

MW Forensic is a newsletter prepared on an ad hoc basis covering topical issues in the areas of business valuations and forensic accounting.

## New Victorian Law on Document Destruction

Victorian legislation has recently been introduced which makes it a criminal offence to destroy documents that are likely to be used in litigation proceedings.

The introduction of the *Crimes (Document Destruction) Act 2006* follows the Victorian Court of Appeal decision in *British American Tobacco Australia Services Ltd v Cowell (as representing the Estate of Rolah Ann McCabe, Deceased)* [2002] VSCA 197.

In this case, the Court held that the destruction of documents was not unlawful as the destruction occurred prior to commencement of litigation, and that the Court could only intervene where the destruction amounted to an attempt to pervert the course of justice or was a contempt of court.

Following this decision, a report was prepared by Professor Peter A Sallman, Crown Counsel for Victoria at the request of the Victorian Attorney General. This led to the introduction of the new legislation.

The Act commences on 1 September 2006 unless proclaimed earlier and inserts a new Division 5 in the *Crimes Act 1958*.

Under the new legislation, a person who knows that a document or other thing is, or is reasonably likely to be, required in evidence in a legal proceeding; and either:

- destroys, conceals or renders it illegible, undecipherable or incapable of identification;
- expressly, tacitly or impliedly authorises or permits another person to do so and that person does so; and
- acts with the intention of preventing it from being used as evidence in a legal proceedings.

is guilty of an offence.

Penalties include and liable to five years maximum imprisonment or a fine (\$62,886 for an individual and \$314,430 for a corporation).

The term “document” is defined under section 38 of the *Interpretation of Legislation Act 1984* and is interpreted widely to include any material dealt with including paper, electronic or image.

The above matters appear to apply equally to expert witnesses. Accordingly, experts should adopt a document retention policy.

Solicitors instructing experts should also address document retention issues in their instruction letters.

## Updated Commercial Disputes Booklet

Following recent changes effecting experts, we have updated our booklet – “Forensic Accounting for Commercial Disputes”.

Copies are to be forwarded to our list of litigation solicitors and barristers. If you wish to also obtain a copy, please contact us.

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## Draft Business Valuation Standard Released

The Business Valuation Special Interest Group Committee has drafted a submission to the Accounting Professional and Ethical Standards Board (APESB) for the establishment of a business valuation standard, which would adopt the International Glossary of Business Valuation Terms.

This was issued to and reviewed by members of the ICAA and CPA Australia. A final submission will then be forwarded to APESB. After APESB has completed its review we will see a resultant exposure draft.

The intention of the draft standard is to set the professional framework by which valuation engagements will be undertaken by members. Key points of the draft standard include:

### Professional Independence

In providing valuation services where there is an expectation of independence, a business valuer must be and should be seen to be free of any interest which might be regarded as being incompatible with integrity and objectivity.

In providing valuation services, a business valuer shall not act as an advocate in the issuance of reports for valuation engagements that have the expectation of independence and objectivity.

### Reasonable Care, Skill and Competence

In providing valuation services, a business valuer must apply due care and skill.

A business valuer should refrain from performing valuation services which he or she is not competent to carry out.

### Confidentiality

In providing valuation services, a business valuer must respect the confidentiality of information acquired in the course of his or her work and must not disclose any such information to a third party without specific authority or unless there is a legal duty to disclose it.

### Performance

A business valuer must ensure that there is a clear understanding between the client and the business valuer regarding the terms of the valuation engagement...

A business valuer should record in the valuation report (a) whether they have been engaged and have prepared the report as an independent valuation, (b) the scope of the valuation engagement and any limitations or restrictions on that scope, and (c) any material valuation assumptions”.

### Quality Control

A business valuer must comply with the requirements of APS 4 Statement of Quality Control Standard.

## Business Valuation Special Interest Group

Business valuation relates to the valuation of financial and intangible assets (such as contracts, brands and intellectual property), businesses, and securities (debt, equity, derivatives and hybrids). There are also plant and equipment and property valuers who specialise in specialised asset classes.

There have been numerous recent changes in accounting standards:

- IFRS standards involving business combinations, intangible assets, employee options and financial instruments require much more regular valuation of assets and liabilities;
- taxation (aspects of tax consolidation rely on market values); and
- corporate governance (remuneration plans are linked to market values).

In view of these changes and other factors (such as the absence of professional standards relating to the conduct of valuations), the Institute of Chartered Accountants in Australia established the Business Valuation Special Interest Group (BVSIG) in July 2005.

The principal functions of BVSIG are to:

- improve standards adopted by the business valuation profession, with reference either to international valuation standards or locally promulgated standards;
- provide guidance in relation to the practice of valuation by members of BVSIG; and
- influence debate and regulatory position on valuation-related issues.

BVSIG has already attracted over 600 members throughout Australia (including the three directors at Munday Wilkinson Pty Ltd).

In particular, a business valuer must ensure (a) staff have sufficient proficiency and training, and are adequately supervised and directed, and (b) each valuation engagement is adequately documented.

### Remuneration

A business valuer shall be remunerated for such services by way only of professional fees in accordance with the Code of Professional Conduct (section D and F6).

A contingency fee arrangement for valuation services requiring independence must not be entered into.

### Valuation Terminology

In providing valuation services, a business valuer is encouraged to adopt the definitions set out in the Glossary of Business Valuation Terms as appropriate and to the extent practicable ...

The technical aspects of the execution and reporting of the work undertaken have specifically been excluded from the Draft Standard. However, it is intended that technical standards will be drafted in the future to cover areas such as:

- minimum content and disclosures required in reports;
- the nature of the valuation opinion (i.e. limitations in scope);
- valuation methodologies; and
- sources and use of information, including forecasts.

## FLS submission outlines expert evidence concerns

The Family Law Section (FLS) of the Law Council of Australia submitted concerns expressed by practitioners and experts in the current operation of the rules to the Family Court Judges' Rules Committee in February 2006. In particular:

- Practitioners feeling constrained in suggesting to clients that they ought to obtain their own evidence.
- Reliance upon an (inevitably small) group of single experts increases the risk of over-reliance on expert opinion. In short, there is a profound danger in having experts decide cases.
- A frustration that practitioners cannot speak to experts to "explore" alternative factual scenarios and/or challenges to their reports ahead of trial, or to clarify their methodology or findings.

- Difficulties experienced by experts in obtaining clear joint instructions.
- The requirement that experts request things in writing and provide a copy to the other side creating greater paperwork and costs.

The FLS recommended to the Family Court Judges' Rules Committee the following:

- A broad distinction between "forensic" and "non-forensic" cases should be absorbed into the court process.
- "Non-forensic" cases generally appoint a single expert at an early stage with the probable enhancement of settlement prospects or, at least, significant reduction in the issues.
- In forensic cases the appointment of a single expert should be left open until the "trial looks inevitable".
- In such cases, the Rules/Case Management Guidelines ought make it clear that, in the event that parties have their own experts from whom they intend leading evidence, those experts must exchange reports, confer and report on their conference prior to the Pre-trial Conference. At that conference, the issue of expert evidence for the trial, including the appointment of a single expert if indicated, would be addressed. In the case of disagreement, the issue could be referred to a judge.

In our experience as single experts, we have found it difficult to act in situations where it is suspected or suggested that the records of the business do not reflect its true trading. In other words, some type of forensic investigation is required. Typically, in such cases, the two legal parties have difficulty agreeing on a joint letter of instruction or one party attempts to limit our role.

## Farewell to Lilian Hung

We say farewell to Lilian Hung who has been with us for 2 and half years as a forensic accounting consultant. For personal reasons, she is returning to Hong Kong in early August 2006. She will be missed.

Gerard Lim has been appointed as a forensic accounting consultant. Gerard has 6 years experience in chartered accounting and has an honours degree from Monash University.

## Munday Wilkinson – in its 7th Year!

On 1 July Munday Wilkinson commenced its seventh year of operation. In that time, we have completed hundreds of reports for numerous legal firms, providing expert witness services in the Magistrates Court, County Court, Supreme Court, Family Court and the Federal Court. We have been engaged by the following firms and thank them for their support. We look forward to being of assistance again in the future.

Abbott Stillman & Wilson	Grundy Maitland	Mason Sier Turnbull	Richard Calley
Adams Maguire & Sier	Hall & Wilcox	Maurice Blackburn & Cashman	Rigby Cooke
Aitken Walker & Strachan	Harwood Andrews	McCarthy Hoey	Robertson Gill
Allens Arthur Robinson	Hayes & Associates	McCluskys	Rogers & Every
Aloe & Co	Heinz & Partners	McCracken & McCracken	Rogers & Gaylard
Anthea Hayes	Henry Carus & Co	McKeon & Park	Rudd & Co
Anthony Petersen & Co	Henty Jepson & Kelly	McLellans	Russell Kennedy
Antippa Lawyers	Herbert Geer & Rundle	McNab McNab & Starke	Secombs
Australian Government Solicitor	Hicks & Oakley	Michael Maplestone	Serafini Hill
Baker McKenzie	Hill Legal	Michael Ruse	Slater & Gordon
Barry Fried	Hogg & Reid	MK Steele & Giammarino	Stephen A Canals
Battiatto Drane & Co	Holding Redlich	Middletons	Stephen Farmer & Associates
Bazzani Brand	Holt & McDonald	Mills Oakley	Susan Snyder
Beck Legal	Home Wilkinson Lowry	Minter Ellison	Tait Leishman Taylor
Berger Kordos	Hume Lawyers	MMR Legal	Tartaglia & Associates
Best Hooper	Hunt & Hunt	Moray & Agnew	Taussig Cherrie & Associates
BJT Legal	Hunter Newns	Neal Collin & Associates	Tischer Liner & Co
Blake Dawson	Issac Brott & Co	Nedovic & Co	TJ Mulvaney & Co
Brondolino	J A Middlemis	Neville & Co	Tolhurst Druce & Emmer-ton
Byrne & Clarke	Jane Baldwin	Nevitt & Ford	Tony O'Brien & Associates
Campbell & Shaw	Jane Curtis & Associates	Norton Gledhill	Tress Cox
Caroline Counsel Lawyers	Jansen Walsh & Grace	O'Farrell Robertson McMa-hon	Trumble Szanto
CE Family Lawyers	John Matthies & Co	Pearce Webster Dudgales	TSA Lawyers
Charlesworth Josem	Jones Newell	Pearsons	Warren Graham & Murphy
City Pacific Law Firm	Kellehers Australia	Phillips Fox	Webb Korfiatis
Clancy & Triado	Kelly & Associates	Plaza Legal	Westminster Lawyers
Clark & Toop	Kenna Teasdale	Privitelli Solicitors	Williams Hunt
Coadys	Kennedy Guy	Pryles & Co	Wilmoth Field & Warne
Comito & Co	Kennedy Wisewoulds	Remington Wright	Wilson
Cuddlipp Partners	Kenyon	Rennick & Gaynor	Wisewoulds
David Stagg Tonkin & Co	Kliger Partners		Zolis
Deacons	Klonis & Co		
De Marco & Co	Lamplugh McIntosh		
Denniston & Day	Lander & Rogers		
Desmond Dunn Dwyer	Ledermans		
Doyle & Considine	Lennon Settle Mazzeo		
Eales & McKenzie	Leo Dimos & Associates		
Ebsworth & Ebsworth	Lewis Walker		
Ellinghaus & Lindner	Lilley Dawson		
Farrar Gesini & Dunn	Logie-Smith Lanyons		
Farrell Lusher	Louis Rotman		
Fernandez Johnson	Macpherson + Kelley		
Fetter Gdanski	Maddens		
Fiona McGregor	Madisons		
Freehills	Madwicks		
Gadens	Malleson Stephen Jaques		
Galbally O'Brien	Mahoneys		
Garland Hawthorne Brahe	Maria Barbayannis & Co		
Giampiccolo & Co	Mark Walter		
Glezer Laneteri & Associates	Marks Freeman		
Goddard Elliott	Marshall & Dent		
Grice & Grice	Maeve O'Brien, Geoffrey Bon-sal & Associates		
GSM Lawyers			

### Further information

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