Law Report

Christmas 2009

The Partners and Staff of Esplins wish all our clients a joyous Christmas and a happy and prosperous New Year.

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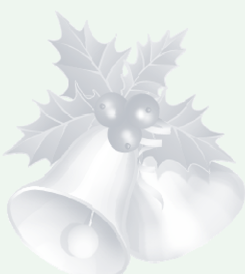

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SOLICITORS

SHARES, LIES AND FIDUCIARY DUTIES

Taking care of the little man is something of an Australian tradition. In the commercial world however, it's a concept that sometimes falls by the wayside with expensive consequences. One recent legal action highlights the need to look after the little man—especially when that little man is a minority shareholder.

Sometimes majority shareholders of private companies may take the view that they have no obligation to look after the interests of the minority investors. It's a principle that has its limits, particularly where the majority shareholder is also a director, as the Victorian Supreme Court recently found.

In *Jones v Jones (2009),* the Court held that a director-shareholder, when negotiating to buy out a minority shareholder, owed - and breached - a fiduciary duty to disclose that negotiations were in progress to sell the company's business.

> ***...majority shareholders of private companies may take the view that they have no obligation to look after the interests of the minority investors...***

David Jones and Jeffrey Jones together owned all the shares in the ITR Group with Jeffrey Jones being the majority shareholder and director. David Jones agreed to sell his shareholding to Jeffrey Jones for $575,000. A week later, ITR had sold its business for $4,050,000. Before contracting to sell his shares, David Jones had asked his colleague if there was a "deal in the wings" to sell the company or its business - a question that was answered in the negative.

At the hearing, it was alleged that the majority shareholder-director had breached his duty by failing to disclose the negotiations for the sale while procuring the minority shareholding. Equitable compensation of $963,710 was claimed as the amount denied by reason of the breach.

Jeffrey Jones' denials of the existence of the negotiations were held to be misleading and deceptive within the meaning of the Victorian *Fair Trading Act 1999*. Of more interest from a company law point of view, is that the Court found that the majority shareholder-director had also breached a fiduciary duty owed to the minority shareholder and ordered him to pay $963,710 in equitable compensation.

This case reaffirms the NSW Court of Appeal's finding in *Brunninghausen v Glavanics (1999)* that directors may owe fiduciary duties not only to the company, but also to its shareholders. Whilst the relationship between director and shareholder is not expressly recognised as a fiduciary relationship, it may be deemed to be so in certain circumstances.

Directors and director-shareholders need to be aware that information they are privy to may affect the interests of other shareholders. In dealings between shareholders where one shareholder is aware of a "deal in the wings", care must be exercised when determining the extent of disclosure. There can, for example, be a duty to disclose significant contracts and transactions that will otherwise affect the value of the company and therefore the share value. This decision remains open to interpretation in NSW.

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GOING FOR BROKERS

Federal Government Financial Market Reforms To Be in Place Next Year

In August this year, the Federal Government announced major changes to financial markets regulation which will result in the Australian Securities and Investment Commission being granted new powers. By late 2010, ASIC will be responsible for both the supervision and policing of Australian financial market participants.

Under the current regime, each of our financial markets supervises its own operations. For example, the Australian Stock Exchange (the ASX) monitors the conduct of market participants, ensures compliance with market and listing rules and refers suspected breaches of the law to ASIC.

Under the new regime ASIC will ultimately be responsible for both supervision and policing of market misconduct, such as insider trading and market manipulation. The proposed changes do not extend to the supervision and monitoring of listed companies on individual markets.

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There some serious implications to the new reforms.

Licensed operators, such as the ASX will no longer self-supervise trading in their own markets. As a result, brokers and other trading participants will be subject to ASIC's direct supervision and enforcement powers.

The proposed reforms are designed to enhance the integrity of Australia's financial markets and support other Federal Government initiatives aimed at reinforcing Australia as a credible and significant financial services hub. They will bring Australian markets into line with other leading jurisdictions that have - or are in the process of moving to - centralised or independent regulation.

Questions remain as to how far the proposed ASIC supervision will extend. Is it intended that the ASX will still admit market participants and supervise their operational capability, financial adequacy and client order processing, leaving ASIC to monitor only trading activities; or is it proposed that market participants will be solely regulated by ASIC, with the ASX having no supervisory role to play?

Giving ASIC the ability to monitor trading activity directly and the sole power over market participants should lead to more efficient and consistent market supervision and enforcement since a uniform approach to enforcement and supervision can be adopted in all licensed markets. On the other hand, there may be a fear among market participants that supervision by a central regulator who is remote from day-to-day operations could lead to a heavy-handed approach which may inhibit markets at a time when confidence is returning.

However, the changes may also be seen as addressing a perceived conflict of interest that arises under the current system - the ASX, for example, needs to balance its commercial interests with its supervisory obligations. The reforms are likely to clear the way for the licensing of new market operators. The Government has already indicated that this is one outcome of the proposed changes.

The operational capability of ASIC to effectively supervise markets is under question as is the level of Federal Government funding available for the purpose. Market supervision is both very expensive and time consuming.

Daniel Tysboulski

Call Daniel Tsyboulski for more information on the legal implications of financial market reforms.

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AULD LANG SYNE WORKCHOICES

New Year's Day 2010 - not just a new year and a new decade but the final curtain for the Howard Government's "WorkChoices" regime. It's successor, Labor's "Fair Work" system, gradually introduced changes from 1 July 2009 and by 1 January 2010 the *Fair Work Act 2009* will be operating in its entirety.

Among the most controversial aspects of WorkChoices was the restriction on unfair dismissal claims being brought by employees of companies with less than 100 staff. Now, in any small business of less than 15 employees, new employees can bring an unfair dismissal claim if they are employed for more than 12 months. In all other businesses, workers can make such a claim after 6 months.

The Rudd reforms also abolish Australian Workplace Agreements which allowed employers unwilling to be bound by an award to make one-on-one agreements with employees. These were often skewed heavily in the employers' favour. The reforms have simplified the federal and state awards systems, reducing total awards from some 3,000 to around 100. Employers will have to keep on top of changes to their industry awards because some workers will come under new awards.

The WorkChoices Australian Fair Pay and Conditions Standard will give way to ten National Employment Standards. These will allow more generous maternity leave and give workers who care for children under school age the right to request flexible working arrangements.

The Fair Work System also incorporates streamlined protections dealing with workplace and industrial rights, including protection against discrimination and unfair dismissal. Two new organisations - Fair Work Australia and the Fair Work Ombudsman - will regulate the system itself.

Brett Ritchie

TERTIARY STUDY EXPENSES NOW TAX DEDUCTIBLE-FOR SOME

Education is generally considered to be an investment in the future – whether paid for by the individual or the State.

In the recent full Federal Court of Australia decision in *Symone Anstis v Commissioner of Taxation,* a full time student receiving Youth Allowance claimed some self-education expenses as a tax deduction.

In considering the legitimacy of the deductions for expenses such as textbooks, travel and the depreciation of a computer, the Court had to examine whether the student's expenses were incurred in deriving Youth Allowance and whether they were proximate to the derivation of income.

The key element in the Court's support of the student's claim was that in order to be eligible to receive Youth Allowance, the student had to be enrolled in full time study at an approved institution and be making satisfactory progress.

As a result, the Court held that because the student had to be enrolled in full time study to receive income in the form of Youth Allowance, then she was entitled to claim deductions for expenses incurred in undertaking her studies.

The Court also found that these costs of full time study in these particular circumstances were not too remote to the derivation of income which is the usual reason why self-education expenses are generally not deductible.

Hamish Esplin

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Hamish Esplin has more information on this topic. Call him on (02) 9251 3999 or email HEsplin@esplins.com.au