

although the firm has since taken down its offending website content.

The new actions follow the successful prosecution last year of Gerard Malouf, the principal of a medium-sized personal injury firm based in NSW and Queensland.

The ADT found Mr Malouf guilty of five counts of professional misconduct in relation to the advertising of Gerard Malouf and Partners, publicly reprimanding him for his conduct.

place and in practitioner directories. Maximum penalties include a \$22,000 fine for each offence and loss of practising certificate.

Lawyers have long argued the NSW and Queensland bans disadvantage firms in those states, particularly those in border towns such as Albury. National firms are also prevented from taking a nationally consistent approach to advertising.

bring the profession into disrepute or encourage misleading or false advertising," he said.

"I've been saying for years that the way to get around these issues is to ban all advertising for lawyers except a simple statement of what they do and where they are."

Mr Mark said firms were "becoming more and more clever" by, for example, putting "Compen-

in fact charges are to be made for costs or disbursements, or the client has to pay costs should they lose.

Law Society president Hugh Macken said the draft guidelines "reflect our long-held view that legal advertising should be consistent across all areas of law and should prohibit any advertising that is inappropriate in content or that inappropriately incites litigation".

we believe we've struck the right regulatory balance".

In Victoria, Tasmania and South Australia, personal injury advertising is not prohibited, but all advertising is subject to consumer protection legislation and lawyers are bound by professional conduct rules that place restrictions on advertising conditional costs arrangements.

Qantas, Amcor actions cause concern

James Eyers
Legal editor

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Qantas and Amcor are understood to have been putting commercial pressure on group members to opt out of class actions against both companies, leading plaintiff lawyers and academics to call for the courts to more strictly control communications.

In the class action against Qantas and other airlines alleging a failure to include fuel surcharges when calculating agents' commissions, an opt-out notice was approved by the Federal Court in February. Group members had until last Friday to decide whether they would remain in the proceedings.

During the opt-out period, Qantas took a close interest in which travel agents were opting out of the action: *The Australian Financial Review* has seen an email that Qantas sent to certain group members, dated March 11, 2008, asking them to contact Qantas "if you would like us to send you a copy" of the notice.

But Qantas is understood to have gone further, asking some large travel agents who receive commissions from the airline to include in new contracts a clause requiring them to opt out of the proceedings.

"The agent and Qantas agree and acknowledge that commission (base or otherwise) is not payable on the fuel surcharge component of the price paid for international airlines tickets. The agent agrees to opt out of the proceedings," a copy of the clause reads in part.

Qantas did not respond to the *AFR's* written questions this week, which queried whether any travel agents were asked to include such a clause in new contracts.

But in a letter published in the *Travel Today* industry newsletter in September last year, Qantas's group general manager of sales and distribution, Rob Gurney, said the airline was not attempting to coerce agents out of the legal action and that "we



Qantas says that it is not trying to coerce agents to drop out of a class action over commissions.

Photo: REUTERS

cannot be expected to negotiate on commercial arrangements with parties taking legal action against us on issues relevant to those arrangements as if it was business as usual".

Steven Lewis, practice group leader at Slater & Gordon, which is running the case for the travel agents, said: "The class action provision provides for group members to make an informed decision as to whether they wish to remain part of the action, and what Qantas has done is use ancillary commercial relationships to persuade travel agents as to whether they wish to remain in the group or not."

Slater & Gordon will still pursue the case on behalf of group members that have not opted out, but will not ask the court to review the airline's conduct because no travel agent that opted out is willing to act in such an application.

Meanwhile, it is understood that Amcor, the subject of a class action relating to an alleged cartel with Visy in corrugated fibreboard packaging products, has also been asking

certain group members to opt out as new supply contracts are negotiated.

"We are aware that Amcor has settled directly with a number of large group members in the Amcor-Visy class action," said Bernard Murphy, the chairman of Maurice Blackburn, which is running the action for cartel victims.

An Amcor spokesman said yesterday: "Unfortunately, Amcor does not comment on matters before the courts."

A law professor at Monash University, Vince Morabito, said contact with group members should not take place out of the class action context "because it could lead to a number of unsavoury consequences" even if the companies were not providing misleading information to the group members.

"The individual class members are not likely to have the expertise and the knowledge of the litigation to be able to deal on equal terms with the defendants or their solicitors," he said. "If you are in a commercial relationship with the defendants, you

may not be in a position to negotiate with equal bargaining power."

Charles Wright, a partner at Canadian law firm Siskinds, said that Canadian courts took a strict approach on communication that was considered to be intimidating and that discouraged litigation by using the defendant's power. "The courts have clearly indicated their displeasure with that," he said.

Mr Murphy said that it was not appropriate for the "perpetrators of alleged illegal conduct to be having private conversations with the victims, part of which is to ask them to opt out of the proceedings".

"Courts need to take a strong stance in relation to conduct that undermines the utility of the class action mechanism. Class actions have provided a good system to date in Australia for consumers and businesses to recover their losses in the shareholder and cartel context. If defendants are able to individually deal with group members, the utility of the system is badly damaged and may be lost."

Hard work cracking the Magic Circle

Alex Boxsell

The heads of national law firms are studying the softening London legal market closely to determine the impact on local firms.

Allens Arthur Robinson managing partner Michael Rose will travel to London next week to meet the leading law firms and alumni, and gauge the state of the British economy. Though he is not aware of a recruitment decline in the United Kingdom, it is becoming harder for Australian lawyers to land jobs in traditional markets abroad.

"I think people are becoming a little more cautious about the environment and also I think positions in London and New York and other places are becoming a little harder to find," Mr Rose said. "We've seen a slowdown in the rate that the London firms are recruiting here, and we're seeing a slowdown at the rate at which our lawyers are leaving us to go overseas."

In Australia, legal work was shifting with the business cycle to areas such as insolvency and restructuring, but stayed healthy, Mr Rose said.

"In the banking and finance area, we're seeing a shift which reflects the fact that many of our clients who are refinancing need to go about it in different ways," he said.

Mergers and acquisitions lawyers were just as busy as last year, though for different reasons.

"A lot of assets are being sold by organisations that are facing different market conditions," he said.

"The shift in the economic conditions is keeping M&A buoyant."

In recent months, Minter Ellison and Blake Dawson partners have travelled to London and Mallesons Stephen Jaques' chief executive, Robert Milliner, goes this week.