

Pacific Rim Advisory Council
September 2016 e-Bulletin

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CONFERENCES & EVENTS

PRAC 60th International Conference
Manila - Hosted by SyCip Salazar Hernandez & Gatmaitan
September 24 - 27, 2016

IBA Washington, D.C. Member Receptions
September 19 - hosted by Bennett Jones
September 20 - hosted by Hogan Lovells

PRAC 61st International Conference
Hong Kong - Hosted by Hogan Lovells
April 22 - 25, 2017

PRAC 62nd International Conference
Sao Paulo - Hosted by TozziniFreire
October 21 - 24, 2017

visit www.prac.org for full event details

MEMBER DEALS MAKING NEWS

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BAKER BOTTS - NOTED IP LITIGATORS JOIN FIRM

SAN FRANCISCO - August 3, 2016: Baker Botts L.L.P., a leading international law firm, today announced that Wayne Stacy and Sarah Guske will be joining the firm's San Francisco office as Partners in the Intellectual Property practice group. They will join Stuart Plunkett and Jonathan Shapiro who joined the firm in May.

"Wayne and Sarah are outstanding litigators and we are thrilled that they are joining our firm. Baker Botts has a vibrant Technology practice, in fact eight of the firm's largest 15 clients are in the Technology Sector, and their decision to join us highlights our sector leadership and the added value we are able to provide to our clients," said Andrew M. Baker, Managing Partner of Baker Botts.

Mr. Stacy has a background in trying patent cases in the Northern District of California and the Eastern District of Texas where his practice has targeted litigation among competitive entities where significant damages are at issue and injunctions are utilized. He also has extensive expertise in representing clients before the Patent Trial and Appeal Board (PTAB). In addition, he has litigated on behalf of clients in the software electronics, telecommunications systems and cloud computing industries.

Mr. Stacy has been an Adjunct Professor for over a decade teaching Patent Litigation and Patent Office Litigation.

He has a BS in Computer Engineering from Southern Methodist University and a JD, with high honors, from George Washington University Law School.

Ms. Guske's practice focuses on technology and patent litigation. She has litigated matters in district court and before the PTAB involving a wide variety of technologies, including telecommunication protocols and systems, MPEG multimedia data for broadcast, telephonic voice recognition software and graphic chipset design. Ms. Guske also has significant appellate, unfair competition and trademark litigation experience. In addition, she also served as an Adjunct Professor teaching Patent Litigation.

She has a BS in Physics, summa cum laude, from Washington State University, a BA in Electrical Engineering, summa cum laude, from Whitworth College and a JD from the University of California, Davis School of Law.

"Sarah and Wayne are well known and highly regarded technology and patent litigators. Baker Botts is known as one of the industry's leading patent litigation firms and having them join our San Francisco office further highlights the momentum that we have generated since opening our office earlier this year," said Pat Stanton, Partner-in-Charge of the firm's San Francisco office.

Ms. Guske and Mr. Stacy are joining Baker Botts from Cooley LLP.

The Baker Botts IP and Technology practice is recognized for its expertise and the firm's lawyers were recently described by Chambers & Partners as having "excellent judgment and are highly skilled litigators."

For more information, please visit www.bakerbotts.com

DAVIS WRIGHT WELCOMES HIGHLY EXPERIENCED EMPLOYMENT LAWYER

LOS ANGELES – 17 AUGUST 17 2016: Julie Capell, an experienced employment lawyer well-versed in the continually evolving body of California employment laws and regulations, has joined Davis Wright Tremaine as a partner in the firm's Los Angeles office.

Ms. Capell has been practicing in the employment area for over 12 years and comes to the firm from Winston & Strawn. She partners with companies across the country to craft policies and procedures that protect employers and minimize litigation risk, under both California and federal law.

"We are delighted to expand our highly regarded California team with Julie's skills and experience," said Henry Farber, chair of Davis Wright Tremaine's Employment Services Group. "She has a track record of excellence in both counseling and litigation and I look forward to having her assist our growing roster of clients."

"Davis Wright's employment team has been expanding on both coasts, and for good reason," said Ms. Capell. "Their combination of legal excellence, dedicated client service, and inspired innovation is much in demand. I'm very excited to bring my practice to this strong platform."

Ms. Capell regularly counsels clients in California and throughout the country on personnel policies, wage and hour compliance, federal and state disability laws, sexual harassment, retaliation, and reasonable accommodation of disabilities. She also has extensive experience defending employers in disputes involving these issues.

Ms. Capell's professional activities include serving on the Executive Board for the Disability Rights Legal Center and as an Advisory Board member for the Lexis Practice Advisor Journal. At Winston & Strawn, she served as chair of the Women's Leadership Initiative & Summer Associate Program for the firm's Los Angeles office.

Ms. Capell received her B.A. from University of California, Los Angeles, and her J.D. from University of the Pacific.

Davis Wright's national employment and labor law practice is one of the largest in the country. The firm was awarded a 2016 National Tier 1 rating in Employment - Management by Best Law Firms and U.S. News. Eight of the firm's partners have been elected as Fellows of the College of Labor and Employment Lawyers.

For additional information visit www.dwt.com

GOODSILL ANDERSON QUINN & STIFLE ADDS NEW LITIGATION ASSOCIATE

HONOLULU - 28 July 2016: Stacy Y. Ma is an associate at Goodsill Anderson Quinn & Stifel and concentrates her practice in the areas of personal injury, premises liability, commercial litigation and medical malpractice defense.

Prior to joining Goodsill, Stacy was an associate at an Am Law 100 firm in New York and currently holds licenses in both Hawai'i and New York. She has worked with financial services clients in regulatory investigations and enforcement proceedings brought by government and regulatory agencies.

Stacy is a graduate from Boston University and received her Juris Doctor from The George Washington University Law School.

For additional information visit www.goodsill.com

HOGAN LOVELLS WELCOMES LEADING LONDON FINTECH PARTNER

30 August 2016: Revered technology partner John Salmon joins Hogan Lovells corporate practice in London today, 30 August, in a boost to its global Fintech team. He will be an active member of the financial institutions and TMT sectors.

John has been at Pinsent Masons since 1999, most recently in the role of Global Sector Head for Financial Services. He focuses on advising financial institutions on innovative digital projects including IT procurement, outsourcing, cloud, cyber security, and mobile payments. He has 20 years' experience across the financial institutions and TMT sectors, during which he set-up OUT-LAW.com, the most used law firm website in the world, and has advised high profile clients such as AXA, Royal London, Aviva and Zurich. He has also advised the financial services sector on cutting edge industry-wide projects including on the setting up of TeX to facilitate re-registration of assets on wealth platforms.

Hogan Lovells has a highly regarded regulatory and commercial financial services practice and is particularly active in the Fintech space, announcing a Strategic Partnership with Innovate Finance in November 2015 and launching its Regulatory Accelerator this month. John's hire both complements and builds on the firm's market leading reputation. He will focus on areas of increasing importance to financial institutions clients in the tech space such as blockchain, big data, cloud, mobile payments and insuretech.

Commenting on John's arrival, Rachel Kent, global head of Hogan Lovells' financial institutions sector, said:

"Technology is an important and constantly changing feature of the financial services market and clients expect up to the minute, innovative advice from the law firms they work with. Hogan Lovells is ideally placed to respond to the evolving landscape, and John's experience complements perfectly that of our existing regulatory, commercial, and cyber teams".

John commented:

"I am looking forward to working with the team here in London and globally to continue to build the brand in the Fintech space. Hogan Lovells has a great reputation for innovation and being first to market with solutions, and with so many challenging and constantly changing issues to explore in the financial services sector it is a very exciting time. We feel that by combining market leading financial services regulatory and commercial lawyers on a global basis with technology specialists operating at the forefront of financial services we have a real opportunity to add value to our clients."

For additional information visit www.hoganlovells.com

SYCIPLAW SET TO HOST PRAC 60TH INTERNATIONAL CONFERENCE

MANILA – 10 September 2016: Pacific Rim Advisory Council ("PRAC") member firm SyCip Salazar Hernandez & Gatmaitan ("SyCipLaw") will host the 60th International PRAC Conference September 24 – 27, 2016 in Manila. Member firm delegates from around the globe will be gathering in Manila to attend the business conference featuring topical professional development programs and business development opportunities. Among the business sessions on tap for Manila:

Business Session | Country Briefing presented by SyCipLaw

Business Session | Guest Presentation Noritaka Akamatsu, Senior Advisor, Sustainable Development & Climate Change Department, Asian Development Bank

Business Session | PRACTice Development - "Public Private Partnerships – The Philippine Experience"

Business Session | Visit to the Philippine Supreme Court

Business Session | "Data Security Issues and Challenges for Law Firms"

Business Session | PRAC Business Development featuring:

- Member Firm spotlight – Arias Fabrega & Fabrega – Panama
- Group Table Discussions – "Brexit Implications for Law Firms"

Business Session | PRACTice Management "General Counsel Forum – What do General Counsel Truly Want from Foreign External Counsel?"



Event is exclusive to PRAC Member Firms. For event details visit www.prac.org

About SyCip Law

SyCip Salazar Hernandez & Gatmaitan (SyCipLaw), founded in 1945, is the largest law firm in the Philippines.

SyCip's Practice Areas

SyCipLaw's practice is diversified, as reflected in its seven principal departments: banking, finance and securities; corporate services; intellectual property; labor; litigation; special projects; and tax. Within this structure, some of the firm's lawyers are involved in additional fields of specialization, such as power, immigration, shipping, and maritime law.

SyCip represents enterprises in many fields, including construction, energy, mergers and acquisitions, manufacturing, mining, insurance, banking and other financial services, transportation and communications, and real estate. In addition to domestic, foreign and multinational business corporations, the firm represents individuals, non-profit institutions, governmental agencies, and multilateral organizations.

SyCipLaw is widely recognized as a leading law firm. Recent awards include: Philippine Law Firm of the Year, Who's Who Legal Awards 2016; Top Tier Firm, Chambers Asia-Pacific Rankings 2016; Top Tier Firm, Chambers Global Rankings 2016; Top Tier Firm, Asia-Pacific Legal 500 Rankings 2016; Top Tier Firm, IFLR1000 Financial and Corporate Rankings 2016; Philippine Employer of Choice, ALB Employer of Choice Ranking 2016; Top Tier Firm in IP, ALB IP Ranking 2016; Philippine Law Firm of the Year, Asian-MENA In-House Community Firms of the Year 2015; Most Responsive Domestic Firm of the Year, Asian-MENA In-House Community Firms of the Year 2015; Philippine Deal Firm of the Year, Asian Legal Business (ALB) SE Asia Law Awards 2015; Largest Firm in the Philippines, ALB Asia's Top 50 Largest Law Firms 2015; Top Tier Firm, ALB M&A Ranking 2015; Top Philippine Firm for Patents and Trademarks, Asia IP Awards 2015.

For more information visit www.syciplaw.com

ARIAS FABREGA & FABREGA (ARIFA)

ASSISTS BANCO GENERAL IN ISSUANCE DPR BACKED SECURITIES

PANAMA - August 2016: Panama's Arias, Fábrega & Fábrega assisted Panama's second largest bank, Banco General, issue securities worth US\$250 million that are backed by diversified payment rights (DPRs).

The securities are backed by a DPR programme established by Banco General, which securitises future funds flows, represented by DPRs. The offering closed on 14 July.

Counsel to Banco General Arias, Fábrega & Fábrega Partner Ricardo Arango and associate Marianne Romero in Panama City; Mayer Brown LLP (Chicago).

For additional information visit www.arifa.com

BAKER BOTTS

REPRESENTS U.S. DEPARTMENT OF TRANSPORTATION IN \$2.45 BILLION RRIF FINANCING FOR NEW AMTRAK HIGH-SPEED TRAINS

NEW YORK , 29 August 2016: The U.S. Department of Transportation announced the closing of a \$2.45 billion loan to Amtrak under the Railroad Rehabilitation and Improvement Financing (RRIF) program. Proceeds from the loan will be used by Amtrak to acquire Tier III next generation high-speed trainsets for use on the Northeast Corridor between Boston and Washington, D.C. and to fund other facility improvements, safety mitigation and ride quality measures.

The RRIF program generally provides direct federal loans and loan guarantees to finance the development of railroad and intermodal infrastructure. Eligible borrowers include railroads, state and local governments, government-sponsored authorities and corporations, joint ventures that include at least one of the other eligible entities, and limited option freight shippers who intend to construct a rail connection. The loan to Amtrak constitutes the largest financing to date under the program.

Baker Botts represented the U.S. Department of Transportation in the transaction.

Baker Botts Lawyers/Office Involved: Martin Toulouse (Partner, New York); Stuart Solsky (Partner, New York); and Clint Culpepper (Associate, Austin).

For additional information visit www.bakerbotts.com

BENNETT JONES

ADVISING DEVON ENERGY CORP AGREEMENT TO SELL ACCESS PIPELINE INTEREST

- Date Announced: July 13, 2016
- Date Closed: Unknown
- Deal Value: \$1,400,000,000

Devon Energy Corp. (NYSE: DVN) announced that it has entered into a definitive agreement to sell its 50-percent ownership interest in Access Pipeline to Wolf Midstream Inc., a portfolio company of Canada Pension Plan Investment Board, for C\$1.4 billion, or US\$1.1 billion, using current exchange rates. The agreement also includes the potential for an incremental C\$150 million payment with the sanctioning and development of a new thermal-oil project on Devon's Pike lease in Alberta, Canada. Under terms of the sale agreement, Devon's thermal-oil acreage is dedicated to Access Pipeline for an initial term of 25 years. A market-based toll will be applied to production from the Company's three Jackfish projects, which are fully operational. The agreement also includes the potential for the Access Pipeline toll to be reduced by as much as 30 percent with the development of new thermal-oil projects in the future. The transaction is subject to regulatory approvals along with customary terms and conditions. Closing is expected in the third quarter of 2016.

Bennett Jones LLP is advising Devon in connection with the transaction with a team led by Pat Maguire (Oil and Gas) that included Vivek Warriar (Oil and Gas), Anu Nijhawan (Tax), Beth Riley (Competition) and Ashley White (Oil and Gas).

For additional information visit www.bennettjones.com

CLAYTON UTZ

ADVISING ON SCHEME OF ARRANGEMENT WITH SIMONDS GROUP

Melbourne, 02 September 2016: Clayton Utz is advising SR Residential Pty Ltd in respect of its entry into a Scheme Implementation Agreement with ASX-listed Simonds Group Limited (Simonds Group), announced on 31 August.

Under the agreement, SR Residential Pty Ltd, which is jointly controlled by associates of Roche Holdings Pty Ltd (Roche) and Simonds Family Office Pty Ltd (SFO), will acquire all of the outstanding shares in Simonds Group which are not already held by SFO via a scheme of arrangement.

Subject to shareholder approval, Court approvals and other conditions of the scheme being satisfied, the scheme is expected to be implemented by mid-November 2016.

If the scheme is approved, Simonds Group shareholders will receive cash consideration of \$0.40 for each Simonds Group share, which implies an enterprise value of approximately \$80 million.

Melbourne corporate partner John Brewster is leading the Clayton Utz team, with support from lawyer Sam Morrissy.

For additional information visit www.claytontuz.com

CAREY

ADVISES RABOBANK CHILE, THE BANK OF NOVA SCOTIA, BANCO DE CRÉDITO DEL PERÚ AND EXPORT DEVELOPMENT CANADA IN USD100 MILLION CROSS BORDER CREDIT AGREEMENT

SANTIAGO – 10 August 2016: Carey advised Rabobank Chile (as agent), The Bank of Nova Scotia, Banco de Crédito del Perú and Export Development Canada, as lenders, and on the other side to Masisa, as borrower, and Masisa Forestal, as subsidiary guarantor, in a credit agreement for USD100 million granted to Masisa with Masisa Forestal.

Two different and independent teams of Carey participated in the transaction. One of them acted as counsel to the lenders, which implied to coordinate the positions and interests of the different banks led by the agent. The other acted as counsel to the borrower. It was a cross border transaction as the credit is subject to New York law.

Carey advised Rabobank Chile, The Bank of Nova Scotia, Banco de Crédito del Perú and Export Development Canada by a team led by partners Diego Peralta and Jorge Ugarte, and associate Macarena Pivcevic. And Masisa and Masisa Forestal by partner Francisco Ugarte.

For additional information visit www.carey.cl

GIDE

ACTS IN OPENING OF THE CHINESE DOMESTIC BOND MARKET TO FRENCH ISSUERS

PARIS - 02 September 2016: Gide advised Veolia Environnement on the first issue of Panda Bonds, Renminbi denominated bonds issued on the Chinese domestic bond market, for an amount of RMB 1 billion (i.e. EUR 135 million).

The transaction was made under a Chinese law issuance programme of RMB 15 billion (i.e. EUR 2 billion), approved by the NAFMII (National Association of Financial Market Institutional Investors) for a two-year term.

Veolia Environnement is the first French and the second European corporate issuer to complete a private bond placement on the Chinese domestic market.

Gide's team comprised partner Hubert du Vignaux and senior associate Laurent Vincent in Paris on French law aspects, and partner Jiannian Fan in Shanghai on Chinese law aspects.

Bank of China acted as lead underwriter and Standard Chartered, BNP Paribas and Crédit Agricole CIB as financial advisors.

For additional information visit www.gide.com

NAUTADUTILH

ASSISTS CHARLESBANK CAPITAL IN ACQUISITION OF POLYCONCEPT

AMSTERDAM - 24 August 2016: NautaDutilh assisted Charlesbank Capital Partners LLC, an experienced middle-market private equity firm, managing more than USD 3.5 billion of capital, on its acquisition of Polyconcept, the world's largest supplier of promotional products, from investment firm Investcorp Bank INVB.BH.

Charlesbank focuses on management-led buyouts and growth capital financings, generally investing in companies with enterprise values of USD 150 million to USD 1 billion. Charlesbank Capital Partners is based in Boston and New York City.

Based in Roelofarendsveen, the Netherlands, Polyconcept makes and distributes promotional items such as pens, watches and mugs, as well as decoration. Polyconcept operates on five continents and sells to over 100 countries around the globe. The company supplies a wide range of promotional, lifestyle and gift products to several hundred thousand companies ranging from small enterprises to global corporations, through a network of advertising specialty distributors.

NautaDutilh's team consisted of Ruud Smits, Rebecca Pinto, Aalt Colenbrander, Jacqueline Clement (Corporate/ M&A), Marianne de Waard-Preller, Stephanie Schoonhoven-Stoot, Sophie van Lanschot, Sanne Mesu (Corporate Notarial) Elizabeth van Schilfgaarde, Cathelijn Frederiks, Philip Silvis, Taida Pasic (Banking & Finance), Chris Warner, Nina Kielman (Tax), Sven Uiterwijk (Financial Regulatory), Michiel Verveld, Julius Cramwinckel, Joyce Trebus (Employment) and Willem van der Vossen (Real Estate).

For additional information visit www.nautadutilh.com

HOGAN LOVELLS

ASSISTS CNN TO BECOME FIRST US COMPANY GRANTED RIGHT TO FLY UNMANNED AIRCRAFT SYSTEMS 'OVER PEOPLE'

WASHINGTON, D.C. - 29 August 2016: Hogan Lovells today announced that it has successfully assisted CNN in its receipt of a first of its kind waiver from the Federal Aviation Administration (FAA) to legally fly unmanned aircraft systems (UAS) across the country for news gathering and reporting activities 'over people.'

CNN's success comes at a critical moment for the UAS industry. Today, Part 107 of the Small UAS Rule became effective -- for the first time broadly allowing commercial use of UAS in the United States. However, under the rule UAS flights directly over people are still prohibited unless an organization has received special permission from the FAA.

Some of the most promising applications of commercial UAS – including disaster response, newsgathering, and aerial photography – require the ability to fly over people. CNN's success securing a waiver to fly over people therefore represents a huge step forward for the industry at large.

CNN worked with Hogan Lovells to file an application for a certificate of waiver that would permit the organization to operate a Fotokite Pro, a small, tethered drone platform, over areas with unsheltered people who are not directly participating in the UAS operation.

CNN, which reaches more Americans via television, the web and mobile devices than any other TV news organization, has been actively evaluating technology, personnel and safety needs to operate UAS effectively and safely in the National Airspace System. CNN is also part of the FAA's Pathfinder Program, which has been exploring how UAS might be safely used for newsgathering in populated areas.

CNN will use UAS to gather and disseminate news and other important information in situations where it would be unsafe or costly to fly a conventional helicopter, including emergency and disaster situations.

The Hogan Lovells team consisted of Lisa Ellman, Partner and Co-chair of the firm's Unmanned Aircraft Systems (UAS) Practice, Matt Clark, Senior Associate in the Aviation and UAS practice groups, and Pat Rizzi, Counsel in the Aviation and UAS practice groups.

Hogan Lovells partner Lisa Ellman said:

"As this is the first time a company will be allowed to fly UAS over people in unsheltered areas in the United States, CNN's victory is a significant milestone for commercial drone operators all over the country. It's also a major victory for consumers of news – as this will allow CNN viewers to witness events across the country in ways that would not have been previously possible. We are thrilled with the FAA's decision and hope the government and industry leaders capitalize on this momentum to see commercial drones safely and broadly integrated into our airspace."

For additional information visit www.hoganlovells.com

ROUSAUD COSTAS DURAN SLP

ADVISES CORNERJOB ON EUR23 MILLION RAISING

BARCELONA - 25 July 2016: RCD's innovation team has advised CornerJob, a jobs marketplace start-up belonging to Antai Venture Builder, on its recent investment round. The capital injection will help the firm consolidate its presence in Spain and other foreign markets.

The round was led by VC firm Northzone (shareholder in Wallapop), with the participation of e.ventures, as well as earlier investors who have reinvested in the firm. With this round CornerJob has managed to raise over 30 million euros since its creation in 2015.

CornerJob is a blue collar Jobs app that has up to 40,000 monthly job offers in industries such as hotel and leisure, retail, security, services and industry, among others. The company operates in Spain, Italy, France and Mexico where it will invest the capital received. Furthermore the start-up is planning on entering new markets before the end of the year.

Since its creation RCD has been committed to innovative and entrepreneurship projects for this reason it has become a pioneer and a reference for legal advice in this area. Our clients include technology and biotech companies to whom we offer a comprehensive and unique advice.

For additional information visit www.rcdslp.com

SYCIP LAW

ADVISES BORROWER ENERGY WORLD CORPORATION IN P6.75 BILLION FINANCING OF PAGBILAO LNG POWER PLANT AND LNG HUB TERMINAL

MANILA - 01 August 2016: SyCipLaw is acting as borrower's counsel for Energy World Corporation in the P6.75 billion financing package to partially fund the development of the first phase of the proposed 650-megawatt liquefied natural gas combined cycle power plant in Pagbilao, Quezon Province.

The term loan facility will be extended by a syndicate of Philippine banks, with Development Bank of the Philippines acting as the mandated lead arranger, and with Land Bank of the Philippines and Asia United Bank acting as joint lead arrangers. EWC enlisted Standard Chartered Bank as its financial advisor.

EWC's program aims to bring clean and affordable power to the Philippines, and this transaction embodies a significant step in achieving that goal.

In connection with the power plant project, on June 14, 2016, EWC also closed its deal for a P1.5 billion financing package to partially fund the development of its liquefied natural gas hub terminal in Pagbilao, Quezon Province, which is expected to be the first in the Philippines. This will serve as the power plant's source of regasified LNG when it is completed. Standard Chartered Bank and Land Bank of the Philippines participated in the notes facility for this transaction.

The SyCipLaw team is led by senior partner Marievic G. Ramos-Añonuevo, with partner Melyjane G. Bertillo-Ancheta, senior associate Bhong Paulo A. Macasaet, and associate Aldous Benjamin C. Camiso rounding up the team.

For additional information visit www.syciplaw.com

SANTAMARINA Y STETA

ADVISES OCC MUNDIAL IN THE ACQUISITION OF EMPEOLISTO

MEXICO CITY - 26 August 2016: The Mexican law firm Santamarina y Steta advised Online Career Center México, S.A.P.I. de C.V. (OCC Mundial), in the acquisition of Empeolisto. Both companies closed the deal last week.

With this operation, OCC Mundial will consolidate its job offering in the operative segment. Both websites will continue their independent operations. However, Empeolisto.com.mx will offer point of sale positions mainly, while OCC Mundial will focus its operations on a more professional target audience.

The merger of this two companies will add up to approximately 12.5 million users in Mexico and will consolidate a job board that will promote openings from more than 60 thousand companies that are, currently, active clients of OCC Mundial and Empeolisto.

In order to consolidate the purchase, Santamarina y Steta was appointed to prepare the contracts and negotiations from the beginning to the end of the process. Jorge León Orantes, partner of the firm and team leader in the OCC Mundial case, said that "the transactional part comprised a complex sale of assets. It involved the industrial property, technology, software and data protection areas, which required expertise and detailed knowledge of these issues. Also, the operation required binational documentation under the Mexican and US laws".

Partner Jorge León-Orantes, whose practice is focused on mergers and acquisitions and telecoms, media and technology, led the efforts regarding the case with the support of Pablo Laresgoiti Matute whose practice is also focused on mergers and acquisitions.

For additional information visit www.s-s.mx

TOZZINIFREIRE

ADVISES JOINT VENTURE CORN ETHANOL PLANT FUNDING

SAO PAULO – 02 September 2016: Brazil's TozziniFreire Advogados has helped a joint venture between US crop farmer Summit Agricultural Group and Brazilian counterpart Fiagril obtain a US\$50 million loan that finances construction of the first corn ethanol plant in Brazil.

The identity of the US lender who provided the loan is confidential. The financier hired Pinheiro Neto Advogados for the deal, which closed on 11 August.

In total, the plant will require 400 million reais (US\$123 million) in debt and equity investment.

The facility is being built near Lucas do Rio Verde in Mato Grosso, a state in west central Brazil that is the country's largest producer of corn and soybeans. It is set to be completed by mid-2017.

Brazil produces 25 per cent of the world's ethanol, while ethanol represents almost 18 per cent of the Brazilian transport sector's energy consumption. The plant is intended to offset Brazil's increasing demand for the fuel, which cannot be met by existing production from sugarcane.

TozziniFreire was counsel to Fiagril when the Brazilian company signed its joint venture with Summit last November. Levy & Salomão Advogados advised Summit on the agreement.

Counsel to FS Agrisolutions TozziniFreire Advogados Partners Vladimir Miranda Abreu and Alexei Bonamin, and associates Lais Claudio Monte, Jacques Abi Ghosn, Matheus Ferreira and André Togna.

For additional information visit www.tozzinifreire.com.br

PRAC EVENTS



PRAC 59th
INTERNATIONAL
CONFERENCE
21 - 24 MAY 2016



PRAC @ Taipei 2014



PRAC @ Vancouver 2015



PRAC @ INTRA San Diego



PRAC @ Brisbane 2015



PRAC @ JPA Hong Kong



PRAC @ PDAC Toronto 2014



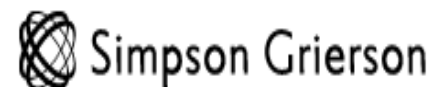
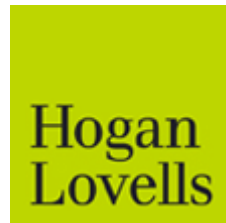


The Pacific Rim Advisory Council is an international law firm association with a unique strategic alliance within the global legal community providing for the exchange of professional information among its 28 top tier independent member law firms.

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client alert

MEASURES RELATED TO INVESTMENT | ALGERIA |

26 AUGUST 2016

NEW INVESTMENT CODE IN ALGERIA

Following the adoption in June 2016 by the People's National Assembly ("*Assemblée Nationale Populaire*") and in July 2016 by the Council of the Nation ("*Conseil de la Nation*") of the bill relating to investment promotion, law No. 16-09 on the promotion of investment ("**Law 16-09**") was published in the Official Gazette of 3 August 2016. This Client Alert presents its main measures.

1. IMPLICATIONS OF THE REPEAL OF ORDINANCE NO. 01-03

With the exception of certain provisions concerning the National Agency of Investment Development ("*Agence nationale pour le développement de l'investissement*", ANDI) and the National Investment Council ("*Conseil National de l'Investissement*", CNI), Law 16-09 repeals the provisions of Ordinance No. 01-03 on the development of investment.

The legal framework currently applicable to investments is mainly composed of Law 16-09 and the Finance Law for 2016 (the "**2016 FL**"), in which a certain number of provisions of Ordinance No. 01-03 have already been reflected, including:

- the "49/51" rule and the obligation for companies majority-owned by foreign investors to comply with such rule, now governed by Article 66 of 2016 FL;
- the obligation to resort to local financing for investments, a softer version of which is currently set out in Article 55 of the 2016 FL;
- the privatisation through opening up of state-owned companies' share capital, formerly ruled by Article 4 *quater* of Ordinance No. 01-03, is now governed by Article 62 of the 2016 FL.

It should be noted that certain provisions of Ordinance No. 01-03 have merely been repealed, without being included in Law 16-09 or in the 2016 FL, such as:

- **the obligation** for foreign investors **to generate a foreign currency surplus** to the benefit of Algeria for the duration of the project;
- **the annual information obligation** regarding the shareholding of foreign legal entities owning shares in Algerian companies.

2. MAIN MEASURES CONCERNING FOREIGN INVESTMENTS

Law 16-09 clarifies and/or amends certain provisions of the former legislation, namely:

- **modification of the invested capital and investment proceeds transfer guarantee:** eligibility is now subject to a capital contribution in cash equal to or in excess of minimum thresholds defined according to the project's global cost. Terms and conditions will be set out by regulations. The reinvestment in capital of transferable profits and dividends are considered as external contributions that benefit from the transfer guarantee and contributions in kind are eligible to the transfer guarantee under certain conditions;
- **maintaining the Algerian State preemption right:** Article 30 of Law 16-09 restates the principle that any sale of shares by or to foreign investors is subject to the State preemption right. Law 16-09 refers to regulations on implementing provisions. Since former Article 4 *quinquies* of Ordinance No. 01-03, which set out a *minima* the implementing provisions of this right, was repealed, it seems difficult to apply the State preemption right as is unless reference is made to past practice;
- **clarification concerning the Algerian State's "right to repurchase":** any sale of 10% or more of shares of a foreign company owning an interest in an Algerian company that enjoyed advantages or benefits at the time of establishment, triggers prior information of the State Holding Council ("*Conseil des Participations de l'Etat*", CPE). Non-compliance with this obligation or the reasoned objection of the CPE, within one month of receipt of information, confers on the State a right to repurchase at most the interests in the Algerian company held by the sold foreign company. In the absence of specifications regarding its implementation conditions, the Algerian State's right to repurchase should not be applicable as is unless reference is made to past practice;
- **competence of the Algerian jurisdictions** in the event of disputes between foreign investors and the Algerian State, except where bilateral or multilateral conventions or an agreement including an arbitration clause are in place (Ordinance No. 01-03 related to "competent jurisdictions").

3. RECASTING THE INVESTMENT INCENTIVE REGIME

After slightly amending the definition of investment, Law 16-09 provides for a single and prior registration with the ANDI of investments in order to benefit from the advantages provided for by this law:

- **eligibility to the advantages:** investments registered with the ANDI and that are not included on the lists of activities excluded from all advantages ("negative lists"), automatically benefit from the advantages provided for by Law 16-09, except (i) investments whose amount is equal to or higher than five billion Algerian dinars (approximately EUR 45,000,000) and which are subject to prior CNI approval; (ii) investments with a specific interest in the national economy and that are subject to the derogation regime of the investment agreement; and (iii) activities with their own regime of advantages (such as the hydrocarbons sector);

- **three levels of advantages:** Law 16-09 makes a distinction between (i) the **advantages that are common** to all eligible investments; (ii) the **additional advantages** for privileged activities and/or employment-generating activities; and (iii) the **exceptional advantages** for projects presenting a special interest for the national economy;
- **nature of the advantages:** Law 16-09 grants advantages whose nature and duration vary according to the qualification of the investment and the implementation stages of the project (completion and operational stages).

4. TRANSITIONAL PROVISIONS

Even though Law 16-09 comes into force immediately, the rights acquired by investors under the former regulations are maintained and the texts implementing Ordinance No. 01-03 remain in force until the enactment of the regulations implementing Law 16-09.

ALSO IN THE NEWS...

- **Publication of Executive Decree No. 16-196 of 4 July 2016 laying down the level, conditions and methods for granting the interest rate subsidy of investment loans**

This decree provides in particular that the rates and duration of the interest rate subsidy, whose maximum levels are set respectively at 3% and 5 years (including the deferred period), are granted according to the classification of the eligible activities and the nature of the loan contracted.

- **Publication of Executive Decree No. 16-205 dated 25 July 2016 on the conditions for setting up, managing and exercising the activity of an investment funds management company**

The text provides in particular that the investment funds management company shall be incorporated in the form of a joint stock company and have a minimum share capital of 10,000,000 Algerian Dinars (approximately EUR 85,000), fully paid up at incorporation.

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01 SEP 2016

Opening up the WA residential and small business electricity market to competition

BY BRETT COHEN, ARMIN FAZELY

Full retail contestability in the WA electricity market is coming, but the State Government is still considering the steps it needs to take to implement it.

One of the key reforms selected by the State Government following the review of the Wholesale Electricity Market for the South West Interconnected System (**SWIS**) was to open up the residential and small business electricity market to competition, known as "full retail contestability". This is expected to commence by 1 July 2019. In this article, we consider this key reform and the changes currently being developed to implement full retail contestability.

Current state of play

Electricity consumers within the SWIS can be divided into two general categories – contestable and non-contestable – based on the quantity of electricity consumed during each year.

The non-contestable category of consumers are customers that consume 50 megawatt hours of electricity or less during a year (equating to an annual electricity bill of approximately \$14,000). Generally, all residential households and small businesses in WA are non-contestable consumers.

Currently, only Synergy can supply electricity to the non-contestable electricity market within the SWIS. Contestable customers on the other hand (being customers that consume more than 50 megawatt hours of electricity in a year) have a choice of electricity providers.^[1]

The full retail contestability project involves redesigning the SWIS to allow electricity retailers to access all electricity customers within the SWIS. This will be consistent with the National Electricity Market which is a fully contestable electricity market. Competition in the market should put downward pressure on electricity prices offered to consumers and drive innovation in the market, although without a break-up of some sort of Synergy, the scope of meaningful retail competition will arguably be limited.

Some of the changes currently being considered by the State Government in order to implement full retail contestability within the SWIS are considered below.

Lifting the prohibition on new entrants

Under the Electricity Corporations Act 2005 (WA), no electricity retailer other than Synergy is allowed to supply

electricity to customers in the SWIS who consume 50 megawatts of electricity per annum or less.

The full retail contestability reform will therefore require legislative changes to remove the prohibition on supply to non-contestable consumers in order to allow competition for all electricity customers within the SWIS. There will also be changes required to the tariffs that Synergy may charge as regulated by by-laws made under the Electricity Operators (Powers Act) Act 1979 (WA) to ensure that competition between retailers can exist.

Removing barriers to entry

As part of the full retail contestability reform, the State Government has set up a separate but related project to identify material barriers to entry into the electricity market. The Government aims to remove or minimise barriers in order to encourage new entrants into the retail electricity market once it is opened to competition.

This area of reform is focused on the following objectives:

- ensuring that electricity providers are able to secure access to competitive wholesale electricity within the SWIS in order to enter and supply to the retail market;
- safeguarding Government concessions that some household consumers of electricity currently receive so that those consumers will be able to continue receiving concessions regardless of their choice of electricity retailer; and
- removing any undue barriers to emerging energy technologies, including battery storage and solar power.

Small consumer protections

Currently, the Economic Regulatory Authority is responsible for regulating the conduct of retailers who supply electricity to residential and small business customers in Western Australia and larger consumers that purchase up to 160 megawatt hours of electricity per annum. The regime that Synergy must comply with when supplying to these customers at the date of this article – referred to as the Code of Conduct for the Supply of Electricity to Small Use Customers – took effect on 1 July 2016.

The introduction of competition in the retail electricity market will necessarily mean that there will be changes in the relationship between customers and electricity providers within the SWIS and that changes in the consumer protection framework will be required. The State Government is in the process of reviewing the protections currently afforded to small consumers of electricity within the SWIS under the Code. There is a possibility that the State Government will adopt the National Energy Customer Framework (with or without amendments) in replace of the Code, which at the date of this article is in force in New South Wales, Queensland, Tasmania, the ACT and South Australia.

The adoption of the National Energy Customer Framework will improve the ability of electricity providers currently operating in other parts of Australia to enter the SWIS residential and small business market.

Integration of electricity and gas markets

The residential and small business gas market in Western Australia was opened up to competition in 2004. However, there is a moratorium on Synergy supplying natural gas to the consumers who consume less than 0.18 terajoules per annum. This quantity of gas equates to an annual gas bill of approximately \$6,000. The rationale behind the Synergy moratorium is to achieve competitive neutrality for participants in the residential and small business electricity and gas markets.

As part of the full retail contestability reform, we expect the State Government will remove the gas moratorium in place with respect to Synergy. This, along with the introduction of full retail contestability in the electricity market, will allow Synergy and other retailers to sell both electricity and natural gas to the residential and small business market within the SWIS, giving customers more market choice.

^[1]The contestable market is divided into two sub categories – customers who consume between 50 megawatt hours per year and 160 megawatt hours per year and customers who consume more than 160 megawatt hours per year. Synergy charges regulated tariffs to customers who consume between 50 megawatt hours per year and 160 megawatt hours per year, although they may choose to negotiate with a different electricity provider. Consumers who consume more than 160 megawatt hours per year may negotiate a contract with an electricity retailer of their choice and Synergy may not offer regulated tariffs to those customers. [Back to article](#)

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ANVISA publishes new rules on transfer of marketing authorizations

Life Sciences & Healthcare

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The Brazilian National Sanitary Surveillance Agency (ANVISA) published on August 25, 2016 the Resolution No. 102 ("RDC 102/2016") issuing new rules for the transfer of marketing authorizations of cosmetic, drug, tobacco, agrochemicals and health products, as well as for the transfer of responsibility for clinical trials and the update of information relating to the operation and certification of companies as a result of corporate or business transactions.

Among the new rules is the authorization for the transfer of marketing authorizations and good practices certificates in business transactions involving the purchase and sale of assets, without necessarily occurring a corporate transaction between the companies.

Up to the moment, there was no legal protection for the transfer of marketing authorizations in transactions involving the purchase and sale of assets, but only in corporate transactions resulting in spin-off, merger or amalgamation of companies, as provided for in the RDC No. 22 of June 17, 2010 ("RDC 22/2010").

The new regulation will apply to all corporate and business transactions executed between companies carrying out ANVISA regulated activities, as well as corporate transactions concluded overseas, which have impact in companies and products in Brazil.

The discussions regarding the change in this regulation started back in 2011 and the Life Sciences sector waited with expectation for the conclusion of this process. RDC 102/2016 is an important milestone for the Life Sciences industry and for Brazilian economy, as it may cause an increase in the number of business transactions, allowing a smoother negotiation of product portfolios and a shorter timeframe between signing and closing in Life Sciences transactions.

RDC 102/2016 will enter into force on December 23, 2016 and will revoke RDC 22/2010.



Alberta Judge Upholds No-Fault Provisions of CAODC Master Daywork Contract

By Brian P. Reid and Jennie A. Buchanan

The Alberta Court of Queen's Bench recently upheld the no-fault provisions of the standard form, Canadian Association of Drilling Contractors (CAODC) Master Daywork Contract (MDC) in *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd.*, 2016 ABQB 365 [Precision]. In Precision, Mr. Justice E.C. Wilson upheld the July 6 and October 14, 2015, decisions of Master J.T. Prowse (collectively, the Master's Decision) granting Precision's application for summary judgment against Yangarra and awarding Precision interest at a rate of 18 percent per annum on its unpaid invoices pursuant to the MDC.

Bennett Jones acts for Precision in this litigation.

Knock-for-Knock Regime

In western Canada, most conventional oil and gas wells are drilled under the 2001 standard form MDC negotiated by the Canadian Association of Petroleum Producers and the CAODC. The MDC contains a so-called 'knock-for-knock' or no-fault regime which differs from the common law in that risks for certain categories of loss and damage are allocated according to ownership or control, rather than fault. Generally speaking, parties to an MDC are responsible for all loss or damage to their own property and death or personal injury to their own employees, regardless of the negligence or other fault of the counterparty. Furthermore, the operator under an MDC generally assumes all risks for matters originating below the well-bore (*e.g.*, a blow-out) with the contractor assuming all risks for matters arising above the well-bore (*e.g.*, damage to the rig). However, it is important to note that unless a particular risk is identified and expressly allocated to either party, each party remains liable to the other for their own negligence.

The utility of a no-fault liability regime is widely recognized as providing two primary benefits. First, it eliminates the need for parties to obtain overlapping insurance coverage thereby reducing aggregate insurance premiums. Second, and more importantly, parties *should* be able to avoid complex, costly and protracted litigation because the need to determine fault and causation according to principles of contract and tort law is eliminated. Instead, by clearly allocating certain risks of loss to each party, the determination of liability *should* become a simple matter of contractual interpretation.

Background

Facts

In 2011/2012, Precision drilled three wells for Yangarra pursuant to an MDC and invoiced Yangarra approximately \$3.5M for this work. However, Yangarra refused to pay based on an allegation that a Precision employee had mixed the wrong chemical into the drilling mud causing the rig to get 'stuck in the hole'. Based on the clear allocation of risk in the MDC to Yangarra for this risk, Precision applied for summary judgment. In response, Yangarra raised a myriad of legal theories and defences including that the knock-for-knock provisions of the MDC should not be enforced because of alleged gross negligence, fraud, breach of duty of good faith and public policy considerations.

Decision of Master Prowse, Q.C.

On July 17, 2015, Master Prowse granted Precision's application for summary judgment finding that Yangarra's losses were "exactly the type of loss envisaged by the bilateral no fault contract between the parties". In a follow-up decision issued on October 14, 2015, Master Prowse also rejected Yangarra's argument that the 18 percent per annum interest provision under the MDC amounted to an unenforceable penalty.

Appeal Decision of Justice E.C. Wilson

Yangarra appealed Master Prowse's decision and on June 30, 2016, Justice Wilson dismissed this appeal concluding that Yangarra's allegations of gross negligence, fraud, breach of duty of good faith, etc., "individually and cumulatively, lack merit". Justice Wilson further rejected Yangarra's argument that it would be contrary to public policy to enforce the MDC, noting that this was a private contract between two companies which did not impact the public interest.

Finally, the Court rejected Yangarra's argument that the 18 percent per annum rate interest provision should not be enforced because it would amount to an unenforceable penalty. Justice Wilson held that the outstanding interest was only as large as it was because Yangarra decided not to pay and that it must "live with the consequences of that decision".

Yangarra has filed an appeal of Justice Wilson's decision.

Implications

When one considers only those costs incurred by an innocent party following a loss for which they have accepted the risk pursuant to an MDC, the no-fault provisions may appear unfair. However, when the bilateral sharing of risks between an operator and a contractor are viewed as a whole, this contractual approach makes much more sense. In particular, a no-fault risk regime allows companies involved in oil and gas drilling to anticipate and properly insure for risks undertaken and *should* allow each to avoid the delay and expense associated with complex litigation which would otherwise occur. However, to avoid surprises, it is critical that parties to an MDC carefully review and understand their rights, obligations and risks assumed before signing and before drilling commences.



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China's second draft of the Cyber Security Law continues to propose more stringent regulation of cyberspace, further escalating concerns

**Hogan
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July 2016

China's second draft of the Cyber Security Law continues to propose more stringent regulation of cyberspace, further escalating concerns

Introduction

On 6 July 2016, a second draft of the *People's Republic of China Cyber Security Law* ("**Draft 2**") was released to the public for comment following its second reading by the Standing Committee of the National People's Congress. The deadline for submitting comments on Draft 2 is 4 August 2016.

The first draft of the law ("**Draft 1**") was issued a year ago to the day on 6 July 2015, and followed on the heels of China's National Security Law, the first comprehensive law of its type, which touched on cyber security matters by imposing, among other things, a national security review system and provision for management of internet information technology products and services that have or might have an impact on national security (more on that [here](#)).

Since then, a number of separate legislative and regulatory developments brought forward have demonstrated an increasing resolve by the Chinese authorities to assert control over cyber space, not only with respect to the security of networks, systems and data, but also with a focus on monitoring and censoring content, for example:

- **Counter-terrorism**, with a number of specific provisions for telecoms and internet service providers, in the *People's Republic of China Counter-Terrorism Law*, issued by the National People's Congress (more on that [here](#));
- **Online publishing**, in the *Online Publication Services Administrative Provisions*, jointly issued by the State Administration of Press, Publication, Radio, Film and Television ("**SAPPRFT**") and the Ministry of Industry and Information Technology (more on that [here](#));
- **Online games played on mobile devices**, in the *Notice on the Administration of Mobile Games Publishing Services*, also issued by SAPPRFT; and

— **App developers and app store operators**, in the *Mobile Internet Application Program Information Services Administrative Provisions*, issued by the Cyberspace Administration of China ("**CAC**").

It is also important to note that there has been a pronounced sector focus on cyber security issues by China's financial services regulators, with the publication by the China Banking Regulatory Commission in December 2014 of draft regulations prescribing minimum quotas for financial institutions' use of technologies certified by the authorities to be "secure and controllable" and the publication by the China Insurance Regulatory Commission of similar draft regulations in October 2015 (more on that [here](#)). While neither of these regulations have been implemented to date, they are illustrative of an overall trend towards a much tighter, more prescriptive and potentially invasive approach to technology regulation in China.

Given the growing cyber threat globally, the Chinese move towards more rigorous cyber security regulation is in line with international trends. However, the specific approach to regulation being taken in China is a clear outlier, primarily for the broad and often imprecise terminology used in the draft law and also for the invasive and potentially discriminatory nature of the regulation. The immediate reaction to Draft 1 has therefore been confusion as to who the law would apply to and what requirements the law will bring to those within its reach. More broadly, the Cyber Security Law has raised fundamental concerns about regulatory intention, and in particular whether or not the law is meant to close certain areas of business to foreign participation.

Draft 2 of the Cyber Security Law has done nothing to quell concerns raised by Draft 1. In our commentary on Draft 1, we categorised three principal areas of interest in the cyber security regulation as:

- **Technology regulation:** In this respect, the Cyber Security Law seeks to regulate what technology can or cannot be used and/or imposes requirements for pre-market certification of certain types of technology, specifically by creating a catalogue of "critical network equipment" and "specialized cyber security products" (Article 22);
- **Co-operation with authorities:** Here, the Cyber Security Law would impose duties on "network operators" to provide technical support and assistance in national security and criminal investigations (Article 27); and
- **Data localisation:** Finally, Draft 1 introduced requirements on "critical information infrastructure operators" to store data gathered and produced in China on Chinese soil (Article 35).

Our briefing here focusses on how Draft 2 has carried forward these key aspects of Draft 1.

Technology Regulation

As in Draft 1, Draft 2 requires that "critical network equipment" and "specialized cyber security products" be inspected or certified by a qualified institution before they can be sold in China (see Article 22 in Draft 2). Both drafts envisage that an official catalogue will be issued identifying which equipment and products will specifically be subject to this rule.

The idea of restricting the use of technology in China to a closed list of pre-approved products is an important area of focus for most multinationals dealing in China, not just in terms of technology companies that could be facing approval requirements, but also in terms of multinationals reliant on foreign technologies that may or may not in future be available if a necessary certification is not forthcoming. Inspections and certifications may delay a product's entry to the market, and, as was the case with Draft 1, Draft 2 leaves open precisely how invasive any proposed inspections of technology would be.

Where Draft 2 differs from Draft 1 is in the introduction in Article 15 of a responsibility on the State Council and People's Governments at the provincial level to promote the use of "secure and reliable" network products and services. Draft 2 does not offer a definition of "secure and reliable" technology, nor does it elaborate on what the promotion of this classification of technology will mean in practice.

While Article 15 may just be a general call for technology to meet "secure and reliable" standards in the ordinary sense of the word (which may well be hard to argue against), the provision comes against the backdrop of the introduction of similar terminology ("secure and controllable") to technology guidelines put forward in the banking and financial services sector. Those guidelines proposed a "secure and controllable" quota system, which engendered strong pushback, primarily driven by concerns that "secure and controllable" might in effect mean that only domestic Chinese products hand-picked by the authorities would be available for use in those industry sectors. If this view is correct, there would be a regulatory basis to discriminate against foreign technology businesses who have developed their products offshore and so may be viewed by Chinese authorities and businesses to be inherently incapable of being "secure and controllable". Article 15 of Draft 2, by introducing a concept of "secure and reliable" into the Cyber Security Law, requires elaboration in order to avoid adding further to these concerns.

We can also see privileged status for domestic Chinese technology in other regulations. For example, under the *Administrative Measures for Hierarchical Protection of Information Security*, information systems in China classified (on the basis of potential national security implications) as being tier-3 or higher must procure their information security products from manufacturers invested by Chinese citizens or legal persons and the core

technologies or key parts and components of such products must have be proprietary domestically developed intellectual property rights.

If there is any bright spot in the formulation of technology regulation under Draft 2, it is in a clarification that government-issued standards are mandatory (such as for certification processes) whereas industry standards are not.

Co-operation with Authorities

Article 27 of Draft 2 continues with Draft 1's obligation on "network operators" to provide technical support and assistance to public security organs and national security organs for their activities of lawfully protecting national security and investigating crimes.

The scope of the term "network operator" is considered by many observers to be unclear. In Draft 1, a network operator was defined to be "an owner or manager of any cyber network, and a network service provider who provides relevant services using networks owned or managed by others, including a basic telecommunications operators, network information service provider, important information system operator and so forth." Draft 2, by contrast, pares this back to "owner or manager of any cyber network, and a network service provider."

While there is a difference of wording, we still read both texts to define the term on fairly broad terms and so expect that Draft 2 would likely be interpreted in practice, as Draft 1 would have been, to include any businesses operating over networks and the Internet, from basic carriers to companies operating websites, with the consequence that all such businesses will be under Article 27's obligation to provide technical support and assistance (in Draft 1 this was limited to *necessary* support and assistance, but Draft 2 has deleted the word *necessary*).

The breadth of duties to cooperate with authorities in investigations, in particular with

the expansive wording in Draft 2, is a concern, in particular given the relatively small role for judicial oversight in the procedures for conducting investigations in China. There have been a number of well-publicised instances in which investigations by Chinese authorities have raised brand or public relations challenges for technology companies.

Draft 2 also introduces some new requirements that appear to be directed at making network operators duty to co-operate more effective from the authorities' point of view, including:

- Article 20's requirement that network operators keep network log records for 6 months; and
- Article 21's requirement that network operators notify the authorities of security defects discovered in their systems.

Data Localisation

"Data localisation" is a term used to describe a legal or regulatory requirement to keep data in the jurisdiction where it has been collected or generated. Article 31 of Draft 1 introduced data localisation in the form of an obligation on "critical information infrastructure operators" to store personal information collected or generated in their networks onshore in mainland China. Draft 1 defined "critical information infrastructure operators" very broadly to mean the operators of:

- basic information networks of providing public communication, radio and television transmission services;
- important information systems in energy, transportation, water conservancy, finance and other key industries;
- power, water and gas suppliers;
- medical care, social security and other public service sectors;
- military networks;
- government affairs networks of state organs above the city level; and

— networks and systems owned or managed by network services providers with a large number of users.

Notably, Draft 1 did not provide any clarity as to which businesses (or which operational streams and functions) in the sectors mentioned above, or which of their specific networks, would be considered to be "critical information infrastructure".

The final bullet point raised particular concern on the basis that looking simply at the number of users of a system as the measure for identifying critical information infrastructure could potentially implicate a wide range of commercial businesses that have a large number of users but have little practical bearing on national security, such as e-commerce businesses or online game platforms.

Draft 2 introduces an important structural change to the definition. The itemized list has been removed and instead there is a provision appointing the State Council to make a separate enactment setting out the specific scope and definition of "critical information infrastructure operators". Whether this leads to a broadening or a narrowing of remains to be seen, adding yet another layer of uncertainty to the developing law.

A second key change to Article 35 is Draft 2's extension of the data localisation requirement from personal data to also include "important business data". Neither category of information may be sent outside China unless it is "truly necessary" for business and the operator has conducted a security assessment in support of the offshore transfer. These security assessments will need to be carried out in accordance with measures to be jointly formulated by the state-level cyberspace administration authorities and the relevant departments of State Council. No detail is provided in Draft 2 as to how broad the exemption for "truly necessary" international transfers would be or what the criteria for

clearing the associated security assessment would be.

A third key change is the removal of "storage" of such information outside China. Draft 1 contemplated both the storage and sending of such information outside of China where necessary. The removal of this term in Draft 2 suggests that China no longer contemplates the possibility of data storage outside its borders, even if necessary.

Data localisation laws are not new to China. There are some confined localisation requirements in specific industry sectors such as e-banking, insurance, credit reporting, and network-based payment services. By contrast, the Draft Cyber-Security Law would apply to all "critical information infrastructure operators", a potentially much larger segment of industries, depending on how the State Council proceeds to give life to this term.

It is hard to tell at this stage what approach the State Council would take to filling in this critical missing definition. It may be that the CAC will be "holding the pen" for the State Council given that the *Notice of the State Council's 2016 Legislative Work Plan* indicates that the CAC has been commissioned to draft a Safety Protection Regulation for critical information infrastructure operators, a regulation which will no doubt need to include a clear definition.

If this assumption is correct and the CAC will be providing the necessary missing details, there may be some publicly available documentation that sheds light on the likely direction. A CAC press release dated 8 July 2016 announced that it will soon kick off network security inspection work on critical information infrastructure (see [here](#))(Chinese only). This announcement states that "critical information infrastructure" means "information systems or industrial control systems that provide network information services to the public or support the operations of energy, telecommunications, finance, transportation, public utilities and other important industries."

The inclusion of "information systems ... that provide network information services to the public" is the potentially the broadest part of the definition. The term is not defined in the press release, but if it is anything similar to the way the term of art "internet information services" is used in the *Administrative Measures on Internet Information Services* issued by the State Council, it could be so expansive as to include all businesses operating over the Internet and all websites. If so, this would make critical information infrastructure operators virtually indistinguishable from "network operators" as used in Draft 2 of the Cyber Security Law, and this could greatly extend the reach of the data localisation requirement beyond the requirement set out in Draft 1.

There are a number of information security obligations tied to the data localisation requirements carried forward in Draft 2. Draft 2 carries forward duties on critical information infrastructure operators that are in addition to those imposed on network operators (Article 32), including a duty to enter into security confidentiality agreements with network product and services providers (Article 34) and a duty to accept government security inspections in relation to network products and services that might have a bearing on national security issues (Article 33). Interestingly, some of the security protection duties in Article 32 appear on their face to overlap with the requirements of network operators found in Article 20, but as they are stated to be additional to the requirements of Article 20, it is reasonable to expect the seemingly overlapping parts will represent an increase in the regulatory burden here.

Conclusions

Draft 2 of the Cyber Security Law stands as the latest in a series of regulatory developments that demonstrate a China increasingly focused on national security, stability, control of cyberspace and imposing restrictions on those who may operate and publish in it, and the

particular challenges that a digitally connected world pose for China's unique political, culture and economic context. Against a backdrop of geopolitical tensions over cyber security and Chinese concerns about the position that western technology companies hold in the domestic industry, there can be no doubt that there is a much bigger picture to this draft law. The more typical concerns of cyber security regulation involve moves to shore up operational risk standards and facilitate the sharing of information about cyber incidents. China's approach to cyber security regulation includes some challenges to conventional wisdom on these fronts.

It is clear that Draft 2 is very much an evolution of Draft 1 rather than a re-write. The amendments introduced to this new draft will, if anything, stoke further concerns amongst multinational businesses operating in China that lawmakers are taking cyber security as a basis to limit foreign access to China's vast, expanding markets for technology and technology services. The scope for technology regulation has both been made wider and less clear. Authorities' access to systems and data has been broadened. The scope of data localisation requirements is very likely to have increased.

Clouding the picture further is the fact that Draft 2 introduces more delegation of critical points of definition to implementing rules and regulations. There may, of course, be some mitigation of the impact of the Cyber Security Law in this. However, at the moment the key consequence of these changes is uncertainty.

Fortunately, Draft 2 has also been opened for public comments, which means there still may be room for engagement and negotiation on some of the more challenging aspects of the draft law. We do not necessarily expect to see any further clarification per se on the uncertain elements of the draft law prior to its final enactment, as it is likely there is also uncertainty within the various government departments who may be charged with

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implementation as to exactly how they intend to or will actually apply the law in practice. However, during the comment period, we do hold some optimism that the law-makers will be responsive to concrete suggestions for improvement.



Self-control and Risk Management Systems against Money Laundering and Terrorist Financing

On August 19, 2016, the Superintendence of Companies issued a modification to the Basic Legal Circular (No. 100-000006), which, among other matters, regulated which companies, according to their economic sector, are required to adopt Self-control and Risk Management Systems against Money Laundering and Terrorist Financing (in Spanish, SAGRALFT), to the extent that such companies meet all of the following criteria or requirements, per sector:

Sector	Requisitos
Real Estate	Permanent surveillance or control exercised by the Superintendence of Companies
	Economic activity registered in the commercial register or activity identified with code L6810 and/or L6820 of the International Standard Industrial Classification, Revision 4 (in Spanish CIIU Rev 4 AC).
	In December 31st of the previous year, it obtained a total income equal or superior to 60,000 monthly legal minimum wages (SMMLV), (i.e., as of December 31, 2015, COP 38,661,000,000 c. USD 12,887,000).
Mining or quarrying	Permanent surveillance or control exercised by the Superintendence of Companies
	Economic activity registered in the commercial register or activity identified with the code B05 and/or B06 and/or B07 in CIIU Rev 4 AC.
	In December 31st of the previous year, it obtained a total income equal or superior to 60,000 monthly legal minimum wages (SMMLV), (i.e., as of December 31, 2015, COP 38,661,000,000 c. USD 12,887,000).

Legal Services	Permanent surveillance or control exercised by the Superintendence of Companies Economic activity registered in the commercial register or activity identified with code M6910 in CIIU Rev 4 AC. In December 31st of the previous year, it obtained a total income equal or superior to 30,000 monthly legal minimum wages (SMMLV), (i.e., as of December 31, 2015, COP 19,330,500,000 (c. USD 6,443,500)).
Accounting, Collection and/or Credit Rating	Permanent surveillance or control exercised by the Superintendence of Companies Economic activity registered in the commercial register or activity identified with the code N8291 and/or M6920 in CIIU Rev 4 AC. In December 31st of the previous year, it obtained a total income equal or superior to 30,000 monthly legal minimum wages (SMMLV), (i.e., as of December 31, 2015, COP 19,330,500,000 (c. USD 6,443,500)).
Trade of vehicles, parts and accessories	Permanent surveillance or control exercised by the Superintendence of Companies Economic activity registered in the commercial register or activity identified with the code G4511 and/or G4512 and/or G4530 and/or G4541 in CIIU Rev 4 AC. In December 31st of the previous year, it obtained a total income equal or superior to 130,000 monthly legal minimum wages (SMMLV), (i.e., as of December 31, 2015, COP 83,765,500,000 (c. USD 27,922,000)).
Building construction	Permanent surveillance or control exercised by the Superintendence of Companies Economic activity registered in the commercial register or activity identified with code F4111 and/or F4112 in CIIU Rev 4 AC. In December 31st of the previous year, it obtained a total income equal or superior to 100,000 monthly legal minimum wages (SMMLV), (i.e., as of December 31, 2015, COP 64,435,000,000 (c. USD 21,479,000)).
Any other business	Other companies not listed in the above sectors that on December 31st of the preceding year have obtained total revenues equal or exceeding 160,000 SMLMV (i.e. as of December 31, 2015, COP\$103,096,000,000 c. USD\$34,365,000).
Football Clubs	Subject to External Circular No. 2 dated July 16, 2016 or regulations <i>in lieu</i> .

Those companies that as of December 31, 2015 had fulfilled these criteria, have a maximum term of twelve (12) months as from September 1, 2016, to adopt, review and/or adjust their policy or system of prevention and risk management regarding Money Laundering and Terrorist Financing, so that such policy or system complies with the provisions set forth in the Basic Legal Circular (No. 100-000006).

Additionally, those companies obliged under the Basic Legal Circular (No. 100-000006) as from December 31, 2016, have a maximum term of twelve (12) months as from January 1 of the year following that in which the companies have met said criteria.

The Basic Legal Circular (No. 100-000006) contains a series of mandatory parameters, standards and minimum requirements that the SAGRALFT of each company must comply with.

Failure to comply with this regulation can result in fines, successive or not, to be imposed by the Superintendence of Companies to the company and/or its officers, up to 200 minimum legal wages (COP\$137,891,000, c. USD\$45,900).

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COSTA RICA: CONSTITUTIONAL CHAMBER DECLARES ARTICLE 144 OF THE TAX CODE UNCONSTITUTIONAL

On August 31, by Vote N° 12496-16, the Constitutional Chamber declared the Tax Code's Article 144 unconstitutional. This Constitutional Chamber's ruling is historic in terms of defending taxpayers' rights and in setting a brake on the Tax Administration's power.

In 2014, taxpayer petitioners in Costa Rica challenged the constitutionality of the Tax Code's Article 144. Article 144 of the CNPT stipulates that once the Tax Authority has determined the tax amount, the taxpayer must either pay this amount or provide a bank guarantee; including those cases where there is a dispute about the amount. Before the 2012 amendment, taxpayers had to pay as soon as the Administrative Tax Court had ruled that the Tax Authority's requested amount was acceptable - a process that could take up to five years. Taxpayer petitioners argued that the dispute process prior to Article 144's enforcement maintained a careful balance between the Tax Authority's discretionary decisions and tax payers' rights.

Now, it is expected that the government will pass a draft bill to Congress to correct the administrative procedure that allows the Tax Authorities to determine and issue tax amounts as a result of a tax audit. After which, Congress must approve this bill. Costa Rica prides itself on maintaining rule of law principles; and, equally, as part of its Rule of Law Initiative and by applying all the available administrative and judicial measures, Arias & Muñoz prides itself on supporting taxpayers both to present their cases to the appropriate authorities and to protect them from unfair Tax Authority practices.

Guatemala

El Salvador

Honduras
Panamá

Nicaragua

Costa Rica



NEWS DETAIL

03/05/2016

REGISTRATION PROCEDURE OF IP LICENSING AGREEMENT

The Ministry of Law and Human Rights of the Republic of Indonesia ("MOLHR") has issued a new regulation which requires that all IP licensing agreements be registered for recordation at the ministry. The regulation is MOLHR Regulation No. 8 of 2016 regarding Rules and Procedures for the Recordation of Intellectual Property License Agreements ("**Regulation No. 8 / 2016**").

Regulation No. 8 / 2016 applies to all of the intellectual property rights, namely, copyright and related rights, patents, marks, industrial design, integrated-circuit layout design, and trade secrets. For the recordation an application must be submitted by the licensor or the licensee or their representative. The application may be submitted either electronically or non-electronically. Below are the basic rules and procedures.

Electronically	Non-Electronically
The application is to be submitted through the official website of the Directorate General of Intellectual Property's ("DGIP"). The below documents must be uploaded along with the application:	The application is to be manually submitted to the Ministry. The below documents must accompany the application:
<ul style="list-style-type: none"> ◦ A copy of the License Agreement or another evidence thereof; ◦ A copy of the certificate of the respective patent, mark, industrial design, integrated circuit layout design or ownership evidence of the respective copyright, related right, or trade secret which is still valid; ◦ Original specific power of attorney, if the application is made through a proxy; and ◦ Original receipt of the payment of the application fee. 	
In addition to the above, the applicant must complete and submit the electronically available Declaration Form which states that the intellectual property right referred in the respective license agreement:	In addition to the above, the applicant must complete and submit the Declaration Form provided as an attachment to Regulation No. 8 / 2016 which states that the intellectual property right referred in the respective license agreement:
<ul style="list-style-type: none"> ◦ is still validly protected; ◦ does not prejudice national economic interests; ◦ does not inhibit the development of technology; ◦ is not contrary to the provisions of the prevailing laws, morality and public order; 	

Foreign applicants must be represented by an IP consultant who is domiciled in Indonesia.

Under Regulation No. 8 / 2016, the processing of an application should not take more than 10 days as of the acceptance of the application. Incomplete applications will be returned to the applicants and the applicants will have no more than 10 days as of the date of the notification to complete the application. Failure in submitting the application within the prescribed time frame will result in that the application will be deemed as withdrawn. Successful recordation applications will be announced in the official website of the DGIP. The recordation is valid for 5 years, at the end of which the applicant may re-apply for the continued recordation.

This regulation has been in force since 24 February 2016. All recordation applications which were submitted before this issue of this Regulation No. 8 / 2016 will be processed on the basis of the provisions of Regulation No. 8 / 2016. (*by: Evelyn Irmea Sinisuka*)



LEGAL UPDATE

August, 2016

Special Economic Zones

On June 1st, 2016, it was published on the Mexican Federal Official Gazette, the decree by which the Special Economic Zones Federal Law was issued (the "Law").

On the other hand, on June 30th, 2016, it was published in the Mexican Federal Official Gazette the regulation of the Law. This new regulation is an innovative and cutting-edge legal instrument that complements and establishes the institutional and legal design of the Law.

In addition, that same day, it, was published in the mentioned Gazette, the decree by which the Federal Authority for the Development of the Special Economic Zones was created.

Background

On September 29th 2015, the President of the Mexican United States, in exercise of his constitutional faculties, sent to the House of Representatives, the Legislative Initiative of the Law. Such initiative aims to set the standards for the planning, establishment and further operation of the Special Economic Zones (the "Zones"), as instruments to contribute and enhance growth and sustainable and balanced economic development of the regions of the country with greater social backwardness and high underdevelopment rates, through the promotion of productive and social investments.

Likewise, on December 14th, 2015, the House of Representatives approved the Legislative Initiative of the Law submitted by the President of the Mexican United States and proceeded to submit the Minute of the Decree of Issuance of the Law to the Senate.

In ordinary session on April 14th, 2016, the Senate approved with amendments the above mentioned Minute, and submitted it to the House of Representatives for the corresponding constitutional approval.

On April 19th, 2016, the Board of the House of Representatives turned over the Minute containing the Decree of Issuance of the Law to its Economic Commission for the corresponding review.

What are the Special Economic Zones?

The Zones are specific geographical areas located within the national borders of the Mexican United States where business rules are different and apply in a special way. Such rules are designed to regulate a free market economy rather than the traditional business rules that prevail in national territory. The Zones are to be used as a tool to boost trade, investment and a

differentiated industrial policy, which aims to overcome investment barriers to a wider economy, including security policies, lower governance indexes, inadequate infrastructure and property access problems.

In this regard, the issue of the Law is intended to establish the regulation, planning, establishment and further operation of the Zones, within the framework of the planning of the national development, as an instrument to eradicate inequality and allow to close the everyday growing gaps regarding regional development through an economic, sustainable and balanced economic growth of the regions of the country that present the largest social backwardness levels.

The development of the Zones will be carried out through the promotion and procurement of certain policies, such as investment, productivity, competitiveness, employment and a better income distribution among the population.

In addition, the creation and operation of the Zones by the Federal Government will help position Mexico as a world leader in international trade, while simultaneously developing an innovative process of economic integration with Asia-Pacific markets. This integration, from the commercial and industrial processes point of view, will allow to build an institutional framework based on the legal standards of the North American free trade Agreement, to develop regional competitiveness in order to face new global challenges.

The Zones will be operated following a Master development program with the main objective of establishing the necessary public policies and actions to provide a comprehensive and long-term approach for the establishment and proper way to operate such Zones.

Certain relevant and key aspects of the Law are:

A. Private Sector

The construction, development, management and maintenance of the Zones are expected to be carried out by the private sector when in relation to private real state property, or by the public sector when in relation to Public Federal real state property. Likewise, domestic and foreign companies that meet the necessary requirements and standard issued by the competent authorities are expected to carry out productive economic activities within the Zones.

B. Coordination and Participation of the different levels of Government

The Law addresses the need to celebrate, subscribe and execute certain coordination agreements into by and between the President of the Mexican United States and the heads of the State and Municipal executive power, where the Zones will be located. These agreements will regulate the obligation of the Federal, as well as of the corresponding State and Municipal Governments, to maintain a permanent coordination with each other, in order to perform in a coordinated and efficient way, all actions, procedures and efforts necessary to achieve an optimal development and operation of the Zones.

C. Incentives Tax and Customs Regime

The President of the Mexican United States shall establish and provide certain tax benefits considered to be necessary to promote and enhance the establishment and development of the

Zones. These benefits will aim to encourage the generation of permanent jobs and productive investments that foster the economic development of the Zones, as well as the creation of infrastructure, formation of human capital, training and education of the workers.

In addition, the President of the United States shall create and design a specific customs regime for the Zones. Such regime will be at all times subject to the provisions stated in the Customs Law, and will regulate the import and export of foreign, domestic or nationalized goods, and will also establish facilities, requirements and controls for the import and export of goods, as well as for the activities carried out within the Zones. The aforementioned, in order to promote the development and operation of the Zones.

D. One Stop Shop

Each Zone will have a One Stop Shop, in order to simplify and streamline all formalities and procedures necessary to build, develop, operate and manage the Zones, carry out productive economic activities, or install and operate businesses in the Influence Area of the Zones.

All parties and agents involved in the development and operation of the Zones will have the advantage of a One Stop Shop through which they will be able to submit all procedures and formalities regarding and in connection with the Zones, such One Stop Shop will be responsible to remit and refer all submissions to the competent authorities for their corresponding resolution, thus facilitating the relationship between the involved parties and the competent authorities.

E. Social and Environmental Impact

In order to protect, preserve and respect the human rights of the vulnerable social groups, as well as of the communities situated within the Zones and their Influence Areas. All principles of sustainability, progressiveness and respect for human rights will be taken into account for the development, implementation and installation of the Zones.

In this regard, the Law mandates the realization of a strategic evaluation regarding the environmental and social impact and status regarding the Zones and their Influence Areas. The results and findings of such evaluation will be taken into account and considered for the development plans of the Zones.

Likewise, the realization of a prior, free and informed consultation is considered in the Law in order to consider and respect the rights of the communities and of the indigenous people groups, as well as their interests in the Zones and their Influence Areas, as well as other additional activities necessary for protection of their rights and interests.

F. Federal Authority for the Development of the Special Economic Zones

The Secretary of Finance and Public Credit will be the Authority of the federal government responsible of regulating and ensuring the proper development and implementation of the Zones. Accordingly, the creation of an administrative body of the Secretary of Finance and Public Credit called Federal Authority for the Development of the Special Economic Zones was conducted. Such administrative body will have the necessary authority and sufficient powers to carry out all tasks and functions regarding the regulation of the Zones.

In this respect, on June 30th, 2016, it was published in the Mexican Federal Official Gazette, the decree by virtue of which the Federal Authority for the Development of the Special Economic Zones was created.

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Netherlands | EU

Consultation of Renewable Fuel Units legislation

Friday 19 August 2016

On August 8th, 2016 an internet consultation was published regarding a legislative change of the Dutch Environmental Management Act.

The amendment is a transposition of the European Directive Indirect Land Use Change (ILUC). The Directive aims at limiting the share of conventional biofuels. Conventional biofuels are produced from crops such as corn and sugar cane which are grown on agricultural land. By limiting the production of conventional biofuels the Directive aims at preventing an increased competition with food and livestock feed. For this, the Directive also sets an indicative 0.5% target for the use of advanced biofuels made from non-competing sources like waste and algae.

By 2020, EU member states are already required to have 10% of their transport fuel come from renewable sources such as biofuels. The Netherlands has implemented this requirement via yearly requirements for fuel suppliers, and therefore focusses specifically on one company in the transport chain. Fuel suppliers need to account for having supplied enough renewable energy to the Dutch road transport and rail transport sectors. To monitor this, the Netherlands implemented a Renewable Fuel Unit system in May of 2015. In exchange for each delivered gigajoule of renewable energy, suppliers are credited with one Renewable Fuel Unit ("RFU") on their 'personal accounts' of which the quantities are checked annually. Similar to emission rights, these RFUs are also tradable.

Considering that the ILUC-Directive limits conventional biofuels and sets a target for advanced biofuels, the legislative proposal now implements differentiated RFUs: conventional, advanced and 'other' RFUs. The expectation is that in 2016, the Dutch House of Representatives will establish how many and which type of RFUs each company must have in order to fulfill their annual obligation.

The internet consultation for the amendment of the Renewable Fuel Units Legislation can be found [here](#) (Dutch only). You can submit comments on this consultation until September 5th, 2016.

European Commission call for advanced biofuels projects

On a related note, overseas partnerships are also enhancing possibilities to increase the use of advanced biofuels, such as the cooperation between the European Commission, the Brazilian Ministry of Science, Technology and Innovation, the São Paulo Research Foundation (FAPESP) and the Brazilian National Council of State Funding Agencies (CONFAP). The European Commission published a coordinated call aiming at exploiting synergies between

Brazil and Europe in terms of scientific expertise and resources in topics related to advanced biofuels by implementing coordinated projects. The call can be found [here](#) and proposals can be submitted until September 8th, 2016.

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The statutory framework of New Zealand's local government sector: is the key legislation working properly?

July 2016

About Simpson Grierson

Simpson Grierson is New Zealand's leading local government law firm. Our expertise ranges from the day-to-day operation of councils in their statutory and political environments, to the highest level strategic developments affecting local government as a whole.

We advise many of the local authorities in New Zealand, including major city and regional councils based in Auckland, Wellington, and Christchurch. We have extensive and long-standing networks with key policy and decision makers throughout local government.

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Introduction and overview

This paper, commissioned by Local Government New Zealand (LGNZ), takes a high-level look at the interrelationships between the Local Government Act 2002 (LGA), the Resource Management Act 1991 (RMA) and the Land Transport Management Act 2003 (LTMA). It comments on the coherence of the statutory framework for local government and on how this statutory framework is holding up in the face of current challenges.

In exploring our brief there were a number of factors which create an important context for developing this paper. The challenges facing New Zealand, and in particular local government, are significant.

A recent Blue Skies discussion document about New Zealand's resource management system by MartinJenkins, also commissioned by LGNZ, notes a number of issues including rising income inequality, declining water quality where land is used intensively, localised strong population growth, extreme rates of biodiversity loss and steadily rising carbon emissions.¹

That report, together with others, refers to the importance of the interface between the three acts:²

"Although the RMA is at the heart of the [resource management] system, the Local Government Act (LGA) and the Land Transport Management Act (LTMA) have a significant bearing on the location, nature and timing of infrastructure development. Decisions under these three Acts affect the nature of both urban and rural development patterns and influence, or sometimes even determine, the extent of property rights and actions of individual landowners."

In particular, the RMA has come under intensive scrutiny regarding its perceived contribution to the housing crisis, but also more generally in relation to its

perceived constraint on economic growth. A recent report from the New Zealand Productivity Commission entitled *Using land for Housing* stated that the "planning system is not adequately responsive to changes in demand [for land]".³ According to the Commission, *"the process requirements in the planning system and the lack of integration between land use, infrastructure and transport planning can make it difficult for local authorities to act promptly and consistently"*.

The latest proposed amendments to the resource management system in the Resource Legislation Amendment Bill (currently before Select Committee) continue this theme. The stated objectives of the Bill include "better alignment and integration across the resource management system".

The spotlight is currently on the need to align the strategic decision-making as it relates to urban areas, making the interrelationship between the LGA, RMA and LTMA particularly important. The need for lined up decision-making goes beyond urban planning and is relevant for addressing many issues facing New Zealand – the relationships between urban growth and energy use, urban growth and water quality, water quality and rural productivity, mining activities and conservation areas.

Our brief from LGNZ did not require us to take a strictly legal approach to the issues, but to incorporate our experience in advising many local authorities over a number of years.

¹ A 'blue skies' discussion about New Zealand's resource management system: A discussion document prepared for LGNZ by MartinJenkins, (Local Government New Zealand, December 2015)

² Page 4

³ Using Land for Housing (Productivity Commission Report, September 2015)

A summary of our key findings

1. NOT BROKEN, JUST WORSE FOR WEAR

Our major finding is that overall the statutory framework for local government in New Zealand as provided for in the LGA, RMA and LTMA is not broken, but simply worse for wear. For so long as the purpose of local government includes enabling democratic local decision-making and action by, and on behalf of, communities, the consultation and engagement focus in the LGA remains appropriate. Establishing local mandates for infrastructure and its funding takes time.

2. THE THREE STATUTES WERE ORIGINALLY WELL-ALIGNED

Each of the Acts (especially the LGA and RMA) was the product of a comprehensive policy debate producing robust, coherent legislation. This is shown by the high degree of initial alignment amongst the purpose provisions of the three Acts. While each Act has different purposes (reflecting the fact they are designed to do different things) by 2002 when the LGA was enacted there was a strong commonality of purpose. All three Acts referred to sustainability, and both the LGA and RMA were concerned with the social, economic, cultural and environmental well-being of communities. In consequence, the underlying context of decision-making was aligned.

3. AMENDMENTS HAVE ERODED THE ALIGNMENT

Over the past decade or so, there has been a noticeable trend showing a reduction in the alignment of the three Acts. Multiple recent legislative changes, particularly to the LGA and RMA, have undermined the coherence and commonality of purpose of the three Acts. The changes to the purpose provisions in the LGA were a clear signal that the Government wanted local authorities to focus on efficiency and cost-effectiveness over other considerations. Equivalent changes were not made to the purpose provisions of the RMA, which retains its focus on sustainable management whilst balancing the four well-beings.

4. FOCUS ON ECONOMIC EFFICIENCY AT THE EXPENSE OF LOCAL DEMOCRACY

We have identified a trend in recent legislative amendments away from local democracy and toward economic efficiency. Recent changes to the LGA and RMA have had the effect of limiting local decision-making and public participation and had an emphasis on "efficient" outcomes rather than quality ones with wider or longer term benefits. While this is a Government's prerogative, it is producing an incremental reform to the concept of local democracy by stealth (and the Local Government Act 2002 Amendment Bill (No 2) appears to be another instance of this).⁴

5. RECENT LEGISLATIVE CHANGE HAS BEEN SOMEWHAT HASTY

Recent amendments to the legislative framework have been reactive. They have focussed on specific issues, some of those being real (for example, housing affordability crises in certain urban areas) and others more perceived (for example, unconstrained scope of local authority activity), with the aim being to achieve quick solutions. There has generally been a dearth of consultation and informed policy analysis to support the changes (again the Local Government Act 2002 Amendment Bill (No 2) is a case in point).

There are also instances of mixed messages making the legislation less rather than more effective and efficient.

What has been lacking is a measured, consultative process, taking an integrated approach to the wider situation. Genuine engagement with the stakeholders with actual knowledge of the issues and processes (including local government itself) would also aid the development of effective legislative solutions.

6. LESS HASTE, MORE COHERENCE

We suggest better outcomes would be achieved by taking more time to develop coherent, sustainable enhancements to the existing legislation. As a starting point, perhaps the core Acts could be administered by a single well-resourced agency instead of the three disparate agencies as at present: the Department of Internal Affairs, the Ministry for the Environment and the Ministry of Transport. Such an agency would need a strong mandate to engage properly with local government, and the community at large.

⁴ Please refer to our paper Commentary on the Local Government Act 2002 Amendment Bill (No 2) for some further commentary on this Bill.

1. Not broken, just worse for wear

We acknowledge there to be significant and urgent issues facing local government in New Zealand, along with increasing pressure on the statutory framework for local government. However, in our view the system and framework is not broken and a complete overhaul would be unwise and unjustified.

It makes sense that the framework be based on three separate statutes, with different spheres of operation.

No one would seriously suggest that the pursuit of national productivity should override the need for local, place-based democracy.

The establishment and constitution of local government itself is contained in the LGA. Through the sophisticated accountabilities of the LGA, communities have a say in what will meet their own current and future needs and well-being, and how that will be funded. Ultimately, this is what the LGA was intended to provide for when it was enacted, and fundamentally it still does.

Transport networks, far more than infrastructure, integrate more than one local area (and, in respect of the State highway system, the whole of the country).

It is therefore appropriate for the planning and management of those transport networks to be focussed nationally and regionally. The LTMA achieves this with local authorities participating through regional land transport committees.

Once democratic local government is provided for at a local level, and land transport is planned and managed at a regional (and national) level, there still needs to be a set of rules governing the use of natural and physical resources and the planning of urban and rural spaces. It is through the RMA that the mechanism exists to balance different private and public rights in respect of the use of resources. Local authorities participate in RMA processes both as a regulator and as a participant in its processes (for example, an applicant for a consent).

Fundamentally, the system is not only functional, but represents a logical and coherent approach to what are essential questions around enabling and providing for democratic local decision-making, managing and providing for communities' needs and well-being, and allocating scarce resources while protecting the environment.

The system is undoubtedly worse for wear – not least due to the combination of current issues putting pressure on the system alongside continuous legislative interventions that, in our view, have complicated rather than simplified the issues.

2. The three statutes were originally well-aligned

At the point at which the LGA was enacted we believe that there was a reasonably high degree of alignment in the purposes of all three Acts. Fundamentally we also believe that the original Acts were sound, coherent law.

The process that was followed for the development and enactment of the LGA covered a period of over two years. In late 2000, the Government released a statement of policy direction in respect of local government. The statement took the position that the Local Government Act 1974 imposed costs on local authorities and required constant amendment to meet changing circumstances. The Government intended to replace the 1974 Act with legislation that clearly established the position of local government in New Zealand's democratic system of government and set out local government's powers, roles and responsibilities.

During 2001, a consultation document was released and submissions received. The Local Government Bill was introduced to Parliament in December 2001, and reported back from the Local Government and Environment Select Committee in December 2002 (which recommended significant amendments to the Bill). It received Royal assent in December 2002 and generally came into effect from 1 July 2003.

At the time of its enactment, the LGA represented a fundamental reform. It picked up decades of developments and changes in local government legislation and took it forward with a rationalised, purpose- and principles-based, regime. Fundamental to this regime was engagement with local communities through well-prescribed accountability and decision-making provisions.

The same can be said of the RMA. In 1988, the Government began a review of a number of statutes dealing with town and country planning, water rights and regulation, air pollution, mining licences, noise control and geothermal energy. At the same time, the Ministry for the Environment prepared a report on the implications for New Zealand of the United Nations World Commission on Environment and Development Report called *Our Common Future*.⁵ The report provided various policy recommendations, including to ensure the sustainable use of renewable resources such as fisheries, forestry, soil and water.

⁵ This Report is commonly known as the Brundtland Report (named after Gro Harlem Brundtland, ex-Prime Minister of Norway and the Chairperson of the Commission).

There was significant and extensive public consultation with public bodies, interest groups and individuals across New Zealand, and a number of working papers were prepared, before the Government issued a report in December 1988 on its proposals for resource management law reform. The essence of the proposals was that a single statute would replace the various separate rules and processes across several existing Acts.

The intention was that the new Resource Management Act would resolve the problems with the old regime in that it would provide a coherent and consistent framework for managing natural and physical resources in a sustainable way. It was the culmination of a three year process.

When it was enacted in 2003, the LTMA reflected a shift in purpose away from a previous perceived focus on roads (under the Transit New Zealand Act 1989) to the broader land transport system as a whole. It was the product of a process of refinement and improvement which had begun in 1989.

Schedule 3 to this paper addresses the history of the legislation in more detail.

Each of the Acts has a unique purpose reflecting the fact each is designed to do different things:

- The LGA provides for the constitution and empowerment of multi-functional local authorities and their democratic accountabilities
- The RMA addresses the management of natural and physical resources
- The LTMA provides the framework for the delivery of transport networks

At one level the LGA takes precedence as it provides the framework for democratic local government. Local authorities have responsibilities to deliver a wide range of infrastructure including transport networks and to provide regulatory functions including under the RMA.

However, the RMA is the over-arching general legislation regulating any form of development. It therefore regulates local authorities exercising their responsibilities to deliver infrastructure and services, and the Crown and local authorities exercising responsibilities to provide transport infrastructure and networks under the LTMA.

The coherence amongst the three statutes is shown by the alignment of their purpose provisions (these are provided in full in Schedule 1 to this paper). In 2003, the purpose of each of the LGA, RMA and LTMA was relatively well-aligned with each of the others. The purposes all included reference to “sustainability” in one form or another. The LGA referred to providing for local authorities to play a broad role in promoting the well-being of their communities “taking a sustainable development approach”. In 2003, the purpose of the

Land Transport Management Act 2003 referred to a “sustainable” land transport system. The RMA refers to promoting the “sustainable management” of natural resources.

In addition, both the LGA and the RMA were about promoting (or balancing) social, economic, cultural and environmental well-being. The LTMA was about integrated, safe and responsive transport systems.

Over the past decade or so, this level of coherence has been eroded.

3. Amendments have eroded the alignment

The purpose provisions of the Acts have changed over the past decade or so, dramatically in the case of the LGA and LTMA.

The Local Government Act 2002 Amendment Act 2012 changed one arm of the purpose of local government from:

“promoting the social, economic, environmental and cultural well-being of communities”

to:

“meeting needs to communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses”.

This change from what were known as the “four well-beings” to a focus on cost-effectiveness is clearly a change directed to the promotion of efficiency over well-being.

The other arm of the purpose, enabling democratic local decision-making by, and on behalf of, communities has remained unchanged.

The LTMA’s purpose has changed from:

“achieving an integrated, safe, responsive, and sustainable land transport system” (“affordable” was included in 2008 amendments).

to:

“achieving an effective, efficient, and safe land transport system in the public interest”.

While the inclusion of “the public interest” reveals a certain parallel with the original purpose of local government in the LGA (being the four community “well-beings”), the 2013 amendments have some resonance with the amended purpose of local government in the LGA. The focus is on effectiveness and efficiency rather than on the land transport system being “integrated” and “sustainable”.

The purpose provisions of the RMA have been relatively static over the period since its original enactment in 1991. The principal purpose of the RMA in section 5 has not changed from promoting the sustainable management of natural and physical resources. The four community well-beings continue to have statutory recognition in the RMA.

There have been some changes to sections 6 of the RMA (being the matters of national importance to be recognised and provided for by decision-makers) and section 7 (being other matters persons exercising functions and powers under the RMA are to have particular regard to). The changes have effectively been the insertion or removal of matters, rather than any fundamental shift in the relative weightings of matters.

Schedule 2 to this report sets out in detail the amendments made to each of the three Acts over their history.

4. Focus on economic efficiency at the expense of local democracy

A theme running through the three key Acts has been the Government's concern with local government getting the "right" answer as an outcome of its processes. In the recent past and at present, the primary focus of the Government's approach to the overall framework and its statutory amendments has been economic outcomes over allowing for effective local democracy.

Although a purpose of local government remains to "enable democratic local decision-making and action by and behalf of communities", changes to the LGA since 2010 have had the effect of limiting local democracy.

This can be seen in the following:

- The change to the purpose of local government creates an objective test for what it is lawful for a local authority to be involved in. The test of "meeting communities' needs cost-effectively" replaces the community-defined test of "promoting community well-being". This change hampers a local authority's ability to balance competing interests and values (a central aspect of democratic representation) by casting debate in an economic cost-benefit light, limiting activity to options that are most "cost-effective".
- Allowing for Ministerial benchmarks to control outcomes is another way that communities lose the ability to define and put into effect their own values (which may or may not put economic values first).

- The opportunities for direct Ministerial intervention have been increased significantly.

As originally conceived, the primary accountability of local government provided for in the LGA was to communities though the very extensive transparency regime of the Act.⁶ This accountability regime included and includes:

- general requirements that apply to all decision-making found in Part 6 of the Act;
- explicit obligations to identify and assess different options when making any decision and to consider community views and preferences (found in sections 77 and 78);
- consultation based on several principles (section 82);
- mandatory consultation requirements in certain instances (for example, in relation to strategic assets);
- a three-yearly cycle of audited 10-year plans with extensive prescribed content (**LTPs**); and
- annual planning and reporting cycles.

Since 2010, a series of amendments have been directed to making consultation and engagement with communities more effective (to encourage participation) by providing more targeted documents on which to engage with communities. Those documents include, for example, a financial strategy, an infrastructure strategy with a 30 year focus, a pre-election report and simplified consultation documents for the LTP and annual plan.

Unfortunately, these attempts to improve engagement have been highly detailed, and there has been an increase in prescription as to content and process.

The increased prescription in the content and style of consultation material has been slightly off-set by a "streamlining" of engagement by:

- repealing sections 88, 97(1)(c) and (d) which related to specific consultation obligations;
- simplifying sections 77 and 78 relating to decision-making engagement generally;
- reducing the use of the special consultative procedure in favour of consultation principles; and
- removing the need to consult on an annual plan where there are no material differences from the long-term plan.

The jury remains out on whether community engagement has been improved. The changes have generally made compliance more complicated and

⁶ Contrast this with the old local government regime with "hard" financial accountability mechanisms through, for example, borrowing restrictions.

uncertain especially around critical areas such as rates. The processes themselves certainly do not generate efficiencies.

The recent and proposed changes to the RMA also effectively limit opportunities for effective public participation, for example, by removing steps from the process. However, in common with changes to the LGA, the RMA is becoming more directive of particular outcomes, and with a move to greater national standardisation.

Many of the amendments to the RMA over the past decade were intended to make the Act more “forward-leaning” and “development-friendly”. The current Resource Legislation Amendment Bill is in a similar “directory” vein. It includes the trimming down of consultation obligations (a key public accountability and engagement mechanism) to facilitate the Government’s desired outcomes.

Alongside the resource management law reforms (including the current Bill) is the fact that the RMA itself already has a number of tools for Government to utilise to achieve national policy outcomes (for example, national policy statements and national environmental standards). Many of these tools are only just beginning to be properly used, and yet the underlying legislation continues to be amended.

5. Recent legislative change has been somewhat hasty

In addition to the general focus of the recent changes discussed above, a feature of these legislative developments is that they are reactive, focused on particular issues and legislative provisions, and the result of limited policy analysis or debate.

The local government statutory framework obviously applies to all local authorities in New Zealand and, given the diversity of issues facing different regions, it is essential that the framework be flexible enough to apply appropriately to different circumstances. While some districts experience rapid growth others are in decline. Many of the recent legislative changes have been responses to specific identified issues which are not necessarily of universal national concern. For example, the supply of land for housing is a major issue in growth centres of the country (especially Auckland), but not for all regions. The Housing Accords and Special Housing Areas Act 2013 can be seen as enabling a location-specific solution to housing issues. By circumventing the RMA process it enables fast-tracked development. The long term consequences for local authority infrastructure remain to be seen.

While there is always room for legislation to be improved, not all issues facing the local government sector (and not all outcomes the Government wants local government to achieve) can be solved through amendments to legislation. In our experience, many issues relate to practice rather than deficiencies in the legislation itself. Improving practices takes time, but can lead to more sustainable benefits.

Given the pace of change, there has been limited time for appropriate policy analysis or debate to inform the statutory changes. The nature of the amendments, and especially what we have found in interpreting them, is that they have had the effect of tinkering with the Acts and making them somewhat more confusing and difficult to apply.

A consequence of this approach has been a tendency to create mixed messages. Examples include:

- requirements for local authorities to develop 30 year infrastructure strategies at a time when there is **immediate** demand for essential services to housing development;
- the reduction in the availability and certainty of development contributions, and the proposed repeal of financial contributions, which force urgent growth-related infrastructure spending on to ratepayers, at the same time as other changes create statutory pressures to **reduce** rates funding;
- narrowing the role of local authorities by particularising the purpose provision, then urging them to play a wider part in solving national problems (for example, housing and economic development) which are now arguably out of scope.

Again, not all problems are best solved by legislation. Section 155 of the LGA requires local authorities to specifically decide whether legislating by making a bylaw is the most appropriate way of addressing a perceived problem. Something similar might apply to legislation. As noted earlier, national coherence could have been achieved in the resource management area more effectively if the Crown had progressed key national policy statements much earlier.

In 2012, the Minister of Local Government launched an aggressive campaign on local government with a programme entitled *Better Local Government*. Based on perfunctory analysis, random examples, and information about rates and debt increases (but no analysis of the reasons), this provided a platform for ongoing statutory interventions.

There is now an impatience about change that has not acknowledged, at a national level, which is the essential tenet of the LGA – that engagement with the community produces better and more sustainable decision-making.

6. Less haste, more coherence

It will be evident from the above that we see better, more sustainable solutions to the diversity of issues and circumstances across the country, if more effort were put into engagement ahead of legislative change.

The frameworks of the three Acts are sound, but there has been a fragmented approach to amending them to address particular issues. What is needed is a more measured approach and more coherence. Policy development should be better informed by those at the coal-face, and this importantly includes local authorities.

Policy development would also benefit from being more joined-up. As a random suggestion, perhaps the core Acts could be administered by a single well-resourced agency instead of the three disparate agencies as at present: the Department of Internal Affairs, the Ministry for the Environment and the Ministry of Transport. Such an agency would need a strong mandate to engage properly with local government, and the community at large.

SCHEDULE 1

The current purpose provisions of the three statutes

Local Government Act 2002

3 Purpose

The purpose of this Act is to provide for democratic and effective local government that recognises the diversity of New Zealand communities; and, to that end, this Act—

- (a) states the purpose of local government; and*
- (b) provides a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them; and*
- (c) promotes the accountability of local authorities to their communities; and*
- (d) provides for local authorities to play a broad role in meeting the current and future needs of their communities for good-quality local infrastructure, local public services, and performance of regulatory functions.*

10 Purpose of local government

- (1) The purpose of local government is—*
 - (a) to enable democratic local decision-making and action by, and on behalf of, communities; and*
 - (b) to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.*

- (2) In this Act, good-quality, in relation to local infrastructure, local public services, and performance of regulatory functions, means infrastructure, services, and performance that are—*

- (a) efficient; and*
- (b) effective; and*
- (c) appropriate to present and anticipated future circumstances.*

Resource Management Act 1991

5 Purpose

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.*
- (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—*
 - (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
 - (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
 - (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

Land Transport Management Act 2003

3 Purpose

The purpose of this Act is to contribute to an effective, efficient, and safe land transport system in the public interest.

SCHEDULE 2

A brief history of the amendments to the three statutes

Amendments to the Local Government Act 2002

Local Government (Auckland) Amendment Act 2004 (2004 No 57)

The purpose of this Act was to improve the Auckland regional land transport system, and funding for storm water in the Auckland Region. It was repealed by the Local Government (Auckland Transitional Provisions) Act 2010.

Local Government Act 2002 Amendment Act 2004 (2004 No 63)

Most amendments contained in this Act were technical in nature. A Supplementary Order Paper enabled local authorities to provide in their standing orders for a casting vote, in any circumstances where there is an equality of votes. This amendment applied to both council and council committee meetings.

Local Government Act 2002 Amendment Act 2006 (2006 No 26)

Most of the amendments in this Act were technical. They included minor clarifications (such as when the special consultative procedure is required).

Local Government Act 2002 Amendment Act 2007 (2007 No 69)

This Act was split from an omnibus bill that made minor technical amendments to 50 Acts (including the LGA).

Local Government Amendment Act 2009 (2009 No 48)

This Act made a minor technical amendment to the Local Government Act 2002 (the Act was divided from the Gangs and Organised Crime Bill).

Local Government Act 2002 Amendment Act 2010 (2010 No 124)

This Act made significant amendments to the LGA mainly focussed on making local authority decision-making more transparent and accountable, and restricting local authorities to the provision of core services (within a defined fiscal envelope). The changes included a new definition of "community outcomes", introducing a list of "core services" that local authorities are to have particular regard to, a requirement to periodically assess the expected returns from investments, removal of certain more prescriptive consultation requirements, a requirement for chief executives to produce a pre-election report, changes in relation to the ownership and

management of water assets, and the introduction of the ability of the Secretary of Local Government to make rules specifying performance measures.

Local Government Act 2002 Amendment Act 2012 (2012 No 93)

This Act introduced more significant amendments to the LGA. The changes included major changes to the purpose of local government (and accordingly local authorities' role and powers) to be more focussed on the provision of infrastructure, public services and regulatory functions (rather than the four "well-beings"), providing for greater mayoral powers (along the lines of the Auckland legislation), a greater ability for central Government to intervene in local authorities, and a "stream-lining" of council reorganisation procedures.

Local Government Act 2002 Amendment Act (No 2) 2012 (2012 No 107)

This Act made a minor amendment to Part 2 of Schedule 2 (to omit an item relating to the Banks Peninsula District Council).

Local Government (Alcohol Reform) Amendment Act 2012 (2012 No 121)

This Act made amendments to the LGA required as a result of alcohol law reform.

Local Government Act 2002 Amendment Act 2013 (2013 No 124)

This Act made minor technical amendments to the LGA.

Local Government Act 2002 Amendment Act 2014 (2014 No 55)

This Act made an array of changes to the LGA. The changes included amendments to the development contributions regime, making the local board model available for any reorganisation, requiring councils to review delivery of services and consider collaboration with other councils, the replacement of significance policies with significance and engagement policies, removal of some of the requirement to use the special consultative procedure replaced by obligations to consult in accordance with the principles in section 82, and limiting consultation on annual plan to only material departures from the long-term plan.

Local Government Act 2002 Amendment Act 2015 (2015 No 21)

This Act made minor technical amendments to the LGA.

Amendments to the Resource Management Act 1991

Resource Management Amendment Act 1993 (1993 No 65)

Following the passing of the RMA, a number of technical amendments were recommended to provide clarification. This Act made many minor changes including the provision for esplanade reserves in the case of subdivision and clarifying the procedure for making and changing plans and policy statements.

Resource Management Amendment Act 1994 (1994 No 105)

The aim of this Act was to consolidate discharge controls for the coastal marine area under the umbrella of a single piece of legislation.

Resource Management Amendment Act (No 2) 1994 (1994 No 139)

This Act was largely aimed at removing uncertainty regarding the application of section 32 of that Act. Section 32 is intended to function as a check on unnecessary and unfocused regulations by imposing a duty on Ministers and local authorities to consider alternatives when developing national environmental standards, policy statements, and plans. The amendment sought to clarify the action that must be taken to fulfil the section 32 duty.

Resource Management Amendment Act 1996 (1996 No 160)

This Act made a number of minor changes as well as some more substantive changes to the Planning Tribunal. The more substantive changes included the renaming of the Planning Tribunal as the Environment Court, provision for those who represent some relevant aspect of the public interest to be parties to an appeal and a number of changes to improve efficiencies in the Environment Court process. These changes included increasing the maximum number of judges, removal of the constraint over how many Environment Commissioners may be appointed and a new notification system for proceedings to reduce administration costs.

Resource Management Amendment Act 1997 (1997 No 104)

This Act amended some of the provisions introduced by the Resource Management Amendment Act 1994 and also enabled New Zealand's obligations under the International Convention for the Prevention of Pollution from Ships to be implemented. Furthermore, the Act repealed provisions in the RMA in relation to coastal rentals permitting regional councils to adopt occupation charging regimes and introducing coastal tendering. The Act also made less substantive changes, including

alterations to abatement notices, a legislative process in respect of unlawfully claimed land and prohibition on decision makers or consent authorities having regard to the effect of trade competition on trade competitors.

Resource Management (Aquaculture Moratorium) Amendment Act 2002 (2002 No 5)

This Act's purpose was to impose a moratorium on the granting of coastal permits for aquaculture activities. As part of this the Act aimed to provide regional councils with the opportunity, during the moratorium, to provide in their regional coastal plans and proposed regional coastal plans for aquaculture management areas where aquaculture activities could be undertaken only as a controlled or discretionary activity and areas where aquaculture activities are prohibited.

Resource Management Amendment Act 2003 (2003 No 23)

The aim of this Act was to improve the administration of the RMA. Two major changes were made, the limited notifications of resource consent applications were re-introduced, and the recommendation that the Environment Court should be able to hear appeals on council decisions to not notify a resource consent application was taken out.

Resource Management (Energy and Climate Change) Amendment Act 2004 (2004 No 2)

This Act required explicit consideration of the effects of climate change and renewable energy in the exercise of functions and powers set out in RMA. It provided a stronger legal mandate to take into consideration energy and climate change matters and gave effect to the Government's climate change policies and the National Energy Efficiency and Conservation Strategy 2001 as well as New Zealand's obligations as a signatory to the Kyoto Protocol.

Resource Management (Aquaculture Moratorium Extension) Amendment Act 2004 (2004 No 5)

This Act made amendments to the RMA to extend the moratorium on coastal permit applications for aquaculture activities, deeming certain existing coastal permits for aquaculture activities to have been "given effect to", reviving other permits that have lapsed because they were unable to be given effect to, and removing the time limit for the early expiry of the moratorium over specified areas.

Resource Management Amendment Act 2004 (2004 No 46)

This Act made minor amendments in relation to Environment Court judges.

Resource Management (Waitaki Catchment) Amendment Act 2004 (2004 No 77)

This Act amended the RMA to provide for an improved process to determine the use of water in the Waitaki catchment. The Act provided for the Waitaki Catchment Water Allocation Board to be appointed and for it to develop a water allocation framework for the Waitaki River. It also required a Panel of Commissioners be appointed to consider the consent applications together, within the framework.

Resource Management (Foreshore and Seabed) Amendment Act 2004 (2004 No 94)

The purpose of this Act was to vest the full legal and beneficial ownership of the foreshore and seabed in the Crown. It aimed to guarantee public access while recognising ongoing customary rights.

Resource Management Amendment Act (No 2) 2004 (2004 No 103)

This Act introduced a regime relating to the aquaculture industry, specifically making the RMA the main Act for managing aquaculture. The Act aimed to provide marine coastal users with clarity and certainty.

Resource Management Amendment Act 2005 (2005 No 87)

This Act was intended to improve the operation of the RMA in relation to:

- the achievement of nationally consistent standards through national environmental standards and national policy statements;
- the making of decisions by consent authorities and the Environment Court;
- the power of the Minister for the Environment to call in applications for resource consents;
- the development of policy statements and plans by local authorities;
- consultation with iwi and resource planning by iwi;
- the allocation of natural resources;
- other amendments of a minor or technical nature.

Resource Management Amendment Act 2007 (2007 No 77)

A minor amendment was made in relation to the eligibility for appointment as an Environment Commissioner or Deputy Environment Commissioner.

Resource Management Amendment Act 2008 (2008 No 95)

This amendment related to aquaculture legislation as part of changes to several pieces of legislation.

Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31)

The goal of this Act was to "simplify and streamline processes and reduce costs, delays and administrative burdens" under the RMA. The amendment introduced different notification and service requirements in relation to consent processing, specifically requiring full notification if the effects would be more than minor. The Act introduced modified requirements for what a resource consent decision must obtain, in particular, decisions can cross-reference other documents instead of repeating them.

Resource Management Amendment Act 2011 (2011 No 19)

This Act related to matters of "national significance". In deciding whether a matter is, or is part of, a proposal of national significance, the Act allows the Minister to have regard to a range of factors. The Minister may also request the EPA to advise him or her on whether a matter is, or is part of, a proposal of national significance. Other minor amendments were made.

Resource Management Amendment Act (No 2) 2011 (2011 No 70)

This legislation aimed to simplify planning by removing the requirement for aquaculture management areas to be established before consent applications can be made. The Act removed the requirement for aquaculture management areas allowing for a return to a consent-based regime for aquaculture. The legislation also made several other minor amendments.

Resource Management Amendment Act 2013 (2013 No 63)

This Act was intended to help create a resource management system that delivers communities' planning needs, enables growth, and provides strong environmental outcomes in a timely and cost-effective way. Changes intended included:

- improving the resource consent regime
- a streamlined process for Auckland's first unitary plan
- a six-month time limit for processing consents for medium-sized projects
- easier direct referral to the Environment Court for major regional projects
- stronger requirements for councils to base their planning decisions on robust and thorough cost-benefit analysis.

Amendments to the Land Transport Management Act 2003

Prior to the LTMA, the Transit New Zealand Act 1989 was relevant.

Transit New Zealand Act 1989

This Act created a new central land transport authority, Transit New Zealand (TNZ) to replace the National Roads Board and Urban Transport Council. TNZ was tasked to provide a new framework for the planning, funding and development for the planning, funding and development of NZ's land transport system. TNZ took responsibility for State highways and the new Land Transport Fund and a Land Transport Account to pay for state highways, local roads, roads safety public transport and administration. All road maintenance work on these highways had to be tendered. Highways were fully funded through National funding, whilst the territorial authorities managed local roading networks (funded by Government and local rates). The Act required regional councils to establish regional land transport committees, and for both regional and territorial authorities to prepare a regional/district land transport programmes. (Note that this Act is still in force today, but was renamed the Government Roothing Powers Act 1989 in 2008).

Transit New Zealand Amendment Act 1990 (1990 No 122)

Insignificant amendments.

Transit New Zealand Amendment Act 1991 (1991 No 57)

Insignificant amendments.

Transit New Zealand Amendment Act (No 2) 1991 (1991 No 86)

Insignificant amendments relating to excise duty.

Transit New Zealand Amendment Act 1992 (1992 No 70)

This Act required regional councils/unitary authorities to prepare future 5 year focussed regional land transport strategies (RLTS). Regional councils must consult before making these strategies, and both regional authorities and territorial authorities must report annually on progress in implementing their RLTSs.

Transit New Zealand Amendment Act 1995 (1995 No 42)

This Act allowed territorial authorities to take over some aspects of passenger transport from regional councils. A new board, Transfund New Zealand was created, and took over the funding aspects of TNZ's role; though TNZ continued to be responsible for State highways. A new funding regime for land transport, based on the newly

created National Roads Account and the State Highways Account, was established. TNZ was to operate the State Highways Account. Local authorities were to create and maintain Land Transport Disbursement Accounts, to receive the payments from the National Roads Account. Expenditure out of these accounts by TNZ or local authorities, unless the expenditure was subject to a competitive pricing procedure (tendering).

Transit New Zealand Amendment Act 1997 (1997 No 6)

Insignificant amendments.

Land Transport Management Act 2003

The LTMA reflected a shift in purpose, away from a previous perceived focus on 'roads' to a broader 'land transport system'. This Act altered the way transport funding was prioritised and allocated by establishing a more comprehensive framework to guide decision making, to be guided by the New Zealand Transport Strategy (NZTS). Consultation requirements were streamlined. The Act provided for toll roads and concession schemes.

Land Transport Management Amendment Act 2004 (2004 No 97)

This Act amended the principal Act by dissolving for the Land Transport Safety Authority and Transfund, and replacing them by a new entity, Land Transport New Zealand. The new entity is aligned with the Government's New Zealand Transport Strategy and Land Transport Programme.

Land Transport Management Amendment Act 2008 (2008 No 47)

This Act merged Land Transport New Zealand, the office of the Director of Land Transport, and Transit New Zealand into a single statutory Crown entity the New Zealand Transport Agency (NZTA), and introduced a number of measures allowing for improved regional transport funding and planning.

Land Transport Management Amendment Act 2013 (2013 No 35)

This Act "streamlined transport planning and funding framework by simplifying processes and combining regional and national transport planning documents". It removed the ability of regional councils to raise their own regional fuel tax, simplified the process for approving road tool schemes, and established a new policy framework for planning and contracting public transport by regional councils, known as the Public Transport Operating Model.

Land Transport Management Amendment Act 2008 Amendment Act 2015 (2015 No18)

Very minor amendments.

SCHEDULE 3

A brief outline of the genesis of the three statutes

Local Government Act 2002

Up until the mid-seventies, a large number of Municipal Corporations Acts and Counties Acts provided for urban and rural local government in New Zealand. These were consolidated by the Local Government Act 1974.

In the reforms of the late-eighties, local government was reduced from over 800 local authorities (often with specialist purposes and unique empowering legislation) down to 87 councils. At the same time, new accountability mechanisms were introduced into the legislation. This included annual planning and reporting cycles and consultative procedures. There was also encouragement of separating trading or commercial activities from core service delivery.

In 1996, there were further amendments which removed certain restrictions on local authority borrowing and strengthened financial accountability through prescribed financial management principles, procedures and accountability documents (for example, the long term financial strategy and funding policy). The general trend was to increase the empowerment of local authorities and encourage greater accountability to communities (for example, through mandatory planning documents).

The process that was followed for the development and enactment of the LGA covered a period of over two years. In late 2000, the Government released a statement of policy direction in respect of local government. The statement took the position that the Local Government Act 1974 imposed costs on local authorities and required constant amendment to meet changing circumstances. The Government intended to replace the 1974 Act with legislation that clearly established the position of local government in New Zealand's democratic system of government and set out local government's powers, accountabilities, roles, and responsibilities.

During 2001 a consultation document was released and submissions received. The Local Government Bill was introduced to Parliament in December 2001, and reported back from the Local Government and Environment Select Committee in December 2002 (which recommended significant amendments to the Bill). It received Royal assent in December 2002 and generally came into effect from 1 July 2003.

Resource Management Act 1991

In July 1988 the Government began a review of a number of statutes dealing with town and country planning, air pollution, water rights and regulation, mining licences, noise control and geothermal energy. The Ministry for the Environment prepared a report on the implications for New Zealand of the United Nations World Commission on Environment and Development

Report called *Our Common Future* (commonly known as the Brundtland Report). The report provided various policy recommendations, including around the use of renewable resources such as fisheries, forestry, soil and water.

There was significant and extensive public consultation with public bodies, interest groups and individuals across New Zealand, and a number of working papers were prepared, before the Government issued a report in December 1988 on its proposals for resource management law reform. The ultimate outcome of the proposals was a single statute that would replace the various separate rules and processes across several existing Acts.

The Explanatory Note to the Resource Management Bill noted that a large number of existing laws deal with managing and regulating effects on the environment and that these had reached the point where they often conflicted, overlapped with each other and were confusing.

The intention was that the new Resource Management Act would resolve the problems with the old regime in that it would provide a coherent and consistent framework for managing natural and physical resources in a sustainable way.

Similar to the process for the enactment of the LGA, the enactment of the RMA in 1991 represented a coherent response to the position in which New Zealand's environmental legislative framework found itself. It was the culmination of 3 years of work.

Land Transport Management Act 2003

Prior to the LTMA, the Transit New Zealand Act 1989 provided for a central land transport authority (called Transit New Zealand).

Transit New Zealand provided a framework for planning, funding and development of New Zealand's land transport system (including state highways). The Transit New Zealand Act 1989 also provided for regional councils and territorial authorities (recently established as part of the local government reforms of the late eighties) to establish regional land transport committees and programmes.

Over the course of the nineties, various amendments were made to the Transit New Zealand Act 1989 including a requirement for regional councils to consult on and prepare 5-year regional land transport strategies.

When it was enacted, the LTMA reflected a shift in purpose away from a previous perceived focus on 'roads' to a broader 'land transport system'. The Act altered the way transport funding was prioritised and allocated by establishing a more comprehensive framework to guide decision making.



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Changes to Temporary Residence Permit



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BULLETIN

New additional requirements for initial applications and renewals of the Temporary Residence Permit for executives of companies whose duties have effect abroad.

Resolution 13931 of June 8, 2016

Panama, June 2016. By means of the Resolution 13931 of June 8, 2016, the National Immigration Service added other requirements for the application of the Residence Permit for foreigners hired as executive personnel of international companies whose functions have effects abroad.

1. Power of attorney signed by the legal representative of the Company, asking for an inspection at the offices in Panamá, to verify its existence.
2. Parent Company or subsidiary in Panama must have at least ten (10) years of existence. It is necessary to have a certificate of existence of the Parent Company.
3. Financial statements for the last two (2) years of the Parent Company or the subsidiary in Panama.
4. In the first application, the employment letter should be issued by the Head Office and shall contain:
 - a. Location from both companies, the subsidiary office in the Republic of Panama and the Headquarters or parent company abroad.
 - b. Worker's salary, which must be at least five thousand dollars (USD\$5,000.00) which will come from foreign sources.

These new requirements should be provided for both renewals and with the first application.

Employees or subsidiaries that do not meet the new requirements, shall change the immigration status by the expiration date of their temporary residence permit.

[Resolution 13931 of June 8, 2016](#)



We remain at your disposal for any further inquiries you might have.



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Personal Data Protection

Personal Data Protection Commission publishes nine decisions on data protection enforcement

August 30, 2016

On 21 April 2016, Singapore's Personal Data Protection Commission (PDPC) published its decisions (Click [here](#) to find out **more**.) of action taken against organisations in breach of provisions relating to the collection, use and disclosure of personal data under the Personal Data Protection Act 2012 (the PDPA). There were nine published decisions involving 11 organisations in total – four organisations were slapped with fines while the other seven were issued with warnings for failure to protect the consumers' personal data.

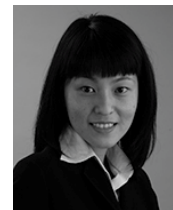
The provisions of the PDPA that were breached mainly related to the failure to implement adequate data protection measures by the organisations in question including failure to appoint a data protection officer, failure to update the software containing customer information and the use of weak passwords (such as those comprising only one letter in the alphabet).

The highest fine of S\$50,000 was meted out to the operator of a chain of karaoke outlets for a data security breach involving unauthorised disclosure of over 317,000 individuals' personal data. The operator's IT vendor was also found guilty and fined S\$10,000 despite being a third-party service provider (and therefore a data intermediary). While data intermediaries are partially exempted from the data protection obligations in the PDPA, this decision reiterates that data intermediaries are also responsible for complying with the provisions related to the protection and retention of personal data (including protecting the personal data that it was processing on behalf of the operator of the karaoke outlets).

From these decisions, it can be distilled that the PDPC will take into account the organisation's initial response to the breach and the level of co-operation throughout the investigations when deciding on the appropriate penalty. For example, the operator of the chain of karaoke outlets was found to be less than forthcoming in providing information during the investigations and provided bare facts in their responses – this was found to be an aggravating factor in deciding the penalty to be meted out.

On the same day that the above decisions were published, the PDPC also published the advisory guidelines (Click [here](#) for more information.) relating to the enforcement of the data protection provisions in the PDPA and regulations. The guidelines, although non-binding, indicate how in practice the PDPC proposes to handle complaints, reviews and investigations of breaches of data protection rules, and its approach to enforcement and sanctions. The guidelines indicate that the PDPC will take into account the time taken by the organisation alleged to be in breach to resolve a matter, whether the breach was intentional, repeated or ongoing, any obstruction or concealment of information, the failure to comply with

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previous warnings as well as the nature and volume of sensitive personal data held by the organisation.

These latest decisions, together with the new guidelines, serve as a reminder to organisations of the consequences of failing to comply with the PDPA. In addition, given the scale of the penalties that may be meted out, they serve to impress on all organisations the seriousness of the consequences of any breaches of PDPA obligations.

Dentons Rodyk acknowledges and thanks Ng Chong Yuan for his contribution in the writing of this article.

Amendments to the TFTC's Guidelines on Handling Cases Involving Trade Associations and Other Organizations

08/26/2016

Yvonne Hsieh / Wei-han Wu

On 17 June 2016, the Taiwan Fair Trade Commission (TFTC) published the amendments to the Guidelines on Handling Cases Involving Trade Associations and Other Organizations (the "Guidelines"), which took effect on same date. The amendment this time not only adjusts relevant content according to the Taiwan Fair Trade Act (the "TFTA") promulgated on 4 February 2015, but also based on the TFTC's previous case precedents, revises the list of activities conducted by trade associations or other organizations that may constitute cartel activities. Other activities that may result in a restrictive impact on competition are also added.

Below are the key features of the amendments to the Guidelines:

1. As the definition of "enterprise" in the TFTA has been amended, the associations lawfully established to promote the benefits of its members are also subject to the Guidelines after the amendment. Also, by referring to Article 2 of the Enforcement Rules of the TFTA, the Guidelines specifically stipulate the party/entity applicable to the Guidelines.
2. Based on the TFTC's previous case precedents, the Guidelines revise the list of activities conducted by trade associations or other organizations that may constitute cartel activities and add examples thereof:
 - (1) to constrain members from engaging in price competition or regulating their selling prices for commodities or service fees (such as to establish the list of reference prices or the standards for service fees, or to constrain the adjustment range);
 - (2) to constrain members' trading geographic area, trading counterparts or the content of trading (such as to constrain members from competing for trading counterparts, to constrain members' tender price, decision whether or not to tender or other relevant matters, or to demand the up/downstream counterparties to end the trading activities with non-members);
 - (3) to constrain businesses from entering the relevant market (such as to boycott non-members' sales or supply of service, to reject an enrollment application to be filed by an entity that cannot engage in practice before enrolling in the association according to the applicable laws);

- (4) to constrain the types, specifications or patterns of commodities or services;
- (5) to constrain members' manufacturing, delivery, sales or supply of commodities or services, or to constrain members from expanding the capacity or scale of production (such as to regulate uniform holidays or rest, to add/reduce holidays or rest, or to constrain the frequency of participating exhibitions);
- (6) to constrain members' terms and conditions for the sales of commodities or the supply of service or other trading conditions (such as to constrain members from stating a certain price in advertising and promotion);
- (7) other joint activities to constrain the competition between enterprises.

3. Based on the TFTC's previous case precedents, the Guidelines add other activities conducted by trade associations or other organizations that may result in a restrictive impact on competition and thus violate Paragraph 1, 2 or 4, Article 20 of the TFTA:

- (1) to boycott or crowd out a certain enterprise by means of issuing letters, facsimile or enrolling his/her/its name with relevant constraints or punishments, and thereby result in a potentially restrictive impact on competition;
- (2) to give differentiated treatment to other enterprises without reasonable cause and thereby result in a potentially restrictive impact on competition, even if such treatment does not constitute cartel activity, this includes rejecting an enrollment application filed by an entity that cannot engage in practice before enrolling in the association according to the applicable laws;
- (3) to prevent price competition between members by means of threat, solicitation or other improper means, such as to reject the application to enroll, to direct members to adjust the price for commodities or service fees through the disclosure of various cost information, to notify or recommend members to adjust the price for commodities or service fees after calculating on its initiative, to demand a cash pledge to prevent members from price competition, to demand members to guarantee that they will crowd out a certain trading counterpart, or to establish internal regulation to encourage members to participate in cartel activities.

4. The Guidelines clarify that on a general aspect some activities conducted by trade associations or other organizations do not violate the TFTA:

- (1) to collect domestic and foreign market survey, statistics, researches and current trend of industries, commerce and service industry and other market intelligence for members' reference.
- (2) to hold functional training programs or lectures on the R&D, business promotion and operations management.
- (3) to adjust agriculture production and marketing upon the request of the competent authorities in charge of agricultural policy, in accordance with agricultural laws and regulations.
- (4) to implement the matters that are delegated by the competent authorities to exercise state power.
- (5) to establish self-disciplinary convention, occupational ethics and other self-disciplinary regulations, in order to encourage members to conform to laws and regulations.

5. Article 43 of the TFTA stipulates that if any trade association or other organization is in violation of the TFTA, the TFTC may impose the same penalty on any member of the concerned association which participates in such violation, unless such member can demonstrate that it has no knowledge of such violation, or does not participate in the collusion, does not implement or ends such violation prior to the investigation conducted by the TFTC. The aforesaid principle is also included in the Guidelines.

As trade associations or other organizations are established aiming to harmonize its members' relationship and to pursue members' common interests, how and to what extent its conduct should be regulated by the TFTA always spark discussion in local legal society. Thus, the amendment this time should be able to facilitate the compliance work of trade associations or other organizations and in the meantime serve as insightful guidance for the TFTC while handling relevant cases.

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Ideas

Can Claim Construction Arguments Impact Later Proceedings Due to Issue Preclusion or Judicial Estoppel?

September 2016

IP Reports

In July, the Federal Circuit decided *SkyHawke Technologies, LLC v. Deca International Corp.*,¹ finding that a patentee who prevails in an *inter partes* reexamination, but who is nonetheless dissatisfied with the claim construction given by the USPTO, may not then challenge that claim construction in an appeal to the Federal Circuit. The Federal Circuit hewed to the general rule that a prevailing party cannot challenge the underlying claim construction, while not challenging the judgment itself.²

Background

At the outset of this controversy, SkyHawke sued Deca in district court for patent infringement. In response, Deca filed a request for *inter partes* reexamination of the asserted patent. The district court stayed the litigation pending the outcome of the *inter partes* reexamination.

The claims were upheld in the *inter partes* reexamination, but based on a narrower claim construction than that advocated by SkyHawke. Despite prevailing in the reexamination, SkyHawke attempted to appeal the claim construction to the Federal Circuit, arguing that the narrow claim construction potentially impacted its patent rights, particularly with respect to the ongoing district court proceeding.³ As discussed below, the Federal Circuit in *SkyHawke* considered both the doctrine of issue preclusion, as well as that of judicial estoppel, before determining that SkyHawke could not obtain appellate review.

Issue preclusion, also known collateral estoppel, can bar a party from re-litigating an identical issue that was actually litigated, if that party had a full and fair opportunity to litigate and a final judgment was rendered as to which the issue was essential.⁴ Judicial estoppel, on the other hand, bars a party from taking a position contrary to an earlier-advocated position after that position has been adopted by a tribunal.⁵ Each of issue preclusion and judicial estoppel can bar a party from taking its desired position in a later proceeding, but through slightly different mechanisms. These principles can play out differently depending upon the context and procedural posture.

The Federal Circuit Decision

In deciding that SkyHawke could not obtain appellate review of the USPTO's claim construction, the Federal Circuit emphasized that SkyHawke was free to advocate its preferred claim construction in subsequent proceedings, particularly the ongoing district court proceeding. First, the Federal Circuit noted that issue preclusion would not be a factor between the two proceedings, as claim construction under the district court's

standard of claim construction had not been “actually litigated” and moreover, a judgment cannot have preclusive effect if there was no right to appeal the judgment.⁶ With respect to judicial estoppel, the Federal Circuit remarked that “SkyHawke clearly did not advocate the claim construction ultimately adopted,” and will not be bound since “judicial estoppel only binds a party to a position that it advocated and successfully achieved.”⁷ Although SkyHawke is thus free to promote a different claim construction, the decision raises interesting considerations regarding a party’s ability to argue for different claim constructions in various proceedings.

District Court and USPTO Proceedings

The first scenario to consider involves separate proceedings before the USPTO and one or more district courts. Generally, a party is free to promote a different claim construction before the USPTO as compared to a district court, and vice versa.⁸ In *SkyHawke Technologies*, the USPTO’s claim construction was based on the broadest reasonable interpretation of the claims, and, as a result, the district court in the co-pending litigation was not bound by that determination. Not only could the District Court give the patent claims a different construction (even, perhaps, a broader construction⁹), but SkyHawke was not estopped from taking any position it wanted before the district court.¹⁰

Multiple District Court Proceedings

Although judicial estoppel can only bar a second, inconsistent claim construction if the party was successful in persuading the court to adopt the first one, as discussed above, issue preclusion can attach regardless of the ultimate claim construction reached in the first proceeding. In particular, there can be issue preclusion if the claim construction ruling was essential to the judgment, for example, essential to the ultimate judgment of infringement or validity.¹¹

An important caveat is that the proceeding must reach final judgment in order to prompt issue preclusion in a later proceeding.¹² Even though a *Markman* hearing or a partial summary judgment on claim construction can often be determinative of the issues, such a claim construction ruling will generally not have a preclusive effect if the case settles before reaching final judgment.¹³

Issue preclusion can apply in a subsequent district court proceeding asserting a different, but related patent or patent claim.¹⁴ However, in *e.Digital Corp. v. Futurewei Technologies, Inc.*,¹⁵ the Federal Circuit faced the question of whether issue preclusion can apply between claim constructions of unrelated patents, albeit patents including the same claim terms.

e.Digital had previously asserted certain claims of a first patent (the ‘774 Patent) in district court, which resulted in an unfavorable claim construction. After the claim construction ruling, the parties stipulated to the dismissal of the case with prejudice, which the court granted. Subsequently, in an *ex parte* reexamination, the USPTO cancelled two claims that were asserted in the district court litigation and reissued the claims combined together as a reexamined claim, adding certain limitations consistent with the district court’s opinion. e.Digital then asserted this reexamined claim, along with claims in a second patent (the ‘108 Patent). The ‘108 Patent included several claim terms that were previously construed in the first proceeding in connection with the ‘774 Patent. The ‘108 Patent did not claim a priority relationship to the ‘774 Patent, but it concerned the same subject matter and provided improvements to the ‘774 Patent.

The Federal Circuit concluded that issue preclusion barred e.Digital from asserting a different claim construction for the reexamined claim of the ‘774 Patent, but not did apply to the claims of the ‘108 Patent. For the ‘774 Patent, the Federal Circuit concluded that issue

preclusion was appropriate because the reexamined claim included an identical limitation to the previously-litigated claims and the reexamination history did not create any new issues with respect to this limitation.¹⁶ Regarding the '108 Patent, the Federal Circuit determined that “collateral estoppel cannot apply to the construction of a claim in one patent based on a previous claim construction of an unrelated patent.”¹⁷ However, the Federal Circuit implied that, for patents within the same family, a claim construction ruling in one can often result in issue preclusion in another.¹⁸ Accordingly, the claim construction ruling on one proceeding can be binding, not only on other claims within the same patent, but potentially on other patents within the same family.

Keeping in mind issue preclusion and judicial estoppel, there may be limited opportunity to pursue an alternative claim construction, particularly in subsequent district court proceedings. Accordingly, it is important to think strategically and take the long view of claim construction arguments, including both the arguments made during patent prosecution and those made in subsequent infringement or invalidity proceedings. Particularly where proceedings in multiple forums are anticipated, it is important to carefully consider a claim construction strategy in the first proceeding, including a strategy for settling or otherwise terminating a proceeding, understanding that the claim construction could be binding in subsequent proceedings. Additionally, it may be beneficial to consider patent portfolio structure to diminish the potential negative effects of issue preclusion. In sum, claim construction is not a process that is isolated within one patent or one proceeding. Rather, it is an ongoing strategy that should be approached systematically and strategically.

¹ No. 2016-1325, 1326, 2016 WL 3854162 (Fed. Cir. July 15, 2016).

² *Id.* at *1 (citing *California v. Rooney*, 483 U.S. 307, 311–13 (1987)).

³ *SkyHawke Techs., LLC*, 2016 WL 3854162 at *1.

⁴ *See, e.g., In re Trans Tex. Holdings Corp.*, 498 F.3d 1290, 1297 (Fed. Cir. 2007).

⁵ *See, e.g., SanDisk Corp. v. Memorex Prods., Inc.*, 415 F.3d 1278, 1290–91 (Fed. Cir. 2005).

⁶ *SkyHawke Techs., LLC*, 2016 WL 3854162 at *2.

⁷ *Id.*

⁸ *See Power Integrations, Inc. v. Lee*, 797 F.3d 1318, 1326 (Fed. Cir. 2015) (citing different claim construction standards between USPTO and district court proceedings as reason that claim construction was not “actually litigated” in previous proceeding); *Trans Tex. Holdings Corp.*, 498 F.3d at 1298 (refusing to apply issue preclusion to force the district court construction in the USPTO “because the PTO was not a party to the earlier litigation”).

⁹ *See, e.g., SRAM Corp. v. AD-II Eng'g, Inc.*, 465 F.3d 1351, 1359 (Fed. Cir. 2006) (holding that the “court is not bound by the PTO's claim interpretation because we review claim construction de novo,” and therefore the court may apply broader claim construction than that adopted during reexamination).

¹⁰ The principle of judicial estoppel was not invoked because *SkyHawke* did not actually succeed with respect to the USPTO's claim construction. *SkyHawke Techs., LLC*, 2016 WL 3854162 at *2.

¹¹ *See In re Freeman*, 30 F.3d 1459, 1466 (Fed. Cir. 1994) (“In order to give preclusive effect to a particular finding in a prior case, that finding must have been necessary to the judgment rendered in the previous action.”); *Phonometrics, Inc. v. N. Telecom Inc.*, 133 F.3d 1459, 1464 (Fed. Cir. 1998) (finding that only construed terms that resulted in the final decision in previous case had preclusive effect; “[a]ny construction of other limitations . . . was merely dictum, and therefore has no issue preclusive effect”).

¹² *See, e.g., RF Delaware, Inc. v. P. Keystone Techs., Inc.*, 326 F.3d 1255, 1261 (Fed. Cir. 2003).

¹³ *See id.* at 1261–62 (concluding that settlement following previous claim construction ruling did not invoke issue preclusion).

¹⁴ See, e.g., *Brain Life, LLC v. Elekta Inc.*, 746 F.3d 1045, 1054--55 (Fed. Cir. 2014) (considering whether issue preclusion should attach to claims that were not “fully, fairly, and actually litigated to finality” in a first proceeding involving other claims of same patent).

¹⁵ 772 F.3d 723 (Fed. Cir. 2014).

¹⁶ *Id.* at 726.

¹⁷ *Id.* at 727.

¹⁸ *Id.* However, “a court cannot impose collateral estoppel to bar a claim construction dispute solely because the patents are related.” *Id.*

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Ninth Circuit Rules All Common Carriers Beyond Reach of FTC's Consumer Protection Authority

09.01.16

By K.C. Halm, Christin S. McMeley, John D. Seiver, and Bryan Thompson

In a decision that could significantly impact the scope of the Federal Trade Commission's consumer protection authority under Section 5 of the FTC Act, the U.S. Court of Appeals for the Ninth Circuit ruled on August 29, 2016, that common carriers are entirely exempt from the FTC's jurisdiction, even when engaged in "non-common carrier" activities. The court's decision in *FTC v. AT&T Mobility LLC* reflects a major rebuke of the FTC's prior interpretation of its authority under Section 5, under which the agency regulated the non-common carrier activities and services of companies otherwise classified as common carriers. Unless reversed or modified, the decision will result in a dismissal of the FTC's current action alleging that AT&T's inadequate notice to its customers regarding data "throttling" practices was an unfair practice under Section 5. The decision also raises a host of new questions regarding who falls within (or outside of) the FTC's jurisdiction.

Specifically, the decision curtails the authority of the FTC – currently the leading federal privacy and data security enforcement agency – over any entity that offers common carrier services, even if that common carrier service is not part of its "core" business. At the same time, the decision will likely be cited by the Federal Communications Commission (FCC) to justify its attempts to impose broad new privacy and data security regulations on Internet service providers (ISPs), following that agency's 2015 *Open Internet Order*, which reclassified broadband Internet access service as a common carrier service. The Ninth Circuit decision also leaves an important jurisdictional issue unresolved: if the FTC has no jurisdiction over any activities of a common carrier, is there any federal agency with jurisdiction to prevent unfair and deceptive practices for non-common carrier services and activities of common carriers that are now fully exempt from Section 5?

Ninth Circuit's Ruling Expands Scope of Common Carrier Exemption under Section 5

The FTC's authority under Section 5 extends to preventing "persons, partnerships, or corporations . . . **except ... common carriers subject to the Acts to regulate commerce**...from using...unfair or deceptive acts or practices in or affecting commerce." The FTC has long interpreted this language to permit the agency to regulate the "non-common carrier activities" of entities that were otherwise classified or operating as common carriers. In other words, the FTC interpreted the statute as an "activities-based" exemption as opposed to a "status-based" exemption.

The FTC brought a Section 5 complaint against AT&T alleging that AT&T's program of "throttling" the Internet data speeds of consumers with "unlimited" mobile data plans, without adequate notice to those customers, was an unfair practice. The district court denied AT&T's motion to dismiss and agreed with the FTC's interpretation of Section 5 that the exemption did not apply to a common carrier's "non-common" carrier services. In reaching its conclusion, the district court relied in part on a 1959 Fourth Circuit decision that addressed a similar meat packer exemption under Section 5. In *Crosse & Blackwell Co. v. FTC*, the Fourth Circuit held that the FTC Act's exemption for meat packers did not apply to an entity that was also

engaged in canning soups and similar products, because meat packing was an inconsequential part of the company's business. The Fourth Circuit reasoned that "it was never intended that relatively inconsequential activity which might be classified as meat packing should insulate all of the other activities of a corporation from the reach of the Federal Trade Commission."

The Ninth Circuit reversed the district court's ruling, finding that the FTC lacked authority under Section 5 because the common carrier exemption is "status-based" (*i.e.*, an entity that is a common carrier for **any** service provided is exempt from the FTC's regulatory authority under Section 5 for **all** of its services). The appellate court declined to defer to the agency's "activity-based" interpretation of the statute and also rejected the district court's reliance on *Crosse*. Instead, the appellate court found that the statute completely exempts common carriers based on their legal status.

In rejecting the district court's reliance on *Crosse*, it first noted that "AT&T's status as a common carrier is not based on its acquisition of some minor division unrelated to the company's core activities that generates a tiny fraction of its revenue." It then criticized the Fourth Circuit's holding in *Crosse*, noting that "the decision seems to be based on little more than the court's own view of the most effective regulatory regime in explicit disregard of the words of the statute. But the text of a statute cannot be disregarded in that manner." The court went on to remind the readers that only Congress can rewrite the statute.

An additional wrinkle to this case exists because the status of AT&T's wireless mobile data service changed in 2015. Although AT&T's wireline business was a common carrier service at the time that the FTC brought its action in 2014, AT&T's wireless mobile data service was not. In a hotly contested ruling in 2015, the FCC reclassified wireless mobile data service as common carriage under its *Open Internet Order*. (Note: the D.C. Circuit affirmed the FCC Order earlier this year, although that affirmance is subject to pending petitions for rehearing, and rehearing *en banc*, with responses due September 12 in that court). Under the district court's previous ruling that Section 5's common carrier exception is "activity-based," the FTC was only barred from regulating AT&T's specific common carrier services but remained free to regulate any common carrier's non-common carrier activities. The Ninth Circuit's holding now has the effect of removing all of AT&T's activities – whether they were classified as common carrier activities or not – from the Section 5 jurisdiction of the FTC.

Implications of the Ruling: Ninth Circuit Decision Puts All Common Carriers Beyond the FTC's Reach

If the Ninth Circuit decision stands (it is almost certain that the FTC will ask for a rehearing), and a "status-based" interpretation is applied uniformly, then all common carriers – including recently reclassified Internet service providers and mobile data service providers – may find themselves free from FTC oversight.

However, if such a gap has indeed been created, we are likely to see it quickly filled – at least partially. The Ninth Circuit's decision will likely reinforce the FCC's view that it *must* intervene to impose new data security and privacy regulations on common carriers as proposed in its recent NPRM, which would create expansive rules to govern the activities of entities like ISPs that are no longer subject to the FTC's authority. The FCC, through recent data security and breach enforcement activities, has clearly revealed its intent to become a dominant player in this area. Indeed, AT&T is currently challenging a proposed \$100 million fine by the FCC for the same data throttling and notice issues that were the subject of the now dismissed FTC action.

Even so, this could still leave a significant gap. The FCC stated in its NPRM that “Section 222 is a sector-specific statute that includes detailed requirements that Congress requires be applied to the provision of telecommunications services, but not to the provision of other services by broadband providers nor to information providers at the edge of the network.” Taken to its extreme, this decision could mean that the FTC could not bring an enforcement action against Google for any of its services because it is now a common carrier in its provision of its “Google Fiber” broadband Internet access service. Google previously entered into settlements with the FTC regarding consumer privacy issues but now appears to be entirely exempt from Section 5. Additionally, the statutory limitations of Section 222 of the Communications Act would prevent the FCC from bringing an enforcement action against Google for privacy or data security violations associated with Google’s non-carrier services.

If this is the outcome, is there any federal agency (as opposed to the 50 states) with jurisdiction to enforce consumer protection issues? Could the FCC rely on other sections of the Communications Act to bring enforcement actions against Google? Stay tuned to the Privacy and Security Law Blog for answers to these questions as we provide updates on this decision, the FTC’s response, and the pending FCC proceeding....

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