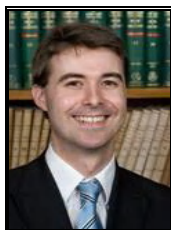


Corporations and Securities Law

Case studies by Dr Philip Bender



***NSX Ltd v Pritchard* [2009] FCA 584 (22 May 2009)**

“Calling” a general meeting (s 249D, s 249E, Corporations Act 2001 (Cth))

NSX Ltd received a request from a group of its shareholders to call a general meeting and consider resolutions to remove the existing directors and to elect new directors. These shareholders held at least 5% of the votes that could be cast at a general meeting. Section 249D(1), *Corporations Act 2001* (Cth) imposes an obligation on a company’s directors to “call” and “arrange to hold” a general meeting where requested to do so by members with 5% of the votes that are able to be cast at a general meeting or by 100 members who are entitled to vote at such a meeting. The directors must call a meeting within 21 days after a request and the members can call and hold their own meeting if this is not done (under s 249E).

After receiving the shareholders’ request, NSX Ltd informed the ASX of the directors’ intention to convene a general meeting. On the last day of the 21 day time limit, the directors resolved:

- to call a meeting (and fixed its time and place);
- to authorise the announcement of the meeting to the ASX; and
- to send notice of the meeting to shareholders.

The meeting was announced to the ASX on that same day. The following day, the shareholders who had made the request called their own general meeting pursuant to s 249E.

The Federal Court considered what was meant by “calling” a meeting and specifically whether the directors’ actions were sufficient to constitute “calling” a meeting where no written notification of the meeting had been given to members before the expiry of the 21 day time limit. Only if the directors had failed to “call” a meeting would the shareholders have validly exercised the power to call their own general meeting under s 249E.

Lindgren J held that, to “call” a meeting, the members must be sent a notice of the meeting, although His Honour did not need to consider whether a receipt of the notice by members is also necessary for a meeting to be “called”. This could be an important consideration in determining whether directors have complied with their duty under s 249D to “call” a meeting within the 21 day time limit after receiving a shareholders’ request. Only if directors have failed to comply with these requirements is the power of shareholders to call a meeting under s 249 is enlivened.

***PCH Offshore Pty Ltd v Dunn* [2009] FCA 553 (20 May 2009)**

Extraterritorial operation of duties of directors, officers and employees (ss 180-183, Corporations Act 2001 (Cth))

The applicant was an Australian incorporated company that carried on business both in Australia and overseas. The applicant alleged that the respondent used his position as branch manager in two countries where the applicant conducted business to misappropriate funds and equipment. It was alleged that the respondent had breached his duties under ss 180(1), 181(1), 182(1), 183(1), *Corporations Act 2001* (Cth) as well as breaching his employment contract and fiduciary duty to the company. These statutory duties are, broadly, as follows:

- Duty to exercise due care and diligence as a director or officer (s 180(1));
- Duty of a director or officer to exercise powers and discharge duties in good faith in the best interests of the corporation and for a proper purpose (s 181(1));
- Duty of a director, officer or employee to not improperly use their position to gain an advantage or cause detriment to the corporation (s 182(1));
- Duty of a director, officer or employee to not improperly use information obtained because of their position to gain an advantage or cause detriment to the corporation (s 183(1)).

The applicant sought leave to serve originating process on the respondent in the UK, as the respondent was ordinarily a resident of that country. Before leave could be granted, the Federal Court needed to consider whether it had jurisdiction over acts or omissions which occurred outside of Australia and which breached the statutory duties above. That is, the Court considered whether these statutory duties had an extraterritorial operation.

Siopis J held that these statutory duties were not limited to acts or omissions within Australia and they could apply to acts or omissions occurring outside Australia. Accordingly, the Court had jurisdiction in relation to the alleged breaches which arose from the respondent's acts which took place overseas. A director or officer (or employee) of an Australian company can therefore be held accountable in Australia for breaches of their statutory duties to the company, even where the relevant acts take place outside Australia.

***Grand Enterprises Pty Ltd v Aurium Resources Limited* [2009] FCA 513 (19 May 2009)**

Duty of disclosure of material personal interests and validity of board resolutions (s 191, s 195, Corporations Act 2001 (Cth))

The respondent gave its members and the ASX notice of a general meeting. The notice contained a proposed ordinary resolution to approve the issue of new shares and to vary a joint venture arrangement of the respondent. Certain board resolutions in support of the proposed actions were passed prior to the notice of meeting being published. The ordinary resolution was subsequently approved at the general meeting while proceedings opposing it were on foot.

One of the main contentions was that the board resolutions were invalid because of a breach of s 195(1), *Corporations Act 2001* (Cth). Section 195(1) requires a director with a material personal interest in a matter being considered at a directors' meeting

not to be present while the matter is being considered and not to vote on it (unless an exception applies). A director also has a duty, under s 191(1), to notify other directors of a material personal interest in a matter that relates to the company. Three directors who had disclosed interests relating to the respondent had been present at the board meeting in which the board resolutions were approved and so it was argued that there was a breach of s 195(1).

In considering the validity of the board resolutions, the Federal Court discussed the general duties of a director as a fiduciary and the specific duty in s 191(1). Barker J discussed the meaning of a “material” personal interest and outlined that it (at para 68):

“...appears to convey the idea that the interest must be of some substance or value, rather than merely a slight interest; that is, an interest of small value can be taken without further inquiry, and does not cross the materiality threshold”

Barker J also discussed the concept of a material “personal interest” as follows:

“The concept of a material personal interest also rather suggests that, on the face of it, the section does not apply to a conflict of duty and duty, where the director has a conflict of duties but the interest at stake is an interest of someone else, such as a beneficiary of a trust of which the director is trustee, or a company of which the director is also a director. While equity may assist to prevent this conflict, it may not be because a “personal” interest is being preferred. However, in both of those situations additional facts no doubt can lead to the conclusion that the director has a personal interest...”

Barker J applied these principles and held that the relevant directors’ interests did not need to be disclosed under s 191(1) because they did not amount to material personal interests. Accordingly, there was no breach of s 195(1). The fact that the directors had actually disclosed their interests at the board meeting did not place any duty on them to comply with s 195(1) as there was not requirement to disclose those interests in the first place. Importantly, the Court also noted that a breach of s 191(1) or s 195(1) would not, in any case, result in the relevant resolutions being invalid.

There was also a secondary argument that there was insufficient disclosure in the notice of shareholders meeting of the directors’ interests. For similar reasons, the Court held that the disclosure was sufficient because those interests were insubstantial or remote. Once again, the directors’ disclosure of interests in that particular board meeting did not place any additional disclosure requirements on them due to the nature of the interests.

Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 3) [2009] FCA 450 (6 May 2009)

Meaning of “managed investment scheme” in the context of litigation funding (s 9, Chapter 5C, Corporations Act 2001 (Cth))

A claim was made that a litigation funding arrangement between a solicitor, litigation funder and members of a class action suit constituted a managed investment scheme (“MIS”) that was required to be registered under Chapter 5C, *Corporations Act 2001* (Cth) but had not been registered (and accordingly did not comply with the requirements of that Chapter). The aim of this application was to restrain the class actions from proceeding further through the grant of an injunction.

The relevant question was whether the arrangement constituted a “managed investment scheme” under the first subsection of the definition in section 9, *Corporations Act 2001* (Cth) which reads as follows:

managed investment scheme means:

(a) *a scheme that has the following features:*

- *people contribute money or money’s worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);*
- *any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the **members**) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders)*
- *the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions)...*

The Court held that the members had not acquired rights to “benefits” produced by the litigation funding scheme as required by the first feature of an MIS. Specifically, the aim of the scheme was to recover, through litigation, damages which each member of the class action was alleged to have suffered. The Court outlined that the recovery of damages was not a “benefit” produced by the scheme because it arose from a cause of action which existed separately from that scheme. It was also argued that each member of the class action received benefits in respect of the scheme consisting of:

- an immunity from an adverse costs order;
- immunity from a requirement to provide security for costs; and
- funding for the legal costs of the proceedings.

Finkelstein J outlined that, to obtain a benefit under an MIS, an investor must acquire a right to some hoped for profit or gain the scheme will produce. In this case, the consideration provided by the litigation funder that allowed the members to participate in the litigation did not constitute a profit made by those members. Accordingly, there was no benefit for the members and so the first feature of an MIS was not present.

The proposed benefits in respect of costs also did not constitute relevant “benefits” because they were not produced by the scheme itself. The litigation funder had, however, acquired rights to benefits from the scheme. Specifically, the litigation funder acquired rights to a proportion of any amount for which the claims were settled or for which judgment was given.

The Court also examined the second feature of an MIS and held that the contributions made to the scheme were not “pooled” and were not used in a “common enterprise” between the litigation funder, the solicitor and the members to produce financial or other benefits for the people with interests in the litigation scheme. The meanings of “pooled” and “common enterprise” were discussed in detail in this context by the Court. It was not necessary for the Court to decide whether the third MIS feature was present (i.e. day-to-day control), although some comments were made regarding day-to-day control in a litigation context.

As all of the features that a scheme must have to constitute an MIS were not present, the relevant litigation funding scheme did not constitute a MIS. It is likely that litigation funding schemes, in general, would also fail to qualify as an MIS for similar reasons and, accordingly, would not need to be registered under Chapter 5C. The case outlines and summarises some important conceptual principles to consider when determining if a scheme is an MIS under the *Corporations Law* definition.

Betta Products (Australia) Pty Ltd v Crampton [2009] FCA 520 (20 May 2009)

Grant of leave to bring proceedings on behalf of a company (s 236, s 237, Corporations Act 2001 (Cth))

The following case is included simply to alert people to the case & the provisions it considers. As the judgment is based very much on specific complex factual issues, I have not gone into the reasoning as I have with the main body of the report.

In ***Betta Products (Australia) Pty Ltd v Crampton [2009] FCA 520***, the Federal Court considered, in an interlocutory proceeding, an application under ss 236 and 237, *Corporations Act 2001* (Cth). These sections permit the Court to grant leave to a person to bring, or intervene in, proceedings on behalf of a company. The Court considered the criteria for granting leave outlined in s 237(1) in the context of a share issue that arose as a consequence of an alleged breach of the directors' duty in s 182(1) and granted leave in the circumstances (s 182(1) outlines the duty not to improperly use a person's position to gain an advantage or cause detriment to the corporation).