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Piper Alderman Legal Update

WELCOME TO THE LATEST EDITION OF THE PIPER ALDERMAN E-BULLETIN. THIS EDITION COMMENTS ON A RECENT DECISION OF THE FULL FEDERAL COURT IN LION NATHAN V COOPERS AS TO WHETHER A SHARE BUY-BACK INVOLVED A TRANSFER FOR SHARES. WE ALSO LOOK AT PROPOSED AMENDMENTS TO THE CORPORATIONS ACT IN RELATION TO INSOLVENCY AND THE FIRST DECISION OF THE AUSTRALIAN FAIR PAY COMMISSION AND OTHER NOTEWORTHY DECISIONS IN OUR PRACTICE AREAS.

Lion Nathan Australia Pty Limited v Coopers Brewery Limited: The interpretation of a company's articles

Dispute Resolution lawyers, Mitch Coidan and Shannon Cogan, explain the decision of the Full Federal Court which discusses the approach to the interpretation and construction of a company's articles of association.

In September 2003 the directors of Coopers, an unlisted public company, undertook a share buy-back in accordance with Division 2 of Pt 2J.1 of the *Corporations Act 2001* (Cth) (**Corporations Act**).

The buy-back was conducted with an offer price of $45.01 per share, with up to 10% of the issued capital of Coopers sought to be re-acquired by Coopers.

Pursuant to an agreement in the mid 1990s, Lion Nathan was granted third tier pre-emptive rights to purchase shares in Coopers through a buy-back process, and these rights were enshrined in Coopers' articles.

In 2005 Lion Nathan issued proceedings against Coopers on the premise that the 2003 reacquisition of shares by Coopers was a share buy-back, and as such Lion Nathan should have been offered the right to purchase those shares, pursuant to its third tier rights.

The matters considered by the Court were the nature of share buy-backs, whether Coopers' conduct was akin to such a buy-back, whether the company's articles required compliance with an established pre-emptive rights regime with regard to share buy-backs and whether regard may be had to extrinsic materials in interpreting a company's articles.

Justice Finn, at first instance, held that the expression "any transfer of shares" in the relevant article did not encompass a share buy-back but meant a transfer to a third party only, thereby leaving the buy-back provisions of the Corporations Act unaffected by the pre-emptive rights regime.

Justice Finn had regard to the explanatory memorandum and the pre-1995 articles of Coopers in determining the underlying purpose of the pre-emptive rights scheme.

On appeal, the Full Court was of the view that this was a case in which Justice Finn was justified in considering extrinsic materials when determining the underlying purpose of the pre-emptive rights scheme in order to decide the meaning of "transfer of shares" in the article.

The court concluded that Justice Finn was right to have regard to the surrounding circumstances to which he referred in aid of his construction of the articles. The Court approved the statement by Brownie J in *Buche v Box Pty Ltd* that regard may be had by a court to "the circumstances, to the factual background known to the corporators, and to the 'genesis' and the objective 'aim' of the transaction for the purpose of resolving the ambiguity".

With regard to the question whether the articles applied to a share buy-back, the Full Court found that a *"buy-back arrangement is quite different to the arrangement contemplated in the Articles under consideration. The purpose of a buy-back arrangement is to further consolidate the holdings of the existing members in the same hands as existed before the buy-back"*. The articles contemplated that shares transferred would pass between members or between members and strangers. As such, it was concluded that the articles, and specifically Lion Nathan's third tier pre-emptive right to purchase the shares, were not intended to apply to a buy-back arrangement.

Piper Alderman acted for Coopers in this action and other proceedings arising from Lion Nathan's failed takeover bid.

The draft Corporations Amendment (Insolvency) Bill 2007 – a comprehensive package for insolvency law?

Dispute Resolution partner, Anne Freeman, discusses the draft Corporations Amendment (Insolvency) Bill 2007 which was released for public comment on 13 November 2006

The exposure draft focuses on four main areas: enhancing protection of employee entitlements, better informing creditor decisions, streamlining external administration and facilitating pooling of external administration.

The Bill effectively mandates the priority of employee entitlements. In relation to deeds of company arrangement, the proposed legislation requires the deed to adhere to the priority requirements of the Corporations Act except in cases where a majority (in value and number) who are affected by the proposed changes to those priority requirements agree otherwise. In addition, the Court may approve a deed which does not preserve the statutory priority requirements if the Court is of the view that it would result in the same or better outcome for the affected creditors. This provision places the burden upon an administrator to ensure priority requirements are met. This alters the existing situation in which employees must challenge a deed of company arrangement that treats them unfairly.

Employee superannuation entitlements are also given some priority in the draft.

In relation to better informing creditors' decisions, the draft requires that the administrator provide a statement of independence which lists any potential areas of conflict of interest. This statement must be provided to the creditors at the time of giving the notice of the first creditors' meeting.

In relation to administrators' fees, the draft legislation provides the Australian Securities Investments Commission (ASIC) with the power to seek a review by the Court of the remuneration of the administrators, provides some factors for consideration by the Court in determining the appropriate fees, requires an administrator to provide information to creditors such that the creditors are able to be reasonably informed as to whether the administrators' fees are reasonable and will allow an administrator to apply to the Court to have administration fees set by the Court in situations where the creditors have not yet met and approved those fees.

The suggested legislation also attempts to streamline some of the procedures which may hinder the efficient external administration of companies. For example, the requirement to publish notices by the administrator is removed in the draft legislation, except in cases where there is some strong policy reason for the advertisement of the notices. The draft legislation also provides for notices to be sent by the administrator by electronic means, such as internet site, email or facsimile, so long as the recipient has nominated that mode of communication and has provided the relevant contact details to the administrator.

The Bill proposes that corporations be able to be members of committees of creditors, and that changes of names of corporations under external administration be allowed, without special resolution of the members, where it is in the interests of the creditors to do so – for example, where the corporate name may of itself be an asset of value.

The proposed legislation also provides both liquidators and administrators with the ability to consent to the transfer of shares in the company during liquidation or administration if the liquidator or administrator is satisfied that such a transfer is in the best interests of the creditors of the company.

The draft legislation also deals with the pooling of administrations of companies in the same group. In the case of voluntary administrations, a decision to pool the administrations of group companies may be made by the administrator with the unanimous consent of the creditors. The administrator may still approach the Court if a creditor objects to the pooling, in order to obtain an order for the pooling.

The effect of a pooling resolution is that each company in the group is jointly and severally liable for the debts of all of the other companies in the pooled group and inter company debts as between group companies will be extinguished.

In respect of companies in liquidation, a pooling decision may be made by the liquidator with the unanimous consent of unsecured creditors or by the liquidator who approaches the Court for an order, without first seeking the consent of the creditors.

There are also a number of other suggested changes proposed by the Bill.

Voluntary administrators, under the proposed changes, will be required to convene a meeting within 20 to 25 business days, which amounts to an extension of the existing 21 consecutive days deadline.

ASIC is also provided with certain powers under the draft legislation, including the power to apply to a Court for an order that prevents a company officer from avoiding any potential liability by restricting the ability of that officer to send funds out of the jurisdiction or to otherwise leave the jurisdiction, including the power to seize passports. The privilege against exposure to penalty for certain ASIC investigations into the conduct of the corporate officers is also removed by the draft legislation which may allow ASIC to compel

the provision of documents from corporate officers. The proposal in this regard seeks to negative the decision of the High Court in *Rich v ASIC* in which the High Court found that proceedings by ASIC to ban a director were penal in nature and, as a result, ASIC was unable to obtain documents from Mr Rich and Mr Silbermann as they maintained privilege over those documents.

The draft legislation is available for public comment until 23 February 2007.

Fair Pay Commission makes first ruling about minimum wage rates

Employment Relations partner, Stephanie Vass, and lawyer, Peter Ferraro, explain the new minimum wages set by the Fair Pay Commission

Since the introduction of the WorkChoices amendments to the *Workplace Relations Act 1996* (Cth), responsibility for setting and adjusting minimum wages for employees covered by the Act belongs to the newly established Australian Fair Pay Commission. The Fair Pay Commission determines the timing, scope and frequency of wage reviews and the manner in which the reviews are to be conducted. It can inform itself in any way it thinks appropriate, including undertaking or commissioning research and consultation. This is significantly different from the mechanism of the annual minimum wage cases conducted by the Australian Industrial Relations Commission (AIRC) which previously set minimum wages.

The Fair Pay Commission released its first ruling on 26 October 2006, which will take effect on wages from 1 December 2006.

The ruling will not affect employers who are paying above the new minimum rates, or whose workers remain covered by a registered agreement made prior to 27 March 2006. The ruling will also not affect those employers who are not covered by the Act – such as unincorporated entities.

The first major component of the ruling is that all Australian Pay and Classification Scales (APCSs) will be increased. APCSs were derived from award rates of pay as they stood on 27 March 2006 when the WorkChoices amendments took effect. All positions of employment that were, or would have been, covered by an award immediately before 27 March 2006 have an APCS. The APCS effectively replicates the basic hourly rate of pay for that position as it existed under the award immediately before 27 March 2006. An APCS will apply regardless of whether an employee was employed before or after 27 March 2006.

For APCSs up to and including $18.42 per hour, there is to be a flat increase of $0.72 per hour. For APCSs over $18.42 per hour, there is to be a flat increase of $0.58 per hour. There is also to be an additional increase of $17 per week for any APCS that had not (for whatever reason) been adjusted to reflect the AIRC's 2005 wage case decision or its State counterparts.

The second major component of the ruling is that the standard Federal minimum wage will be increased from $12.75 per hour, to $13.47 per hour. The Federal minimum wage applies to all employees whose employment is covered by the Act, but who do not have an APCS. For example, a member of middle management may not have an APCS because they would not have been subject to an award immediately before 27 March 2006. They are entitled to receive *at least* the Federal minimum wage per hour.

For casual employees, the increases referred to above apply to base rates. So, for example, a casual employee with an APCS of $16.00 per hour + 20% casual loading will from 1 December 2006 be entitled to a $0.72 increase of their base rate, that is: $16.72 per hour + 20%.

There have also been changes to the minimum rates of workers with disabilities and for those APCSs that fall below the Federal minimum wage.

The Fair Pay Commission has indicated that it will make its next ruling midway through 2007.

Drugs in Professional Sport – Is It Your Business?

This was one of the questions considered by the Victorian Supreme Court in the recent case of Australian Football League v The Age. Dispute Resolution partner, Simon Morris, comments on the case.

The AFL sought injunctions to prevent various media outlets from publishing the names of footballers who had tested positive for illicit recreational drugs in out-of-competition testing.

By the time the AFL brought the proceedings, the names of the players were to a limited extent known in the media, had been distributed to certain government departments (including the Prime Minister's office), disclosed on a football pay TV channel and posted on internet chatroom sites.

The AFL sought to restrain the disclosure of the players' names on the basis that their identity constituted protectable confidential information.

The case turned on two issues:

> whether the information was no longer confidential because it was now in the public domain; and

> even if, it was confidential, that the information was not protectable because disclosure of the players identity was in the public interest.

The Court held:

> that the limited distribution of the information was not sufficient to put the information in the public domain. In reaching his decision, Justice Kellam rejected arguments in respect of the internet publication on the basis that the internet content was "*speculative gossip*" and a reader had no expectations as to the accuracy of the information posted; and

> while the information may be of interest to the public it was not in the public interest. The Court held that shaming the individual players where the disclosure of their conduct would not prove a criminal act did not serve any legitimate community interest.

Lifoon Pty Ltd v Gillard: The valid exercise of a lease option – orally

Property and Projects group lawyer, Alex Keen, explains a recent decision about the oral exercise of lease options

There was a clause in the lease stating that if the Lessee wanted to renew the lease they would have to give the Lessor "not more than six months' notice and not less than three months' notice in writing". The Lessee and their solicitor met with the Lessor during this period but failed to provide a written exercise of the option. The solicitor did however orally mention during this meeting that his client intended to exercise the option, and the Lessor accepted this, essentially waiving the requirement for written notice.

In March 2004 the Lessor sought to purchase the Lessee's business and the issue arose as to whether the Lessee was a monthly tenant or had actually exercised the option. The Lessee then sought specific performance of their right.

Justice Bergin of the Supreme Court of New South Wales in the first instance found that the Lessee's solicitor had validly exercised the option and that the Lessor had in the meeting with the Lessee accepted their oral notice.

The Court of Appeal found that generally a statement of future intention to exercise an option is not sufficient but despite this, accepted the trial judge's findings that something more, creating a binding legal effect, had occurred at the meeting, and that the lease option had been orally exercised.

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