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PA e-bulletin

# Piper Alderman Legal Update

## Lionsgate Australia v Macquarie Private Portfolio Management: Enforcing pre-bid takeover agreements through the courts

*Simon Morris*

**Dispute Resolution partner, Simon Morris, discusses the recent decision of Justice Austin of the New South Wales Supreme Court dealing with the powers of the Takeovers Panel and the ability of Courts to hear proceedings affecting private rights during the bid period of a takeover.**

Section 659B of the *Corporations Act* (the **Act**) prevents persons commencing proceedings in relation to a takeover bid or a proposed takeover bid before the end of the bid period. A proceeding in relation to a takeover bid means any proceeding taken or to be taken as part of, or for the purposes of, the bid.

Section 659B of the Act forms part of a legislative scheme intended to improve the process whereby takeover disputes are determined and create a more competitive market by making the Takeovers Panel the main forum for the resolution of disputes during the bid period. The Panel, while not having powers of a Court to determine legal rights, is invested with the jurisdiction to declare conduct in the course of a takeover unacceptable and to make orders consequential upon a declaration of "unacceptable circumstances".

The question for determination in *Lionsgate* was whether, having regard to the limitations imposed by the Act on the right to commence actions during a bid period, a bidder under a takeover offer may commence court proceedings for specific performance of a shareholder's contractual undertaking to sell into the bid.

The facts of the case were these:

> Macquarie approached Lionsgate inviting it to acquire its shares in Magna Pacific (Holdings) Limited (**Magna**), a media distribution company listed on the Australian Securities Exchange.

> Macquarie held 11.23% of the issued capital of Magna.

> Lionsgate rejected Macquarie's invitation to acquire a minority stake but expressed a willingness to acquire Macquarie's shares should Lionsgate be successful in acquiring all the issued capital of Magna through an off market bid.

> Lionsgate and Macquarie entered a pre-bid agreement whereby Macquarie agreed to sell its shares in Magna into Lionsgate's bid should such a bid be made.

> Macquarie was to be relieved of its undertaking to sell if within five days of the posting of Lionsgate's Bidder's Statement a "higher offer" was made for shares by a competing bidder.

> Lionsgate announced a cash offer for all Magna shares of $0.32 per share and a Bidder's Statement was posted to shareholders. Within the five day period Magna and a third party, destra Corporation (**destra**), announced an intention whereby destra would, through a Scheme of Arrangement, acquire all the shares in Magna on a basis valuing Magna's shares between $0.38 and $0.41 per share.

> Macquarie informed Lionsgate that it no longer considered itself bound by its undertaking to sell on the basis that the proposed destra/Magna scheme constituted a "higher offer".

> Lionsgate joined issue and commenced proceedings seeking an injunction restraining Macquarie dealing with its Magna shares in a manner contrary to the pre-bid agreement and specific performance of Macquarie's undertaking to sell into Lionsgate's bid.

> Macquarie resisted the injunction relying on Section 659B of the Act to argue that the Court did not have the ability to hear the matter during the bid period because the proceedings were in relation to an action taken as part of the bid.

Austin J held that the Court's powers were not curtailed and granted Lionsgate its injunction for the following reasons:

> The underlying legislative policy for making the Takeovers Panel the principal forum for the determination of takeover disputes during the bid period was not evidenced in this case: this case was about the enforceability of a private contract in respect of the sale of shares. The agreement, while relevant to the takeover, did not affect whether the takeover bid should be allowed to proceed.

> The issue to be determined, being one of contractual interpretation, was a matter in

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which the Court had specialist expertise and could deal with expeditiously and as such it was the appropriate venue for resolving the dispute.

> In the absence of a clear intention, legislation should not be interpreted so as to interfere with fundamental private rights. The right to performance of a contractual bargain was such a right.

> Similarly, in the absence of a clear intention, legislation should not be interpreted so as to interfere with the jurisdiction of the Courts. Legislation preventing the commencement of proceeding was akin to legislation that purports to deprive the Courts of their jurisdiction.

> The proceedings were not "in relation to" the making by Lionsgate of a takeover offer but rather were in relation to the enforcement of a contractual obligation.

Lionsgate argued that the provisions of the Act limiting the ability of parties to commence proceedings can only apply to actions the subject matter of which the Panel could deal with. Austin J agreed, finding that if the Panel lacked the power to deal with a matter then the Act should not be construed in such as way as to prevent the Court from hearing the matter.

Lionsgate contended that the Lionsgate/Macquarie pre-bid agreement was not a subject matter in respect of which the Panel had the power to make a declaration of unacceptable circumstances. The Panel's powers are limited to circumstances in relation to the "affairs" of the takeover target. It was contended that a contract dealing with the circumstances of the transfer of shares in a target company was not an affair of the target company. Austin J, whilst acknowledging that the Takeovers Panel lacked the jurisdiction to determine contractual rights (see *Glencore International AG v Takeovers Panel*), found the panel was invested with the power to make a declaration of unacceptable circumstances in respect of an agreement dealing with the transfer of its shares. Austin J held the subject matter was an "affair" of Magna.

Notwithstanding the decision is interlocutory, it is an important contribution to a growing body of law dealing with the jurisdiction of the Takeovers Panel and the scope of the powers of Courts to deal with rights of parties which, while legally separate and distinct from a takeover bid, arise in a commercial sense within the broad factual matrix of a bid.

*Piper Alderman acted for Lionsgate.*

## *"Thank God You're Here" - The proposed amendments to the Insurance Act*

*Amanda Lazarou*

**Dispute resolution associate, Amanda Lazarou, summarises a Bill proposing wide ranging amendments to the Insurance Contracts Act which aim to redress the perceived imbalances in the current regime, particularly for third party beneficiaries.**

The amendments extend the reach of the current legislation to all risks, irrespective of location, provided that the insured party is domiciled in a state or territory to which the Act applies. This means that the *Insurance Contracts Act* can apply to risks arising outside Australia.

Insurance taken out over the transportation by sea of personal or domestic goods will by reason of the amendments be covered by the Act. Currently, this area of insurance is covered by the *Marine Insurance Act*.

Under the proposed amendments, a breach of the duty of utmost good faith will provide a basis for ASIC to intervene on behalf of the insured. Under the current legislation, the only avenue open to insureds to seek redress of an insurer's breach of the duty of utmost good faith is to commence a private legal action. The remedies that can be sought by ASIC are similar to those available to it under the Corporations Act, and include a banning order, suspension or cancellation of the insurer's financial services licence, the imposition of conditions on the licence or the acceptance of an enforceable undertaking.

The amendments extend insurance contracts to third party beneficiaries, providing them with protections but also obligations. The extension applies to persons who have an interest in the insurance policy, but those are not "named insureds".

The duty of good faith is extended to an insurer's dealings with third parties with a recognised interest under the policies as is the duty of disclosure. An insurer is entitled to a right of subrogation in relation to any payments that they make to relevant third parties, and there are remedies available to the insurer should a third party misrepresent the facts or breach their duty of disclosure.

The amendments permit notifications to be given electronically provided that the following safeguards are met:

> the notification remains clear;

> the recipient consents and nominates for information to be distributed to them electronically;

> recipients must be able to print and retain the communication; and

> there must be certainty as to the time and place of origin and receipt of the communication.

The current requirements to notify insureds of non-standard provisions are to "clearly inform". Under the proposed amendment the obligation will be to present information in a "*clear, concise and effective*" manner. This brings the *Insurance Contract Act* into line with the *Corporations Act*. The Government is responding to a perception that insurers did not always disclose non-standard and unusual policy wording in an effective and meaningful manner.

The proposals will also operate to give insurers relief where an insured fails to notify facts that might give rise to a claim during the policy period. The amendments will allow insureds an additional 28 days after their policy expires in which to notify their insured of any facts that arose during the policy period.

The proposed changes are wide reaching and if implemented will impact insurers and insureds to their obligations, not only to each other, but also to third parties.

## Full bench decision on termination for operational reasons

*Erin McCarthy*

**Employment relations senior associate, Erin McCarthy, and law clerk, Nikki Haig, discuss the full bench of the Australian Industrial Relations Commission's decision in *Village Cinemas Australia Pty Ltd v Carter* which upheld an appeal against a single commissioner decision which found that Mr Carter's termination was not for genuine operational reasons.**

Mr Carter was employed as a cinema complex manager. He was made redundant due to the closure of the Doncaster cinema complex he was managing. At the time of closure there were no other managerial positions available within Village Cinemas. Village Cinemas made no offer of redeployment.

Mr Carter requested to take six months long service leave in order to see whether a position became available. Village Cinemas denied the request and terminated his employment. When Mr Carter lodged an unfair dismissal claim with the AIRC, Village Cinemas objected that his dismissal was for genuine operational reasons, so that the claim was barred by the *Workplace Relations Act 1996*.

At first instance, Commissioner Hingley found that Mr Carter's termination was not for genuine operational reasons. The relevant considerations which led to this conclusion were:

> Mr Carter was the only staff member of 12 made redundant;

> The denial of Mr Carter's long service leave request and the fact that it was possible a position would become available; and

> Mr Carter was not offered a position of lower status, which, based on his evidence, he would have accepted.

On account of these considerations Commissioner Hingley found that Village Cinemas did not discharge their onus in establishing that their reasons for termination were genuine. The focus of this decision was Mr Carter's redeploy ability and whether termination was a necessary outcome of the cinema closure.

The full bench overturned the original decision and found that the closure of the cinema was a genuine operational reason for Mr Carter's termination.

The fact that Village Cinemas had refused to grant Mr Carter's long service leave request did not change the fact that the decision was for genuine operational reasons. The full bench determined that the termination was a direct consequence of the closure of the cinema and that there was no evidence to suggest that it was for any other reason.

The decision moves away from the *Perry* reasoning that required the termination to be a "logical response" to the operational requirements of the business. According to the full bench, the termination does not have to be an unavoidable consequence of an operational reason for the limitation to operate.

It is now irrelevant whether the employer could have done something other than terminate the employee when deciding whether the termination was for genuine operational reasons. This means, for future decisions an employer need only show that termination was for genuine operational reasons and was not contrived. Even where an employer had options other than to terminate an employee, if it can be shown that termination was based on a genuine operational reason the exclusion will apply.

It remains to be seen whether a full bench would be prepared to extend the operation of the exclusion to circumstances where, for example, an employee is dismissed for reasons of poor performance or misconduct that are said to have financial implications.

## *Hicks v Ruddock: Commonwealth's summary judgment application refused*

*Ben Hartley*

**Dispute Resolution senior associate, Ben Hartley, comments on the recent decision in the case of *Hicks v Ruddock* where the Federal Court refused a motion brought by the respondents to dismiss proceedings brought by David Hicks.**

In *Hicks v Ruddock,* the respondents, the Commonwealth Attorney General, the Minister for Foreign Affairs and the Commonwealth of Australia, filed a motion seeking an order dismissing the proceedings brought by David Hicks in which he has sought, amongst others, judicial review of a decision by the respondents to not request his release from Guantanamo Bay and his return to Australia. The decision of the Federal Court re-enforces some basic principles regarding applications for summary judgment.

In his proceedings David Hicks sought:

> a declaration that the inability to prosecute him under Australian law is an irrelevant consideration and constitutes an improper purpose with respect to the exercise by the first and second respondents (the respective Government Ministers) of their executive discretion whether, and if so, how the Commonwealth should take steps to protect him by seeking his release and repatriation;

> a declaration that the willingness to waive mandated trial standards is an irrelevant consideration and constitutes an improper purpose with respect to the exercise by the Ministers of their executive discretion whether, and if so, how the Commonwealth should take steps to protect him by seeking his release and repatriation;

> an order that each of the Ministers consider according to law whether, and if so, how, the Commonwealth should take steps to protect him by seeking his release and repatriation; and

> an order by way of relief in the nature of a writ of habeas corpus.

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The basis of the respondents' motion was that the proceedings issued by David Hicks have "no reasonable prospects of success" as a matter of law and should therefore be dismissed. Two principal submissions were put forward to support this view:

> That to allow the matter to proceed to trial would be contrary to the Act of State doctrine, which, in general terms, requires a court of one nation, in this case Australia, to abstain from hearing proceedings which might require it to pass judgment on the legality of the acts of a foreign sovereign government, in this case, the Government of the United States of America; and

> The Court has no jurisdiction to hear the proceeding because it impacts on or relates to the areas of foreign relations and gives rise to non-justifiable questions such that there is no matter on which the Court could or should adjudicate.

The onus of proof in a summary judgment application rests with the party making the application, in this case, the respondents.

The Court considered four principal issues for determination during the hearing of the respondents' motion. Two of those matters will be discussed here. First, the Court considered the meaning of "no reasonable prospect of success". The Court noted that the need for summary judgment must be clear before it will prevent a party from submitting a case for determination in the usual manner, in other words, by way of a trial. Once it appears that there is a real issue to be determined, whether in fact or in law, and that the rights of the parties depend on the resolution of that issue, the court should not terminate the action by way of summary judgment. Through its consideration of the issues in dispute, for example, the operation of the Act of State doctrine, the Court was not of the view that the proceedings had no reasonable prospects of success such to justify the orders sought by the respondents.

The second issue worthy of consideration is the principle of habeas corpus. Habeas corpus is a type of writ designed to provide a timely remedy in the event of illegal restraint or confinement. The relevance to the respondents' motion is not so much the actual operation of habeas corpus, but the relevance of evidence in support of an application for summary judgment. One of the issues raised in respect of habeas corpus was the question of the unlawfulness of detention. While the Respondents contended that there was no evidence that the detention of David Hicks was unlawful, the Court accepted Hicks' submission that the mere fact of his internment for five years in the absence of any evidence before the Court to justify that detention was sufficient to establish that the detention was, prima facie, unlawful. Critically, the respondents did not lead any evidence, principally, no order, writ or document supporting the basis of detention, and in these circumstances the Court was not persuaded that there were no reasonable prospects to warrant the orders sought by the Respondents.

Ultimately, the Federal Court refused the Respondents' application and dismissed it with costs. While the proceedings issued by David Hicks raise important and difficult questions of law, the decision of the Federal Court is a timely reminder that courts will be reluctant to terminate an action by way of summary judgment in the absence of compelling reasons to the contrary and when applying for summary judgment, an applicant must give careful consideration to the evidence it needs to present to the Court in order to discharge its onus of proof.

## *ASIC releases Policy Statement on disclosure in reconstructions and capital reductions*

*Craig Yeung*

**Corporate and commercial senior associate, Craig Yeung, explains PS 188 "Disclosure in reconstructions" which confirms ASIC's views that invitations to vote on an issue of securities constitute an "offer" for the purposes of the Chapter 6D prospectus provisions in the *Corporations Act*.**

The broad result of the policy is that unless an exemption applies (such as for offers that do not need disclosure) or where specific ASIC relief is applicable, a prospectus must accompany the notice of meeting.

The term "reconstructions" includes capital reductions under Div 1 of Pt 2J.1 but not Pt 5.1 schemes. Pt 5.1 schemes already have a specific exemption from the requirement to issue a prospectus under the Act on the basis that ASIC considers there is adequate disclosure with court oversight.

In the Policy Statement, ASIC refers to a number of cases in establishing that the term "offer" should be broader than its strict contractual meaning. ASIC also refers to the inconsistency in treatment between an invitation to vote on the issue of interests (such as a managed investment scheme) and an invitation to vote on the issue of securities. If an invitation to vote was not an "offer", then a reconstruction involving the issue of interests would require a Product Disclosure Statement (PDS), whilst a reconstruction involving the issue of securities would not require a prospectus. This is because the requirement to provide a PDS applies to the "issue" as well as the "offer", whereas the requirement to provide a prospectus only applies to an "offer".

In PS 188, ASIC states that it may give case-by-case relief for capital reductions involving an issue or transfer of securities to members where there is no significant change to their overall investment so the members are not making a new investment decision.

For example, if a company gives securities as consideration in a capital reduction by transferring securities the company holds in another entity to the members (under an in specie distribution), then ASIC considers there is no change to their overall investment, and a prospectus is not necessary.

On the other hand, if a company procures another entity under the capital reduction to issue or transfer securities to members, then ASIC considers there is a change in the overall investment because they have received a security to which they had no previous exposure, and therefore a prospectus is appropriate.

ASIC also considers that if there is no change to the underlying business or assets, such as where a managed investment scheme converts to a company or where a company restructures to replace the parent company of a group, then it may consider giving relief on a case-by-case basis.

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In the event that a prospectus is required to accompany the notice of meeting, the company will also be required to update the prospectus by either a supplementary or replacement prospectus if, before the meeting, the company becomes aware of certain matters that are materially adverse from the point of view of an investor, such as misleading and deceptive statements, material omissions and new circumstances.

In addition to the above, the Policy Statement also provides the various technical relief and relief for foreign schemes.

## *NSW decision redefines Queensland understanding of an "interest in land"*

*Alison Blyth*

**Corporate and Commercial lawyer, Alison Blyth, discusses the decision Mijo Developments v Royal Agnes Waters in which the NSW Supreme Court applied Queensland law in finding broader grounds for the proper lodgement of a caveat than the customary "legal or equitable interest" in land.**

Mijo Developments transferred to Royal Agnes Waters, three lots of land at Agnes Waters in Queensland, pursuant to a deed which provided for later payment. The payment was delayed and then held up as the incoming mortgagees were prevented from registering their mortgages by the caveats.

To protect their interests, Mijo Developments lodged caveats, following which they were asked to establish there was a serious issue to be tried and to prove their interest in the land under the *Land Title Act 1994* (Qld). Customarily this would have meant proving they had a legal or equitable interest in the land.

Mijo Developments' counsel argued that Mijo Developments' "right to be restored as registered proprietor" was sufficient to claim a "right in relation to the land" which satisfied the broader definition of "interest" in the *Acts Interpretation Act 1954* (Qld) .

Justice Hammerschlag upheld that assertion and stated that "the words used in the definition are clearly capable of the construction contended … and therefore there is sufficient foundation for the argument to overcome the threshold of a serious issue to be tried".

Notwithstanding that finding Hammerschlag J ruled, on the balance of convenience and to enable the incoming mortgagees to register their mortgages to refinance the lots pending the final determination of other proceedings, the caveats be removed with an undertaking by Royal Agnes Waters to pay the deferred purchase price.



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