

NEWSLETTER

Legal Up-Date

July 2007

RAINBOW CROSS BORDER BUSINESS LAW ASSOCIATION

Schweizer Kobras has recently become a member of Rainbow Cross Border Business Law AG. Rainbow is an international business law referral group headquartered in Baden Baden, Germany. The group has over 20 members including firms in Belgium, England, France, Greece, Holland, Hungary, Poland, Russia, the Slovakian Republic, South Africa, Spain and the USA.

In May over 50 people attended the first Rainbow international business law conference in Baden Baden. At the conference, Michael Kobras presented a paper on the Legal Issues Involved In Doing Business in Australia.

If you have a legal matter involving any of the countries mentioned or wish to obtain further information about the law in those countries, please contact Michael Kobras at mkobras@schweizer.com.au.

SONS OF GWALIA DECISION

As a result of the High Court's decision earlier this year, shareholders now have a right in certain circumstances, to claim damages based on an action for misleading and deceptive conduct on the part of the company. This provides a limited means of circumventing the section in the Corporations Act 2001 which states that shareholders of failed companies rank behind ordinary creditors if they are claiming purely in their capacity as members.

Some people argue that shareholders should take a back seat to creditors because, in a successful enterprise, they share in the profits of the company with no personal liability for debts. In return, they should accept that their investment can be used to pay creditors and employees in the event of the company becoming insolvent. However, this argument does not take into account the fact that shareholders are deprived of their money for the period of the investment and should share in the profits as a reward for doing so.

While some judges remain unsure that the intention of the legislation has been correctly interpreted in the context of this case, the Federal Attorney General has welcomed the decision as reflecting the need to create a fairer market for all investors. The decision also reflects the importance of strong consumer protection provisions in the legislation.

Directors will now need to be extra vigilant in strictly complying with disclosure requirements in order to avoid

conduct that may be construed as misleading and deceptive.

If you have any queries about any aspect of director's liabilities, please contact Alison Drayton on adrayton@schweizer.com.au.

YOUR CONFIDENTIAL INFORMATION

A recent Supreme Court decision has suggested that a contractual restraint on the use of confidential information may potentially extend to providing the means for an employer to prevent former employees from competing with them **even** in the absence of a specific non-solicitation clause in their employment contract.

In this case, a former employee of an events management company set up a competing business. The former employer obtained an injunction to restrain the former employee from using confidential information. While there was a clause in the employment contract regarding confidentiality, there was no clause imposing a restraint of trade if the employee ceased employment. The former employee sought to contact five of the former employer's clients. The former employer argued that despite the absence of the restraint of trade provision, if the former employee was to contact the five clients, this would involve the use of confidential information.

A final decision in the matter of *Great Southern Events Pty Ltd v Peskops [2007] NSWSC 382* is yet to be made. However, on the hearing of an interlocutory injunction application, the Court found that there was a serious issue to be tried because, despite various restrictions on restraints of trade generally, confidential information obtained during the course of employment should not be used to solicit a former employer's clients.

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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