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Australian Disputes Year in Review 2020

This publication recaps 10 of the most important developments of 2020 across commercial disputes, and identifies some areas to watch in 2021.

1 **Arbitration:** Renewables investment treaty enforcement

With increasing discussions around climate change, many states have introduced incentives to promote investment in the renewable energy sector.

Foreign investors seeking to take advantage of such incentives must consider sovereign risk, and what remedies are available when a state does not honour the promised incentives. Investor state dispute resolution under treaties and conventions offers protection to investors, however any award made under those regimes must be enforced and executed in order to provide an effective remedy.

The case of *Eiser Infrastructure v Kingdom of Spain*, covered in our March update, is a landmark decision because it is the first contested enforcement of an investment arbitration award in Australia. The Court distinguished between recognition/enforcement (ie entry of a judgment on the award) and execution (ie execution of the judgment against the property of the award debtor) of an award.

The Court found that Spain had waived reliance on foreign state immunity in respect of recognition and enforcement of the awards because it had submitted to the jurisdiction of the courts by its agreement to the terms of the Washington Convention on the Settlement of Disputes between States and Nationals of Other States.

Ultimately, however, the practical effect of this decision is not clear because the Applicants may be precluded from recovering the judgment sums if foreign state immunity applies to the execution of the judgment.

An appeal to the Full Federal Court was heard on 12 November 2020 and the decision is reserved.

2 **Class actions:** Continuous disclosure and common funds

Another big year for class actions, in part sparked by concerns about the impact of COVID-19 on business and boards.

Following the High Court's decision at the end of last year in *BMW v Brewster* that common fund orders cannot be made early in proceedings, the NSW Court of Appeal and Full Federal Court were asked to decide whether they could be made at all. Those courts refused to do so in the absence of a live application – but special leave has been sought in the High Court.

Applying the High Court's reasoning in *BMW*, in April the NSW Court of Appeal held that orders cannot be made before mediation that would extinguish claims of group members that don't register for the mediation if the matter settles. In June the NSW Court of Appeal held notices can't be sent to group members foreshadowing the intention to seek extinguishment orders after mediation (without a further registration process) if the matter settles. These cases put an end to a well-established practice by which parties sought to ascertain the size of claims in open classes, to facilitate settlement discussions.

In May, the Federal government announced a six month temporary amendment to continuous disclosure laws, which in September it extended to 23 March 2021. During this period, proving breach of continuous disclosure rules requires the company to have known or been reckless or negligent as to whether information would have a material effect on share price or value. While knowledge and recklessness are high bars, we don't think these changes will have much practical impact given "negligence" is enough, and also given most cases also include an alternative claim under misleading or deceptive conduct laws, which have not changed.

In May the government also announced that it would regulate litigation funders as managed investment schemes. ASIC has since given some relief in the implementation of that change.

Heading in the other direction, though, in June Victoria passed legislation to create the opportunity for solicitors to charge contingency fees.

In October, the Federal Court dismissed the *Worley* shareholder class action. After over 100 settlements, this was only the second shareholder class action to reach judgment. The first to reach judgment (*Myer* – in which the Court found last year that contraventions of Myer's continuous disclosure obligations had not inflated its share price) settled in May this year. *Worley* emphasises the need for clear evidence to support a finding that a company's earnings guidance had no reasonable basis.

And the year is finishing with two further expected developments. First, the Joint Parliamentary Committee on Corporations and Financial Services held an inquiry into litigation funding and the regulation of the class action industry – its report is now due by 21 December 2020. Second, in November the High Court heard an appeal on the management of competing class actions, with judgment expected next year.

3 Corporate crime: Validity of search warrants

In April, the High Court found that a search warrant relied on by the AFP in carrying out a raid on journalist Annika Smethurst's home was invalid.

The AFP announced in May that it would not be pursuing charges against Ms Smethurst or anyone else involved in her articles, citing insufficient evidence.

The High Court unanimously found that the search warrant was invalid because it substantially misstated a criminal offence relating to official secrets in the *Crimes Act*. It followed that entry into Ms Smethurst's home by AFP officers was unlawful.

As explained in our previous update, one interesting aspect of the decision was the Court's discussion of whether a tort of privacy to protect individuals should exist at common law.

Ashurst acted for Ms Smethurst and Nationwide News Pty Limited in the proceeding.

Corporate crime remains an area to watch in Australia, with significant law reforms in the pipeline, as discussed in our update on the recent ALRC report. Proposed reforms include the likely introduction of an offence of failure to prevent bribery and a deferred prosecution agreement regime.

4 **Construction & infrastructure:** Proving cause of delay

In *White Constructions v PBS Holdings* the NSW Supreme Court rejected a claim for damages due to delay for lack of factual evidence. In November, the Court of Appeal dismissed an appeal against the decision.

In this case, a developer sued a sewer designer over the development of a 100 lot subdivision in the Illawarra region. The designer proposed pumping stations rather than a gravity-based solution. The unsatisfactory initial sewer design was alleged to have delayed completion by 8 months.

At trial, having been presented with the reports of two competing programming experts who had assessed the alleged delay using different methodologies identified in the Society of Construction Law Delay and Disruption Protocol, Hammerschlag J availed himself of the rarely used UCPR r 31.54 to appoint a third programming expert to assist him to critically evaluate their reports, which he described as "complex" and "[t]o the unschooled...impenetrable".

Relying on the opinion of the Court appointed expert, Hammerschlag J concluded that expert programming analysis, whether or not it is featured in the Protocol, is not a substitute for proof of the cause and effect of alleged delay events.

While the role of the Court appointed expert and the adequacy of Hammerschlag J's findings about delay and damage were at issue on appeal, the Court of Appeal chose not to deal with these on the basis of judicial economy.

This case continues to highlight the importance of ensuring that any expert programming opinion upon which a party intends to rely is supported by evidence of the material facts including, for example, detailed contemporaneous site records of the cause and effect of alleged delays.

Our global Construction Group discussed the impact of the COVID-19 pandemic, including delay, on construction contracts here.

5 **Contracts:** Types of compensable loss

If your travel plans were put on hold in 2020 due to COVID-19, plenty of others were in the same boat. Government restrictions to contain the pandemic raised commercial contract problems often addressed by force majeure and frustration, discussed in our March update.

Damages for breach of contract are normally designed to put you in the position you would have been in had the contract been performed and undo the harm caused by reliance on a promise. This usually means a loss of expectation of a profit or lost expenditure that would have been recouped.

However you can't normally recover damages for disappointment and distress. Unless, that is, the very object of the contract was to provide pleasure or relaxation. Lawyers may remember the case of *Baltic Shipping v Dillon* from law school.

In *Moore v Scenic Travel* Mr Moore had booked a European river cruise holiday with Scenic Tours from Amsterdam to Budapest. Due to adverse weather, instead of cruising for 10 days, they spent many hours travelling by bus and cruised for 3 days.

The judge at first instance awarded damages for failing to comply with the consumer guarantees of due care and skill and fitness for purpose in the Australian Consumer Law, and awarded Mr Moore $10,990 in compensation for loss of value and $2,000 in damages for disappointment and distress.

Scenic Tours contended that the ACL picks up the statutory threshold for non-economic loss in personal injury cases of 15% impairment, precluding Moore's claim for damages for disappointment and distress. Scenic Tours argued that disappointment and distress constituted an impairment of Moore's mental condition, and therefore it amounted to a "personal injury".

The High Court rejected this argument in April. Damages for distress, vexation and frustration were a distinct category from damages for pain and suffering consequent on physical injury. Therefore they did not amount to a "personal injury" and the threshold did not apply.

6 **Corporate governance:** Who is an "officer"?

The *Corporations Act* imposes a range of duties and obligations on "officers" of corporations.

Breach of those duties can result in civil and criminal sanctions. Therefore, courts must identify which individuals are "officers" when allocating responsibility for corporate misconduct.

It is clear that directors and secretaries of companies are "officers" under the definition in section 9 of the *Corporations Act*. But other individuals may also be "officers" under the section 9 definition.

In *ASIC v King*, covered in our March update, the High Court considered whether a director of a parent company (Mr King) was an "officer" of a subsidiary, even though he held no formal position in the subsidiary company.

The High Court held that Mr King was an officer of the subsidiary because he had "the capacity to affect significantly the corporation's financial standing", within the meaning of section 9(b)(ii) of the *Corporations Act*. This was because, among other things, Mr King acted as "the overall boss" of the corporate group and assumed overall responsibility for the subsidiary. He also approved and authorised the use of funds for the transaction the subject of the proceedings.

In reaching this decision, the High Court overturned a decision of the Queensland Court of Appeal. The Queensland Court of Appeal had found that Mr King was not an "officer" of the subsidiary because he did not have a recognised position in that company, with rights and duties attached to it.

One issue raised before the High Court was that the definition of "officer" might capture individuals who are unrelated to the management of the company, for example, external consultants, advisors, bankers or even the Commissioner of Taxation. The majority said that whether or not these third parties could be "officers" raises questions of fact and degree as to whether they are "of" the corporation in the sense of being engaged in the management of its affairs or property. The majority observed there is a difference between giving advice and acting on advice. The capacity "to affect significantly the corporation's financial standing" resides in the recipient of the advice because they determine whether or not that advice should be followed.

7 **Corporate governance:** Directors duty of care

The collapse of Storm Financial in 2009 left thousands of investors with significant losses, and served as a catalyst for law reform to better protect the interests of retail investors.

The "Storm model" of advice involved the use of ''double-gearing" whereby investors were generally required to take out a home loan and a margin loan to fund substantial investments in index funds.

Mr and Mrs Cassimatis were the sole directors and shareholders of Storm Financial.

In 2016 the Federal Court held they had breached their statutory duty of care to the company by causing or permitting Storm to contravene provisions such as the "efficiently, honestly and fairly" obligation in the *Corporations Act* and exposing Storm Financial to the risk of losing its licence.

The Cassimatises appealed, submitting that, as a solvent company, Storm's interests were effectively those of its shareholders.

In April the Full Federal Court dismissed their appeal.

Justice Greenwood held that the directors and officers statutory duty of care to the company is not merely a private duty, subject to the will of the shareholders expressed unanimously. Instead, it adopts a normative, objective and irreducible standard of care and diligence, which goes beyond *simply* the interests of the shareholders. Here, even though they were the sole shareholders, the Cassimatises had breached their duty of care to the company.

The Court considered the often controversial "stepping stones" approach to attributing liability. Justice Greenwood considered phrases such as "stepping stones" liability unhelpful. Directors do not breach their duty of care because they breached other provisions of the Act. Rather, the breach comes from failing to exercise care and diligence to avoid foreseeable harm to the company. Despite this reservation about terminology, the majority decided that this was a valid approach to director liability, even though it was less onerous than the test for accessorial liability.

For further details, see our update.

8 **Financial services:** Accountability and breach reporting

In early 2020 the government announced a model for the Financial Accountability Regime to replace and extend the Banking Executive Accountability Regime to all APRA-regulated entities in accordance with the recommendations of the Financial Services Royal Commission. Legislation to implement FAR was slated to be introduced by the end of 2020. Details were reported in our January update.

While the timetable was subsequently delayed due to COVID-19, executive accountability came under increased attention this year, for example in the context of the highest civil penalty in Australian history for breaches of the Anti-Money Laundering and Counter-Terrorism Financing legislation.

The *Financial Sector Reform (Hayne Royal Commission Response) Bill* 2020 was introduced on 12 November 2020. The Bill seeks to implement many of the recommendations of the Financial Services Royal Commission. It will, among other things, replace the current breach reporting regime and is expected to commence on 1 October 2021.

Licensees will not only need to report a breach or likely breach of a core obligation which is significant. They will also need to report where an investigation has been commenced or where broader kinds of breaches have occurred than under the current law.

This year the administration of breach reporting changed considerably, with ASIC having established a portal for breach reporting, which requires that reports be more comprehensive and detailed. See our June update for further details.

While the 'why not litigate' mindset may lead our regulators to pursue more breaches through the courts, it is not all one way traffic. As our update on APRA's recent Federal Court proceeding explains, it is unlikely that statements about breaches of obligations in such reports and documents will, of themselves, represent admissions that can be used against regulated entities in litigation.

9 Practice & procedure: Remote hearings after covid-19

In many areas of business the pandemic accelerated the take-up of technology. The legal profession is no exception.

For years, the legal sector has used technology such as electronic bundles and instant online transcripts. But fully remote hearings are a relatively new development.

While some cases were adjourned in 2020 due to health restrictions, we saw virtual hearings adopted by the courts and arbitral tribunals. We also saw regulators conducting compulsory examinations by video.

Lawyers in disputes have adapted quickly and developed new skills and etiquette for online advocacy.

With courts and lawyers now more comfortable with online hearings, there is an ongoing discussion of their future role.

At this stage it appears that certain efficiency gains will continue, as there has proven to be a number of benefits. Time can be saved on getting barristers and solicitors to and from court for case management hearings. Expert witnesses can potentially be spared the inconvenience of travel. In appropriate matters, lawyers based interstate or in regional Australia may be able to appear remotely, and the courts can be accessible to a wider audience.

On the other hand, we expect that hearings in person will continue to be required for lengthy or complex matters post-pandemic. It appears the courts are unlikely to depart from previous expectations that jury trials and cross-examination of witnesses take place in person.

10 **Regulatory enforcement:** Responsible lending and directors duties

Despite a number of successful enforcement matters, 2020 was not all plain sailing for ASIC.

Two notable defeats were the Full Federal Court's decision on responsible lending in *ASIC v Westpac* and the decision of Beach J in ASIC's case against former directors of Tennis Australia in *ASIC v Mitchell* (*No 2*).

Responsible lending practices came under close scrutiny during the Financial Services Royal Commission. However, concerns were raised, in the context of the COVID-19 pandemic, that ASIC's increasingly tough regulatory stance would restrict access to credit and damage the economy.

The Commonwealth government granted a temporary regulatory exemption from some of the responsible lending obligations to facilitate credit for small business customers during the COVID-19 pandemic, as explained in our April update.

Then in June, the Full Federal Court in *ASIC v Westpac* upheld Perram J's judgment favouring aspects of Westpac's interpretation of the Consumer Credit Code. At issue was whether an automated decision system which did not take into account actual living expenses adequately assessed consumers' likely ability to comply with their financial obligations. The Court accepted, as Perram J put it, that home buyers can cut back on living expenses such as Wagyu beef washed down with the finest shiraz. ASIC decided not to appeal.

In September, the government announced proposed permanent reforms to the responsible lending obligations which will reduce or remove responsible lending obligations and transfer enforcement responsibility to APRA. Draft legislation and explanatory materials were released for consultation in November.

The Federal Court was also critical of ASIC's investigation into directors of Tennis Australia in *ASIC v Mitchell* (*No 2*). ASIC alleged the directors breached their duty of care during broadcast rights negotiations, and that Mr Mitchell improperly misused information. However Beach J rejected almost all of the allegations, saying ASIC's construction of the evidence displayed "confirmatory bias" and "conspiracy theories".

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