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Australian Disputes Year in Review 2019

This publication recaps 10 of the most important developments of 2019 across commercial disputes, and identifies some areas to watch in 2020.

1 Financial services: The Hayne Royal Commission Final Report

In February the Government released the final report of the Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, following on from the interim report which was published in September 2018. For an overview of the final report, see our update The Hayne Royal Commission Final Report.

Of the 76 recommendations in the final report, 54 were directed to the Government. The Government committed to implement all of the recommendations except recommendation 1.3, which sought to end conflicted mortgage broker remuneration by banning trail commissions and requiring the borrower, not the lender, to pay mortgage broker fees.

The Government's response includes expanding the Federal Court's jurisdiction in relation to corporate crime and implementing the outstanding ASIC Enforcement Review recommendations to improve the breach reporting regime.

ASIC was heavily criticised in the final report. The Commissioner observed that:

- too often the law was not enforced at all, or not enforced effectively;
- ASIC has an "ineffective enforcement culture"; and
- ASIC has a "deeply entrenched culture of negotiating outcomes rather than insisting on public denunciation of, and punishment for, wrongdoing".

The Commissioner also recommended that ASIC adopt an approach to enforcement that:

- takes, as its starting point, the question of whether a court should determine the consequences of a contravention (as opposed to a negotiated outcome);
- recognises that infringement notices will rarely be appropriate for provisions that require an evaluative judgment and, beyond purely administrative failings, will rarely be an appropriate enforcement tool where the infringing party is a large corporation;
- recognises the relevance and importance of general and specific deterrence in deciding whether to accept an enforceable undertaking and the utility in obtaining admissions in enforceable undertakings; and
- separates, as much as possible, enforcement staff from non-enforcement related contact with regulated entities.

In response to the final report, ASIC established an Office of Enforcement, and focused on accelerating enforcement outcomes. Its enforcement priorities include 13 matters referred to it by Commissioner Hayne.

For further details see our alert What to expect from ASIC enforcement in the "post-Hayne world".

2 Financial services: Acceleration of financial regulatory enforcement

Following the release of the Royal Commission interim report in September 2018, ASIC adopted a "Why not litigate?" approach to enforcement.

ASIC has continued to accelerate this approach throughout 2019 through the newly established Office of Enforcement, bolstered by an additional $404 million in funding over four years.

Specifically we have seen:

- A significant increase in the intensity and breadth of ASIC's investigations. ASIC targets a six month timeframe for completion of all of its investigations, irrespective of the complexity of the issues it is investigating. In practice, this requires very short turnaround times for responding to compulsory notices, which can place significant compliance burdens on financial institutions.
- A substantial reduction in the number of negotiated outcomes, with ASIC preferring to issue proceedings before entering into settlement discussions.

These changes come on top of a 20% increase in enforcement investigations, with a particular focus on larger financial institutions.

Looking into 2020, we expect to see ASIC:

- place increased emphasis in litigated matters on the scope of the obligation on Australian financial services licensees to ensure their financial services are provided 'efficiently, honestly and fairly' as required by s912A(1)(a) of the *Corporations Act*. The scope of this provision has not been extensively tested in Court, and now attracts civil penalties of up to $525 million per contravention. These penalties apply to conduct occurring after 13 March 2019, so we expect to see the first civil penalty cases under s 912A(1)(a) coming to Court in 2020;
- look to hold entities to account for breaches of the enforceable provisions of the updated Banking Code of Practice, which commenced on 1 July 2019; and
- take advantage of the further legislation to be introduced in 2020 in response to the final report, including:
  - amendments to the significant breach reporting obligations under s912D of the *Corporations Act*. The details of these amendments are yet to be released, but they are likely to include the introduction of an objective test that will make the obligation easier for ASIC to enforce; and
  - a greater ability to access telecommunications intercept information, expanded powers to ban individuals in the financial and credit industries and expanded search warrant powers, as detailed in the *Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Bill 2019* (Cth).

For further details of ASIC's acceleration of its enforcement outcomes see our alert ASIC's enforcement update.

3 Contracts: Restitution as an alternative to loss of bargain alternatives

When a contract is terminated for breach before performance is complete, the usual remedy is damages for loss of bargain. However, in September the High Court of Australia decided by majority that an alternative remedy in restitution is also available.

The decision in *Mann v Paterson* involved a contract to build two townhouses. Mr and Mrs Mann asserted that Paterson Constructions had repudiated the contract when only one townhouse was completed by the due date, and they purported to terminate the contract. Paterson Constructions treated the termination notice as a repudiation, accepted the repudiation and applied to the Victorian Civil and Administrative Tribunal for relief on a *quantum meruit* basis or alternatively damages.

Quantum meruit (how much earned) is a cause of action recognised by the courts for the recovery of the reasonable value of services performed.

VCAT found that the Manns had requested variations claimed by Paterson and ordered the Manns to pay Paterson $660,000, calculated on a *quantum meruit* basis.

The High Court held that contractual rights which have accrued under a contract up to the point of termination, including the right to be paid for work carried out, remain enforceable (unless the contract says otherwise) and restitutionary relief under *quantum meruit* will not be available in respect of that work.

The equitable doctrine of breach of confidence may be called on when privileged communications have been disclosed and an injunction is sought to restrain the misuse of confidential information.

> However, the majority also said that *quantum meruit* will be available where work has been carried out under a contract but the right to be paid for that work has not yet accrued.

For example, where a price is payable for stages of work and some stages are incomplete, *quantum meruit* is available for incomplete stages.

The theoretical advantage of *quantum meruit* over loss of bargain damages is that it may be easier to assess the fair value of work by reference to charges commonly made by others for like services than to calculate damages for loss of bargain based on hypothetical events.

Even though *quantum meruit* was available, Paterson Constructions was unsuccessful in its claim because it had failed to comply with the security of payment regime, which applied to variations to domestic building contracts. For further details see our update, What can a builder recover for wrongful termination of a building contract?

4 International arbitration: The purpose and context of arbitration clauses

In May the High Court delivered judgment in *Rinehart v Hancock Prospecting*.

The Court was asked to interpret arbitration clauses which provided that "any dispute under this deed" would be submitted to arbitration.

This raised the question of whether claims about the validity of deeds containing those words were covered by the arbitration clauses. The Full Federal Court and the New South Wales Court of Appeal had reached different views. Ultimately the High Court interpreted the clause broadly, so that claims about the validity of the deed would be dealt with by arbitration.

In an earlier House of Lords decision *Fiona Trust* Lord Hoffman said that the construction of an arbitration agreement "should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal" unless there is clear language to suggest that some disputes were intended to be excluded.

The High Court treated the context and purpose of the deeds as important to their construction. The Court considered that the purpose of quelling disputes about the title to assets was of great commercial importance to the prospective arrangements and that confidentiality was a serious concern for the parties in their dealings leading up to the entry into the relevant deeds. The Court concluded that it was "inconceivable" that a person in the position of the parties would have thought that claims involving allegations of undue influence would be ventilated in open court.

Ultimately the Court held that it did not need to consider the principles in *Fiona Trust* to resolve the appeals, given the "application of orthodox principles of interpretation, which require consideration of the context and purpose of the Deeds". The Court further observed that "[t]he approach adopted in *Fiona Trust* may not assume so much importance for courts in the future given the likelihood that arbitral clauses such as the UNCITRAL Arbitration Clause in different and arguably wider terms are now recommended for use by commercial parties".

Although the Court did not adopt the approach taken by the House of Lords in *Fiona Trust* to the interpretation of arbitration agreements, the decision continues a line of authority that is consistent with the Australian courts' liberal and pro-arbitration approach to the interpretation of arbitration agreements.

For further details see our update, Rinehart: The High Court of Australia makes significant decision regarding interpretation of arbitration agreements.

5 Corporations: Trust assets are company property for statutory priorities

In June the High Court delivered judgment in *Carter Holt Harvey Woodproducts Australia v Commonwealth* (the Amerind case). The decision ended decades of uncertainty by explaining how the corporate insolvency regime applies to trustees of trading trusts.

When a company becomes insolvent, an external administrator (such as a liquidator or receiver) may be appointed. If the company holds assets on trust, those assets are not necessarily available to its general creditors. However the liquidator/ receiver will be entitled to exercise the company's right of indemnity by applying trust assets against liabilities that were properly incurred by the company as trustee.

In the case before the High Court, Amerind carried on business solely as trustee for the Panel Veneer Processes Trading Trust and had debt facilities with Bendigo and Adelaide Bank. When its director appointed a voluntary administrator, the bank appointed receivers and managers. The receivers traded the business for a short time, realising most of its stock. In the meantime, Amerind's creditors resolved to wind up the company and have liquidators appointed.

After the Bank's secured debt had been discharged (including the costs of the receivership) there was a remaining surplus of about $1.6 million. There were two competing claims to this surplus – the Commonwealth and Carter Holt.

The Commonwealth had paid $3.8 million in accrued wages and entitlements to former employees of the company and claimed priority for these payments under s 433 of the *Corporations Act*. The competing creditor was Carter Holt Harvey, which asserted amongst other things that the Commonwealth was not entitled to priority because assets held on trust are not the property of the company and therefore the relevant provisions of the *Corporations Act* do not apply (rather, distributions to creditors are to be governed by trust law principles which do not involve employees enjoying any priority over general creditors).

The High Court dismissed Carter Holt's appeal on the basis that the trust assets were properly to be considered property of the company, to the extent of the right of indemnity.

Consistent with this, the High Court's decision also made clear that trust assets can only be used to discharge liabilities properly incurred by the company in its capacity as trustee of that trust, and are not available for distribution to the company's general body of creditors (or for payment of debts incurred by the trustee in relation to other trusts). This resolved conflicting authority on this question which has existed for over 35 years.

6 Consumer: Statutory unconscionability in financial services

In June the High Court handed down its decision in *ASIC v Kobelt*. The High Court by a 4-3 majority rejected ASIC's case that Mr Kobelt had contravened s 12CB of the *Australian Securities and Investments Commission Act 2001* by providing credit to members of a remote indigenous community under a "book-up" system. The decision provides an important guide as to the application of statutory unconscionability and how the court may approach a case concerning financial services provided to remote indigenous communities.

The majority of the Court appeared to accept that statutory unconscionability under s 12CB of the *ASIC Act* is broader than the equitable concept. A key question that was not clearly answered is whether exploitation of a special disadvantage is required for conduct to be unconscionable (as it is in equity).

The decision also considered the relevance of special disadvantage in the context of a "system" case. Chief Justice Kiefel and Justice Bell in the majority explained that "a system or pattern of conduct by a trader could constitute unconscionable conduct without the necessity to identify the circumstances, or the effect upon, any particular consumer". While Keane J held that a party must prove a calculated taking advantage of a weakness or vulnerability on the part of victims of the conduct in order for the stronger party to obtain a benefit not otherwise obtainable, Nettle and Gordon JJ held that it was not necessary to identify that an individual had a special disadvantage.

Given the number of untested issues, it seems likely that the appellate courts will continue to be asked to consider unconscionable conduct under the *ASIC Act* and the *Australian Consumer Law* in the coming year.

For further details, see our update Statutory unconscionability in the provision of financial services.

7 Class actions:
Market based causation in shareholder class actions

In October the first final judgment in a shareholder class action was delivered in *TPT Patrol v Myer Holdings*. Justice Beach confirmed that market based causation is available in Australia for both continuous disclosure and misleading or deceptive conduct cases.

Despite this, the plaintiffs were unsuccessful. Justice Beach was not satisfied on the evidence that Myer's disclosures caused share price inflation. The decision is notable for the number of questions identified in relation to causation in shareholder class actions that remain to be answered. Ultimately a level of uncertainty will continue until the availability of market based causation in shareholder class actions has been tested on appeal.

The decision was also one of the first substantive discussions of continuous disclosure requirements. Information about earnings can fall within the Listing Rule exceptions if it is generated for internal management purposes, insufficiently definite to warrant disclosure, and confidential. However Beach J considered that if a company provides forward-looking guidance, it must ensure that the market is promptly informed of changes to that guidance.

For the details, see our class actions update Market based causation finds its feet in first shareholder class action judgment – but that does not mean damages will follow.

Other class actions developments of 2019 included:

- the High Court's decision last week that the Federal Court of Australia and the Supreme Court of New South Wales did not have the power to make **common fund orders**, covered in our update here;
- the **ALRC's report** on class actions and litigation funding, covered in our update here;
- decisions on **competing class actions**, which include the decision of the Supreme Court of NSW in *Wigmans v AMP*, covered in our class actions update here and since affirmed on appeal, and the Full Federal Court's decision in *Klemweb Nominees v BHP* which also foreshadowed the possibility of contingency fees for plaintiff law firms as part of a common fund order – covered in our class actions update here; and
- a Bill before the Parliament of Western Australia to introduce a class action regime in that State as noted in our class actions update here.

8 Business conduct and risk: Whistleblower reforms

Over the course of 2019 the Government introduced a suite of whistleblower reforms aimed at increasing the protections available to whistleblowers in the private sector, encouraging disclosure of criminal behaviour and misconduct, and consolidating the multiple different whistleblower protection regimes.

The *Treasury Law Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) came into force on 1 July 2019 and provided a consolidated and strengthened regime for whistleblowers for proprietary and public companies in the corporate, financial and credit sectors.

The new legislation, among other things, requires public and large proprietary companies to have compliant whistleblower policies in place by 1 January 2020.

See our update Australian whistleblower laws one month on to read about some of the practical challenges facing companies trying to implement these new laws.

Following the commencement of whistleblower reforms in the private sector the Government turned its focus to whistleblower protections for public servants who have limited protections under the *Public Interest Disclosure Act 2013* (Cth). This became particularly apparent in the Federal Court decision of *ACD13/2019 v Stefanic* where an application for an injunction by a security officer for the Department of Parliamentary Services to prevent a sanction being imposed on him for a breach of the Department's Code of Conduct, was dismissed. We anticipate further developments in this space over the coming year.

In addition, the latest version of the ASX Corporate Governance Principles and Recommendations, due to commence on 1 January 2020, require listed companies to have, and publicly disclose, whistleblower and anti-bribery policies.

You can read more about whistleblower and anti-bribery reforms in our previous publications Mid-year update on anti-bribery and corruption in Australia and Quarterly update on anti-bribery and corruption in Australia.

Over the course of 2020 employers both in the private and public sectors will need to respond to the new whistleblower regimes to ensure compliance. There are civil and criminal penalties for failure to comply with confidentiality and detrimental conduct provisions. This is likely to result in an increase in the need for internal investigations.

More recently the Australian Law Reform Commission has released a discussion paper as part of its review of corporate criminal liability. See our update, ALRC discussion paper on corporate criminal responsibility: another potential game changer.

Finally, last week the Government introduced the *Crimes Legislation Amendment (Combatting Corporate Crimes) Bill 2019* (Cth). If passed, this Bill will create a new offence of failing to prevent the bribery of foreign public officials and a new deferred prosecution agreement regime. For further details, see our update Failure to Prevent Foreign Bribery and Deferred Prosecution Agreements: the latest reforms proposed to Australia's corporate criminal regime.

9 Privilege: Paradise Papers decision

In August the High Court delivered judgment in *Glencore International AG v Commissioner of Taxation*. The Court held that legal professional privilege is not an actionable legal right capable of sounding in injunctive relief. The privilege is only an immunity from the exercise of powers that would otherwise compel the disclosure of privileged communications.

In late 2017, the Paradise Papers, a cache of over 13 million confidential electronic documents relating to offshore investments, were leaked to the International Consortium of Investigative Journalists.

The leaked material included documents relating to Glencore, relevantly advice from Appleby, the Bermudan law firm whose documents were stolen. That advice related to a restructure of four Australian companies within the Glencore group in a transaction called "Project Everest". In subsequent meetings with Glencore, the ATO indicated that it was in possession of the documents and that it was seeking to identify possible Australian links to tax avoidance.

Glencore commenced proceedings in the original jurisdiction of High Court, seeking an injunction to restrain the ATO's use of the documents, and orders requiring that the ATO return the documents in its possession. Having found that legal professional privilege was not an actionable legal right, the High Court declined to grant the injunction or orders Glencore sought.

The equitable doctrine of breach of confidence may be called on when privileged communications have been disclosed and an injunction is sought to restrain the misuse of confidential information.

It appears that this avenue was not available to Glencore in this instance given that the ATO had obtained the documents from the public domain. For further details see our update High Court holds that legal professional privilege may not found a cause of action.

Other avenues to protect privileged material (eg any tort of unjustified invasion of privacy) may be available to parties in different circumstances, and it remains to be seen whether those areas of law may be developed by the courts to meet the recognised need to adequately protect privileged material from sophisticated cyber-attacks. See our media update to read more: A tort of privacy: an invitation from the High Court?

For the time being, however, this decision serves as a reminder that while the law recognises legal professional privilege as an immunity from production or disclosure in certain circumstances, it is important to remain vigilant and conscious of the risk that the contents of privileged communications might be revealed due to matters beyond your control.

10 Energy and resources: Griffiths native title decision

In March the High Court delivered its first decision on native title compensation. The High Court reduced the native title compensation awarded to the Ngaliwurru and Nungali Peoples for the effect of land grants and public works on their native title rights from approximately $2.9 million to just over $2.5 million.

The High Court's decision in *Timber Creek* provides greater certainty about how native title compensation should be assessed. More importantly, it marked the beginning of a new phase in the relations between native title holders and the governments and third parties that deal with and use native title land.

The High Court said that the standard valuation of land process is appropriate to determining economic value. The steps to assess economic loss are:

- identify the native title rights and interests in question and in particular, whether they are exclusive or non-exclusive;
- if the native title rights and interests amount or come close to a full exclusive title – they will have an objective economic value similar to freehold value;
- if they are not exclusive – compare the native title rights and interests with full exclusive native title and make an evaluative judgement of the appropriate percentage reduction to reflect the more limited nature of the non-exclusive rights; and
- apply the percentage reduction to the "full freehold value" (ie the market value at the time of the compensable act).

The High Court also upheld the award of simple interest on the economic loss component, calculated from the date of the compensable acts.

The High Court's decision to uphold the trial judge's $1.3 million award for noneconomic loss is the most significant part of this decision.

The High Court said that this component of native title compensation is not solatium. It is about the particular effect of the compensable act on the native title holder's cultural or spiritual connection with the land. The steps for assessing this component of the compensation are:

- identify the compensable acts;
- identify the native title holders' connection with the land or waters by their laws and customs; and then
- consider the particular and inter-related effects of the compensable acts on that connection.

For further details, see our publication First High Court decision on native title compensation in Timber Creek case.

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