



LCAD HOSTS LEGAL EVENING

The Legal and Constitutional Affairs Division (LCAD) hosted an informal evening on February 26 for its friends and partners who have over the years contributed to and complemented its work. The bodies represented include the Commonwealth Magistrates and Judges Association (CMJA), the Commonwealth Parliamentary Association (CPA), the Commonwealth Legal Education Association (CLEA), the International Bar Association (IBA), and the Law Society of England and Wales.



Guests at the Legal and Constitutional Affairs Division's reception held in February.

The following day the Division held an Open Day for the Secretariat staff and invited external partners to view its work and explain its vision and plans for the future. Presentations were made by the four senior officers of the Division - Betty Mould-Iddrisu (Director), Cheryl Thompson-Barrow (Deputy Director and Head of the Law Development Section); Kimberly Prost (Deputy Director and Head of the Criminal Law Section) and Katalaina Sapolu (Deputy Director and Head of the Justice Section).

The Law Development Section demonstrated that it continues to assist countries in the removal of the jurisdiction of the Privy Council and establishing and strengthening of a final appellate court, whether nationally or regionally. In other areas such as trade, environment, intellectual property, company law, investment laws and technology laws, the Section noted the model laws developed by the Division and the training programmes provided for government officials to enable them adopt/adapt the model laws for their use. The Section's portfolio includes information dissemination and is the publisher of this LAWD newsletter. The Section also has responsibility for the Division's website which can be found at

www.thecommonwealth.org/law. Awareness was also raised on the main publication which serves as a tool for information dissemination, namely the Commonwealth Law Bulletin (CLB) - a bi-annual publication which documents legislation, law reform, judicial decisions and international developments, from various parts of the Commonwealth. The CLB celebrates its 30th anniversary this year.

The Criminal Law Section drew attention to its efforts executed in areas such as corruption and terrorism, money laundering, extradition, confiscation of asset and asset repatriation. **The Justice Section** gave details of its work in land and development, constitutional matters, privacy laws, freedom of information and the civil aspect of corruption. Focus was also given to programmes designed to provide access to justice in order to reduce poverty, thus fulfilling some of the Millennium Development Goals. The Open Day allowed the audience to gain a good understanding and appreciation of the work of the Division.

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UPDATE ON TECHNOLOGY LAWS FROM WITHIN THE COMMONWEALTH

Singapore to update technology law

A consultation paper on electronic contracting issues has been jointly produced by the Infocomm Development Authority (IDA) and the Attorney-General's Chambers (AGC) aimed at reviewing the Electronic Transactions Act (ETA). The consultation paper is the first in the three-stage public consultation exercise to be carried out this year. The second stage will address exclusions from the ETA under section 4 and the third stage will focus on secure electronic signatures and certification authorities. The production of these consultation papers is part of on-going efforts to provide a platform for industry and members of the public to share their views and to take into account industry trends and developments. Issues raised by the consultation paper include:

- party autonomy: consent to accept electronic communications and variation by agreement
- recognition of electronic signatures
- formation of contract: effectiveness of electronic communication and attribution
- time and place of dispatch and receipt
- automated information systems; and
- other contract issues such as incorporation by reference, provision of originals etc.

The proposed revisions will fine tune the ETA and bring it in line with international developments and on-going work by the E-Commerce Working Group of the United Nations Commission on International Trade Law. The step taken by the IDA and the AGC indicates the rapid pace of developments in technology as the ETA was enacted in July 1998 to create the legislative framework for electronic transactions in Singapore. The Act gives legal recognition, predictability and certainty to transactions on the

internet and facilitates electronic-commerce. It further provides for the legal recognition and usage of electronic signatures and electronic records, and also covers the duties and regulation of certification authorities and the duties of subscribers. The consultation paper can be found at: http://www.agc.gov.sg/site_map/div_lrrd_org.htm The laws of Singapore can be accessed at: <http://www.statutes.agc.gov.sg/>. Whilst it is envisaged that consultation for the overall project would be completed by the end of the year, the consultation date for the first phase ended on 15 March 2004.

Australia – Move to increase powers of spy agencies

The federal Government has introduced the Telecommunications (Interception) Amendment Bill 2004 in Parliament. The Bill seeks to give greater powers to spy agencies to intercept people's emails. It also allows warrants to be sought in connection with the investigation of a wider range of serious offences, including terrorism.

If the Bill is passed it will also:

- allow the recording of calls to ASIO public lines;
- amend the definition of interception to ensure that the protections conferred by the Interception Act keep up with technological developments. This will be achieved by allowing the definition to include reading and viewing, as well as listening to and recording a communication in its passage over the telecommunications system;
- ensure that the protections afforded by the Bill extend to all forms of communication passing over the Australian telecommunications system.

CORPORATE SOCIAL RESPONSIBILITY – A NEW PARADIGM IN BUSINESS STRATEGY

The conventional view that the role of businesses is simply to maximise profit is no longer plausible. There is no denying the significance of profit-making but equally noteworthy is the role of businesses in the economic and social development of society. Such acknowledgement is now pushing corporate social responsibility (CSR) into a position of priority on the international agenda alongside that of corporate and political governance.

The concept of corporate social responsibility is not new. It has evolved over several periods including the classical times, the medieval, mercantile, industrial and the corporate period. However, the current climate sees a split view of CSR. Whilst it is perceived by some as embodying philanthropic connotations, others opine that it serves as a new and good business strategy. Businesses with CSR reflective strategy tend to gain more than those without, even within unpopular industries such as tobacco. This is demonstrated in the positive impact on companies with CSR oriented plans such as increased sales, customer loyalty, enhanced reputation and popularity, among others.

Several international codes, such as the Global Reporting Initiative, the OECD Guidelines for Multinational Enterprises and the Global Compact have been developed to encourage businesses to incorporate CSR in their policies and practice. The codes serve as guidelines and are not legally binding. Consequently, companies are not obliged to comply with them and this is much to their inclination as proponents argue that to make the codes binding would be counterproductive as companies would resort to simply meeting the minimum standards.

In the face of an ever more complex global economy with continuous economic, social and environmental inequities, companies are now being required by stakeholders to be accountable for their performance. Such accountability must necessarily embrace CSR as a legally binding obligation. This would serve as the way forward. It would create international minimum standards from which companies cannot derogate and must apply in all their countries of operation.

International codes such as the Global Compact derive from international conventions. It incorporates principles in the areas of human rights, labour and the environment. Most countries have subscribed to these conventions but not all countries have passed the

enabling laws. This makes CSR difficult to monitor and enforce.

The corporate scandals of recent times clearly illustrates why CSR cannot be left solely to voluntary initiatives. There is evidence to suggest that some companies strengthen their CSR policies in accordance with their popularity level and depending on the monitoring capabilities of local stakeholders. A rise in the level of popularity sees a reduction in their CSR activities. The lack of incentive for increasing or maintaining CSR activities supports the view that CSR is nothing more than a business strategy.

The importance of good governance cannot be overstated and whilst not deviating from their own responsibilities towards society, national governments should take active steps towards developing policies and reforming their laws to ensure the binding nature of CSR. Such steps would no doubt require full consultation with stakeholders.

CSR is especially useful in countries where some international companies tend to operate in total oblivion to the anguish of the local community and the environment. Some governments have supported the initiative to the extent of appointing Ministers with duties to promote CSR. The UK is an example where the Minister for CSR has recently launched a draft global framework which details the government's approach to CSR. The draft focuses on encouraging action and progress to maximise the business contribution to social, environment and economic development. The draft framework can be viewed on www.dti.gov.uk/sustainability/. Other national governments might wish to proceed in a similar direction which is especially beneficial for less affluent countries.

Whatever view is taken, the objective of CSR remains consistent and has become a process through which mutual benefits could be derived between a company and its host country.

JAMAICA – OPPOSITION LEADER CHALLENGES THE JURISDICTION OF THE CCJ

Jamaica's Opposition Leader had launched a legal challenge to the jurisdiction of the Caribbean Court of Justice (CCJ). He wants the Supreme Court of Jamaica to rule on whether the CCJ should be the final court for Jamaica. Although the government has expressed its commitment to the CCJ as its final court of appeal, replacing the Judicial Committee of the Privy Council, the legislative measures proposed must await the ruling of the Supreme Court. This development is significant because Jamaica is a major player in the effort to achieve the inauguration of the CCJ.

TRINIDAD – OPPOSITION DEMAND FOR COMPREHENSIVE CONSTITUTIONAL AMENDMENT

For some Caribbean countries, constitutional reform is a necessary part of the process towards the removal of the jurisdiction of the Judicial Committee of the Privy Council and supplanting that with the CCJ as their final court of appeal. Trinidad and Tobago fall into this category where a majority vote is obligatory to amend the constitution. However, such majority requires the cooperation of the Opposition and the Opposition Leader has expressed that such amendment should not be limited to the CCJ but must cover broader ground.

JAMAICA – NEW BILL TO ESTABLISH TRADE STANDARDS BODY

The Senate passed a bill on 13 February to establish the Caribbean Community (CARICOM) Regional Organisation for Standards and Quality (CROSQ). The organisation will facilitate trade in the Caribbean Single Market and Economy (CSME) by taking responsibilities which include the harmonisation of standards, metrology, technical regulations and the mutual recognition of conformity assessment procedures covering goods and services produced or provided in the region.

The organisation's functions will also be to:

- encourage the mutual recognition of accreditation and certification systems which are based on internationally accepted criteria;
- facilitate the achievement of international competitiveness of regional goods and services by fostering a culture of quality in regional enterprises;
- support standards-infrastructure development at the national level; and
- provide guidance to community organs and bodies regarding matter within its competence, including dispute settlement

It is also expected that the organisation will promote awareness of standards and standards-related matters as well as consumer health and safety. Funding of the organisation will initially be from CARICOM Member Countries but it is envisaged that it will be self-funding in the future. The revenue will derive from fees received on the use of marks owned and operated by the organisation.

SOUTH AFRICA – AWARD OF DAMAGES FOR INTERNET DEFAMATION

A South African High Court has awarded damages of 75,000 Rands to an Eastern Cape lawyer for defamatory statements published about him on an internet chat site. This case is the first successful web libel suit in South Africa. It was alleged that the lawyer had made false and misleading submissions to the Supreme Court of Appeal during an appeal hearing for one of his clients. The judge regarded the publication of the allegation on the internet as "enormous".

BARBADOS TRIGGERS DISPUTE RESOLUTION MECHANISM UNDER UNCLOS

Barbados has sought the dispute resolution mechanism provided under the United Nations Convention on the Law of the Sea (UNCLOS) over a delimitation matter which arose with Trinidad and Tobago. Both countries are involved in negotiations relating to maritime boundaries and fishing agreements but there are issues which remain unresolved and which Trinidad and Tobago asserted would contravene the terms of its treaty with a third country -Venezuela. The treaty between Trinidad and Tobago and Venezuela purports

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to unilaterally appropriate to Venezuela and Trinidad and Tobago an enormous part of Barbados' and Guyana's maritime territory, as well as Guyana's land territory. Barbados was not party to the treaty and has held that it is not bound by it. Such usurpation is also contrary to international law and to the national interest of the countries concerned. UNCLOS creates a compulsory dispute resolution mechanism - the International Tribunal for the Law of the Sea (ITLOS) - based in Hamburg, Germany. Meanwhile, Barbados and Trinidad and Tobago are meeting to develop provisional arrangements for Barbadians fishing north of Tobago.

MALTA SIGNS UP TO 1996 PROTOCOL ON MARITIME CLAIMS CONVENTION

Malta has deposited its instrument of accession to the 1996 Protocol of the 1976 Convention on Limitation of Liability for Maritime Claims. The Protocol substantially increases the amount of compensation payable in the event of an accident. It also introduces a "tacit acceptance" procedure for updating these amounts. Malta's action is significant in that it is the tenth State to accede to the Protocol and this triggers the Protocol's entry into force 90 days from 13 February 2004, the date of Malta's accession. The Convention and Protocol are at www.imo.org

CANADA – COMPETITION TRIBUNAL GRANTS LEAVE TO BRING FIRST PRIVATE APPLICATION UNDER “REFUSAL TO DEAL” PROVISION

The Competition Tribunal, in January allowed a private party for the first time, to bring an application against another party under section 75 of the Competition Act. Under the section which is known as the “refusal to deal” provision, the Tribunal can compel a party to supply a product to a customer on usual trade terms where certain conditions are satisfied. For example, the customer must be substantially affected in its business or precluded from carrying out its business due to its inability to obtain adequate supplies of the product on usual trade terms. Also, the refusal to deal must have an adverse effect on competition in a market.

The applicant, Barcode Systems Inc. (BSI), a company involved in the selling, servicing, modifying and

upgrading of barcode equipment claimed that Symbol Canada (Symbol), a subsidiary of Symbol Technologies, a manufacturer of barcode scanners, had taken steps to ensure that its distributors did not deal with BSI, and this had a devastating effect on BSI's business to the extent that a receiver had been appointed. Symbol admitted that it had refused sale to BSI but gave several reasons for this which included allegations of BSI's misuse of Symbol's trademark and failure to meet standard trade terms. In granting BSI's application, the Tribunal determined the grounds on which a private application might be granted. This would occur where the Tribunal has reason to believe that:

1. the applicant is directly and substantially affected in its business by the alleged practice; and
2. the alleged practice could be subject to an order by the Tribunal under the relevant section.

Prior to the amendment allowing a private application, only the commissioner of competition can bring such action. Now that a private claim has been allowed to proceed beyond the leave stage, additional applications are bound to be initiated and this has generated a lot of interest in the business community as the decision heightens the potential exposure to antitrust litigation faced by companies operating in Canada. The Tribunal's record can be viewed at www.ct-tc.gc.ca/english/cases

CANADA – SUPREME COURT TERMINATES APPEAL PROCESS IN MERGER CASE

The Supreme Court of Canada has denied an application for leave to appeal brought by Canadian Waste Services Inc (CWS) in connection with its challenge to an order of the Competition Tribunal requiring it to divest a property acquired as part of a merger in 2000. The Court's denial of CSW's application for leave ends the appeal process in a case which represents one of the few instances in which the commissioner of competition has successfully challenged the transaction under the merger provisions of the Competition Act. It should be noted however that CSW is yet to divest its acquisition as the company has a pending application before the competition tribunal asking the tribunal to rescind or vary the divestiture order on the grounds that the circumstances that led to the order had changed. The proceeding can be viewed at www.ct-tc.gc.ca/english/cases/ct-2003-005/waste.html.

SOUTH AFRICA – COMPETITION COMMISSION MAY DIVEST MERGER ENTITY FOR NON-COMPLIANCE

The South African Competition Tribunal had upheld the decision of the Competition Commission that the applicant, Digital Healthcare Solutions (Pty) Ltd (DHS) failed to establish that it had substantially complied with obligations set by a conditional merger approval. This is a significant step, which could lead to the unbundling of the merged entity – a first for the South African competition authorities.

The successful respondents, along with the Competition Commission had been involved in a long running battle with DHS, the parent company over the failure of its wholly owned subsidiary (DH Switch) to comply with the merger conditions imposed upon it. The merger conditions were intended to address the fact that the proposed transaction would give rise to significant vertical integration concerns (principally foreclosure,) as both parties were dominant in the market for conveying claims electronically between medical practitioners and healthcare funders (the switching market), and in the practice management software market. To address these concerns the Commission ordered that if the merged company received a reasonable request from a healthcare switch entity, the company must integrate its practice management software packages with an application programme interface linked to the switch technology of the requesting entity.

The Commission issued a notice of apparent breach on the basis that DHS had failed substantially to comply with this condition. DHS took the decision to review and the tribunal upheld the notice of apparent breach. Subject to further appeal proceedings, the commission may elect to pursue the revocation of the merger or supplement its merger conditions. Alternatively, it might request the tribunal to impose an administrative penalty.

OECD REVIEWS PRINCIPLES OF CORPORATE GOVERNANCE

The OECD has released draft revised principles of corporate governance following a review of corporate governance developments in its member countries which includes the United Kingdom. The principles cover areas such as the rights and equal treatment of

shareholders, the role of stakeholders in corporate governance, disclosure and transparency and the responsibilities of the board of directors. The document can be found at:
www.oecd.org/document/26/0,2340,en_2649_201185_23898906_1_1_1_1,00.html

UNITED KINGDOM - A REVIEW OF DIRECTORS AND AUDITORS' LIABILITY

The Department of Trade and Industry (DTI) has published a consultation document relating to the reform of the law on directors' and auditors' liability. The document only addresses civil liability and does not address criminal issues such as fraud.

Under section 310 of the Companies Act 1985, companies are prohibited from exempting or indemnifying directors and auditors against liability for negligence, default, breach of duty or breach of trust in relation to the company. The consultation is seeking views on whether to:

- maintain the status quo;
- implement the Company Law Review recommendations by for example allowing a company to pay a director's legal costs upfront; and
- consider more radical proposals such as allowing companies to limit the liability of directors against claims for negligence.

OECD REVIEWS PRINCIPLES OF CORPORATE GOVERNANCE

The OECD has released draft revised principles of corporate governance following a review of corporate governance developments in its Member Countries which include the United Kingdom. The principles cover areas such as the rights and equal treatment of shareholders, the role of stakeholders in corporate governance, disclosure and transparency and the responsibilities of the board of directors. The document can be found at:
www.oecd.org/document/26/0,2340,en_2649_201185_23898906_1_1_1_1,00.html

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As regards auditors, the document seeks views on the feasibility of auditors contracting with their clients to limit their liability. The options here include, allowing:

- audit firms to limit their liability with clients, subject only to the general law of contracts;
- audit firms to limit their liability, with a cap set at a multiple of the audit fee;
- audit firms to limit their liability, with a cap set at a multiple of total fees paid to the auditor – including any non-audit services provided;
- audit firms to limit their liability, set as a multiple of the auditor's turnover; and
- audit firms to limit their liability at a fixed rate (for example, one rate for the Big Four firms and lower rates for the next tier of firms etc).

Consultation on this document ended on 12 March 2004. The document can be found at www.dti.gov.uk/cld/auditors_directors.pdf

UNITED KINGDOM – GOVERNMENT RESPONDS TO PROPOSALS ON COMPETITION LAW

The Department of Trade and Industry is proceeding to repeal the current exclusion for vertical agreements from the scope of the Competition Act. The

government had in January, published the bulk of its response to consultations but it delayed those relating to the exclusion of vertical agreements because of particular concerns expressed by the newspaper and magazine sectors. A 30 day consultation was given to address those concerns with the assistance of the Office of Fair Trading (OFT), an independent mediator. This is now completed and the industry has been encouraged to continue to seek advice from the OFT in considering whether to make changes to their agreements to achieve full compliance with competition law.

This step is being taken in order to bring the Competition Act of 1988 in line with EU Competition Law. Although the UK law implements EU law (i.e. Articles 81 and 82 which prohibits anti-competition agreements, decisions and concerted practices between undertakings and forbids the abuse of dominant position respectively) it excludes vertical agreements. Vertical agreements are agreements between firms at different levels of the supply chain. In the newspaper industry this would be the relationship between the publisher and the distributors to distribute to exclusive regional areas.

The legislative change will become operational on 1st May 2004 but a transition period of one year is being given so that the repeal will not take effect until 1st May 2005. Details are on www.dti.gov.uk/ccp/consultations.htm

Upcoming Activities

10 – 14 May 2004

Commonwealth Asia Regional Expert Group Meeting on
Draft Model Bill on Competition
Singapore, Singapore

21 – 25 June 2004

Commonwealth Asia Regional Workshop on Law and Technology
Colombo, Sri Lanka

18 – 20 October 2004

Commonwealth Meeting of Senior Officials of Law Ministries
London, UK

21 – 22 October 2004

Meeting of Law Ministers of Small Commonwealth Jurisdiction,
London, UK

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Please send enquiries and contributions to:

Cheryl Thompson-Barrow,
The Editor, LAWD

Tel: +44 (0)20 7747 6121

Fax: +44 (0)20 7747 6406

E-mail: lds-lcad@commonwealth.int

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