

## NEWSLETTER

### Legal Up-Date

### April 2006

#### PRESENTATION IN BERLIN

Invest Australia is the Australian government's inward investment agency with offices in eleven locations around the world. It is the primary source for companies seeking specialist advice and assistance concerning investing in Australia.

Schweizer Kobras enjoys a close relationship with Invest Australia. We were therefore delighted to co-host an investment seminar with Invest Australia in Germany last month. The seminar "Australia – Location with Attractive Investment Conditions" was held on 31 March at the Australian Embassy in Berlin. Highlights included descriptions by Thomas Loher of ARRI AG and Benjamin Hannig of Conergy Australia Pty Ltd of their experiences in recently establishing subsidiaries in Australia, and an outline on "The current Australian Economy" by Christina Neisser of Invest Australia.

Michael Kobras of this firm also made a key presentation on "Legal Implications of Investments in Australia". He gave a broad overview of the many legal considerations which apply to foreign investment projects in Australia. The business structure an investor selects should be chosen carefully. It is also important for investors to be aware of immigration requirements as well as the industrial and employment law, taxation, intellectual property and trade mark law that applies in Australia.

If you have any queries regarding legal issues relating to investing in Australia please contact Michael Kobras at [mkobras@schweizer.com.au](mailto:mkobras@schweizer.com.au).

#### WORKCHOICES NOW IN EFFECT

From 27 March 2006, the Workplace Relations Act 1996(Cth) and the Workplace Relations Regulations 2006 (the "Regulations") apply to all constitutional corporations throughout Australia and to private sector employers in Victoria, the ACT and Northern Territory.

Employers to whom the new WorkChoices legislation applies should ensure that they comply with the minimum conditions applicable to their employees who are covered by the new Australian Fair Pay and Conditions Standard. They should also be aware of the onerous record-keeping requirements imposed by the Regulations, including a requirement to record and retain for seven years, employees' daily starting and finishing times, the number of hours worked each day and nominal hours of work.

As far as court proceedings are concerned, some of those proceedings will now automatically lapse. However, all unfair contract claims commenced prior to the new legislation coming into force continue on course as before until resolved.

If you have any queries about the new WorkChoice legislation or industrial relations matters please contact Michael Kobras at [mkobras@schweizer.com.au](mailto:mkobras@schweizer.com.au).

#### EMPLOYER UNABLE TO ENFORCE RESTRAINT OF TRADE CLAUSES

*Kearney Australia Pty Ltd Joseph Ronald Crepaldi & Ors* is a recent decision which offers guidance on the enforceability of clauses in restraint of trade against former employees.

Kearney Australia Pty Ltd ("Kearney") was in the business of management consulting. Two of the defendants had been employed by Kearney for lengthy periods of time – Crepaldi was managing director of Kearney for two and a half years of his eight years employment, and Paxton was vice-president for sixteen months of his five years with Kearney.

The third defendant, Crescendo, was a company formed and controlled by Crepaldi and carried on the business of management consulting.

Kearney sought injunctions to restrain the defendants on the basis that the defendants were:

- (a) performing management consulting work similar to that performed in their last twelve months employment with Kearney;
- (b) soliciting employees and clients and diverting to themselves work which could and should be performed by Kearney; and
- (c) using confidential information of Kearney for their business.

#### Crepaldi's Position

Crepaldi's employment contract contained a non-solicitation clause – intended to apply for a period of twelve months after his employment was terminated – and a clause acknowledging that methodologies developed as an employee of Kearney were the property of Kearney.

Crepaldi had also signed an Equity Related Agreement with an American company of which Kearney was a subsidiary. This agreement also contained various non-competition clauses.

Following termination of his employment, Crepaldi and Crescendo continued to perform services for Kearney in respect of a particular transaction. In October 2005, Crepaldi entered into a Termination Deed under which he acknowledged that he would continue to be bound by the

post-employment restrictive covenants in the Employment Agreement and Equity Related Agreement.

#### Paxton's Position

On 17 July 2000, Paxton signed a document entitled "Additional Terms of Employment" which also contained a non-solicitation clause.

The defendants conceded there was a serious question to be tried in respect of the breaches of the non-completion and non-solicitation clauses. The Court then held that Kearney had made out a basis for the grant of interlocutory relief. Nevertheless, the Court declined to exercise its discretion and grant the relief.

Justice McDougall reasoned as follows:

#### Non-Competition and Non-Solicitation of Clients

1. As a rule, restraint of trade provisions are unenforceable because they are contrary to the public interest in competition and the onus lies on the party asserting the restraint to show that the clause is necessary to protect the party's legitimate interests;
2. It would have been a 'travesty of justice' to enforce the restraint because, despite knowing that Crepaldi would be a competitor, Kearney took no step against Crepaldi following his employment being terminated until Crescendo had completed the contract work for Kearney;
3. There was no evidence to suggest that Kearney had some secret or confidential manner of performing its business or providing its services that gave it a competitive edge over other management consultants;
4. There were inconsistencies in the Equity Related Agreement (one clause providing a non-compete term of six months and another a non-compete term of twelve months) and Kearney's position in choosing the longer term could hardly be said to be meritorious when it had proffered such a confusing agreement;
5. In at least one case, work was diverted to Crepaldi because Kearney declined to pursue the opportunity and recommended Crepaldi to the client; and
6. Prior to Crepaldi resigning discussions had been taking place regarding a Management Buy-Out ("MBO"). It was made clear to Crepaldi and Paxton that if they did not take part in the MBO, Crepaldi would cease to be managing director once the restructure had taken place and Paxton's role, duties and influence would be much reduced.

#### Non-Solicitation of Employees

1. The employer's interest in maintaining a stable workforce is not of itself a sufficient interest to support a restraint of the kind relied on;

2. In any event, in the present context of the MBO, there would be considerable flux in employment and redundancies on completion of the MBO;
3. Kearney had an adequate remedy in damages in respect of any work it was unable to complete as a result of employees leaving and taking up employment with the defendants;
4. Regardless of the source of solicitation or the reason for employees' departure, the employees leaving would give Kearney the period of notice specified in their contracts which was a period fixed by Kearney presumably having regard to the time it might take to replace them. If the notice period was inadequate, this is not the defendants' fault; and
5. Kearney's delay in bringing proceedings (three weeks after receiving conclusive evidence that employees had gone to Crescendo) was a sufficient basis for refusing the relief sought.

Please contact Alison Drayton at [adrayton@schweizer.com.au](mailto:adrayton@schweizer.com.au) if you have any queries about restraint of trade clauses in employment agreements.

#### **NEW SWISS LAW CONSULTANT**

We are pleased to announce the appointment of Thomas Kohli, lic. iur., as our Swiss Law Consultant replacing Beatrice Stuber.

Thomas completed his legal studies at the Universities of Zurich and Lausanne in 1996. From 1996 to 2001 he was a member of the legal team of the Federal Institute of Intellectual Property and worked for the District Court of Meilen and for various law firms in Zurich.

Admitted as an attorney in 2001, Thomas became an associate with Schürmann & Partner, Lawyers in Zurich in April 2002. Thomas has also been an editor of the bi-lingual (German/French) journal "sic!", the leading intellectual property, information and competition law journal in Switzerland, since 1997.

Thomas has developed various areas of specialisation including intellectual property law, contracts, employment and labour law and immigration. He is presently working towards an LL.M. degree at the University of Sydney.

#### **YOUR FEEDBACK**

If you have any comments about this newsletter, suggestions for improvement or would like to see any particular areas of law which interests you covered, please drop us a line at:

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