

## Financial Lines Quarterly Review

This is a new publication intended to provide a brief overview of developments and important issues occurring in the Financial Lines environment.

### ASIC UNDER PRESSURE

The Australian Securities and Investments Commission (**ASIC**) had 3 high profile losses in late 2009 (although ASIC managed to successfully appeal one of those decisions). The 3 cases are:

- + **ASIC v Rich and Silberman** respectively, the former One.Tel joint chief executive and former finance director;
- + **ASIC v Fortescue Metals Group (FMG)** and its chief executive officer Andrew Forrest; and
- + **ASIC v Andrew Lindberg (No.2)**, the former managing director of the Australian Wheat Board (**AWB**).

#### One.Tel Saga

The major blow to ASIC both reputationally and financially was Austin J's 3,152 page judgment which heavily criticised almost every aspect of ASIC's case against Mr Rich and Mr Silberman. ASIC alleged that they had each breached their director's duties of care and diligence owed to the company and were therefore liable for civil penalties (including banning orders) and a

\$92 million compensation order on behalf of One.Tel creditors.

Austin J's key criticism was that ASIC had sought to establish the financial standing of One.Tel over a 5 month period but had failed to establish its case on all counts. A more detailed review of the judgment is in the Wotton + Kearney *Insurance News* (November 2009) by Matt Foglia which includes comment on Austin J's expansive analysis of the business judgment rule under section 180(1) of the **Corporations Act (Cth) 2001**.

Since that newsletter ASIC has confirmed that it will not appeal the judgment and has recently agreed to pay millions of dollars to Mr Rich in settlement of his defence costs. A further issue which arises out of the judgment (and his Honour's comments) is that the special purpose liquidator of One.Tel (who was appointed to consider possible claims arising out of the failed \$132 million rights issue) has confirmed that he is in the final processes of securing funding to instigate claims in relation to that failed rights



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issue. The One.Tel saga appears to still have significant life nearly 10 years after its collapse.

### Fortescue decision

ASIC was also unsuccessful in its case against FMG and Mr Forrest regarding the adequacy of their disclosure that FMG had signed binding 'Framing Agreements' with 3 Chinese contractors for the building, finance and transfer of infrastructure. ASIC argued that:

- + the 'Framing Agreements' were not binding contracts;
- + FMG had breached its continuous disclosure obligations pursuant to ASX Listing Rule 3.1 and section 674(2) of the **Corporations Act**;
- + FMG through Mr Forrest had no genuine and/or reasonable basis for making the announcement and consequently FMG and Mr Forrest were dishonest in knowingly making claims that were false, unqualified and emphatic;
- + a breach of disclosure obligations was (and had to be) an objective standard which did not depend upon FMG's or Mr Forrest's perception of the information;
- + it was self-evident from the terms of the Framing Agreements and from Mr Forrest's position and experience that the agreements were not final; and
- + if FMG and/or Mr Forrest had obtained competent legal advice they each could not have reasonably made the market disclosures that were made.

Gilmore J did not accept ASIC's argument and held that:

- + where the relevant information is "*constituted by or includes an expression of an opinion, [as he found in this case] then the belief, or opinion, of the disclosing entity is in my view relevant. The question will be whether the particular opinion was reasonably and, in some circumstances, also honestly held ...*"; and

- + there was no evidence that FMG and/or Mr Forrest ever considered the agreements to be anything other than binding; and
- + there was a reasonable basis for FMG and its board, including Mr Forrest, to hold the view that the Framing Agreements were binding as claimed. That opinion was also supported by the legal opinion they obtained. Accordingly, he held that FMG and Forrest's opinions were "... *honestly and reasonably held at the times of disclosure and thereafter ...*".

### Significance

The decision is important in determining the ambit of the relevant information which is required to be disclosed pursuant to the continuous disclosure obligations under section 674(2) of the **Corporations Act** and ASX Listing Rule 3.1. Gilmore J rejected ASIC's argument (that the relevant test was solely an objective test which only required determination of whether the information was material and whether the disclosure was correct) and instead held that where the relevant information consisted of an opinion of the facts, the relevant test was a subjective test of whether the relevant opinion or belief was reasonably and in some circumstances honestly held.

The decision has significant implications both for ASIC prosecutions and Australian shareholder class actions which to date have sought to rely heavily on a purported strict liability for any breach of a company's continuous disclosure obligations. The mere fact that a disclosure may have been incorrect does not necessarily mean that there has been a breach of relevant disclosure obligations in circumstances where the company and its board may have honestly and reasonably held that opinion. This raises an interesting argument (which has not yet been determined by the Courts) as to whether a claim for misleading and deceptive conduct under the **Trade Practices Act** (which does not require any intent to be established) could still be maintained in circumstances where there has been no breach of section 674 or ASX Listing Rule 3.1.

Given the importance of the decision and the outright rejection of ASIC's view of the ambit of information to be disclosed, ASIC has confirmed that it will appeal against Gilmore J's decision.

### Australian Wheat Board

ASIC suffered the trifecta of its high profile losses in its expanded second set of proceedings against the former AWB chief executive Andrew Lindberg. The decision was largely dependent upon its facts and involved an application to have a second set of proceedings permanently stayed on the basis that it was an abuse of process and would be unfair and oppressive.

Robson J of the Victorian Supreme Court initially upheld Lindberg's application and was most critical of ASIC's actions in holding that "... *the second proceedings brings the administration of justice into disrepute in the minds of right thinking people ...*".

However, on appeal the unanimous verdict of the Victorian Court of Appeal was that Robson J had mistaken the facts in important respects and failed to take into account material considerations including giving insufficient attention to the public interest in the adjudication of allegations of significant wrongdoing in the conduct of an Australian company's foreign business. The Court of Appeal held that ASIC had conducted itself properly (which is most important for a 'model litigant').

### Overview

There is no doubt that although ASIC was successful in its appeal of the Lindberg decision, ASIC's reputation has been severely tarnished by these high profile losses in such a short space of time. While the Rich decision was largely dependent on the extremely wide ambit of the

case which ASIC tried (but failed) to establish, it is likely to mean that in future ASIC will seek to simplify its prosecutions and concentrate on specific issues at particular points in time.

The most important decision is the Fortescue and Forrest decision given the divergent views on such an important issue as the ambit of the relevant information required to be disclosed under a company's continuous disclosure obligations. The decision has significant implications for future ASIC prosecutions and to the plethora of shareholder class actions which rely upon a breach of continuous disclosure obligations as the primary cause of action against a company and/or its directors.

In late 2009 the Victorian Court of Appeal held that funded class actions were a managed investment scheme (MIS) as defined by section 9 of the **Corporations Act (Brookfield Multiplex Ltd v International Litigation Funding Partners Pty Ltd** (2009) – see Wotton + Kearney newsletter in October 2009 by Patrick Boardman). Accordingly retail investor class actions may constitute an unregistered MIS contrary to the **Corporations Act**. As a consequence of that decision ASIC announced that until 30 June 2010 transitional relief from the requirements of the **Corporations Act** may be provided upon application.

ASIC's recent rejection of such transitional relief in a class action on behalf of retail investors in the Transpacific Industries Group Ltd class action (which means that the Transpacific class action is by sophisticated and professional investors only) evidences that ASIC will not automatically provide such relief as thought would occur.

## ENVIRONMENTAL ISSUES

### Global Warming/Carbon Omissions *Comer v Murphy Oil*

On 16 October 2009 the U.S. Court of Appeals for the Fifth Circuit, in the case of **Comer v Murphy Oil**, granted a group of Louisiana Gulf

Coast property owners standing to sue 30 large oil and coal companies for damages under the common law of nuisance, trespass and negligence on the grounds that their carbon

emissions allegedly added ferocity to the 2005 Hurricane Katrina.

An earlier District Court decision had dismissed the class action on the grounds that the harms and injuries alleged from Hurricane Katrina were not "*fairly traceable*" to the defendants. In overturning the District Court decision, the Court of Appeal noted the US Supreme Court decision in **Massachusetts v EPA** where the Court had accepted a causal chain which was nearly identical to the allegations in *Comer*, namely "that *defendants' greenhouse gas emissions contributed to warming of the environment ... which damaged plaintiffs' coastal Mississippi property via sea level rise and the increased intensity of Hurricane Katrina.*"

The decision in **Comer v Murphy Oil** is not an isolated decision and comes a month after the decision **Connecticut v American Electric Power** in which the U.S. Court of Appeals for the 2<sup>nd</sup> Circuit allowed 8 states to pursue a public nuisance claim against a number of large coal burning utilities.

#### **Relevance to Australia**

Although US common law rulings have no authority in Australia the groundswell of such cases raise a number of important issues for consideration in Australia, namely:

- + because global warming is by its nature a global issue without borders there is the potential for Australian companies to be sued in the US (or indeed anywhere else in the world) in relation to their carbon dioxide emissions both in Australia and/or elsewhere; and
- + there is the potential that if successful in the US, similar actions may be brought in Australia or other countries (such as the UK) against relevant Australian companies.

Australia is already experiencing the start of its own global warming litigation with coastal councils/developers and planners in dispute over real and/or potential sea erosion and rising sea levels affecting coastal properties. Similar to the tobacco litigation of the 1970s (which was initially dismissed but then grew into billion dollar

litigation) there must now be the potential for the global warming litigation to expand which, unlike the tobacco litigation, has the potential to span international boundaries.

While it remains to be seen whether large Australian mining and energy companies will be facing billion/trillion dollar damage claims in 20-30 years time, it is important that such businesses and their insurers are aware of the potential for such future claims.

### **Contaminated Land**

Directors of companies now face increased liability since the implementation of the NSW **Contaminated Land Management Amendment Act 2008 (the Amended Act)**.

#### **Removal of the "no knowledge" defence**

Previously under the **Contaminated Land Management Act 1997 (the Act)** directors or persons concerned with the management of the company were considered to have committed the same offence as the company unless the director could establish one of the following defences:

- + the person was not in a position to influence the conduct of the corporation in relation to the contravention;
- + the person used all due diligence to prevent the contravention by the corporation; or
- + the person had no knowledge of the contravention.

Under the Amended Act the "*no knowledge*" defence has been abolished which increases the potential of director's liability under s 98 of the Act.

#### **Increased notification obligations**

Previously under the Act it was only necessary to notify the Environmental Protection Authority (**EPA**) if an owner or polluter "*becomes aware*" of a contamination. Under the Amended Act there is now an obligation to report the contamination if the owner or polluter "*ought reasonably to have been aware of the contamination*".

The amendments extend a company's (and their directors') obligations by creating a positive duty to investigate previous contaminations.

A subjective lack of knowledge by a company/director will no longer be a defence against liability for a failure to make any required notification.

A failure to report a contamination is itself an offence incurring a fine of up to \$165,000 for a corporation (and \$77,000 for each day that the offence continues) and up to \$77,000 for an individual (and \$33,000 for each day that the offence continues).

#### **Significant risk of harm test replaced**

The Amended Act has also given the EPA broader powers to issue investigation and management orders. The EPA now has the power to regulate contaminated land if it considers that the contamination is “*significant enough to warrant regulation*”. Formerly, the EPA had to be satisfied that contamination

presented a “*significant risk of harm*” before it regulated a site under the Act. The new test allows the EPA more freedom to issue management orders for the investigation and clean-up of contamination.

#### **Implications**

The Amended Act which came into force in 2009 has significantly increased the obligations and potential liability of directors and officers for land contamination. It is important for directors and officers to familiarise themselves with the Amended Act (as ignorance is no longer a sufficient defence) and where necessary obtain appropriate insurance to cover any potential liability which may arise. Notably most Directors’ and Officers’ insurance policies expressly exclude pollution risks.

## CHANGES TO AUSTRALIA’S INSOLVENCY TRADING LAWS

### **Shareholder Priorities**

The Federal Government will reverse the effect of the controversial 2007 High Court ruling in *Sons of Gwalia v Margaretic* which ranked the claims of certain shareholders equally with those of unsecured creditors in the event of a corporate collapse.

The Government considers that the direct benefits of the ruling to aggrieved shareholders were outweighed by its negative implications which included the increased uncertainty and increased external administration costs, the negative impact on both business rescue procedures and a company’s access to debt financing together with the undermining of the longstanding distinction between debt and equity.

#### **Implications**

The proposed changes to the **Corporations Act** are part of a wide raft of reforms to Australia’s corporate insolvency laws (see more below) which are aimed at reducing the complexities and costs associated with insolvency administrations. In the future shareholders will no longer have the

ability to bring a claim for their investment losses merely by seeking to lodge a claim on an administrator (or liquidator) of a company and have that claim assessed. Aggrieved shareholders will now have to seek recourse through litigation against the company and/or against the former directors personally so as to seek access to the directors’ wealth and/or any Directors’ and Officers’ insurance policy.

### **Insolvent Trading**

It has long been recognised that Australia has some of the most punitive insolvent trading laws in the world where a mere suspicion of insolvency can be sufficient to establish liability on a company’s directors. (For a more detailed review of Australian insolvency law, see the paper by Patrick Boardman on the Wotton + Kearney website.)

The global financial crisis has focused greater attention on Australia’s onerous and complicated insolvency laws which have been criticised for promoting the premature instigation of formal insolvency arrangements (which may not be in

the best interests of the company, its shareholders or creditors) because of the potential unlimited liability of any director who may ultimately be found to have traded while insolvent. That criticism has caused ASIC to release:

- + a consultation paper so that directors can better understand and comply with their duty to prevent insolvent trading; and
- + a discussion paper on changes to the insolvent trading provisions.

ASIC has sought interested parties' input on the following 3 proposed insolvency law provisions:

- + maintain the current status quo;
- + to adopt a modified business judgment rule which is currently set out in section 180 of the **Corporations Act**; or
- + create a "safe harbour" for informal work-outs which would be a variation of the US Chapter 11 provisions.

ASIC's preference is for a modification of the business judgment rule and it has requested submissions by 2 March 2010. We will monitor the situation to advise of the outcome of the ASIC proposal.

To assist directors in assessing their duty to prevent insolvent trading the ASIC consultation paper outlines the following 4 principles which directors need to comply with:

- + directors must keep themselves informed about the company's financial affairs, and regularly assess the company's solvency;
- + as soon as directors identify financial difficulties they should immediately take positive steps to ascertain the company's financial position and realistically assess the options available to deal with the financial difficulties;
- + directors should seek appropriate professional advice from an accountant, lawyer or other person experienced in advising on insolvency matters to help address the company's financial difficulties; and

- + directors should consider and act appropriately on the advice received and in a timely manner.

ASIC says that it will take account of those factors in assessing whether to prosecute any director for insolvent trading in breach of section 588G of the **Corporations Act**. However, mere reliance on those provisions will not necessarily prevent a director being sued by a liquidator of a failed company or indeed any creditor. It is therefore important that a director utilises the consulting paper as a basic minimum requirement in the performance of their duties rather than a prescribed standard.

### Credit Rating Agencies

As a result of the Global Financial Crisis there has been severe criticism of the rating agencies which were considered to be responsible for providing ratings which do not appear to have been commensurate with the relevant investment risks.

From 1 January 2010 credit rating agencies in Australia require an Australian Financial Services Licence (**AFSL**) which, for those agencies wishing to provide credit ratings for investment products offered to retail investors, must include the setting up of an internal dispute resolution procedure and exposure to the Financial Ombudsman Service (which can provide a fast track claim procedure for retail investors).

ASIC has agreed to withdraw the Class Order which was in place prior to 1 January 2010 which allowed companies issuing financial products to include the ratings of agencies in their prospectus or product disclosure statement without the consent of the rating agency. ASIC considers that "by withdrawing the relief, ASIC is allowing credit rating agencies to control the use and presentation of their ratings and disclosure by giving or withholding consent".

### Claims against credit rating agencies

Although there have been numerous claims in the USA in respect of alleged inaccurate credit ratings provided by the 3 leading rating agencies, there has been very little similar litigation in Australia to date, notwithstanding that some local

governments, churches and charities are said to have lost hundreds of millions of dollars as a result of purchases of what were thought to be low risk investments.

Most recently the Local Government Financial Services Agency (which is the subject of a claim by 12 NSW councils in respect of \$18.5 million of

financial products called Rembrandts) has issued a cross claim against the credit rating agency Standard & Poor's and the investment bank that created those products, ABN Amro.

We will continue to monitor that litigation and advise of developments.

## PROPORTIONATE LIABILITY

Under Federal and State proportionate liability legislation if there are 2 or more concurrent wrongdoers responsible for a plaintiff's loss, then liability for that loss must be allocated among them because no concurrent wrongdoer may be held liable for more than his or her share of responsibility for the loss.

Notwithstanding that the wording of the respective NSW and Victorian legislation is very similar, there is presently a significant disparity in the respective interpretation of that legislation which arises primarily because of the perceived intent behind that legislation. In:

- + New South Wales, the purpose of Part IV of the **Civil Liability Act 2002** was explained by Palmer J in **Yates v Mobile Marine Repairs Pty Ltd** [2007] NSWSC 1463 at [93]–[94] to be:

*"The object of Pt IV CLA is remedial and it dramatically changes the previous law ...*

*Part IV is designed to alleviate this perceived injustice [regarding a defendant paying all of the judgment due to the insolvency of another]. It is intended to visit on each concurrent wrongdoer only that amount of liability which the Court considers 'just', having regard to the comparative responsibilities of all wrongdoers for the plaintiff's loss."*

- + a recent Victorian Court of Appeal decision of **St. George Bank Ltd v Quinerts Pty Ltd** [2009] VSCA 245 (**St. George**), Justice Nettle held that in his view the intent behind the

Victorian proportionate liability legislation was to put a defendant in the same position as they would have been in if they had been sued before the introduction of proportionate liability and was reliant on a right to contribution to apportion their loss with other wrongdoers.

The distinction between the two approaches is important and is shown by the recent decisions of Young CJ in the NSW Supreme Court decision of **Vella v Permanent Mortgages Pty Ltd** [2008] NSWSC 505 (**Vella**) and the Victorian Court of Appeal in **St. George**.

In **Vella** the Court held that a claim by a mortgage provider could be apportioned between the borrower (72.5%), the mortgagor's solicitors (12.5%) and the borrower's solicitor who also "played a significant, but relatively minor part in the fraud" (15%). The basis of the Court's decision was:

- + the intended purpose of the NSW legislation. In that regard Young CJ approved the reasoning of Palmer J in Yates above;
- + the parties were all liable in respect of the plaintiff's loss. Consequently there was an "apportionable claim" pursuant to section 35 of the CLA;
- + in assessing the liability of the parties, Young CJ held "... that a judge 'must make a comparison of the culpability and of the acts of the parties causing damage and, thus, to the relative blameworthiness and the relative causal potency of the negligence of each party'."

However the Victorian Supreme Court recently rejected Young CJ's reasoning in *Vella* and in doing so held that:

- + the stated intended purpose behind the Victorian proportionate liability regime is as set out above;
- + before the introduction of proportionate liability, a defendant who was found liable for 100% of a plaintiff's loss had to rely on a right to contribution from other wrongdoers, but that right was available only against a wrongdoer who had caused the same loss as the defendant; and
- + a concurrent wrongdoer under the Victorian proportionate liability regime is a person who is responsible for the same loss as the defendant and relevant applicable case law relates to the application of the law of contribution between 2 persons responsible for that same loss.

In *St. George*, St. George sued Quinerts Pty Ltd for negligently overvaluing a property. The valuer argued that its share of the liability for the lender's loss should be reduced because the borrower was a concurrent wrongdoer (in defaulting on the repayment of the debt). The Victorian Supreme Court and the Victorian Court of Appeal rejected that proposition and held that the borrower and the valuer were not concurrent wrongdoers because they were not responsible for the same loss. The valuer's negligence resulted in St. George accepting inadequate security for the loan, but the borrower did not cause that to occur. Conversely, the borrower caused St. George's loss by defaulting on their loan, but nothing which the valuer did caused the borrower to default.

*Vella* is still good law in New South Wales, however, it is the subject of appeal to the NSW Court of Appeal. Given that the 2 decisions are based upon the intent of their respective state legislation, it is possible that the NSW Court of Appeal and the Victorian Court of Appeal could

have differing views based upon the perceived intent of their respective legislation.

### Proportionate liability in building matters in NSW

Proportionate liability applied to building matters in NSW before the application of Part 4 of the **Civil Liability Act 2002 (NSW) (CLA)** by way of the operation of section 109ZJ of the **Environmental Planning and Assessment Act (EP&A Act)**.

When Part 4 came into operation, section 109ZJ was repealed, however the **Civil Liability Regulation 2003** provides that Part 4 of the CLA applies only to liabilities arising after 26 July 2004. This had the unintended result of providing a legislative "gap" for those building matters where liability arose before 26 July 2004 but litigation had not commenced by 1 December 2004. Insurers of defendant building professionals in those matters were faced with the prospect of their insured being found liable on a joint and several basis.

This anomaly has been remedied by a provision of the **Civil Liability Regulation 2009** which excludes any "building action" or subdivision action commenced on or after 1 December 2004 from the operation of the regulation which provides that Part 4 will only apply to matters where liability arose after 26 July 2004. The result is that the "gap" is removed and Part 4 of the CLA applies in respect of such an action. (It should be noted that despite its repeal, section 109ZJ continues to apply to matters where litigation was commenced before 1 December 2004).

"Building action" is relevantly defined in s 109ZI of the EP&A Act to mean an action (including a counter-claim) for loss or damage arising out of or concerning defective "building work" which is in turn defined as any physical activity involved in the erection of a building including the design, inspection and issuing of a development certificate.

## FINANCIAL PLANNERS

### FOS provides guidance on advice on fixed interest products

The Financial Ombudsman Service (FOS) recently released an information sheet with a view to clarifying its interpretation of fixed interest investments. This follows from what was arguably a controversial FOS determination in which it was held that a financial advisor's classification of the now defunct Basis Yield Fund as a "fixed interest" product was inadequate. That was despite the fund being marketed as a fixed interest product and independent research houses analysing the fund on that basis.

FOS states that fixed interest investments are usually understood by consumers to involve regular interest returns and a capital guarantee. FOS confirms that the touchstone remains a process of comparing the complexity and characteristics of each product in determining whether it is suitable for a particular investor.

FOS' information sheet reflects the approach previously adopted by the Australian Securities and Investments Commission, in which the appropriateness of advice was determined with reference to:

- + the potential for capital loss;
- + the degree of diversification; and
- + reliance upon materials other than external recommendations.

What FOS makes clear in this paper is that in making determinations it will proceed on the basis that it is not enough for advisors to simply rely upon external research publications without considering an investor's situation and objectives to the investment in question. FOS' comments provide valuable guidance to insurers on how it will assess disputes involving fixed interest products.

The information sheet is available at:  
[http://www.fos.org.au/centric/home\\_page.jsp](http://www.fos.org.au/centric/home_page.jsp)

### The new FPA Code of Professional Practice

The Financial Planning Association of Australia's (FPA) Code of Professional Practice takes effect from 1 July 2010 (with a 12 month conditional moratorium on enforcement). The Code includes:

- + a Code of Ethics;
- + revised Rules of Professional Conduct;
- + miscellaneous FPA Professional Standards; and
- + FPA Guidance Notes.

The new Code of Ethics provides a minimum benchmark for professional behaviour and is intended to provide guidance on what is considered to be appropriate and acceptable professional behaviour with reference to eight core principles: (1) Client First, (2) Integrity, (3) Objectivity, (4) Fairness, (5) Professionalism, (6) Competence, (7) Confidentiality, (8) Diligence.

The new FPA Practice Standards reflect the broad-based thematic rules of financial planning. They are intended to reflect the expectations on planners and to provide confidence and certainty about professional obligations. There are eight Practice Standards covering topics such as the collection of client information through to service promotion.

The new Rules of Professional Conduct are a substantial revision of the rules first introduced in 1997 and set out what is expected of a financial planner with reference to the standard of a reasonably diligent financial planner acting competently. They are enforceable and provide a detailed explanation of what is required in relation to each of the eight Practice Standards.

It is intended that the FPA Guidance Notes will address any part of the Code and elaborate on the application of particular rules. They will not be enforceable like the Code but are intended to aid members and other stake holders in the interpretation of the Code.

The FPA's has also issued a **consultation paper** addressing the minimum educational requirements for planners and is accepting written submissions on the issue until 31 March 2010. The FPA has proposed, among other things that new planners will need to have a

tertiary qualification in financial planning as a minimum requirement and undertake at least one year of full time supervised work in client facing activity before holding themselves out as professional planners. It is envisaged that these requirements are to be gradually introduced.

## CASE NOTES

### Indemnity for legal costs incurred

Directors and officers and professional indemnity policies provide cover for defence costs and investigation costs incurred in respect of a claim or investigation respectively. In the recent case of **Major Engineering Pty Limited v CGU Insurance Limited** (9 November 2009) the Victorian Supreme Court had to determine whether indemnity was available for legal costs incurred in respect of claim for breach of professional services under a public and products liability policy which incorporated an exclusion of claims "*arising out of*" the rendering of professional advice or a service.

The Insured argued that the claim was misconceived and the insurer had an obligation to indemnify it for the costs incurred in defending the claim. The Court disagreed and held that:

- + in determining indemnity there had to be consideration of the claim as a whole and

whether, if successful, the insurer would have been obliged to indemnify the Insured for any liability; and

- + if the claim had been successful, indemnity would not have been available to the Insured (by reason of the exclusion). Consequently the Insurer was not liable to indemnify the Insured's costs.

The decision has implications for policies which provide an indemnity and/or advance payment of defence costs. If the claim as pleaded would fall within an exclusion to the policy (notwithstanding that it may trigger the insuring clause) then where the allegations are "*... clearly beyond the scope of the policy ...*" there is no trigger or entitlement for the payment of defence costs.

This quarterly report is written by Patrick Boardman, Charles Thornley and Colleen Palmkvist with assistance from Olympia Samolis, David Brady, Hannah Keane and Deepak Shankar.

Please call Patrick, Charles or Colleen with any questions.