

Corporations Law (Section 229)

By Sandra Kerr

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Introduction

The Australian Securities and Investments Commission (ASIC) formerly the Australian Securities Commission (ASC) regularly prosecutes prohibited persons for being involved in the management of corporations. ASIC, as part of its Small Business Program detects, and if necessary, investigates and refers for prosecution, persons who breach this provision of the Law.

Section 229 of the Corporations Law prohibits certain persons from being involved in the management of corporations unless they seek leave of the court.

These prohibited persons include, but are not limited to:

- (a) an insolvent under administration (s229(1)); and
- (b) a person who has been convicted of serious fraud, as defined by section 9 of the Corporations Law, (s229(2)(b)) - who is prohibited for a period of 5 years from the date of conviction or from the date of release from prison.

It is a matter of strict liability - the prosecution need not prove the person acted intentionally in breach of section 229 in any proceedings arising out of a breach of the prohibition.¹

It is important to note that the prohibition expressed in the section is wider than generally perceived. The section:

- (a) does not merely prohibit certain persons from being a director - but from being **involved in management** and
- (b) does not merely prohibit bankrupts - but **insolvents under administration**.

This paper will concentrate particularly on the discussion of the definition of (i) "being involved in management" and (ii) "insolvents under administration" in the context of companies.

What is "being involved in management"?

Section 91A defines what, for the purposes of section 229, constitutes managing a company. It states

"A person manages (a company) if the person, in this jurisdiction or elsewhere, is a director or promoter of, or is in any way (whether directly or indirectly) concerned in or takes part in the management of, the (company)".

This definition is far wider than merely "being a director". Indeed it has been noted that the

phrase "being involved in management" should be given "a fairly wide scope if those affected by the way in which companies are managed are to be given the protection the provision is designed to give them".² The caselaw supports this wide definition.

In *Corporate Affairs Commission (Vic) v Bracht*³ Ormiston J held that, for a person to take part in the management of a corporation, that person's participation would not have to be in a role of ultimate control but would need to be more than the mere carrying out of orders.

His Honour noted that a person involved in management need not form part of the board, nor even communicate directly with the board (at 733). To be "involved in management" required participation in activities involving some responsibility, although not necessarily ultimate responsibility. It would suffice if the person went beyond the mere carrying out of directions or where the person provided advice to management in its decision-making processes and execution of its decisions particularly where those decisions could have "significant bearing on the financial standing of the corporation or the conduct of its affairs". (at 734-735)

In particular His Honour noted (at 733) that in a small company

"...the actions of those directly answerable to the directors may amount to "management", ... if powers and functions are delegated to those persons which are likely in their performance to have a significant effect on the business and financial standing of a company".

In *Cullen v Corporate Affairs Commission (NSW)*⁴ Young J stated that

"One looks to see somebody making decisions as to the direction of the corporation though one does not necessarily look for someone who is making decisions at the highest level, nor is it necessarily so that the manager's decisions will not be subject to obtaining the approval of some higher officer".

Consequently the fact that decision making may be subject to supervision by a superior does not necessarily mean that the decision maker will not be taking part in the management of a corporation. However His Honour also noted that "managing" does not incorporate some-

one, even if titled "manager" who merely carried out the policy of the corporation and did not make decisions as to its direction.

An "insolvent under administration"

An "insolvent under administration" is defined in section 9 of the Corporations Law to include a person who:

- (a) is an undischarged bankrupt under the laws of Australia or an external territory;
- (b) has the status of an undischarged bankrupt under the law of any other country and includes:
- (c) a person who has executed a **deed of arrangement under Part X** of the Bankruptcy Act 1966 or any corresponding provision under the law of any other country, where **the terms of the deed have not been fully complied with;** or
- (d) a person whose creditors have accepted a **composition under Part X** of the Bankruptcy Act 1966 or the corresponding provision of the law of any other country, **where a final payment has not been made under that composition.**

The definition of "insolvent under administration" is clearly wider than undischarged bankrupts. The disqualification arises automatically upon the adjudication of bankruptcy or entry into one of the prescribed types of agreement. Subsequent annulment of a bankruptcy does not validate a directorship held while the bankruptcy order was in force.⁵

Conclusion

During my employment with ASIC I have been involved in a number of matters, not all of them in the Territory in which these issues have been raised. On a number of occasions the prohibited persons involved had actually received professional advice (either from an accountant or a solicitor) - but that advice was not always correct.

In one instance an insolvent under administration was continuing to manage a number of companies. He had received legal and accounting advice which indicated that he could continue to be a director so long as he did not become a bankrupt.

In another instance, a person convicted of a number of serious fraud offences was aware, on professional advice, that they could not be a director of a company but was unaware that they could not be involved in management itself.

It is to be hoped that this short article will clarify this area of the Corporations Law.

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Mr Nicholas Venizelakos has been a member of the Athens Bar Association since 1981 and is a current legal practitioner in Victoria. He is able to provide immediate advice in matters involving issues of Greek and/or Greek Australian law.

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¹ See *Poyser v Commissioner for Corporate Affairs (Vic)* [1985] VR 533; (1985) 9 ACLR 651; 3 ACLC 584; *Pollard v DPP (Cth)* (1982) 28 NSWLR 659 28 NSWLR 659; 8 ACSR 813; 10 ACLC 1511.

² *Burchett J, Holpitt Pty Ltd v Swaab* (1992) 33 FCR 474; 105 ALR 421; 6 ACSR 488; 10 ACLC 64 at 67.

³[1989] VR 821; (1988) 14 ACLR 728; 7 ACLC 40.20

⁴ (1988) 14 ACLR 789 at 794; 7 ACLC 121.

⁵ See *Re Baysington Pty Ltd* (1988) 12 ACLR 412; 6 ACLC 50; *Salter v NCSC* [1989] WAR 296; (1988) 13 ACLR 253; 6 ACLC 717.

Supreme Court Library Notes

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68/1998	Supreme Court (Judges Pensions) Amdt Act (N/C)	40/1998	Northern Territory Treasury Corporation Inscribed Stock Regulations (14.10.98)
69/1998	Superannuation Amdt Act (N/C)	41/1998	Treasury (Northern Territory Stock) (Repeal) Regulations (14.10.98) (Expires day after commencement date)
70/1998	Superannuation Guarantee (Safety Net) Amdt Act (N/C)	42/1998	Lands Acquisition Amdt Regulations (1.10.98)
71/1998	Waste Management & Pollution Control Act (N/C)	43/1998	Mining Amdt Regulations (1.10.98) 44/1998 Petroleum Amdt Regulations (1.10.98)
72/1998	Waste Management & Pollution Control (Consequential Amendments) Act (N/C)	45/1998	Energy Pipelines Amdt Regulations (1.10.98)
New regulations		New reprints	
36/1998	Legal Practitioners Regulations (1.10.98)	Long Service Leave Act – Reprinted 26.8.98	
37/1998	Local Court Rules (7.10.98)	Trustee Act – Reprinted 23.9.98	
38/1998	Small Claims Rules (7.10.98)	Unit Titles Act – Reprinted 26.8.98	
39/1998	Local Court Regulations (7.10.98)		

Commencements

50/1998	Lands Acquisition Amendment Act (No 2) (1.10.98)
51/1998	Lands and Mining Tribunal Act (1.10.98)
52/1998	Mining Amendment Act (1.10.98)
53/1998	Petroleum Amendment Act (1.10.98)
54/1998	Petroleum (Submerged Lands) Amendment Act (1.10.98)
55/1998	Validation of Titles and Actions Amendment Act (1.10.98)
56/1998	Energy Pipelines Amendment Act (1.10.98)

Repealed legislation

7/1855-6	Trustee Act (Ss. 2 to 47 inclusive)
6/1860	Property Act (Ss. 24 to 30 inclusive)
7/1862	An act to give to Trustees... (Ss. 1 to 9, Ss. 23 to 31 inclusive)
14/1866-7	Limitations of Suits & Actions Act 1866 (S. 26)
523/1891	Trustees Appointment Act 1891
27/1979	Treasury (Northern Territory Stock) Regulations
32/1985	Treasury (Northern Territory Stock) Regulations
7/1997	Mining Amendment Act 1997



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