

Focus on Small Business – ASC

By Philip van der Ey

Territory lawyers will be aware that the Australian Securities Commission maintains both a “business centre” and a small regional office in Darwin. These offices service the whole of the Northern Territory and by arrangement, some aspects of corporate regulation in far north Queensland and Western Australia as well.

While the business centre takes care of the processing needs of the commercial and legal community, the regional office deals with the ASC’s wider “programs”. The ASC program titled “small business” is particularly relevant for the Northern Territory because the economic engines of the Territory are for all practical purposes entirely made up of small to medium enterprises.

The ASC’s small business program was established to complement the Federal government’s small business initiatives.

The main aims of the program are firstly to minimise the financial hardship on small business caused through the misuse of companies and non compliance with the law, and secondly to provide access to information that can help reduce risk.

Misuse of Companies

The expression “misuse of companies” is used within the ASC to refer to commercial conduct of company officers and persons concerned with the management of a company that is unlawful and against the interests of the commercial and wider community.

Examples of misuse of companies are many and include those officers who believe that the company can be used as a shield for their own reckless conduct and those who use the corporate form as a convenient vehicle to deal with assets for what amounts to their own personal benefit.

Taking “Sharks out of the Water”

Practitioners will be aware that the ASC has a number of civil remedies available to it including statutory injunctive proceedings, standing to make application to appoint external administrators to companies and to intervene in any proceeding.

One “string to the bow” that is directly pertinent to the small business

program is the ASC’s regulatory interest in removing persons from the small business community who ought not to manage corporations.

Practitioners will be aware that the

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ASC has an administrative capacity to prohibit persons from managing corporations. This capacity is described in the regime of section 600 of the Corporations Law and a candidate must fall within a formula, the most important ingredient being that he or she has been a director of at least two companies that upon winding up have returned less than fifty cents in the dollar to its unsecured creditors.

The Courts have properly described such prohibitions to be in the public interest rather than as the punishment of an individual. This is consistent with the ASC’s declared vision of fostering honesty and fairness in business but the section 600 administrative action is of no use where the conduct falls outside of the formula.

Practitioners will be interested to know that a much more flexible regime to prohibit individuals from managing corporations was added to the Corporations Law in 1993 and is described in Part 9.4B. This “civil penalty regime” is not an administrative power of the ASC but provides the ASC with standing to make an application to the Court for a number of civil penalty orders, one of which is to prohibit a person from the management of a corporation “for such period as is specified in the order” (section 1317EA(3)).

These civil penalty orders flow only from a very limited number of contraventions of the Corporations Law, the most notable of which for the small business program being the duties of company officers (section 232) and insolvent trading (section 588G).

Most discussions of the civil penalty provisions observe that there are advan-

tages in being able to pursue a matter in the civil courts. These benefits are well known and include the lower standard of proof and the procedural advantages and aids to proof under the rules of the various courts. Additionally, the long waiting times in the criminal courts are avoided as may be delays arising from the principles outlined by the High Court in *Dietrich* regarding an indigent’s right to legal representation.

Practitioners should note that the lower standard of proof may not be what it seems and is in practice presented in reference to the High Court cases *Briginshaw v Briginshaw* (1938) 60 CL 336 and *Helton v Allen* (1940) 63 CL 691 and the cogency of evidence required when allegations of serious misconduct are made in a civil trial. The special standard was recently explained by the High Court in *Neat Holdings Pty Limited v Karajan Holdings Pty Limited* (1992) 67 ALJR 170 at 171:

“Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and the judicial approach that a court should rightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct”

In addition to the potential for an extra time required to present evidence at this standard, the ASC is also mindful that an application for a civil penalty order will permanently stay any criminal proceedings (section 1317FB).

The practical effect of section 1317FB can often be to cause the ASC to wait before commencing a civil action until the Commonwealth Director of Public Prosecutions can be satisfied as to whether the conduct under investigation warrants the laying of criminal charges. On the one hand, the public demands of the ASC that it should take speedy action and the ASC accepts that timely action is important, indeed essential in some cases if the civil action

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to be worthwhile. Yet, on the other hand, it may be forced to wait and not begin a civil action that it would otherwise commence because the consequence of doing so would be to preclude forever a criminal charge for breach of the same civil penalty provision.

Nevertheless, the ASC is ready and willing to use the courts or its own powers to remove sharks from the water and the NT regional office is always receptive to misconduct reported to it.

The Information Focus of the Small Business Program

The second and perhaps more important aim of the program is to help small business to help themselves.

ASC Information Line [1300 300 630]

The ASC has had its own "infoline" operating since the beginning of 1996 and many Territory practitioners would be aware of it.

The infoline operates in both inquiry mode where any caller can ask for basic information and also complaint mode where a caller may wish to provide the ASC with information about conduct

they are concerned about.

ASC data on the Internet [<http://www.asc.gov.au>]

The ASC's homepage was launched shortly after its infoline service in May, 1996 and has been enhanced to assist small business.

At the most basic level, any Internet user can now confirm the authenticity of the Australian Company Numbers of the corporations they are dealing with. An entity without an ACN may of course turn out to be another type of business organisation and the ASC is keen for small business to be aware of the nature of the legal entities, and hopefully the legal consequences following from a default, that they deal with.

A very useful enhancement to the homepage is a new search mechanism that lists individuals who have been prohibited by the ASC from being involved in the management of a company.

It should be noted however that this search will not disclose individuals who are prohibited for other reasons such as being undischarged bankrupts or hav-

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ing been convicted of a fraud offence.

A small business signpost has been added to the homepage and take the inquirer to ASC public information such as "The Company Director's Survival Kit", "Company Essentials", "Getting Your Money Back". It provides an easy link to ComNetsearch which gives inquirers access to information brokers who can provide other useful information such as company profiles and financial information. A version of the "Small Business Guide" that appears as Part 1.5 to the Corporations Law will also shortly join the range of material available.

Public Record

Practitioners will already be aware that more detailed searches of company information, such as the identity of directors, the address of the registered office and the principal place of business, and searches for registered charges over company property are available from the ASC. These services are available for a small fee from the ASC Business Centre at the Harbourview Building in McMinn Street or through ASC's on-line information broker either by going through the ASC's website, to one of its brokers' sites, or phoning one of the brokers)

Presentations

ASC staff are available to conduct presentations about Corporations topics to small business operators, advisers, and other interested groups. These presentations usually include information about services available from the ASC and how to access them, a director's duties, the dangers of insolvency trading and how to identify or "resurrect" phoenix companies (ie companies that rise out of the ashes of old companies using the old company's assets, including the goodwill in a similar name but leaving the debts and liabilities behind).

A number of presentations have already been conducted in the Darwin area and groups interested in an Small Business presentation should contact the small business program manager at the regional office on 89436

High Court and Federal Court Notes

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Practice - discovery - legal professional privilege - operation of Evidence Act 1995 (Cth) - legal advice and fraud.

In *Zemanek v Commonwealth Bank* (NG 873/96, 2 October 1997) Hill J considered the operation of s117, 118 and 119 of the *Evidence Act 1995* (Cth). He observed that in some respects the statutory definition of legal privilege was broader than the common law and in others narrower. The applicant claimed the document came into existence in furtherance of the crime of making a false or misleading representation by the bank contrary to s53(g) of TPA. Hill J observed that more than a mere allegation was required and the applicant had not established a scintilla of evidence in support of the fraud.

Industrial law - whether certified agreement may be enforced by injunction.

In *CFMEU v Gordonstone Coal Management* (NG 804/97, 30 September 1997)

Burchett J concluded the remedies for breach of a certified agreement specified in s178 of *Workplace Relations Act* constituted a special statutory mode of enforcement not only of awards and orders made under the Act but also of certified agreements. He concluded this scheme excluded the jurisdiction of the court to grant injunctions.

Administrative law - migration - reconsidered decision - confidential material.

In *Chu Sing Wun v Minister for Immigration* (WAG 32/97, 19 September 1997) a Full Court considered when an application remitted from the Federal Court to a decision maker for reconsideration will require a hearing "de novo" or merely a reconsideration of the grounds on which the order to review was granted. The court also considered when a primary judge should consider confidential information withheld from the applicant to ensure that natural justice has been afforded.