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# Modernisation of Australia's International Commercial Arbitration Law

*The Australian Federal Government is looking to promote Australia as a regional seat for international arbitration. To support this the Government is committed to ensuring Australia's arbitral law meets the needs of users. Dispute Resolution Partner, Andrew Robertson, explains.*

The Australian Federal Government, and especially the Australian Federal Attorney-General, has indicated that modernisation of Australia's international commercial arbitration law is a priority for the Government with an ultimate goal of attracting more international arbitration to Australia.

Australia has been a signatory to the New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (**New York Convention**) since 1975. Indeed Australia has gone so far as incorporating the text of the New York Convention into Australian law as a schedule to the *International Arbitration Act 1974* (Cth) (**International Arbitration Act**). The New York Convention is a significant international treaty enabling international arbitral awards to be recognised and enforced easier than some international judicial decisions. It is the cornerstone for modern international commercial arbitration law.

Australia has also already adopted the United Nations Commission on International Trade Law (**UNCITRAL**) *Model Law on International Commercial Arbitration* (**Model Law**), the 1985 text, as part of Australia's arbitral law, albeit presently with an ability to opt out and select another law to apply to the arbitration.

In November 2008 the Attorney-General announced a major review of Australia's International Arbitration Act as part of a commitment to developing Australia as a regional hub for international commercial dispute resolution.

That review has found support for Australia's arbitral law but has also identified improvements that could be made.

As a result on 25 November 2009 the Attorney-General introduced into Federal Parliament a Bill to update the International Arbitration Act to further develop Australia's arbitral law. As the Attorney-General said in his second reading speech, *"This Bill will not only assist Australian businesses in resolving their disputes but will ensure Australia is an attractive venue for parties from around the world to resolve their disputes."*

Significant developments in the Bill are:

- the UNCITRAL Model Law will remain the back-bone of Australia's legislation. However Australia will by and large now adopt the 2006 text of the UNCITRAL Model Law in lieu of the 1985 text
- the ability to choose a law other than the UNCITRAL Model Law will be removed
- the Bill clarifies the bases upon which recognition and enforcement can be refused, and what is the nature of public policy
- the operation of domestic arbitration legislation on international arbitrations is excluded

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- a statement of objects including that the purpose of the amendments is to facilitate trade and commerce by encouraging the use of arbitration as a method of resolving disputes. These objects are to be taken into account in performing operations pursuant to the International Arbitration Act. The Bill goes further to provide that in interpreting the legislation regard is to be had to the fact that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and that awards are intended to provide certainty and finality
- confirmation for the "avoidance of doubt" that an agreement in writing includes:
  - » agreements recorded in any form even if concluded orally
  - » electronic records
  - » an exchange of statements of claim and defence
  - » incorporation by reference
- provisions that arbitral process and documents in it are confidential. Australian common (case) law had determined that the arbitral process was not impliedly confidential but if passed the Bill will reverse this position.

These amendments reflect a willingness by the Government to take the legislative measures necessary to ensure that Australia's arbitral jurisprudence meets the needs of the international commercial arbitration community.

These amendments to Australia's international arbitral law are being matched in developments in Australia's domestic arbitral law. The Australian States propose to amend domestic arbitration legislation, which presently had been quite distinct in form, to also largely adopt the UNCITRAL Model Law (with some amendments reflecting the domestic nature of the arbitrations). This would by and large create a consistent jurisprudence for domestic and international arbitration in Australia.

Piper Alderman has partners qualified in both domestic and international arbitration who can assist with queries in relation to the drafting of effective arbitration agreements and the conduct of arbitral proceedings.

# Personal Property Securities Act – Implications for Reservation Of Title Suppliers And Consignors

*The introduction of the Personal Property Securities Act and the associated regulations will dramatically change the way security interests in personal property are dealt with. Corporate Partner, Craig Wappett, and Corporate Lawyer, Paul Henry, discuss some of the implications for reservation of title suppliers and consignors.*

The *Personal Property Securities Act 2009* (Cth) (**PPSA**) was assented to on 14 December 2009 with the new legislative package governing personal property securities to come into operation May 2011.

## Overview of the PPSA

The PPSA and the complementary regulations seek to address the current complexity of statutory and case law governing personal property securities. The PPSA seeks to create a system that is simpler, more consistent and cheaper for all parties to the transaction.

The PPSA applies to a transaction that, in substance, secures the payment or performance of an obligation. Under the new regime parties will generally be free to negotiate the terms of the security agreement without the need to satisfy prescriptive form requirements.

The PPSA will, with limited exclusions, apply to all security interests in tangible and intangible personal property. Personal property means any kind of property (including a licence) other than land, fixtures, water rights and certain rights, entitlements or authorities excluded by statute. The current priority regime under the *Corporations Act 2001* (Cth), other relevant statutes and common law will be replaced with a new set of priority rules. A new, online, 24/7 register will be established to record personal property security interests.

## Implications for ROT suppliers

Reservation of title (**ROT**) suppliers need to be aware of the changes to practice required under the PPSA. Of particular relevance is the power to register a security interest over personal property which operates through an ROT provision. A security interest under an ROT provision will generally constitute a purchase money security interest (**PMSI**) under the PPSA and upon registration (within the prescribed time frame) will enable the supplier to obtain super priority. Failure to register ROT security interests will jeopardise the enforceability of the security interest on insolvency and may mean that another secured party has priority even though the ROT supplier has title to particular property.

The PPSA will clarify the effect of securities taken over processed and commingled goods that are the subject of ROT provisions. Under the current law there is uncertainty as to enforceability of an ROT provision where the goods become an unidentifiable part of a larger product or mass as the result of being processed or commingled. Under the PPSA a security interest in the original goods continues in the product or mass.

## Implications for consignors

A consignor under a commercial consignment may register the security interest as a PMSI (within the prescribed time frame) and therefore obtain super priority. Failure to register such a security interest will jeopardise the enforceability of the security interest on insolvency.

## What do you need to do

There is some time until the new personal property securities regime comes into effect but now is the time to start considering the ways in which the new regime will significantly change how businesses operate. In particular, a full review of standard documents is required to ensure compatibility with the new regime. Businesses who are prepared for the incoming changes will be able to maximise business efficiency while minimising cost and risk.

> *"The PPSA seeks to create a system that is simpler, more consistent and cheaper for all parties to the transaction."*

# Class Actions In Australia – A Plaintiff's Paradise?

*First proposed in the late 1970s, it was not until 1992 that the Federal Court of Australia Act 1976 (Cth) was amended to introduce a statutory class action regime. Initially, plaintiffs were slow to adopt the new procedure. However, class actions are now commonplace in the Australian legal environment. Dispute Resolution Senior Associate, Florian Ammer, and Dispute Resolution Lawyer, Stephen Morrissey, discuss.*

Class Actions are a prominent feature of the Australian legal landscape. A regime of rules facilitating class actions was first proposed in Australia in the late 1970's. However it was not until 1992, through the introduction of Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**Act**), that a uniform statutory regime was implemented.

As at October 2009, 242 class actions had been commenced under Part IVA of the Act since its inception in 1992. Product liability and securities (or investor) claims comprise just under half of the class actions to date, with investor class actions comprising approximately 75% of recent annual claims filed.

Outside of the United States, Australia is now the place where a corporation is most likely to find itself defending a class action. According to some commentators, this is unsurprising because the Australian class action regime is more plaintiff-friendly than that in the US. Two main differences between the Australian system and the system in the United States are cited in support of this view:

- Under the Australian system, there is no initial certification procedure that requires the court to be satisfied that the proceedings are appropriately brought in class action form.
- Under the Australian system, there is no requirement that common issues among group members predominate over the individual issues (referred to in the United States as the "predominance requirement"). In contrast, the Australian system merely requires that there be at least one substantial common issue of law or fact.

In the majority of cases, where the Australian system deviates substantially from the system in the United States, it does so to the benefit of plaintiffs. One commentator has gone as far as to say that upon seeing the differences between the two systems, a plaintiff's lawyer from the United States might think that he or she had died and gone to heaven.

## Certification

Certification is required in the United States but is not required in Australia. To obtain certification in the US, the prospective representative plaintiff of the class action must show that there are common issues of law or fact, the claims of the class representative are typical of the claims of all class members, the class representative is an adequate representative of the class, the class is so numerous that joinder of individual claims is not feasible, the class action is superior to other methods of resolving the controversy and that the common issues amongst class members predominate over the individual issues.

By comparison, an Australian representative plaintiff may commence a representative action if:

- 7 or more persons have claims against the same person; and
- the claims of all of those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- the claims of all those persons give rise to a common issue of law or fact.

Thus whilst the certification procedure in the United States places the onus on the representative plaintiff to satisfy the court that the class action has been properly brought, the Australian regime assumes that the class action has been properly brought unless the defendant proves otherwise.

Despite the absence of a certification requirement in Australia, defendants may apply for an order from the court under section 33N of the Act, that a proceeding no longer continue as a class action in situations where it would be against the interests of justice to do so (e.g. where the cost of the class action is likely to exceed the cost of separate proceedings by each class member).

> *"Outside of the United States, Australia is now the place where a corporation is most likely to find itself defending a class action."*

## Predominance

There is no requirement in Australia that the common issues amongst class members predominate in number over their individual issues. It is argued that the predominance requirement in the United States makes it extremely difficult for mass tort and shareholder actions to proceed in class action form, as there are usually too many factual issues unique to individual class members to enable this requirement to be satisfied.

The American experience in asbestos exposure cases is illustrative. There are hundreds of thousands of Americans who have been exposed to asbestos and as a consequence have suffered injuries. However, because every such person will have had different levels of exposure, in different places, at different times, in different environmental conditions, with different levels of pre-existing medical conditions resulting in different injuries, the United States Supreme Court has ruled that such cases cannot be certified as class actions.

In contrast, without the predominance requirement, plaintiffs in Australia can bring class actions even where liability will ultimately turn on factors unique to each individual. However, section 33N of the Act also allows a defendant to seek an order from the court that the proceedings no longer continue as a class action on the basis that the class action mechanism is not an efficient or effective means of dealing with the claims of each of the class members.

## Class Actions and Piper Alderman

Piper Alderman has a well-established team of lawyers who are experienced in both prosecuting and defending class actions of all sizes and scopes.

In defending class actions, we have acted for a number of major international insurers including AIG and HIH.

We are currently acting on behalf of investors who acquired synthetic collateralised debt obligations (CDOs) through Lehman Brothers Australia Limited and for an Australian publicly listed company in defence of a class action where the allegations include breach of continuous disclosure requirements under the Corporations Act and the Australian Securities Exchange Listing Rules.

## Conclusion

The plaintiff-friendly nature of the Australian class action regime has unsurprisingly brought class actions to the forefront of the Australian legal landscape. With Australia now regarded as the place, outside of the United States, where a corporation will most likely find itself defending a class action, expertise and experience in the Australian class action system is now a more valuable commodity than ever.

# Directors' Duties – Current Perspectives

*Those who are asked to serve as senior officers of Australian companies need to be aware of how companies are managed in the Australian legal context. This is particularly important given recent Australian decisions which have highlighted the consequences of breaching the duties that directors owe to their companies. Corporate Partner Mark Poczman and Corporate Lawyer Vasyl Nair summarise the role of Australian directors and the duties imposed upon them.*

## The role of the director

All Australian companies must have directors. Private companies (in Australia called proprietary limited companies and identified by use of the abbreviation "Pty. Ltd.") need only have one director (who can also be the company secretary and sole shareholder of the company). Public companies (in Australia designated as "Limited" companies) must have at least three directors. In every case, a private company must have at least one director who ordinarily resides in Australia while a public company must have two directors who ordinarily reside in Australia.

The director's role can broadly be divided into two: a decision making function and that of taking action as agent for the company.

The power to make decisions for an Australian company is divided between the company in general meeting of members and the board of directors. The *Corporations Act 2001* (Cth) (**Act**) requires that certain matters must be decided in general meeting. For example, a public company must obtain the approval of shareholders in order to give a related party of that company a financial benefit. For companies listed on the Australian Securities Exchange (**ASX**), the Listing Rules of the ASX (**Listing Rules**) also require certain transactions to be approved by shareholders in general meeting.

Absent an applicable statutory or Listing Rule requirement, the division of decision making power between the board of directors and the general meeting will be governed by the company's internal management rules. These rules are found in the *replaceable rules* that apply to a company or the company's *constitution*. Replaceable rules are provisions of the Act that govern the internal management of a company unless they are displaced by the company (although some replaceable rules are mandatory for public companies).

The Act includes a replaceable rule that states that directors may exercise all of the powers of a company except any powers that the Act or the company's constitution require to be exercised in general meeting. In the case of private companies with a sole director/shareholder, a statutory provision of similar effect applies.

A company's constitution is an internal management document adopted by a company which amongst other things has contractual effect as between the company and each director and each company secretary. With some exceptions (for example, companies listed on the ASX), Australian companies do not need to adopt a constitution but it is common for them to do so. Private companies do not need to publicly disclose their constitution, even if they have adopted one.

An individual director may by the exercise of ostensible authority (being the apparent authority of the director as it appears to others) bind a company even though the action may be outside of that individual director's actual authority given by the constitution or replaceable rules, although to act in this way may expose a director to personal risk.

Directors of companies can either be executive or non-executive directors. Broadly speaking, executive directors are actively involved in the running of a company's operations while non-executive directors are not. Larger companies are more likely to have a mix of executive and non-executive directors. The Corporate Governance Principles and Recommendations of the ASX contain corporate governance guidelines for companies listed on the ASX, including dealing with the mix of independent and executive directors.

## Directors as fiduciaries

Directors have a fiduciary relationship with their company and it is this relationship that underpins all of the duties that directors owe to a company. Broadly, a fiduciary relationship is characterised by a person (the director) being appointed to act for the benefit of another person (the company) in circumstances where the appointment gives the appointed person powers which could be exercised to the detriment of the other person.

In order to prevent directors (in their capacity as fiduciaries) acting to the detriment of a company, they have imposed on them general law obligations of disinterested conduct in the form of duties and statutory duties imposed by the Act.

## General law duties

The general law duties owed by a director to a company include:

- the duty to exercise care and diligence in the exercise of the powers which form part of their office
- the duty to act in good faith in the interests of the company as a whole
- the duty to use their power for proper corporate purposes
- the duty to avoid situations in which they have (or may have) a personal interest that conflicts (or may conflict) with the interests of the company, and
- the duty to give adequate consideration to matters for decision and to keep decisions unfettered.

## Statutory duties

The statutory duties of directors that supplement the general law duties described above include:

- the duty to exercise their power and discharge their duties with reasonable care and diligence (broadly the same as the standard imposed on directors under general law)
- the duty to exercise their power and discharge their duty in good faith in the best interests of their company
- the duty to exercise their power and discharge their duty for a proper purpose
- the duty not to gain an advantage for themselves or someone else or cause detriment to the company by improper use of their position or by improper use of information gained from their position, and
- the duty to disclose any material personal interest they may have in a matter that relates to the affairs of a company.

## Insolvent trading

A director also has a statutory duty to prevent a company from incurring a debt while a company is insolvent or if it would become insolvent by incurring that debt, while that director had reasonable grounds for suspecting that the company was insolvent or would become insolvent as a result of incurring that debt. As defined by the Act, a company is insolvent if it cannot pay all of its debts as and when they become due and payable. As presently formulated, this statutory duty may prevent directors from restructuring a poorly performing company outside of formal external administration (which can be costly and complex).

In order to overcome this issue, the Australian government has recently (19 January 2010) released a consultation paper which looks at a series of options for reform to give some protection to directors seeking to help their ailing companies. Amongst the options being considered are a modified "business judgment rule" enabling directors to balance creditors' and members' interests. The period for submissions ends in March 2010 and we would expect draft legislation to follow sometime after that.

## Who owes these duties?

A person may owe general law duties and statutory duties to their company even if they do not hold the office of director. General law duties are owed by senior executive officers as well. Similarly, in a statutory context, some of the duties owed by directors are also owed by 'officers'. An officer is defined by the Act to include any person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the company, and any person who has the capacity to affect significantly a company's financial standing.

*"As the principal decision making and executive organ of a company, directors and senior officers also owe specific duties in a wide variety of legal contexts..."*

In the recent *Jamies Hardie* case, the general counsel and chief financial officer of a company were each held to be officers of the company on the basis that each participated in decisions that affected the whole or a substantial part of the business of their company, resulting in significant personal exposure for those persons. Click here for recent articles by this firm on that important case.

Even those duties expressed to be owed only by directors (for example, the duty to prevent insolvent trading, mentioned above), may also be owed by persons not formally appointed as directors. The statutory definition of 'director' includes shadow directors (that is, persons not validly appointed as directors but in accordance with whose instructions or wishes a board is accustomed to act). It also includes alternate directors and those acting de facto as a director.

## Breach of duties and removal of directors

A director who breaches a general law or statutory duty owed to a company may face court action by the company (or in certain circumstances, by the shareholders) to claim various remedies which could include injunctions, damages and an account of profits. That director may also face action by the corporate regulator, the Australian Securities and Investments Commission (**ASIC**). ASIC can itself apply to court for various orders including disqualification orders and pecuniary penalties. In the *James Hardie* case, at ASIC's application, disqualification orders were imposed for periods ranging from 5 to fifteen years and pecuniary penalties imposed for amounts up to $350,000. Criminal charges can also be brought against directors who breach certain statutory duties.

The director breaching his duty may also be removed from office and have his or her service arrangements terminated. The Act contains a replaceable rule enabling members of the company to punish a director by removal from office (unless in the case of private companies that rule has been displaced by the company's constitution; for public companies the rule is mandatory).

## Other duties

As the principal decision making and executive organ of a company, directors and senior officers also owe specific duties in a wide variety of legal contexts, including environmental, occupational health and safety, taxation and trade practices matters. Piper Alderman regularly advises directors on their responsibilities in a variety of contexts and has partners well qualified to assist with queries in relation to this important and complex area of corporate law.


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