30 Days Series 20 by Zhang Kaihui

KWM ANNUAL DIGEST OF JUDGMENTS AND PROCEEDINGS AGAINST DIRECTORS

Published or commenced in 2023

JUNE 2024

KING&WOOD MALLESONS
金杜律师事务所

INTRODUCTION

In this digest we provide a summary of key judgments and proceedings against directors in Australian courts and tribunals in 2023.

We summarise court judgments and proceedings instigated by the Australian Securities and Investments Commission (**ASIC**) as well as private litigants, workplace health and safety proceedings and environmental proceedings.

Our review of 2023 cases highlights that ASIC continues to take a "stepping stones" approach to cases involving breaches of directors' duties, whereby ASIC first seeks to prove that the relevant company has breached its legal obligations. ASIC then argues that a director breached their duties under the *Corporations Act 2001* (Cth) (**Corporations Act**), often the duty of care and diligence under section 180, by failing to prevent the relevant company from breaching its legal obligations when a breach was reasonably foreseeable. Interestingly, in one case, *ASIC v Wilson (No 3)* [2023] FCA 1009, there was no associated claim that the company itself was in breach, and instead ASIC relied on a *potential* breach of the Corporations Act by the company as evidence of a director's breach of his duties. This approach, which the Court accepted was permissible, is an extension of the "stepping stones" technique.

TIM BEDNALL
PARTNER, SYDNEY

EMAIL tim.bednall@au.kwm.com

MARY PETRIDIS
SOLICITOR, MELBOURNE

EMAIL mary.petridis@au.kwm.com

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ASIC v Australian Mines Limited [2023] FCA 9; *ASIC v Australian Mines Limited (No 2)* [2023] FCA 468	Breach of continuous disclosure by the company (s 674) with involvement by the Managing Director in breach of s 180; Director disqualified and ordered to pay a civil penalty
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***Hakea Holdings Pty Ltd v Neon Underwriting Ltd for and on behalf of Underwriting Members of Lloyds Syndicate 2468* [2023] FCAFC 34**	Contravention of duty of care and diligence (s 180) for personal benefit excluded ability to claim under Directors and Officers Liability Insurance
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Director is permanently banned from providing financial services and disqualified from managing corporations for five years	Director permanently banned from providing financial services and disqualified from managing corporations for five years
Director disqualified from managing corporations for five years due to his involvement in the failure of five companies and after engaging in illegal phoenix activity	Director disqualified from managing corporations for five years due to his involvement in the failure of five companies and after engaging in illegal phoenix activity

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CASE	OVERVIEW
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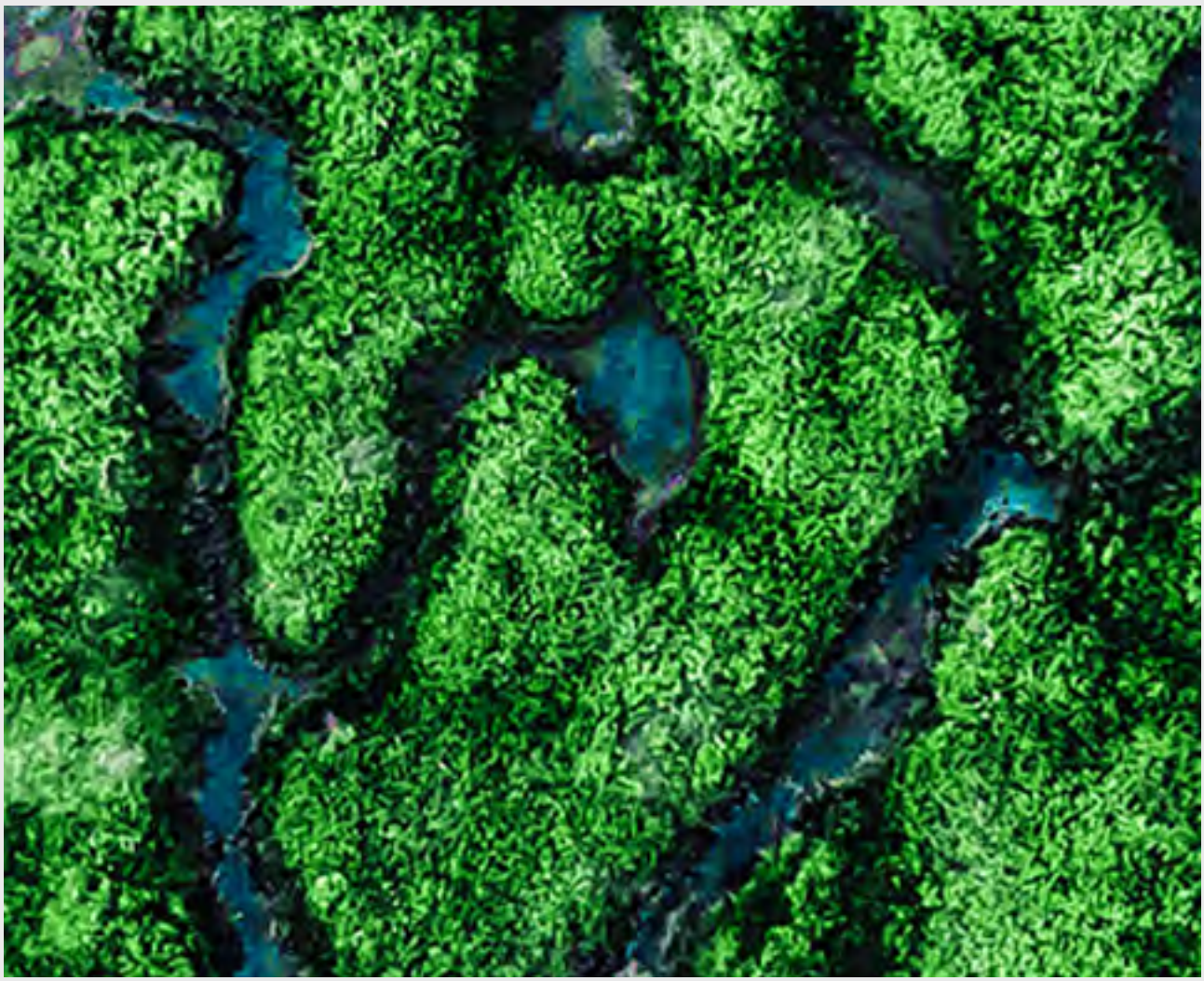
Environment Protection Authority v Crush and Haul Pty Ltd; Environment Protection Authority v Cauchi [2022] NSWLEC 113	Director liability; Environmental offences; Significance of prior offences; Reliance upon third parties; Fines imposed



COURT JUDGMENTS AND PROCEEDINGS: REGULATORS

ASIC v GetSwift Limited (Penalty Hearing) [2023] FCA 100

Record penalties against company and three directors for knowingly breaching continuous disclosure obligations (s 674) and duty of care and diligence (s 180)

In February 2023, the Federal Court handed down its largest ever penalty for contraventions of continuous disclosure obligations, ordering failed tech start-up GetSwift Limited (in liq) (**GetSwift**) to pay a record pecuniary penalty of $15 million. The initial liability judgment with 2,618 paragraphs also found that three directors of GetSwift contravened their duty of care and diligence and were knowingly involved in and caused or permitted GetSwift's continuous disclosure contraventions.

Former director, CEO and executive chairman, Mr Hunter, was ordered to pay a penalty of $2 million and disqualified from managing corporations for 15 years. Former director Mr Macdonald was ordered to pay a penalty of $1 million and disqualified for twelve years, and Mr Eagle, also a former director, was ordered to pay a penalty of $75,000 and was disqualified from managing corporations for two years.

GetSwift had announced to the market a series of agreements with enterprise clients for the use of GetSwift's company software-as-a-service (**SaaS**) platform, including agreements with Amazon, CBA and Yum Brands. However, these clients were only trialling, or contemplating a trial, of the GetSwift platform, and the agreements, when announced, were not ongoing or revenue generating. GetSwift's share price rose almost 800% and GetSwift also raised $100 million in capital from institutional investors in two placements, including $75 million in December 2017 when the company's share price was close to its peak.

The liability judgment held that GetSwift made numerous misleading statements in its announcements on ASX and breached its continuous disclosure obligations on 22 occasions between February and December 2017. Mr Hunter, Mr Macdonald, and Mr Eagle were found to have misled the market and were knowingly concerned in GetSwift's continuous disclosure breaches – Mr Hunter with 61 total contraventions, Mr Macdonald with 73 total contraventions and Mr Eagle with 8 contraventions.

The Court found that the contraventions were "the result of a plan and constituted deliberate conduct by the company, as part of a public-relations-driven approach to corporate disclosure executed by the company's most senior officers."

The Court described GetSwift as a company that "became a market darling because it adopted an unlawful public-relations-driven approach to corporate disclosure instigated and driven by those wielding power within the company." Neither Mr Hunter nor Mr Macdonald showed remorse or contrition, nor did they make any acknowledgment that they behaved improperly.

Link to judgment

ASIC v Select AFSL Pty Ltd (No 3) [2023] FCA 723

Breach of duty of care and diligence s 180; Managing and sole director disqualified for five years and ordered to pay a penalty

This Royal Commission case study dealt with the contravention of the conflicted remuneration provisions of the Corporations Act and the consumer protections provisions under the *ASIC Act 2001* (Cth) by Select AFSL Pty Ltd (**Select**), BlueInc Services Pty Ltd (**BlueInc**) and Insurance Marketing Services Pty Ltd (**IMS**). It also concerned the involvement of former managing and sole director of Select and BlueInc, Mr Howden, in these contraventions, as well as his breach of the duty to act with care and diligence.

In the 2022 liability judgment, the Federal Court found that Select, BlueInc and IMS engaged in unconscionable conduct when mis-selling insurance over the phone to 14 consumers, including First Nations consumers from remote communities whose first language was not English.

Having been made aware of problems with Select's marketing to Indigenous communities, and having done nothing in response, except informally warn a sales agent, the Court found that Mr Howden "turned a blind eye to the risks to consumers arising from the use of the Refer a Friend program and sales made to consumers within certain Indigenous communities."

The Court imposed combined penalties of $13.5 million on Select, BlueInc and Insurance Marketing Services, imposed a penalty of $100,000 on Mr Howden, and disqualified him from managing a corporation for five years. The Court noted that at times, although accepting responsibility for the contravening conduct, Mr Howden showed no real appreciation for what had occurred.

Link to judgment

ASIC v Australian Mines Limited [2023] FCA 9; *ASIC v Australian Mines Limited (No 2)* [2023] FCA 468

Breach of continuous disclosure by the company; Involvement by the Managing Director

In January 2023, the Federal Court found that Australian Mines failed to perform its continuous disclosure obligations in 2018 and ordered the company to pay $450,000. Proceedings were also brought against the Managing Director, Mr Bell, who failed to exercise his powers and discharge his duties with care and diligence. The Court ordered Mr Bell to pay a civil penalty of $70,000 and disqualified him from managing a company for two years.

Australian Mines admitted to failing to notify the ASX of material matters on three separate occasions, including failing to notify of the existence and quantum of a buyer's discount of 15% on the base price to be paid for cobalt and nickel in an Offtake Agreement with SK Innovation Co Ltd (**SKI**), conditional upon SKI exercising an option to acquire 19.9% of Australian Mines shares, at 0.12 AUD per share.

Mr Bell made various representations at presentations in London and Hong Kong, which he was aware or ought reasonably to have been aware were false or materially misleading, and which he failed to immediately correct when a query was raised by the ASX.

The representations related to securing finance for the construction of a processing plant, and the value of and conditions for the Offtake Agreement, including that the value of the Offtake Agreement was reduced by a buyer's discount of 15% on the base price to be paid. Mr Bell therefore caused Australian Mines to breach its continuous disclosure obligations.

Mr Bell admitted that he breached his duty of care and diligence and consented to declarations of contravention, the imposition of the civil penalty and disqualification from managing a company for two years. However, the Court noted that there was no suggestion of dishonesty in Mr Bell's conduct, and there was no direct personal benefit obtained by Mr Bell.

Link to judgment - Company

Link to judgment - Managing Director

ASIC v Kaur [2023] FCA 599

Two directors disqualified, for life and for 15 years, with one director found to have breached duty of care and diligence (s 180)

This case concerned the disqualification of two directors, one for life, and one for a period of 15 years, following the operation of an unregistered managed investment scheme without an AFSL license between March 2017 and December 2020.

A director of MKS Property Investments Developments Pty Ltd (**MKS**), Ms Kaur, gave advice to potential investors which led them to set up their own self-managed superannuation funds (**SMSFs**), roll funds from existing superannuation accounts and other sources into those SMSFs, and use the funds to invest with MKS. At MKS, funds were to be pooled with the funds of other investors and invested in property development and the investors were to be paid a fixed return on the funds they invested.

ASIC commenced proceedings when the investor monies were distributed by Ms Kaur to MKS for the purchase, development and sale of real property, to related parties, and to herself and her daughter for personal use.

The Court held Ms Kaur's conduct to be "very serious and very damaging to many members of the public", disqualified her for life, and permanently restrained her from carrying on a financial services business in Australia and operating an unregistered managed investment scheme.

The Court also found that Ms Kaur's husband Mr Singh, as a fellow director of MKS, contravened the duty of care and diligence in the relevant period by deferring all matters regarding the affairs of MKS to Ms Kaur. Mr Singh took no part in the management of MKS despite his role as director, and he did not monitor or supervise Ms Kaur.

The Court noted that reliance on another to perform tasks is only reasonable where there are sufficient monitoring systems in place so as to be aware of possible internal irregularities.

Link to judgment

ASIC v Daly (Liability Hearing) [2023] FCA 290

Breach of various duties including duty of care and diligence by former and current directors and an officer; All penalised and disqualified from managing corporations

Endeavour Securities (Australia) Ltd (**Endeavour**) was a registered managed investment scheme that raised approximately $17.3 million from 131 investors under three Product Disclosure Statements which did not comply with the Corporations Act's disclosure requirements. Of these investors, 127 were retail investors.

In breach of its conflict policy and compliance plan, and without member approval, Endeavour transferred approximately 95% of those funds to its parent company, Linchpin Capital Group Ltd (**Linchpin**). Linchpin acted as the corporate trustee of an unregistered managed investment scheme, Investport Income Opportunity Fund.

Linchpin subsequently used the funds to make various loans, including two unsecured and undocumented loans to a director and officer. Linchpin loaned a total of $125,000 as an unsecured loan to Mr Daly and a total of $40,000 as an unsecured loan to Mr Raftery.

The Court found that between 2015 and 2018, directors of Linchpin and Endeavour, Mr Williams, Mr Nielsen, Mr Raftery and Mr Daly (who was found to have acted as an officer of Endeavour), did not take all reasonable steps to ensure that Endeavour would comply with its compliance plan, obtain member approval for related party loans and issue Product Disclosure Statements that complied with the law. They failed to exercise care and diligence and did not act in the best interests of members of the Investport Income Opportunity Fund. Mr Daly and Mr Raferty were also found to have improperly used their position by receiving unsecured loans for personal use.

In finding a breach of the duty of care and diligence under s 601FD(1)(b), the Federal Court focused on the PDS non-compliance with disclosure requirements, the failure to comply with Endeavour's conflict policy and compliance plan, and the failure to obtain member approval to transfer the funds.

In January this year, the Federal Court ordered Mr Williams, Mr Raftery, Mr Nielsen and Mr Daly to pay a total of $390,000 in penalties. Mr Neilson and Mr Williams were banned from managing corporations for four years, Mr Raftery for three years and Mr Daly for five years.

Link to judgment

ASIC v Wilson (No 3) [2023] FCA 1009

Alleged breaches of directors' duties to exercise care and diligence (s 180); Breaches not established due to factual findings; ASIC relied on a potential breach of the Corporations Act by the company as evidence of a director's breach of his duties and the Court accepted this approach to be permissible

The respondent in this case, Frank Wilson, was the managing director and the largest shareholder of Quintis Limited (previously named TPF Corporation Limited) (**Quintis**). Two subsidiaries of the Company entered into agreements with dermatology company Galderma between 2011 and 2014 (**Galderma Agreements**). Mr Wilson referred to these Galderma Agreements between 2014 and 2017 in numerous ASX releases, despite Galderma terminating these agreements in December 2016. No disclosure of such termination was made to the ASX.

The Federal Court found that the alleged breach of the duty of care and diligence by Mr Wilson was not made out.

First, ASIC claimed that Mr Wilson had failed to tell the Quintis Board that the Galderma agreements were at risk of being terminated, and then that they had been terminated. However, the Court found that ASIC did not establish that a reasonable director with knowledge of the risk of termination would have informed the Board when it wasn't established that the Board could have done anything to prevent termination or minimise harm to Quintis' interests.

Secondly, ASIC alleged that Mr Wilson, in not disclosing the termination of the Galderma Agreements to the Board and the ASX, failed to ensure that Quintis did not mislead the market and exposed the Company to a risk of breaching continuous disclosure requirements. The Court held that ASIC could not establish that Mr Wilson had actual knowledge of the termination of the Galderma Agreements before a board meeting in February 2017.

Finally, ASIC claimed that in the alternative, Mr Wilson failed to make inquiries about the status of the Galderma Agreements before approving an ASX response in March 2017 which referred to Galderma as a customer. The Court did not accept that a reasonable director in Mr Wilson's position would have made inquiries about the status of the Galderma Agreements before approving the ASX response. Mr Wilson was acting reasonably by proceeding on the basis that he would have been informed if Galderma had terminated, or wished to terminate, the Galderma Agreements.

There was no associated claim that Quintis itself was in breach, and instead ASIC relied on a *potential* breach of the Corporations Act by Quintis as evidence of Mr Wilson's breach of his duties. This approach, which the Court accepted was permissible, is an extension of the "stepping stones" technique.

Link to judgment

ASIC v Bettles [2023] FCA 975

Alleged breach of duty of care and diligence (s 180) and duty to act in good faith (s 181); The Court was not satisfied that the director was involved in the alleged contraventions

In 2019, ASIC took action against appointed liquidator Mr Bettles on suspected illegal phoenix activities.

Mr Bettles was the appointed liquidator to 18 companies in the Members Alliance Group (**MA Group**) and Bradford Marine Pty Ltd from July 2016 to July 2017. ASIC alleged that he had breached the duties of care and diligence, good faith and use of position, which extend to liquidators as officers of the companies to which they have been appointed, because he aided and abetted the controllers of the MA Group to engage in illegal phoenix activity by diverting assets and revenues streams.

The Federal Court dismissed ASIC's case. The Court acknowledged that Mr Bettles had failed to provide adequate disclosure in his Declaration of Independence but considered this to be a minor infraction. While the Court acknowledged the "naivety" and the "complete lack of scepticism" of Mr Bettles as the liquidator, it was not satisfied that Mr Bettles was in some way involved in the contraventions alleged by ASIC.

Contrary to the high standard of care and scrutiny of liquidators imposed by ASIC, the Court generally took a view that "it is not every error of judgment that will be accounted negligence" and that the Court should not be quick to condemn a person in the difficult position of a liquidator. Also, the Court should not judge a liquidator's conduct "with wisdom born of hindsight".

Link to judgment

COURT DECISIONS: PRIVATE LITIGANTS

Crowley v Worley Limited (No 2) [2023] FCA 1613

Continuous disclosure breaches by the company; Whether conduct and knowledge is limited to conduct and knowledge of the board

This case, commencing eight years ago, was remitted from the Full Court of the Federal Court to the Federal Court for further reconsideration of the whole of the evidence following an appeal of a shareholder class action relating to Worley Ltd's (**Worley**) continuous disclosure obligations.

On 14 August 2013, Worley published an earnings guidance statement projecting a net profit after tax (**NPAT**) figure of over $322 million for FY14. This earning guidance was based on Worley's internal budget which projected an NPAT of $352.1 million for FY14. On 20 November 2013, Worley then published a correcting statement projecting the FY14 NPAT figure to be between $260 million and $300 million. Crowley, who acquired shares in Worley in October 2013, argued that Worley breached its continuous disclosure obligations and engaged in misleading or deceptive conduct causing himloss. In particular, he argued that Worley failed to disclose the fact that it did not have a reasonable basis for the August 2013 forecast.

At first instance, the Federal Court found that Worley did not lack reasonable grounds when issuing its earning guidance statement on 14 August 2013 and that it was reasonable to maintain this revenue statement until the revised statement was issued on 20 November 2013.

The Federal Court's judgment at first instance was appealed to the Full Court of the Federal Court. The Full Court of the Federal Court found in favour of the appellants, finding that the judge at first instance mistakenly focused on the conduct and knowledge of the board, as opposed to the conduct and knowledge of Worley when assessing Worley's liability. In that regard, the conduct and knowledge of other officers of Worley was relevant.

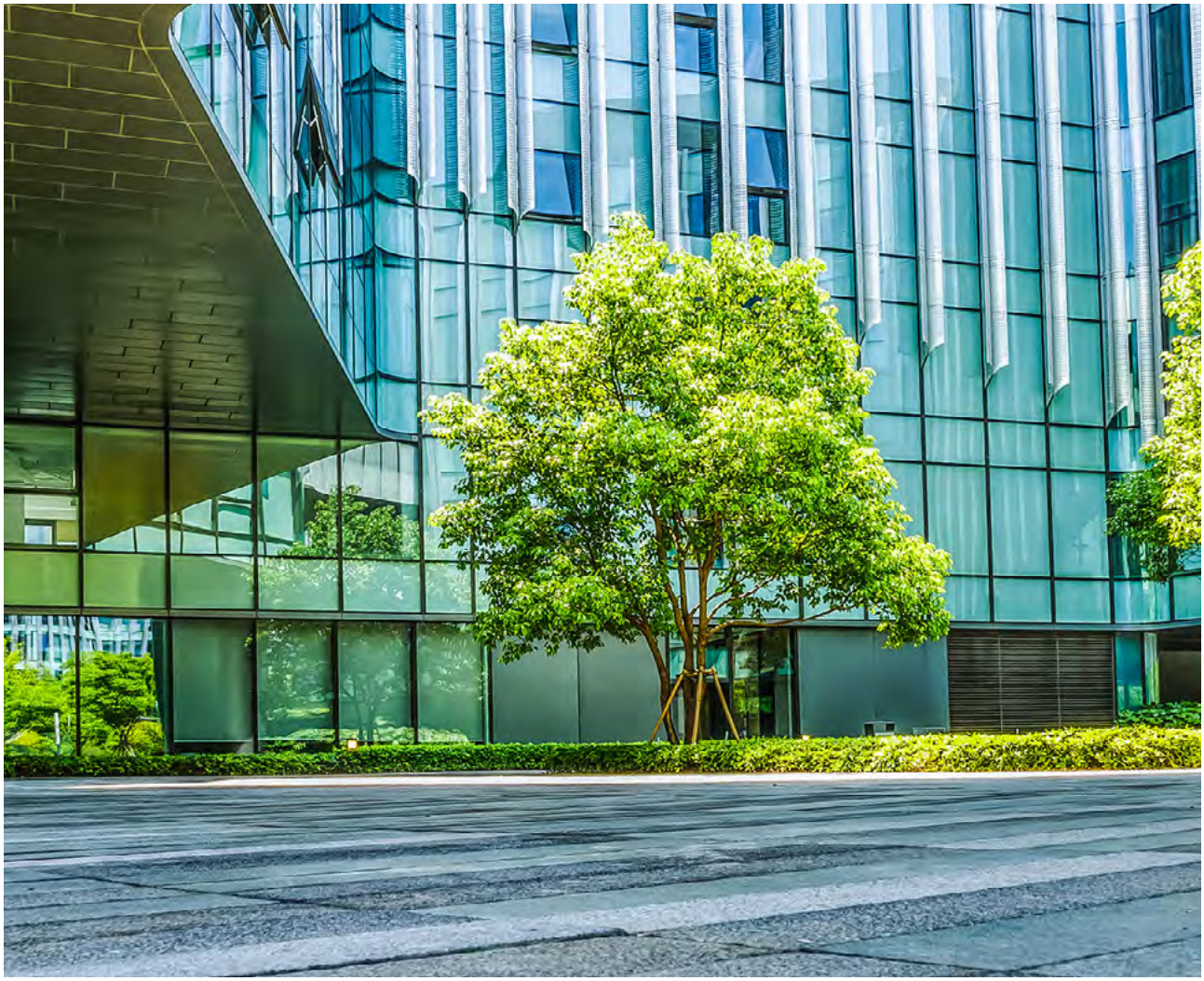
The Court clarified that the relevant issue is whether Worley had reasonable grounds for making the representations about the FY14 revenue forecast, not whether the board acted reasonably or unreasonably given the information made available to it.

Judgment on the remitter to a single judge of the Federal Court held that the August 2013 FY14 earnings guidance material was misleading or deceptive and made without a reasonable basis and that this should have been disclosed to the ASX as Worley was aware. However, the Court concluded that Crowley had not established that Worley's misleading conduct caused any loss or damage in relation to his interest in Worley, and no compensation was awarded.

While Crowley relied on the August 2013 FY14 earnings guidance when deciding to, Worley's contravention did not cause the market price for shares to be substantially greater than their true value or the market price that would have prevailed but for the continuous disclosure breach.

Importantly, the Federal Court confirmed that it was the conduct and knowledge of Worley that was relevant, and not merely knowledge of the Board.

Link to judgment



McFarlane as Trustee for S McFarlane Superannuation Fund v Insignia Financial Ltd [2023] FCA 1628

Alleged continuous disclosure obligation (s 674); Company and officers did not breach obligation as information was not material to the share price or future earnings of the company

The respondent in this case, Insignia Financial Ltd (**Insignia**), operated a substantial Australian financial service business and was acquiring other financial services businesses to build scale and then use its existing infrastructure, including its Research team, to service that increased scale.

The applicant, Mr McFarlane, alleged that between March 2014 and July 2015, Insignia contravened its obligation of continuous disclosure by failing to disclose to the market material information which Insignia and its officers were or ought to have been aware. The alleged information concerned problems with the existing operations, particularly the Research team, including historical instances of improper share trading, failure of compliance oversight, and inadequate resourcing of the Research team.

The Federal Court found that while Insignia and its officers were aware of the information (which the Court found to be true and not disclosed), none of this information constituted material information under the ASX Listing Rules.

The Court did not accept that investors acting rationally would consider that the disclosure of this information would be material to Insignia's future earnings or the price or value which an investor would pay for Insignia shares.

Link to judgment

Sapphire Holdings Group Ltd v Medina [2023] VSC 714

Alleged contravention of section 180 of the Corporations Act; No duty owed in the circumstances

On 4 December 2023, the Supreme Court of Victoria found that director, Mr Medina, did not breach his duty of care, skill and diligence when he executed contracts of sale for two properties on behalf of Carrington Property (Aged Care) Pty Ltd (**Carrington**), a subsidiary of Sapphire Holdings Group (**SHG**).

This matter concerned two properties purchased by Carrington in Donvale, Victoria, for a combined price of $7.2 million in 2015. Prior to settlement, Carrington nominated parent company SHG to take the transfers pursuant to nomination clauses contained in the contracts of sale. Prior to entry into the contracts, the SHG Board, including Mr Medina as managing director, resolved to sign a Heads of Agreement (**HOA**) which provided for the purchase of the two properties. Settlement of the contracts occurred in 2017.

SHG sold the two properties for only $2.515 million in 2019, and initiated proceedings seeking compensation for alleged breaches of Mr Medina's obligations to act with due care, skill and diligence in causing Carrington to enter into the contracts of sale. SHG argued first that Mr Medina signed the contracts on Carrington's behalf without first obtaining a valuation from a qualified valuer and secondly, that he signed the contracts without obtaining specific authorisation from the board of directors of SHG.

The Court found that Mr Medina did not owe SHG a duty to take reasonable care when he executed the contract of sale on Carrington's behalf, because when he signed the contracts of sale in Carrington's name, he was doing so in his capacity as an officer of Carrington, wearing the Carrington "hat". He did not owe any separate or additional duty to Carrington's ultimate parent, SHG, at that time.

Even if he did owe such a duty of care, the Court found that he did not breach it by either failing to obtain a valuation after the HOA had been executed, or by failing to obtain express authorisation from the SHG Board prior to signing the contracts of sale. It was not the practice of SHG to obtain third party valuations prior to entering into Heads of Agreement or contracts of sale to acquire land. Also, the Heads of agreement had been executed, SHG shareholders had been informed on a number of occasions of the fact of the purchase and its imminent completion, and no circumstance arose after the execution of the HOA which in and of itself would have alerted Mr Medina to the need to obtain a valuation.

The Court also noted that even if Mr Medina did obtain a market valuation, SHG could not establish that in such an event Carrington would not have proceeded with the transaction.

Importantly, the Court found that a director of a subsidiary, acting in that capacity, does not necessarily owe a duty of care, skill and diligence, to the parent entity.

Link to judgment

Hakea Holdings Pty Ltd v Neon Underwriting Ltd for and on behalf of Underwriting Members of Lloyds Syndicate 2468 [2023] FCAFC 34

Contravention of duty of care and diligence (s 180); Directors and Officers Liability Insurance

Mr McGrath was a director of Hakea Holdings Pty Ltd (**Hakea**) and was insured under a Directors and Officers Liability Insurance Policy (**Policy**) held by Hakea and underwritten by Neon Underwriting Limited (**Underwriters**).

In addition, Mr McGrath was the sole director, shareholder, secretary and general manager of Denham Constructions Pty Ltd (**Denham**). On 12 October 2012, Denham entered into a contract with Hakea to design and construct a residential aged care facility on property owned by Hakea in Hamlyn Terrace in NSW (**Project**).

Denham encountered financial difficulties. It was subject to a payment arrangement with the ATO, upon which it defaulted, and was receiving multiple statutory demands. There were various delays in completing its works and all substantive work on the Project had ceased by early November 2015. Hakea became concerned regarding the progress of the Project. In correspondence between Hakea and Mr McGrath (on behalf of Denham) Mr McGrath made no mention of Denham's financial troubles, which were the cause of the delays in the works being completed. Instead, Mr McGrath represented that the works would be completed pursuant to agreed timeframes.

On 1 December 2015, Hakea issued a notice to show cause under the contract, and that notice stated that Hakea had formed the view that Denham was no longer ready, willing and able to perform the contract. Denham failed to show cause to the satisfaction of Hakea, and on 10 December 2015 Hakea issued a letter of termination under the contract and terminated the contract. On 1 September 2016 the Supreme Court made an order for Denham to be wound up. The primary judge found (and the appellate judges in the Full Federal Court agreed) that Mr McGrath had breached s 180(1) by not disclosing to Hakea that Denham was in financial distress, and that Hakea had suffered loss as a result of Mr McGrath's breach of duty.

The appeal deals with the claim that Hakea sought to make under the Policy. The Policy contained an exclusion clause that excluded liability for the Underwriters for any loss in connection with a claim where a director or officer (1) gained any personal profit or advantage or received any remuneration to which he or she was not legally entitled; or (2) committed any dishonest or fraudulent act or omission or any wilful violation of law, if established by admission or by a final and non-appealable adjudication in a court.

The Full Federal Court regarded that the concept of 'personal advantage' as featured in the Policy exclusion is broad and is capable of including a commercial opportunity, or the avoidance of a negative commercial event, such as the risk of cancellation of a contract held by a wholly owned and controlled company like Denham. Ultimately, receiving the benefit of the continuation of the contract was the advantage for which Mr McGrath's wrongdoing was committed.

The Full Federal Court upheld the decision at first instance that the Underwriters were entitled to refuse the claim.

Link to judgment

GJB Building Pty Ltd v AI&PB Property Pty Ltd [2023] VSC 782

Breach of various director's duties by two directors including the duty of care and diligence (s 180) and the duty to act in good faith and for a proper purpose (s 181); Impugned Payments made by the directors to third parties, including related entities, breached the Shareholders Agreement

This case concerned, amongst other things, the internal management of Trimont Australia Pty Ltd (**Trimont Australia**), which later become CornoNero, the second Plaintiff.

CornoNero alleged, among other things, that three directors of CornoNero, Mr Breckenridge, Mr Ascenzo, and Mr Hartwig, breached various directors' duties by causing, authorising or acquiescing CornoNero to make 80 separate payments to third parties (**the Impugned Payments**), including to creditors of Mr Ascenzo and related entities. The Impugned Payments were made without authorisation, not at arms' length, and for purposes foreign to CornoNero's business and interests during a three month period in 2015.
The Court found that Mr Breckenridge, in his capacity as CEO, caused or authorised the Impugned Payments (in most cases) when he established the system for payments and approved all of them. Mr Breckenridge breached his duty of care and diligence and duty to act in good faith in the best interests of CornoNero. He was also found to have exercised his powers for an improper purpose and misused his position to gain an advantage for Mr Ascenzo, without a reasonable basis and without informing the Board or seeking authorisation.

The Supreme Court of Victoria found that the Impugned Payments were not made in accordance with the CornoNero Shareholders Agreement, which required that a decision to enter into an arrangement or incur a liability that was not at arms' length or that was with a related party, or to make a loan to a shareholder or other third party, be made by special resolution of the Board.

Mr Ascenzo, as a non-executive director, acquiesced in the making of the Impugned Payments as he had knowledge of, and involvement in the transactions and personally requested for payments to be made. He was held to have breached his duty of care and diligence as he was "making requests of the right people, knowing that it would be done and wanting it to be done." He was not a mere passive recipient of payments made and he "worked side by side with Breckenridge."

However, the Court did not accept that Mr Hartwig, who functioned as a non-executive director, had acted in breach of his directors' duties. He was not involved in the Impugned Payments and had no knowledge of them, and it could not be concluded that he ought to have made further inquiries but did not.

Link to judgment

Millsave Holdings Pty Ltd v Connective Group Pty Ltd [2023] VSCA 326

Alleged breach of the duty to act in good faith (s 180) and for a proper purpose (s 181); Breach of s 180 upheld on appeal but first instance finding of breach of s 181 overturned

This case was an appeal from a decision of the Victorian Supreme Court. The breach of directors' duties allegations arose from a restructure undertaken by the Connective Group of companies and the subsequent sale of shares in Connective to Macquarie Bank Ltd (**Macquarie**).

The largest shareholder of the Connective companies is, and has always been, Millsave Pty Ltd. Slea Pty Ltd (**Slea**), a minority shareholder held pre-emptive rights in the Connective companies.

In 2012, the Connective companies and their directors entered into discussions with Macquarie about the potential sale of an interest. Legal advice was obtained regarding a restructure proposal to avoid the need to first offer the shares to Slea, and the directors of the Connective companies resolved to enact the restructure plan. Following the restructure, the Connective companies and Macquarie entered into a share purchase deed, where Macquarie agreed to acquire a 25% interest in the Connective Group without Slea's knowledge.

In 2019, Australian Finance Group (**AFG**) entered into a binding conditional implementation agreement to merge with the Connective Group. The directors of the Connective Group sought to bring the approval proceeding to the Court prior to the Court hearing oppression and derivative proceedings brought by Slea.

At trial, the Victorian Supreme Court found that the restructure was undertaken for an improper purpose – to establish a structure to circumvent Slea's pre-emptive rights and enable the sale of equity in the Connective Group to Macquarie without enlivening those rights. As a result, each of the directors were in breach of the duty to act for a proper purpose under section 181.

The Court also found that the directors had acted in breach of section 181 by entering into the merger with AFG because the merger was pursued for the improper purpose of depriving Slea the opportunity to obtain the form of relief that was sought by Slea in oppression and derivative proceedings that were on foot. By entering into the share purchase deed, Slea's available relief was limited to monetary compensation, because the outcome of the sale process prevented the Court from being able to make orders rescinding the restructure and returning direct ownership of the Connective business to the entity in which Slea held shares.

On appeal, the Connective Group alleged that the judge erred in doubting that the Connective directors considered that the Macquarie transaction was in the best interests of the Connective companies. The Connective Group put forward a number of alleged purposes and benefits of the restructure and the Macquarie sale, including that the presence of Macquarie as a cornerstone investor provided material non-financial benefits to the Connective business.

The Supreme Court of Appeal found that the evidence put forward supported the view of the Victorian Supreme Court that the immediate and substantial or dominant purpose of the restructure was to circumvent the pre-emptive rights held by Slea. The directors therefore acted in breach of their duty in section 181.

However, the Supreme Court of Appeal also found that the trial judge was in error in concluding that the directors exercised their powers in entering into the AFG merger for an improper purpose. Accordingly, there was no breach of section 181 here.

Link to judgment

ASIC ADMINISTRATIVE PROCEEDINGS

Former Director of Magnolia Group Capital is disqualified for five years

ASIC has disqualified Mitchell Atkins, a former director of Magnolia Capital Group, from managing corporations for five years and banned him from providing financial services and engaging in credit activities for ten years.

The Magnolia Capital Group collapsed in 2022, owing unsecured creditors millions of dollars. From 19 September 2018 to 7 October 2022, Mr Atkins was an authorised representative of Australian financial services licensee Guildfords Fund Management Pty Ltd (**Guildfords**). ASIC's findings included that Mr Atkins:

- failed to act in good faith as a director by putting investor funds at risk, showed a lack of honesty and integrity by creating false documents, co-mingling investor funds and displayed a lack of competence, professionalism and financial management such that it is in the public interest that he be disqualified from managing corporations; and
- is not a fit and proper person to provide financial services due to him dealing in financial products without authorisation from Guildfords, making misleading and deceptive representations to investors about their investments and dishonestly retaining investor funds which were due to be repaid to investors.

The liquidators of the Magnolia Capital group of companies have reported a deficiency to creditors of between $40-50 million.

Link

Director is permanently banned from providing financial services and disqualified from managing corporations for five years

ASIC permanently banned Sydney-based director David Henty Sutton from providing any financial services, performing any function involved in the carrying on of a financial services business and controlling an entity that carries on a financial services business. He was also disqualified from managing corporations for five years.

ASIC's concerns arose out of Mr Sutton's conduct in making offers of investment in unlisted shares via McFaddens Securities Pty Ltd (**McFaddens**) to Australian and overseas investors in various companies. McFaddens' license was cancelled, and ASIC determined that Mr Sutton is not a fit and proper person to provide financial services when he, among other things:

- induced others to deal in financial products by making a statement that is misleading, false or deceptive or by a dishonest concealment of material facts;
- made false, misleading or deceptive representations in his capacity as a director of McFaddens and another entity, to potential investors;
- did not take reasonable steps to ensure McFaddens' representatives did not accept conflicted remuneration.

Link

Director disqualified from managing corporations for five years due to his involvement in the failure of five companies and after engaging in illegal phoenix activity

ASIC has disqualified Gene Robert Farrelly from managing corporations for five years due to his involvement in the failure of five companies. Since February 2012, Mr Farrelly was the director of five companies that entered liquidation. ASIC found that Mr Farrelly failed to meet his obligations as a director when he:

- operated two companies under a scheme that used self-managed superannuation funds (**SMSF**) for the benefit of investors that was contrary to the intent of the SMSF laws;
- allowed the scheme operated by the two companies to deceive Westpac into making loans to investors by using misleading financial transactions that falsely demonstrated their financial suitability, and
- misused funds belonging to one company by making payments to fictitious employees, and family members, which resulted in substantial loans being made to himself, and also used company funds for personal expenses.

ASIC also found that Mr Farrelly engaged in illegal phoenix activity. At the time of ASIC's decision, the companies owed a combined total of $20,105,830 to unsecured creditors including approximately $58,741 owed to the ATO.

Link

WORKPLACE HEALTH AND SAFETY PROCEEDINGS

SafeWork NSW v Miller Logistics Pty Ltd; SafeWork NSW v Mitchell Doble [2024] NSWDC 58; *SafeWork NSW v Miller Logistics Pty Ltd* [2024] NSWDC 119

Prosecutions for breaches of duty under the *Work Health and Safety Act 2011* (NSW); Company fined $450,000 for breach of duty; Prosecution against director failed

On 4 November 2020, a truck driver employed by Zentry Pty Ltd was working at a transport depot operated by Miller Logistics Pty Ltd (**Miller**) in Tamworth. The truck driver was working on foot assisting the driver of a B-Double trailer which was located in the loading/unloading area at the site. The truck driver was struck by a forklift driven by another worker and suffered serious injuries.

SafeWork NSW prosecuted Miller alleging that as a person conducting a business or undertaking (**PCBU**), it had a health and safety duty under s 19(1) of the *Work Health and Safety Act 2011* (NSW) (**WHS Act**) to ensure so far as is reasonably practicable the health and safety of workers while the workers are at work in the business or undertaking, and that it failed to comply with that duty by exposing workers to a risk of death or serious injury. SafeWork NSW also prosecuted the sole director of Miller alleging he had breached his duty under s 27(1) of the WHS Act, by failing to exercise due diligence to ensure that Miller complied with its duty or obligation under the WHS Act. Miller, then in liquidation, did not appear at the trial and the prosecution proceeded ex parte after a plea of not guilty was recorded on its behalf. The director pleaded not guilty to his charges.

The Court was satisfied beyond a reasonable doubt that Miller failed to comply with its health and safety duty by failing to take reasonably practicable measures which would have prevented or minimised the risk in question, including taking steps to separate forklifts and pedestrians, implementing and enforcing a traffic management plan, properly inducting workers on safety matters, and supervising workers to ensure they followed any safety measures put in place. Miller was ordered to pay a fine of $450,000.

The Court determined that SafeWork NSW failed to prove the offence against the director and the prosecution against the director failed. The Court found that the director was not a "hands-off" director in relation to work health and safety, but rather that he visited Miller's eight depots, took an active interest in ensuring health and safety was attended to, and contacted the appointed WHS Manager to fix safety issues right away if he observed a problem. The Court found that to run a corporation there must be a level of delegation, that there was no suggestion that the director had any reason not to place confidence in the WHS Manager carrying out his work health and safety duties, and the engagement of that manager was the primary process or resource which the director used to ensure that the PCBU carried out its duty under the WHS Act.

Link to judgment

Link to judgment - Sentencing

R v LH Holding & Hanna [2024] VSC 90

Workplace manslaughter charge was transferred from the director to the company as part of a plea deal; Company fined $1.3 million for offence and director placed on a two year community corrections order

In October 2021, a director of LH Holding Management Pty Ltd (trading as Universal Stone and Marble) (**LH Holding**) was operating a forklift with a raised load on a sloping driveway at a Somerton factory, when the forklift tipped over and landed on a 25-year-old subcontractor, causing fatal crush injuries.

WorkSafe Victoria initially charged the director with workplace manslaughter under the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**), in the first case initiated under the offence since it came into effect in Victoria in July 2020. Under that offence the director faced up to 25 years in jail. Under the terms of a plea deal with the State Director of Public Prosecutions, the manslaughter charge was eventually transferred to LH Holding. The director pleaded guilty to the alternative charge of breaching section 144 of the OHS Act, admitting LH Holding's manslaughter offence was solely attributable to his failure to take reasonable care.

WorkSafe Victoria submitted that it had been reasonably practicable for LH Holding to reduce the risk of serious injury or death by ensuring the forklift was driven with the load as low to the ground as possible, only driven in reverse down slopes or inclines, not driven across or turned on slopes or inclines, and only operated when other people were at a safe distance away. LH Holding's failure to ensure the forklift was operated properly constituted negligence because it fell well short of the standard of care that would have been taken by a reasonable person in the circumstances.

The Court stated that companies and their officers must understand that offences that involve negligent conduct in the workplace in breach of duties under the OHS Act, and that result in death, are serious and will attract substantial punishment that reflects the profound harm caused to the deceased and his or her loved ones.

The director was convicted and placed on a two-year community corrections order requiring him to complete 200 hours of unpaid community work and a course in forklift operation. LH Holding was fined $1.3 million for its offence (with the maximum potential fine being $18.5 million). The director and LH Holding were also ordered to pay $120,000 in pain and suffering compensation to the deceased worker's family.

Link to judgment

ENVIRONMENTAL PROCEEDINGS

Lowe (A pseudonym) v DPP [2023] VSCA 152

Environmental hazards; Pollution of atmosphere by company; Defence of due diligence for directors

This Victorian Supreme Court matter was an appeal of a pre-trial ruling relating to the prosecution of a company, **XYZ**, and its sole director, Lowe. Both Lowe and XYZ were charged with offences under sections 27A, 41 and 59E of the *Environment Protection Act 1970 (Vic)* (now repealed) (**EP Act 1970**). XYZ operated a business that processed recyclable materials including paper, cardboard and plastics. XYZ and Lowe were charged following a large fire at the site.

XYZ was deemed liable for the contraventions by virtue of section 62C, and Lowe was then deemed liable for the contraventions by virtue of section 66B. Lowe sought to rely on the due diligence defence contained in section 66B(1A). The Court found that it was not an oppressive requirement for Lowe to demonstrate that he exercised due diligence, despite the "double deeming" in the two provisions, as he could still demonstrate that he took all reasonable steps to prevent the contravention by the company.

Lowe could have demonstrated due diligence by directing the company to prevent or reduce the build-up of flammable materials, guarding against ignition of flammable materials by enforcing a no smoking policy on site or reducing or eliminating the presence of biological matter among recyclable materials, or directing the company to install sprinkler systems.

The Court also found that no specific "act or omission" of a corporation needs to be particularised or identified by the prosecution to enliven the section 66B(1) deeming provision, as "act or omission" are not words of limitation, but words of extension.

Link to judgment

Environment Protection Authority v Nath [2024] NSWLEC 10

Criminal director liability; Environmental offences; Due diligence not made out where director has complete control over commission of offences

Virendra Nath was one of two directors of BSV Tyre Recycling Australia (BSV) between 30 March and 26 July 2022, when BSV breached four conditions of its Environmental Protection Licence relating to the storage of waste tyres, contrary to section 64(1) of the Protection of the Environment Operations Act 1997 (NSW) (**POEO Act**). Mr Nash's liability was based on the "special executive liability" provisions in section 169(1) of the of POEO Act.

Factors which encouraged the EPA to personally prosecute Mr Nath included that the corporation had already been previously prosecuted for similar or other offences which did not result in compliance, the corporation had entered voluntary administration and Mr Nath had "almost complete control over the commission of the offences".

The Court found that Mr Nath could have taken further steps to prevent the commission of the offences and was therefore unable to avail himself of the due diligence defence in section 169(1). Mr Nath took steps such as holding meetings with his fellow director regarding the storage of waste tyres on the premises, arranging for excess waste tyres of be disposed of by a waste management company and obtaining finance and personal guarantees to enable the repair of BSV's tyre shredding machine. However, the Court found that Mr Nath failed to properly direct employees about the proper storage of waste tyres.

Mr Nath was ordered to pay fines totalling $65,000, pay the EPA's legal costs and publish a notice detailing his conviction at his own expense.

Link to judgment

Environment Protection Authority v Carbon MF Pty Ltd; Environment Protection Authority v Fair [2023] NSWLEC 120

Dual EPA prosecution of director and company; Bankruptcy of director

On 9 November 2023, Carbon MF Pty Ltd (**Carbon MF**) and Mr Mark Fair, the sole Director of Carbon MF were each convicted of two offences pursuant to the POEO Act after earlier both entering guilty pleas. Mr Fair was convicted by virtue of the section 169 special executive liability provision. The offences related to polluting land by dumping waste tyres, and then failing to comply with a clean-up notice issued by the EPA.

The Court found that the commission of the offence was solely within the control of both defendants, and no argument was made by Mr Fair that he had exercised due diligence.

The EPA chose to prosecute both Carbon MF and Mr Fair, despite the Court's view that "the primary culpability for the offending conduct rests on the corporate defendant" and Mr Fair being declared bankrupt.

Carbon MF was fined a total of $525,000, half of which was ordered to be paid to the EPA and ordered to pay half the EPA's costs. Mr Fair was fined a total of $57,375, half of which was ordered to be paid to the EPA and was also ordered to pay half of the EPA's costs.

Link to judgment

Environment Protection Authority v Elmustapha [2023] NSWLEC 143

Director liability; Environmental offences; Deregistered company; Guilty plea concerning supply of false or misleading information; Publication order made and fines imposed

Mr Elmustapha was the sole director of Southland Waste Pty Ltd (**Southland Waste**) between 25 September 2017 and 9 March 2018, when Southland Waste sent materially false and misleading emails to an environmental consulting company, amounting to six breaches of section 144AA(1) of the POEO Act. The EPA also initially alleged that the Director *personally* committed the breach (offences under section 169A(1)).

Despite intention not being an element of the offences, the financially motivated, deliberate nature of his actions pointed towards the offences being more objectively serious. Mr Elmustapha did not enter his guilty plea at the earliest possible opportunity, instead doing so after the EPA agreed to dismiss certain the six alleged breaches of section 169A as part of a guilty plea. Nevertheless, the resultant time and resource savings still justified a full 25% discount.

At the time of the proceedings, Southland Waste had been deregistered, and Mr Elmustapha was no longer the director or shareholder. Nevertheless, without evidence that Mr Elmustapha was no longer involved in the waste disposal industry, the Court was not ready to "wholly rule out" the possibility of him reoffending. Mr Elmustapha was fined $263,000 and ordered to pay the EPA's legal costs.

Link to judgment

Environment Protection Authority v Crush and Haul Pty Ltd; Environment Protection Authority v Cauchi [2022] NSWLEC 113

Director liability; Environmental offences; Significance of prior offences; Reliance upon third parties; Fines imposed

Mr Cauchi was the sole director of Crush and Haul Pty Ltd (**Crush and Haul**) during 2018, when the company carried on land-based extractive activity without the requisite environmental protection license, committing an offence against section 48(2) of the POEO Act. Mr Cauchi's liability for those offences was based on the "executive liability" provisions in section 169A(1) of the POEO Act.

Although Crush and Haul was found to have committed an offence recklessly, it did not necessarily follow that Mr Cauchi himself also acted recklessly. Evidence that Mr Cauchi failed to take all reasonable steps to prevent the commission of the offence by Crush and Haul proved an offence under section 169A. However, without further evidence, which the EPA did not adduce, this did not support a finding of *recklessness*.

Mr Cauchi had been issued a penalty notice for a minor offence at a different location six years prior, but this was not taken to be a significant record of previous convictions. Mr Cauchi now runs a business in a different industry, and this, combined with genuine remorse, resulted in a finding that he was unlikely to reoffend. Crush and Haul and Mr Cauchi were fined $225,000 and $22,500, respectively, and they were ordered to pay the EPA's costs.

Link to judgment

CONTACTS

TIM BEDNALL

PARTNER, SYDNEY

TEL +61 2 9296 2922
MOB +61 414 504 922
EMAIL tim.bednall@au.kwm.com

JOSEPH MURACA

PARTNER, MELBOURNE

TEL +61 3 9643 4436
MOB +61 400 394 382
EMAIL joseph.muraca@au.kwm.com

DIANA NICHOLSON

PARTNER, MELBOURNE

TEL +61 3 9643 4229
MOB +61 418 481 632
EMAIL diana.nicholson@au.kwm.com

JASON WATTS

PARTNER, SYDNEY

TEL +61 2 9296 2489
MOB +61 419 645 251
EMAIL jason.watts@au.kwm.com

MARY PETRIDIS

SOLICITOR, MELBOURNE

TEL +61 3 9643 4487
MOB +61 498 554 710
EMAIL mary.petridis@au.kwm.com

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