

Federal Court of Australia Sets Aside Order for Non-Party Discovery from the Russian Federation

The decision on appeal of the Full Court of the Federal Court in *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International NV* (2007) 157 FCR 558; [2007] FCAFC 43 has now been reported in the authorised Federal Court Reports (available online to subscribers to Lawbook).

The case arose out of a claim by Spirits and a related company in relation to the ownership of certain registered trademarks, including marks incorporating the words 'Stolichnaya' and 'Moskovskaya'. FKP, as the second respondent to the claim, filed a cross-claim against Spirits and the first respondent seeking the transfer or cancellation of registration of the disputed trademarks. (Related proceedings have been brought in other countries.) FKP is an economic entity existing under the laws of the Russian Federation. Another such entity, Federal Public Unitary Enterprise External Economic Union Sojuzplodoimport (FGUP VO), was joined as a second cross-claimant.

FKP and FGUP alleged that, prior to 1992, the disputed trade marks were owned by an entity existing under the laws of the former Soviet Union and that, following the dissolution of the former Soviet Union in 1992, the marks were wrongfully appropriated by certain individuals and ultimately came to be held by Spirits. Spirits sought discovery of certain documents from the Russian Federation pursuant to the provision of the *Federal Court Rules* permitting the Court in its discretion to order discovery from non-parties. The trial judge concluded that the Russian Federation was the 'real' party to the cross-claim brought by FKP and FGUP, and ordered that it should make the discovery sought and that, unless it did so, the cross-claim would be stayed.

The Full Court set aside the trial judge's orders. The Court noted that it had been conceded (and the Court apparently agreed with the view) that the trial judge had power to make an order for discovery against a non-party foreign state, even if

the foreign state was not the 'real' party to the litigation. However, the Court said that the trial judge did not 'act with the caution that the principled exercise of the discretion requires where there is an intrusion upon the sovereignty of a foreign state.' Even though the intrusion upon the sovereignty of the Russian Federation was only indirect 'and possibly only as a matter of perception' (in the sense that the only sanction for non-compliance was a stay of the cross-claim), 'comity dictated that caution be exercised before making the order'. The Court concluded that the Russian Federation should first be given the opportunity to provide the discovery sought voluntarily and in cooperation with FKP and FGUP.