
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountant

OCTOBER 2005

DIRECTORS' AND OFFICERS' STATUTORY DUTIES

Recent prosecutions by the Australian Securities & Investments Commission ("ASIC") in the HIH Insurance Limited and One.Tel Limited proceedings have once again reinforced the importance of directors and officers complying with statutory duties under the Corporations Act. Of course, directors' and officers' duties are not limited to companies subject to insolvency administrations.

ASIC v Vines was a civil penalty proceeding brought by the Australian Securities & Investments Commission against three executive officers of the GIO Australia Holdings Limited arising out of their part in the making of a profit forecast used by GIO Australia Holdings Limited, in a Part B statement, in response to a takeover bid by a subsidiary of AMP Limited.

Chapter 2D.1 of the Corporations Act 2001 (Cth.) imposes the following statutory duties on directors and officers:

- Section 180, a duty to act with reasonable care and diligence;
- Section 181, a duty to act in good faith and in the best interests of the corporation;

- Section 182, a duty not to improperly use their position to gain advantage for themselves or cause detriment to the corporation;
- Section 183, a duty not to improperly use information; and,
- Section 184(1) which deals with criminal contraventions.

Section 9 defines a director as a person who is appointed to the position of a director. It also includes a person not validly appointed as director such as a shadow or defacto director. It includes a corporation.

In *ASIC v Vines* Justice Austin of the Supreme Court of New South Wales considered the meaning of management and the degree of participation in management in order to make a person liable for the statutory duties imposed by the former Section 232 of the Corporations Law. Sections 180 to 183 provide equivalent duties. However, the former Section 232 only imposed statutory duties on executive officers not all officers of a corporation. Therefore, its application was narrower than Sections 180 to 183 of the

DISCLAIMER:

The material contained in this newsletter is merely general commentary and the comments and information do not represent a legal or professional service. Advice should be sought from Woodgate & Co. in relation to the circumstances of each matter before acting in this area.

Corporations Act.

The Court considered whether management can be said to have occurred when the activity is confined to a section of the company's overall business, such as production or sales or whether management is confined to the central management of the affairs of the company. His Honour stated that the purpose of the definition of executive officer was to identify amongst those who work for a corporation, that group whose responsibilities are significant enough to justify the imposition of special statutory duties. His Honour considered that it would be very odd if the company secretary was subject to special statutory duties; yet the national sales manager was not. His Honour also considered whether management can be exercised by those other employees who report directly to the board of directors. However, on the facts of the proceedings His Honour did not need to determine this issue.

His Honour considered the degree of participation necessary to be concerned in or taking part in management. His Honour quoted with approval Justice Ormiston in *Commissioner for Corporation Affairs Commission v Bracht*. Justice Ormiston stated that taking part connotes active participation which must be real and direct but not necessarily in a role in which ultimate control is exercised. However, it would have to be more than the administrative carrying out of the orders of others. The concept of being concerned in management was said to have a much wider operation which connotes participation in a variety of levels and at differing intensities, some of which may be relatively modest. However, mere clerical or administrative activities

would be insufficient. What was required were activities involving some responsibility, but not necessarily of an ultimate kind whereby control is exercised. Advice given to management, participation in its decision making processes and execution of its decisions, going beyond mere carrying out of its directions as an employee, would suffice. On the facts of the matter, His Honour found that the three defendants were concerned in the management of GIO Australia Holdings Limited.

Justice Austin held that the three executives were executive officers for the purposes of Section 9 of the Corporations Law. The Corporations Act no longer refers to the executive officers.

The implications of His Honour's verdict are significant. In particular, it confirms that the statutory duties on directors and officers are imposed not just on directors and those who report directly to the board but may also be imposed on staff who are concerned in or take part in the management of the company. However, there is some comfort for such officers, in that His Honour stated that when considering whether officers had acted as directors of the company for the purposes of the insolvent trading provisions of the Corporations Act, then the reference to those taking part in the management of the company would be interpreted as applying only to persons whose management role may be likened to that of a director.

Further, Justice Austin stated that in determining whether directors and officers had complied with their statutory duties of care and diligence, a Court would have regard to the general law of torts. His Honour stated that if a

professional person acts as a reasonable professional person would act, he or she is not negligent even if many others would have acted differently in the circumstances. Therefore, the law distinguishes between negligence and mere mistakes.

Section 1317E of the Corporation Act imposes substantial penalties for contraventions of Sections 180, 181, 182 and 183.

In particular a Court may impose compensation for damages suffered. Further, pecuniary penalty orders of up to \$200,000 may be ordered. ASIC may also make application to a Court for an order disqualifying a person from acting as a director of a company pursuant to Section 206C of the Corporations Act.

WOODGATE & CO.

Chartered Accountant

Business Recovery Services

Registered Liquidator & Trustee in Bankruptcy

Level 14, 25 Bligh Street

Sydney, NSW, 2000

GPO Box 882, Sydney, NSW, 2001

Telephone: (02) 9233 6088 · Facsimile : (02) 9233 1616

Associated Offices in

Melbourne · Brisbane · Adelaide · Perth

