

'Novel' Application Results in New Court Practice

The recent Supreme Court of New South Wales decision of *Dean-Willcocks & Ors v. Air International Transit & Ors* has implications for insolvency and legal practitioners and creditors alike. Kemp Strang appeared for the liquidator.

Where a liquidator identifies potential preference or other claims in an insolvent company, ordinarily proceedings follow against one defendant, and there may be numerous such actions.

There is nothing ordinary however in the *Austral & Clifford* administrations. Whilst in large liquidations, such as *Spedley* and more recently *Stanilite*, a number of such different actions have been transferred to the Supreme Court to be case managed, the approach taken in *Austral* has been novel.

The novelty is that in *Austral* there are three corporate plaintiffs and 58 defendants in the one set of proceedings. This course has never been taken before, prompting those creditors who objected to label the approach new, a watershed and a major change in corporate law.

Justice Austin recently delivered judgment in which he noted that the *Austral* case "endeavoured to establish a new model. Rather than having separate proceedings case managed and relying on statutory presumptions, the liquidator proposed that the Court case manage each of the *Austral* and *Clifford* cases as two single proceedings, but with many defendants and one with three corporate plaintiffs".

The Court accepted there were common questions of fact and law in preference claims, and given the advantages, in the circumstances granted leave to the liquidator to continue the *Austral* proceedings because:

- Preference claims are brought by liquidators under the Corporations Act, case managed in the Corporations List of the Court
- Liquidator actions are recoveries for the benefit of creditors
- The Court should consider the best use of resources available to the parties and the Court.
- The adoption of a procedure that is a speedy, inexpensive and efficient should facilitate the commencement and maintenance of proceedings in cases with reasonable prospects.
- The Supreme Court should where practicable determine the question of insolvency in companies of some size.
- The interest of public policy and the commercial community must be considered.

As a result of *Austral*, the Court has essentially endorsed the approach taken as an appropriate procedure for large liquidator recovery actions involving multiple defendants.

The *Austral* and *Clifford* proceedings continue and the approach should be adopted by liquidators in recovery matters of substance.

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THE KEMP
STRANG
BRIEF

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Corporate Code of Conduct Bill

The Corporate Code of Conduct Bill (the 'Bill' or if enacted the 'Act'), first placed before the Federal Parliament in 2000, has been reintroduced by the Australian Democrats for Parliament's further consideration. This Article discusses the purposes and structure of the Bill, identifies difficulties in its intended reach and operation and suggests alternative courses to achieve some of its goals.

The Purposes and Structure of the Bill

The Bill follows legislation dealing with acts and offences of and committed by Australians overseas. The Bill's objects are stated in s3(1):

- (a) to impose environmental, employment, health and safety and human rights standards on the conduct of Australian corporations or related corporations which employ more than 100 persons in a foreign country; and
- (b) to require such corporations to report on their compliance with the standards imposed by this Act; and
- (c) to provide for the enforcement of those standards.

Its scope is, however, limited in that no action need be taken if it would not be required to take any action overseas under the Act that it would not be required to take in respect of its operations in Australia. The Act, by ss11 and 13, would also require observance of local tax laws and compliance with consumer protection and trade practices standards specified by the Act.

Section 14 of the Act would require regulated overseas corporations to annually lodge with the Australian Securities and Investments Commission (ASIC) a 'Code of Conduct Compliance Report'.

The ASIC would in turn, under s15, be obliged to prepare an annual report on compliance with the provisions of the Act, which would be required to be laid before each House of Parliament.

Sections 16 and 17 of the Act would provide for civil penalties for its contravention as well as a basis for civil actions to be brought in the Federal Court of Australia by any person who suffers or is reasonably likely to suffer loss or damage as a result of a contravention of the Act.

Difficulties in the Bill's intended reach and operation

The Bill was considered by the Parliamentary Joint Statutory Committee on Corporations and Securities in its Report handed down in June 2001. After taking over 40 written submissions and hearing witnesses from more than 20 organisations, the Committee recommended that the Bill not be passed 'because it is unnecessary and unworkable'. The Committee also considered the Bill to have been drafted, in the main, as a reaction to unrelated incidents overseas of environmental damage. Some of the difficulties in the Bill's intended reach and operation are listed below.

The Bill would not act on Australian corporations alone. It is expressed to apply to holding companies, subsidiary companies and subsidiaries of a common holding company. Thus, the Bill could apply to foreign nationals (acting as directors and officers) and foreign incorporated companies, in their operations in foreign countries.

The Bill would prescribe legal obligations without regard to the local law. Those requirements of the Bill would invariably be

inconsistent in their terms and their operation to the local law — an Australian corporation may not be able to comply with both the Bill and the local law. The Bill is silent on the consequences of such a conflict.

The Bill also does not provide any means of administration, other than reporting obligations. The qualification in the Act's operation by reference to "its operations in Australia", would be difficult to apply. For example, where a holding company of an overseas corporation has no similar operations in Australia the Act would not operate.

Alternative courses

It would seem that the most achievable object of the Act is the reporting obligation set out in s14. Even this however was considered by the

Parliamentary Joint Statutory Committee in its June 2001 Report to be both 'onerous and expensive'. A reporting obligation, in respect of environmental and other matters, already exists for certain companies under s299 of the Corporations Act 2001 and it is submitted that this provision could be revisited. If another concern of the Bill is that the local law of some of our near neighbours is not sufficiently sophisticated to deal with, for example, environmental degradation, a better course for Australia would be to make its expertise in these areas available to local authorities and legislators. Such a course would result in a better enhancement of Australia's corporate reputation than the prescriptions proposed by the Bill.

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Buyer Beware!

Registration of a strata plan in respect of a building does not necessarily mean the building is ready for occupation.

Purchasers of strata units that are not registered at the time of the contract should be aware that occupation certificates must be issued by the relevant council for the strata units before they may legally occupy the property.

An occupation certificate is a certificate that authorises the occupation and use of a new building or a change of building use for an existing building. An occupation certificate can be an interim certificate or final certificate and may be issued for the whole or part of the building. There is a maximum penalty of \$2,750 where a person commences occupation or use the whole or any part of a new building if an occupation certificate has not been issued.

An incident in which completion of one residential strata block apparently occurred without the issue of an occupation certificate came to light recently in a newspaper article. The residents of that strata block (initially) did not realise the council had not given approval for the purchasers to

move in and that they were living in the units illegally. This discovery has raised all sorts of questions for residents; what would it mean to their property values and more importantly, what would it mean if they tried to sell the units?

It must be noted that there are certain prescribed buildings where the requirement that an occupation certificate be issued before a person may commence occupation of a new building does not apply. These include detached single dwellings or attached dwellings including town houses or terraces.

Occupation certificate is only one area in which a purchaser needs to be aware when buying a new strata property. It is always recommended that legal advice be obtained before any type of contract or legal document is signed so that any potential issues can be raised and resolved before one becomes bound to fulfil an obligation.

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"There is a maximum penalty of \$2,750 where a person commences occupation or use the whole or any part of a new building if an occupation certificate has not been issued."

In this issue we meet partner Steve Williams who talks about his life as a lawyer and his life outside Kemp Strang. Steve discusses his practice and the changes he has seen at Kemp Strang.

How long have you been at Kemp Strang?

I joined Kemps as a partner in 1993 after 20 years with another major Sydney firm. At that time I knew a couple of the other Kemp Strang partners and they persuaded me that they were part of a firm that was really progressing rapidly. I've never regretted the decision. I've seen the firm grow and develop from a small partnership to a practice dealing with both major and complex matters and consisting of over 25 partners.

I have to say that I've enjoyed every minute of my time here. Even after a "mid-life crisis" when I took my family to live in Brisbane where I worked outside the legal world, I realised I could not live without law, or more importantly without this firm and its people, as a part of my life.

Have you always worked in the corporate/commercial areas?

Yes, apart from my very early years as a solicitor, commercial work has always been what I was interested in. I started out, as most solicitors do, as a legal 'jack of all trades' but as time has moved on it became increasingly evident that lawyers were becoming specialists in

different areas and developing reputations in their own particular area of expertise. I decided that corporate and commercial work was where I wanted my expertise to lie.

When you're not "being a lawyer", what do you enjoy doing?

Family take up pretty much most of my time outside of work. I have two teenage children who are both very sports oriented and I spend much of my weekends, like a lot of parents, taking them and collecting them from rowing, water polo swimming etc - not to mention their social events. When time allows, I do enjoy a game of golf - its great exercise for mind and body! I also try to spend regular time on the boat which I share with four other friends. I find being on the water a soothing reprieve from my hectic life.

If you could choose your career again, what, if anything, would you change?

I wouldn't change a thing. I gain alot of satisfaction from my work and like to think that being a good commercial lawyer involves exercising a logical and ordered mind. Its very difficult to imagine being anything else, but perhaps, if my game improved about 1000%, a professional golfer...



B e h i n d t h e
S c e n e s . . .

Staff Update

Congratulations to Jane Lucas who was made an Associate of the firm on 1 July 2002. Jane practices in the Commercial Property Group.

New Numbers

Please note that our telephone and fax numbers have changed, as detailed below, due to the introduction of our new PABX system.

If you do not wish to receive future mailouts please email us at info@kempstrang.com.au or telephone Marianne Slocombe on +61 2 9225 2578

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