena* did not oblige the approach for which the Commissioner contended; the court there expressly considered that different results as to deductibility could follow if a taxpayer was conducting a business, as opposed to being only an employee.

The High Court said that it was possible for a taxpayer to perform an employment contract as part of and during the course of running a business and at paragraph 69 said:

"Looking at their activities as a whole, the appellants were engaged in the business of commercially exploiting their sporting prowess and associated celebrity for a limited period. Those businesses were well established before the management fees were incurred [56]. Neither of the appellants was exclusively or simply an employee of his club. They each exploited their sporting prowess and associated celebrity with different clubs over the years during which they played in the AFL Competition and NRL Competition respectively. There was a synergy between playing activities and non-playing activities, each of which was an income producing activity.

The High Court also rejected the Commissioner's submissions that the management fees were capital in nature, as the playing contracts were revenue assets of a relatively short term nature.

Horticultural Code of Conduct – what's the latest?

Corporate Partner and Head of Piper Alderman's Agribusiness Practice Group, Simon Venus and Graduate Lawyer, Bianca Battistella, provide an update on the Horticulture Code of Conduct.

The ACCC has reinforced its commitment to ensuring compliance with the Horticultural Code of Conduct by taking enforcement activity against a major banana wholesaler, LaManna Bananas Pty Ltd and its associated entities.

The Code was introduced in May 2007 to protect the interests of growers of horticultural produce in the marketplace. The ACCC is vigilantly supporting the operation of the Code, stating that it "will not hesitate to act on suspected breaches".

Following on from enforcement activity in the Murray Brothers and Grove & Edgar cases which we reported on in the March 2009 edition of the e-Bulletin, the ACCC has now investigated the LaManna Group for suspected breaches of the Code, following a complaint by a single grower.

ACCC investigations revealed that the LaManna Group entities had from time to time engaged in conduct contrary to section 18 of the Code, by selling some of the horticulture produce consigned to them between associated group entities, without obtaining express consent from growers in every case. Such conduct raises concerns that the sale of produce was not always on an arms-length basis and potentially impacted on the growers' ability to receive the best possible returns for their produce.

LaManna Bananas Pty Ltd, on behalf of the LaManna Group has been required to make the following court enforceable undertakings as a result of its breaches of the Code:

- to refrain from selling horticulture produce consigned to them by a grower for whom they act as agents between themselves, without the grower's express consent
- to advise potentially affected growers of the ACCC's concerns
- to establish a process to deal with growers who raise concerns about the previous sale of their produce and, in particular, to have any concerning transactions reviewed
- to implement an appropriate trade practices law compliance program to assist in avoiding any future contravention of the Code.

Meanwhile, proposals to amend the Code are still being considered. In the March edition of the e-Bulletin we reported that the Horticultural Code Committee was in the process of considering 13 recommendations made by the ACCC to improve the Code. Such recommendations included:

- extending the Code to regulate "first point of sale" transactions of horticulture produce between a grower and retailer, exporter or processor and between growers and traders who are operating under a written agreement entered into before the introduction of the Code
- amending the Code to require that if a merchant does not reject produce within 24 hours of physical delivery, the produce is deemed to be accepted (as opposed to allowing the merchant to determine a time period for providing a notice of rejection)
- amending the Code to require that before delivery, merchants provide a grower with either a price or a formula for calculating the price of the produce by reference to the amount received by the merchant from a third-party purchaser. Currently the Code prohibits a method for the calculation of the price of produce being included in an agreement and requires that the price (if not already determined) simply be agreed before or immediately upon delivery of the produce).

The LaManna Group enforcement proceedings coincide with the Committee's third meeting in early May 2009, after extensive consultation with representatives of the horticulture industry at its second meeting in March 2009. The purpose of the Committee's third meeting was to resolve its views on the possible implications for the industry of the ACCC's recommendations.

The Committee is now finalising its report to the Minister for Agriculture, Fisheries and Forestry, which will not only detail the Committee's recommendations, but also the divergent views encountered throughout the consultation period across industry sectors.

Damages for Loss of Chance? Fat Chance

Dispute Resolution Graduate Lawyer, Michelle Vegter, explains the New South Wales Court of Appeal in the recent decision of Gett v Tabet.

Background

When a 6 year old girl presented at the hospital suffering headaches, nausea and vomiting, the treating doctor considered her to be affected by chicken pox. It was not until she suffered a seizure that a CT and EEG were performed and it was discovered that, in fact, she had a brain tumour which had been growing for some time. The tumour was removed, and the child was left with significant brain damage as a result of both the seizure and the operation.

The alleged negligence arose due to the CT scan having been performed on 14th January 1991 rather than on 13th January 1991 prior to the seizure. Relevant to this was that the child had some indicators of brain trauma prior to the seizure, and that the seizure caused around 25% of the brain damage. The remainder of the brain damage was the result of an operation to remove the tumour. As a result of the failure to perform the CT scan the plaintiff alleged she had lost the chance of avoiding the seizure and thereby sustaining less brain damage.

First instance Decision and Appeal

At first instance, the New South Wales Supreme Court found that the failure to perform a CT scan on 13th January resulted in the plaintiff losing the chance of a better outcome. The Court cited the authority of *Rufo v Hoskings* which established the principle of loss of chance in circumstances of medical negligence.

The decision was however overturned on appeal and the Supreme Court's reliance on *Rufo* heavily criticised. Particularly, the Court of Appeal condemned *Rufo* for stepping outside its allowable jurisdictional limits by attempting to impinge upon the exclusive authority of the High Court to expand the law of tort to such an extent. The Court went so far as to say that *Rufo "involved a departure from conventional principles and... is plainly wrong"*.

Implications

The Court of Appeal has made a definitive statement regarding the exclusive authority of the High Court to determine whether or not the law of tort should be expanded in order to encompass such aims for loss of chance.

Any other court which attempts to redefine the boundaries of causation would be operating outside its jurisdiction and, as in this case, run the risk of its decision being overturned on appeal.

Importantly, the decision also highlights the desirability of preserving the present limits of tort law.

The decision emphasises the difficulty in awarding damages for a loss of chance, due not only to the virtual impossibility of quantification but also to the subversion of the causation principle in such cases; traditionally the prerequisite for a sustainable negligence claim. The reluctance to expand tortious limits into an area with virtually undefinable outer boundaries is encouraging in that it reaffirms causation as the crucial element of actions in tort.

The Court of Appeal's denial of the loss of chance argument prevents inevitable subversion of the correct application of the onus of proof. The word 'chance' by definition would not allow the onus of proof to be satisfied on the balance of probabilities, considering that the latter concept is generally accepted in common law to mean 'more probable than not'. With credence to that definition, any attempt to satisfy the onus of proof upon a mere speculation as to the outcome of some action or omission is clearly unsustainable.

A successful loss of chance claim would directly contradict the civil liability legislation of every Australian state and territory, considering that the primary principle of such is that a causal nexus between the defendant's conduct and the plaintiff's injury must be established on the balance of probabilities in order to give rise to liability for negligent conduct.

Significant Reforms Proposed for the Freedom of Information Act

Property and Projects Graduate Lawyer, Ben Dighton, discusses the commencement of the second stage of legislative reform by the Federal Government concerning revisions to the Freedom of Information Act 1982 (Cth).

The commencement of the second stage of legislative reform by the Federal Government concerning revisions to the Freedom of Information Act 1982 (Cth) (the FOI Act) was announced with the release of two draft bills, the Information Commissioner Bill 2009 and the Freedom of Information Amendment (Reform) Bill 2009). Having received submissions from the public during the consultation period, it is expected that the Bills will be introduced into Parliament in late 2009.

Proposed reforms which may be of current interest to individuals or businesses include:

- reformulation of the public interest test and the amendment of exemptions
- the establishment of the Office of the Information Commissioner
- revised review process of decisions of Ministers and agencies relating to FOI requests.

Public Interest Test and the Amendment of Exemptions

The draft Bills contain the introduction of a new test to determine how a document that is the subject of an FOI request should be considered with regard to the public interest. One aspect of the test is its application to categories of documents that were previously exempt from disclosure. The test has been stated as follows:

The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

It is also proposed that the following factors are to be explicitly disregarded in using the public interest test:

- Access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government
- Access to the document could result in the applicant misinterpreting or misunderstanding the document
- The author of the document was (or is) of high seniority within the agency
- Access to the document could result in confusion or unnecessary debate.

The public interest test is to be introduced as a qualifying factor in certain categories of documents being exempt from disclosure. The relevant exemptions for documents relating to personal privacy, business affairs, the national economy and research, amongst others, will now be classified as being "conditionally exempt" and will only retain that exemption if their disclosure would be contrary to the public interest. This proposal holds significant implications for individuals and businesses with regard to both the information potentially being made available for FOI requests, and conversely, the time and expense required in responding to FOI requests for information should an individual or business object to that disclosure.

Establishment of the Office of the Information Commissioner

Both draft Bills stipulate guidelines for a new statutory office and officeholders to be created in a restructure of the authorities and processes relating to the management, use and disclosure of information by the Federal Government. The Office of the Information Commissioner is to be the public face of the new freedom of information regime and is intended to be the principal medium between government ministries and the public. It will also have an advisory role to Government Ministers and agencies regarding compliance with the new legislation and investigations under it. The Government has announced it envisages that this new structure will be functioning by January 2010.

Revised Review Process

Schedule 4 of the FOI Reform Bill amends Part VII of the FOI Act to alter the review process regarding the merits of an application made for access to information that has been refused by a Minister or agency. The amendments also authorise the Information Commissioner to make a determination on decisions made by a Minister or Agency relating to an FOI request. The review process as undertaken by the Commissioner is designed towards a more streamlined process rather than a formal structure based on attendance at hearings as would occur in a review before a body such as the Administrative Appeals Tribunal.

Creeping Acquisitions: Patching up the loophole

On 6 May 2009 the Federal Government released its second discussion paper on creeping acquisitions (Discussion Paper). Corporate Graduate Lawyer, Llon Riley, reviews the Discussion Paper, which describes the Government's two proposed options.

Creeping Acquisitions and Section 50

"Creeping acquisitions" is a term used to describe the conduct of a company which, through a number of small acquisitions, substantially lessens competition within a market. While each acquisition considered in isolation from the rest would have no or nominal impact on competition, the cumulative effect of these acquisitions would have the effect, or likely effect, of substantially lessening competition within a market. The conduct also encompasses 'a [company] with a substantial degree of power in a market acquir[ing] small competitors'.

Acquisitions which substantially lessen competition are prohibited under section 50 of the *Trade Practices Act 1974 (Cth)* (TPA). Section 50 prohibits a corporation from directly or indirectly acquiring shares in a company or acquiring any assets of a person (which includes a corporation) if the acquisition would have the effect, or likely effect, of substantially lessening competition.

However, the scope of section 50 of the TPA does not prohibit creeping acquisitions as it does not consider the cumulative effect of a number of small acquisitions over a period of time, but rather only considers each acquisition as an isolated transaction. Consequently, the Government and the Australian Competition and Consumer Commission have perceived that there is a loophole in section 50 for companies to side step the prohibitions on anti-competitive acquisitions because a company might either undertake a number of small acquisitions of shares or assets or a number of acquisitions of small competitors. The result would be a lessening of competition within the relevant market.

The Government's Proposal

The Government has proposed two options to address the issue of creeping acquisitions. These options are based on creating a new provision within section 50 of the TPA.

The Government's first suggestion is to create a new provision in section 50 that 'prohibits mergers and acquisitions that enhance a corporation's existing substantial market power.' A proposed draft of the new sub-section reads:

1. A corporation that has a substantial degree of power in a market must not directly or indirectly:

   a. acquire shares in the capital of a body corporate

   b. acquire any assets of a person

if the acquisition would have the effect, or be likely to have the effect, of enhancing that corporation's substantial market power in that market.

This proposal is specifically limited to companies which have a substantial degree of market power. A substantial degree in market power means a significant, but not absolute, freedom from competitive restraint. Within each market what constitutes a substantial degree of market power will vary. The proposed provision prohibits any enhancement of that company's market power. A company which is deemed to have a substantial degree of market power would be prevented from acquiring smaller companies or making a number of small acquisitions of shares or assets if the effect of those acquisitions substantially lessens competition.

The first option suggested by the Government creates a blanket prohibition on all companies which are considered to have a substantial degree of market power.

The second option involves the introduction of a creeping acquisitions law which operates similar to the Price Surveillance provisions of the TPA. Under the second option, the Minister would be given 'unilateral' power to apply the creeping acquisitions laws to a corporation or a product/service sector where the Minister has concerns about potential and/or actual competitive harm from creeping acquisitions by corporations with substantial market power.

This option does not impose a blanket prohibition on companies which have a substantial degree of market power from enhancing that power by making a number of small acquisitions. Rather, the creeping acquisition laws are limited to either a corporation or product/service sector and are applied under ministerial discretion. This option is said to be able to address creeping acquisitions on an as needs basis.

The Response from the Private Sector

The Government's decision to enact legislation to deal with creeping acquisitions has sparked criticism from both the legal and private sectors. These criticisms focus mainly on the negative impacts that the new laws will have on business growth and established legal principles, for example the principles relating to the concept of substantial lessening of competition. Further, there is concern that creating a provision that specifically targets 'small-scale acquisitions [represents] a level of intervention that could be out of proportion with the size of competitive harm and consumer detriment associated with [creeping acquisitions]'.

The Way Forward

While the Government is aware of these concerns and criticisms, it still perceives creeping acquisitions as an important issue that needs to be addressed in Australia. The law relating to creeping acquisitions will be an important area for small and large businesses to be aware of both in terms of the laws relating to acquisitions, the types of acquisitions that will be prohibited and in terms of the remedies and penalties that the ACCC and Courts can enforce against companies in breach of the laws.

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