

Constitutional Challenges Facing ASIC: An Overview

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1. INTRODUCTION

“There has been increasing dissatisfaction with the duplication in the existing scheme, its lack of direct accountability to a single government and the difficulty of securing swift change in response to market developments. The current system fails to reflect the fact that Australia is one market trying to interrelate with the international financial community and no longer a collection of jealous colonies.”¹

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S.B.: After over eight years of operation, how do you rate the present Co-operative Scheme?

A.G.H.: I consider that the Co-operative Scheme has had some major successes, particularly in terms of greater uniformity of approach within Australia. However, at the same time it has also revealed some basic flaws which I believe will be remedied by the Commonwealth system.

S.B.: Can you give an example of where the Co-operative Scheme is flawed?

A.G.H.: Well, the Co-operative Scheme does not deliver the simple objective that a company incorporated in any Australian jurisdiction can, without more regulatory digestion, carry on business throughout Australia. I believe the Commonwealth system, through the ASC will deliver this. Further, despite a ministerial commitment in 1978, the Scheme could never put together a national computerised corporate database.

S.B.: Why do you believe the change to a Commonwealth system is necessary?

A.G.H.: In my view, the commercial logic for a Commonwealth system is inescapable. That logic is based fundamentally on the need for the Australian corporate regulatory market to be efficient, uniform and understandable Australia-wide.

The present Co-operative Scheme offers corporate and securities regulation based on nine separate jurisdictions (that is, the Commonwealth, the two Territories and the six States) and their institutions - nine Parliaments (including the A.C.T), nine Public Services (10 including the

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¹ “The States’ rights in company regulation” *Australian Financial Review*, 23 September 1987 at 12.

NCSC) and nine Judiciaries. This extensive administrative system is too unwieldy, too costly and ultimately, too inefficient. In this internationally competitive world, where speed is at a premium, Australia simply cannot afford it.

S.B.: How do you see the ASC as being different?

A.G.H.: The ASC offers the opportunity for one uniform administrative system to service Australian corporate and securities industries in an efficient and effective manner. Whether it can deliver is a great challenge - both as to the marshalling of resources and their utilisation.”²

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“These appeals present a further illustration of the grotesque complications that exist in the regulation of corporations under Australian Law. Such complications derive from a heady mixture of legal history, the separate corporations legislation of the Commonwealth, the States and the Territories, a narrow constitutional decision, [footnote omitted] and the successive and unduly complex legislative schemes that have responded to the foregoing.”³

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There is a crisis facing the continued operation of the national corporations scheme. It is essentially a constitutional crisis. The High Court’s decision in *Hughes*⁴ shows that the constitutionality of the legislative underpinnings of the scheme can no longer be assumed. The scheme, built upon “a novel legislative device”⁵, and designed to deliver “a single and truly national regulatory regime that can guarantee a sound and well regulated environment for corporate activity”⁶, requires the urgent attention of Commonwealth and State Governments. However, the crisis is also about how the inherent structural complexities of the national corporations scheme, “an unpleasant task”⁷ at the best of times to read and understand, has led to false issues being exposed. Costly and protracted litigation in our highest court has followed.⁸ As I will show, litigation of this kind is increasing. We have also to deal with the better understood, but also yet to be resolved, implications of the High Court’s decision in *Re Wakim*.⁹ The Minister for Financial Services and Regulation, the Hon Joe Hockey MP, has noted that the effect of such legal uncertainty in the existing Corporations Law “undermines our regulator, the Australian Securities and Investments Commission [ASIC], and it is a

² Selwyn Bajada (S.B.) interviews Mr A.G. Hartnell (A.G.H.), the first Chairman of the Australian Securities Commission (ASC). The interview took place in September 1989 and is reported in *Companies and Securities Law Journal* (December 1989) at 381.

³ *Byrnes -v- The Queen* (1999) 164 ALR 520 per Kirby J at 542.

⁴ *The Queen -v- Craig Allan Hughes* (2000) 171 ALR 155.

⁵ Australia, House of Representatives, *Parliamentary Debates* (Hansard) 8 November 1990 at 3665.

⁶ Australia, House of Representatives, *Parliamentary Debates* (Hansard) 8 November 1990 at 3669.

⁷ *Byrnes* (*supra*) per Kirby J at 543.

⁸ *Byrnes* (*supra*), *Bond -v- The Queen* (2000) 169 ALR 607 and *ASC -v- Macleod* [2000] WASCA 101.

⁹ *Re Wakim; Ex parte McNally; Re Wakim; Ex parte Darvall; Re Brown; Ex parte Amann; Spinks -v- Prentice* (1999) 73 ALJR 839.

threat to business confidence and to Australia's ability to take a major role in the global market-place."¹⁰

Ian Govey has discussed the progress of current efforts to achieve a lasting solution to the constitutional issues, namely the referral of State 'corporate regulation' powers enabling the Commonwealth Parliament to enact the Corporations Law as a single Commonwealth law applying throughout Australia. This solution must be implemented without delay and be capable of delivering a certain and transparent foundation for the national regulatory scheme which Australians have until now taken for granted. In my view, and this paper will touch on examples, the potential and actual issues now required to be dealt with and likely litigated, not only by ASIC but others who seek to know their rights and obligations under the Corporations Law and to have the merits of their disputes resolved, has reached Gilbertian proportions. Sometime next year, the High Court will hear argument about whether a constitutionally sound system for the incorporation of companies that may trade as of right throughout Australia has been created. Other questions which will claim the attention of our courts concern the powers of appeal or prosecution of public authorities, defying the commonsense and legitimate expectations of the community, and questions about which courts should hear particular matters, often after investigations and regulatory intervention involving great public and private expense, and affecting fundamental obligations and rights of companies and citizens.

The High Court's decisions in *Re Wakim, Byrnes and Hopwood, Bond and Hughes* have inspired a number of actual and mooted challenges, not only to ASIC's power to take various kinds of enforcement action under the Australian Securities and Investments Commission Act 1989 (Cth) (**the ASIC Act**) and the Corporations Law, but also the Commonwealth Director of Public Prosecution's (**Commonwealth DPP**) power to prosecute Corporations Law offences.

In what follows, I will start with providing a general overview of the nature of the issues and challenges ASIC has had to deal with since *Re Wakim*. I have not, in general, provided details of the parties involved in these matters as, in most cases, litigation has

¹⁰ "Full power ahead for referral scheme" *Australian Financial Review*, 14 July 2000 at 73.

either been avoided or, for whatever reason, has not yet commenced or sufficiently progressed to make it appropriate for this information to be disclosed. The balance of this paper will focus on three matters currently before the courts in which constitutional challenges have arisen, namely *Edensor Nominees Pty Ltd -v- ASIC (VIC)*¹¹, *The Queen v James O'Halloran (NSW)*¹² and *Australian Securities Commission -v- Malcolm Macleod (WA)*.¹³

2. GENERAL OVERVIEW OF CHALLENGES

There are 29 matters where a constitutional challenge has been raised.¹⁴ Not all of these matters involve a direct challenge to ASIC's power to act. As noted above, there have also been challenges to the Commonwealth DPP and jurisdictional issues under the national corporations scheme.

Of the 29 challenges, approximately 13 are "mooted". By that I mean, the affected person has questioned the constitutionality of the proposed or actual action but has not sought to have the challenge argued before the courts.

The actual and mooted challenges have arisen in a broad range of situations, namely during ASIC's investigations, ASIC's administrative hearings and its referral of matters to the Companies Auditors and Liquidators Disciplinary Board (**CALDB**), prosecutions of Corporations Law offences by ASIC and the Commonwealth DPP, other litigation initiated by ASIC to ensure compliance with the Corporations Law, and the appeal process. I will briefly deal with each situation.

Investigations

¹¹ [1999] FCA 1722 (10 December 1999), [2000] FCA 231 (9 March 2000) and the decision of the Full Bench of the High Court dated 30 August 2000. The High Court has not yet published reasons for its decision.

¹² Judgment of Barr J of the Supreme Court of New South Wales handed down on 7 July 2000. Mr O'Halloran has appealed this decision to the Court of Appeal.

¹³ [2000] WASCA 101. Mr Macleod has applied for special leave to appeal this decision of the Full Court of the Supreme Court of Western Australia to the High Court.

¹⁴ This figure and other matters I discuss here are based on the outcome of a review as at 27 October 2000.

ASIC must strive to take whatever action it can take, and is necessary, in order to enforce and give effect to the laws that confer functions and powers on it in accordance with section 1(2)(g) of the ASIC Act. These laws are set out in sections 11(1) and 12A(1) of the ASIC Act and confer, among other things, extensive investigation and information gathering powers which may be exercised in certain circumstances.

ASIC's principal powers in relation to companies, managed investment schemes, securities, futures contracts and consumer protection are contained in Part 3 of the ASIC Act and include:

- the power to require a person to give all reasonable assistance in connection with an investigation and/or to be examined on oath and to answer questions (section 19 of the ASIC Act);
- the power to inspect books including reports, documents and other records (section 29 ASIC Act);
- the power to require the production of books about the affairs of a company or registered scheme or about securities, futures contracts or financial services (sections 30, 31, 32 and 32A ASIC Act); and
- the power to require the production of books in a person's possession (section 33 ASIC Act).

There have been two constitutional challenges to ASIC's investigation and information gathering powers and these have been inspired by the *Hughes* case.

One of these challenges related to ASIC's power to obtain books. The facts were that ASIC was conducting a surveillance of the activities of an individual under the Corporations Law. As part of the surveillance a notice under sections 32A and 33 of the ASIC Act was issued to the individual to obtain books to check his compliance with the Corporations Law. The individual did not comply with the notice on his solicitor's advice that ASIC as a Commonwealth body was constitutionally prohibited from

enforcing a State law. ASIC did not insist on taking the books as it had also gathered information from other surveillance activities. ASIC did, however, advise the individual who refused to comply with the notice that it believed it had the power to obtain the books, but would not be taking the matter further at that time.

The other challenge related to ASIC's power to conduct an examination under section 19 of the ASIC Act. As noted above, ASIC has the power to require a person to give all reasonable assistance in connection with an investigation and/or to be examined on oath and to answer questions. The facts relating to this challenge were that ASIC issued a notice under section 19 of the ASIC Act to an individual to appear for examination in relation to an investigation of suspected contraventions of section 409 of the Western Australian Criminal Code. The proposed examinee refused to attend. ASIC then commenced proceedings in the Supreme Court of Western Australia certifying this failure to comply and requesting the Supreme Court to inquire into this case pursuant to section 70 of the ASIC Act. Under section 70(3) of that Act the Court may order the person to comply with a requirement with which a person has, without reasonable excuse, failed to comply. In those proceedings, the issue of the notice under section 19 of the ASIC Act was challenged on the basis that ASIC as a Commonwealth body was constitutionally prohibited from investigating a State law. ASIC disagreed, but did not file submissions as the proceedings were discontinued after the proposed examinee agreed to appear for examination.

ASIC's power to release transcripts of an examination under section 19 of the ASIC Act has also been challenged. Under section 25 of the ASIC Act ASIC may give a copy of a written record of the examination or such copy together with a copy of any related book to a person's lawyer if the lawyer satisfies ASIC that the person is carrying on, or is contemplating in good faith, a proceeding in respect of a matter to which the examination related, or to other relevant persons. In one matter, an application was made to ASIC for release of certain transcripts of an examination under section 19 of the ASIC Act. ASIC granted the application. Solicitors acting for the primary examinees commenced proceedings in the Supreme Court of Victoria challenging ASIC's decision. These proceedings were adjourned and an application was brought in the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 (Cth) arguing that ASIC had no power to make the decision to release the transcripts of the

examination (nor did it have the power to conduct the investigations and examinations on which they were based) on the grounds that the Parliament of Victoria lacked the legislative power to give ASIC, a Commonwealth body, jurisdiction to administer the ASC Law of Victoria. ASIC was not provided with further details about the grounds of the applicant's challenge as the Federal Court application, and the Supreme Court proceedings, were eventually withdrawn.

ASIC's administrative hearings and referral to CALDB

Constitutional challenges have been raised in ASIC's administrative hearings and in its referral of matters to the CALDB. These challenges have also been inspired by the *Hughes* case.

There are three broad categories of administrative hearings which ASIC may conduct:

- protective hearings in which ASIC contemplates use of its administrative powers to protect the public (by, for example, excluding a person from, or limiting their participation in, the securities or futures industry¹⁵ or by stopping the issue, sale or transfer of securities¹⁶);
- initial licensing and occupational registration hearings which are held before ASIC decides whether to grant a licence to persons such as securities dealers or whether to register a person as an auditor or liquidator; and
- application of security hearings which considers claims by persons for payments of compensation from security lodged by licensed securities dealers, investment advisers and liquidators.¹⁷

ASIC conducts its administrative hearings through a member of staff acting under a delegation of its powers under section 102 of the ASIC Act. The staff members, referred to as “delegates” or “hearing delegates” are usually reasonably senior members

¹⁵ Pt 7.3 Div 5 and Pt 8.3 Div 5 of the Corporations Law.

¹⁶ Section 739 of the Corporations Law.

of staff and are often, but not always, a lawyer with significant commercial or litigation experience.

In one matter a hearings delegate was conducting a protective hearing to determine whether a banning order should be made against a securities dealer under section 829 of the Corporations Law of New South Wales. Counsel for the securities dealer requested the delegate to refer to a court the issue of whether the delegate was properly delegated to conduct the hearing and to make a banning order. Counsel argued that the *Hughes* case called into question, to put it at its lowest, the authority of ASIC to conduct proceedings according to New South Wales legislation. The delegate declined the request, stating that ASIC did have the power under section 66 of the Corporations (New South Wales) Act 1990¹⁸ and section 11 of the ASIC Act¹⁹ to hold hearings and make banning orders and to delegate those powers. The delegate made a decision on 28 June 2000, imposing a one year partial ban. The affected person has appealed this decision to the Administrative Appeals Tribunal. It is not yet clear whether a constitutional issue will be raised in this context.

The CALDB, upon referral of a matter by ASIC, has the power to cancel or suspend the registration of a person as an auditor or liquidator under section 1292 of the Corporations Law.²⁰ ASIC referred a matter to the CALDB to deregister an auditor. There was a constitutional challenge in respect of ASIC's referral to the extent that it purported to apply the provisions of a State law to vest State judicial power in a federal tribunal, namely the CALDB. It was further argued that the matter could be distinguished from the *Hughes* case in that it related solely to the exercise of powers under purely State legislation which had no connection with either the external affairs power or the trade and commerce power under the Commonwealth Constitution. The

¹⁷ For further information about ASIC's administrative hearings see ASIC's Hearings Practice Manual which is available on ASIC's website <http://www.asic.gov.au>.

¹⁸ This provides that ASIC has the functions and powers conferred or expressed to be conferred on it under a national scheme law of this jurisdiction (ie the Corporations ([name of State]) Act, the Corporations Law of [name of State], or the ASC Law of [name of State]), and that it also has the functions and powers conferred or expressed to be conferred upon the NCSC by or under a Code that is a relevant Code for the purposes of the Companies and Securities (Interpretation and Miscellaneous Provisions) ([name of State]) Code.

¹⁹ This provides that ASIC has the functions and powers as are conferred on it by or under the Corporations Act 1989, the Corporations Law of the Capital Territory, the ASIC Act (other than section 12A and Division 2 of Part 2).

CALDB held that it did not have the power to rule on its own jurisdiction and that it was up to the auditor to seek an injunction in the appropriate court. No injunction was sought and the CALDB heard the matter. In the event, the CALDB suspended the auditor for 3 years.

Prosecutions and other litigation

The majority of challenges are in the context of prosecutions of Corporations Law offences undertaken by the Commonwealth DPP.

The main argument raised has been that the Commonwealth DPP has no power to prosecute in relation to certain suspected breaches of State laws. The *O'Halloran* matter is a good example of such a challenge which I will turn to later.

Another good example is the matter of *R -v- Kaine*.²¹ This was a challenge to an indictment that alleged that Leon Gregory Kaine (a director and an employee of trading corporation incorporated in Tasmania) made false or misleading statements in the course of an examination contrary to section 64 of the Australian Securities Commission Act 1960 (Cth). It was argued that the Commonwealth had no power to have its legislation apply to an officer or employee of a corporation incorporated within the State of Tasmania, and accordingly could not empower or authorise its federal officer (the Commonwealth DPP) to commence a prosecution for breach of its law. The Burnie Supreme Court dismissed the challenge, stating:

If as the High Court accepted in HUGHES the Commonwealth is entitled to accept responsibility of, and prosecution for laws affecting trading corporations generally, it follows it can validly provide for laws incidental to that general power. The conduct of an examination is a necessary adjunct to the supervision of activities of corporations, and the provision of a sanction by means of [section 64 of] the Act ... is a necessary incident to the proper conduct of examinations in accordance with ... Part Three, Division Two of the Act... [The] reasoning [of the High Court in HUGHES] permits the conclusion that there is sufficient nexus between a requirement to make

²⁰ Consideration of ASIC's role under the legislation is discussed in *Re Phyllis Creswick and Australian Securities Commission* (1992) 10 ACLC 1338; (1992) 16 AAR 113; (1992) 28 ALD 61.

²¹ Ruling of Burnie Supreme Court, Tasmania handed down on 18 September 2000.

honest answer to an examination, and the general grant of power afforded by the state of Tasmania.²²

The complexity of the national corporations scheme has also been the source of various evidentiary and procedural arguments that have further protracted litigation. Issues have been raised as to which laws can be invoked to charge defendants and which laws govern the trial process.

By complaint filed in the Adelaide Magistrates Court a person named Bill Vis was charged with a breach of sections 229(3)(b) and 1311 of the Corporations Law²³ for being concerned in the management of a corporation for the period 16 November 1993 to 31 December 1997 without the leave of the Court. Mr Vis had been disqualified because of a serious fraud conviction from being concerned in the management of a company for a period of 5 years from 15 November 1993. Mr Vis pleaded guilty to breaching sections 229(3)(b) and 1311 of the Corporations Law and was sentenced to three months imprisonment but pursuant to section 20(1)(b) of the Crimes Act 1914 was released forthwith upon entering into a bond in the sum of \$100 to be of good behaviour for a period of 8 months.

Three other persons were charged in the same complaint with accessorial liability within the terms of section 5 of the Crimes Act 1914. Section 5(1) of that Act provides that “Any person who aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offences against the law of the Commonwealth, whether passed before or after the commencement of this Act, shall be deemed to have committed that offence and shall be punishable accordingly”. The complaint against the three persons was dismissed after the Adelaide Magistrates Court ruled in favour of the submission made by counsel for one of the defendants that section 5 of the Crimes Act could not be invoked to charge the defendant with aiding, abetting, counselling or procuring the commission of a State offence. There are several other matters before the courts involving similar issues.

²² Transcript of ruling of Burnie Supreme Court (*supra*) at 42.

²³ Section 1311 of the Corporations Law is a general penalty provision.

ASIC appealed the decision of the Adelaide Magistrates Court to the Supreme Court of South Australia.²⁴ ASIC submitted that the complaint was valid in that section 29 of the Corporations (South Australia) Act 1990 is effective in enacting as a law of South Australia a provision imposing accessorial liability in terms equivalent to section 5 of the Crimes Act. However, the respondents were successful in challenging the jurisdiction of the Supreme Court to hear the appeal.²⁵ This is discussed below.

In R -v- Hughes and Bell there have been issues as to which laws govern the trial process. On 26 July 1996 Craig Allan Hughes and Noel Andrew Bell were jointly charged with three counts of making available a prescribed interest contrary to section 1064(1) of the Corporations Law. An indictment was filed and presented by the Commonwealth DPP in the District Court of Western Australia. There was a motion to quash the indictment, which was removed to the High Court. The proceedings in the District Court were adjourned to permit the constitutional challenge. On 3 May 2000 the High Court delivered its judgment and the motion to quash the indictment was remitted back to the District Court for the making of orders to give effect to the reasons for the High Court's judgment.

The accused have applied to the District Court for a stay of the proceedings, submitting, among other things, that there is "irreconcilable uncertainty" in relation to which procedural and evidentiary laws are to apply at the trial.²⁶ In particular, it was submitted that there were issues with respect to whether a trial for an offence against the Corporations Law is to be conducted in accordance with section 80 of the Constitution, so that the verdict of the jury would have to be unanimous, what laws of evidence apply in a trial for such an offence, and whether section 578 of the Criminal Code applies to an indictment for such an offence. Healy DCJ in the District Court decided to reserve these questions of law to the Full Court and to reserve judgment until the opinion of the Full Court sitting as the Court of Criminal Appeal is known. His Honour adjourned the

²⁴ *ASIC -v- Vis, Haarsma and Goodger* [2000] SASC 258.

²⁵ The respondents also challenged ASIC's power to institute the appeal. The Full Court of the Supreme Court considered this issue, should it be wrong in concluding that it lacked jurisdiction to entertain the appeal, and held that ASIC did have power to institute the appeal: *Vis, Haarsma and Goodger (supra)*.

²⁶ *R -v- Hughes and Bell* [2000] WADC 228 at 3.

matter to allow the parties to consider the framing of questions to be reserved, which have not yet been finalised.²⁷

There have been challenges to ASIC's power to bring and carry on civil proceedings for contraventions of various Corporations Law provisions. In one matter the defendant has not yet formalised the basis of the challenge but has queried the application of the *Hughes* case. ASIC has notified that defendant that it has considered the *Hughes* case and remains of the view it does have the ability to bring and carry on such proceedings. In another matter the defendants have pleaded that the relevant conduct associated with suspected contraventions of the Corporations Law relates to a subject outside the legislative power of the Commonwealth and so cannot be the subject of a claim for relief under the Corporations Law. Further and better particulars on this point have not been provided.

Appeal process

ASIC's power to pursue an appeal has not escaped challenge. The *Macleod* matter is an interesting example of such a challenge which I will turn to later.

Whether there is power (on the part of the Commonwealth DPP) to make references to a Court of Appeal on points of law arising in a trial of a Corporations Law offence is an issue. That question depends upon, among other things, a proper interpretation of section 55 of the Corporations ([name of State]) Act which deals with jurisdiction of courts.

Court powers

As noted above, ASIC appealed to the Supreme Court of South Australia from the decision of the Adelaide Magistrates Court which dismissed the complaint against three

²⁷ *Hughes and Bell (supra)* at 17. Mr Bell is also the accused in proceedings in the Supreme Court (*R v Noel Andrew Bell*). He applied for a stay of those proceedings on the grounds that it would be an abuse of process and unfair to proceed with the trial in light of, among other things, Healy DCJ's decision to reserve questions of law to the Court of Criminal Appeal in *Hughes and Bell*. Anderson J of the Supreme Court was not persuaded that these questions needed to be answered before the trial before him could proceed and dismissed the application. Mr Bell has since pleaded guilty to the charges in the District

persons who were charged in the same complaint as Mr Vis with accessorial liability within the terms of section 5 of the Crimes Act 1914. The respondents successfully challenged the jurisdiction of the Supreme Court of South Australia to hear this appeal.

In appealing, ASIC claimed to exercise the right of appeal conferred by section 42 of the Magistrates Court Act 1991 (SA).²⁸ Doyle CJ in the Full Court held that that section, which provides for rights of appeal against a judgment given in the criminal jurisdiction of the Magistrates Court (including a judgment dismissing a charge of a summary offence), did not provide for a right of appeal, and conferred no jurisdiction on the Supreme Court to entertain the appeal, in this case.²⁹ This was due to the operation of section 29(2) of the Corporations (South Australia) Act which provides that for the purposes of a law of South Australia, a Corporations Law offence is taken to be an offence against the laws of the Commonwealth and is taken not to be an offence against the laws of South Australia.

Doyle CJ went on to say that the jurisdiction of courts in respect of criminal matters arising under the Corporations Law of South Australia is provided for by Division 2 of Part 9 of the Corporations (South Australia) Act. His Honour referred to section 55(1) of that Act as being central to the issue of jurisdiction, noting that:³⁰

Clearly enough, s 55 is intended to confer jurisdiction on the courts of South Australia to hear and determine a complaint charging a person with a summary offence against the *Corporations Law* of South Australia, and at least in certain circumstances, is intended to confer jurisdiction to entertain an appeal against a decision of the Magistrates Court made in the exercise of jurisdiction.³¹

The Full Court by majority found that a hearing that results in the dismissal of a charge of a summary offence was a circumstance in respect of which section 55 was not

Court proceedings, and to 24 charges in the Supreme Court proceedings in relation to illegally raising funds from investors without a prospectus contrary to section 1018 of the Corporations Law.

²⁸ *Vis, Haarsma and Goodger (supra)* per Doyle CJ at para 4.

²⁹ *Vis, Haarsma and Goodger (supra)* per Doyle CJ at para 16.

³⁰ *Vis, Haarsma and Goodger (supra)* per Doyle CJ at para 17.

³¹ *Vis, Haarsma and Goodger (supra)* per Doyle CJ at para 18.

intended to confer appellate jurisdiction.³² This was a matter of statutory interpretation.³³

It is interesting that if there were jurisdiction to entertain the appeal both Doyle CJ and Prior J in the Full Court would have concluded that the Magistrate had erred in holding that section 5 of the Crimes Act could not be invoked in this matter.³⁴

Proceedings have been commenced in the High Court to quash orders made by a single judge in the Supreme Court of Western Australia to transfer and treat Federal Court proceedings to wind up a particular company as proceedings of the Supreme Court and the judge's decision to direct the liquidator to proceed with the proposed sale and settlement of certain property.³⁵ One of the grounds of appeal is that the Supreme Court had no power to make the orders because the Federal Courts (State Jurisdiction) Act 1999 (WA), which purports to confer jurisdiction on the Supreme Court to deem a winding up order made by the Federal Court to have been an order of the Supreme Court of Western Australia, is invalid. It is further argued that the purported conferral of power offends the integrity of the judicial system of Western Australia which is guaranteed by Chapter III of the Constitution. The appointment of the receiver and the orders which placed the company concerned in provisional liquidation were also challenged on the same grounds.³⁶

There is also litigation arising out of Queensland, involving a bankruptcy petition against an individual named Damian Michael Lynch, who has challenged the petition on a number of grounds including that the petitioner, GPS First Mortgage Securities Pty Ltd, was not properly incorporated on the basis of a *Hughes* related argument. This

³² *Vis, Haarsma and Goodger (supra)* per Doyle CJ at paras 59-60, with whom Williams J agreed (Prior J dissenting).

³³ On the majority of the Full Court's reading of section 55, there was appellate jurisdiction with respect to, among other things, a trial upon indictment and a conviction upon indictment (Williams J of the Full Court indicated that there was appellate jurisdiction with respect to a summary conviction as well), but these things did not cover a hearing that results in the dismissal of a charge of a summary offence.

³⁴ *Vis, Haarsma and Goodger (supra)* per Doyle CJ at para 81 and per Prior J at para 96. The other judge of the Full Court, Williams J, declined to deal with this issue.

³⁵ *Christmas Island Resort Pty Ltd ACN 009 160 123 (Receiver and Manager Appointed)(In Liquidation)* in the Full Court of the Supreme Court of Western Australia. The High Court, in *Residual Assco Group Limited -v- Janis Gunars Spalvins and Others* [2000] HCA 33 (13 June 2000), has considered related issues. As it happens, this is another ASIC matter (more commonly known as the Adsteam matter) brought pursuant to section 50 of the ASIC Act.

matter has been removed to the High Court for determination of this constitutional issue and it is not expected that the High Court will hear the matter until sometime next year. This case is particularly remarkable for its implications. As Ian Govey has noted in a recent article, "If the High Court finds ASIC's function of incorporation under the Corporations Law scheme to be unconstitutional, approximately 660,000 companies incorporated by ASIC under the State Corporations Law since 1991 would essentially not exist."³⁷ This case alone, assuming further evidence was required, provides reason enough for urgent attention being given to addressing the foundations of the national corporate regulatory scheme.

I now turn to address in more detail three cases.

3. EDENSOR

While on the topic of court powers, I would first like to discuss the *Edensor* matter in which the Federal Court's jurisdiction and ability to make orders has been challenged.

On 11 January 1999 Yandal Gold Pty Ltd (**Yandal**) lodged a Part A Statement for a takeover offer for ordinary shares in Great Central Mines Ltd (**GCM**). Yandal was a wholly owned subsidiary of Yandal Gold Holdings Pty Ltd (**YGH**) which in turn was owned 50.1% by Edensor Nominees Pty Ltd (**Edensor**), the trustee of the Gutnick Family Trust, and 49.9% by Normandy Consolidated Gold Holdings Pty Limited (**NCGH**) which was a wholly owned subsidiary of Normandy Mining Limited (**Normandy**).

The Part A Statement disclosed that Yandal, YGH, Edensor and the members of the Normandy Group had entered into a Shareholders' Agreement on 11 January 1999. As a result of this Agreement, Yandal was entitled to 40.4% of GCM, being the 12.6% of GCM held by Edensor and the 27.8% of GCM held by Normandy Mining Holdings (**NMH**), also a subsidiary of Normandy.

³⁶ In another matter there has been a mooted challenge to an order of the Federal Court which appointed a liquidator. It has been argued that the order has no force and effect as a result of *Re Wakim*.

³⁷ "Companies law deal hailed as workable", *Australian Financial Review*, 20 October 2000 at 33.

Although notionally for all of the shares in GCM, the takeover was really only directed to the 59.6% of GCM that was not held by Edensor and the Normandy Group. This was because the Part A Statement noted that both Edensor and NMH had “advised” Yandal they would not be accepting the offers. Further, the funding sought from Chase Manhattan Bank was only sufficient for this number of shares.

ASIC had concerns that the takeover was in breach of the Corporations Law and disrupted the efficient and fair operation of the market.

On 2 February 1999 ASIC sent a letter to Yandal expressing concerns about the legality of the bid and providing details of ASIC's reasoning. On 9 February 1999, following a response from Yandal's lawyers, ASIC commenced an investigation into suspected contraventions of the Corporations Law.

On 25 March 1999 ASIC issued proceedings in the Federal Court of Australia against Yandal and the parties to the Shareholders' Agreement. ASIC initially sought an injunction restraining the bid from proceeding and this injunction was refused by the Federal Court.

The trial of this matter was then conducted before Merkel J from 13 - 21 May 1999 and 8 June 1999. In essence, ASIC alleged the following:

- Based on the corporate structure used in the bid and the terms of the Shareholders' Agreement, Edensor, Yandal, YGH and NCGH were each deemed to have acquired relevant interests in each other's existing parcels of GCM shares by the operation of section 33 of the Corporations Law. They had therefore acquired each other's shares (and thereby each became entitled to 40.4% of GCM) in contravention of (then) section 615 of the Corporations Law.
- Edensor and NMH reached an agreement or understanding with Yandal and each other that they would not accept the bid, and would not dispose of their shares outside the bid. This would enable Yandal to become entitled to 90% of GCM so it could proceed to compulsory acquisition. They therefore acquired each

others shares and became entitled to 40.4% of GCM again in contravention of section 615 of the Corporations Law.

- The Part A Statement was misleading and deceptive as it failed to disclose these acquisitions. It therefore contravened section 995 of the Corporations Law and section 52 of the Trade Practices Act 1974 (Cth) or section 12DA of the ASIC Act.

ASIC sought a number of remedies including declarations and an order that the shares held by Edensor and NMH and the GCM shares acquired by Yandal in the bid be vested in ASIC.

On 16 June 1999 Merkel J handed down his decision and made the following declarations and orders:

- Edensor, Yandal and certain companies in the Normandy group had contravened the Corporations Law as alleged by ASIC.
- Yandal must give GCM shareholders who accepted into the bid or who were to be subject to compulsory acquisition the option to withdraw their acceptance or avoid compulsory acquisition (and various procedural orders were made to give effect to this including an order that Yandal must send out notices to GCM shareholders).
- Within 21 days, Edensor pay \$28.5 million to ASIC to be distributed to all shareholders who have accepted into the bid or who would have their shares compulsorily acquired and who have not exercised their option of withdrawing their acceptance or avoiding compulsory acquisition.
- If Edensor did not pay \$28.5 million to ASIC within 21 days, Yandal would be required to dispose of the shares it had acquired under the bid (Edensor would still be obliged to pay the \$28.5 million).

- The respondents pay ASIC's costs of the proceeding.

On 24 June 1999 Normandy announced that Yandal would not be appealing the decision and that it had sent out notices in accordance with the orders advising the shareholders of their rights to withdraw their acceptance of the bid or avoid compulsory acquisition. It also announced that it would pay \$14.2 million of the compensation order made by the Federal Court.

On 30 June 1999 Edensor appealed all of the orders made by Merkel J. These orders were stayed by consent on the basis that Edensor pay \$28.5 million to the Federal Court pending the appeal and that it send letters to GCM shareholders informing them of the status of the proceeding.

The Normandy companies were not parties to the appeal and Edensor declined to join them as parties despite ASIC's request that it do so. ASIC subsequently successfully applied to the court for the Normandy companies to be joined as the appeal was seeking to disturb orders that clearly affected them.

The appeal was heard on 31 August 1999 and 1 September 1999. ASIC argued that, in the event the Full Court of the Federal Court decided to disturb the orders made by Merkel J, the Full Court should look at all the available remedies as alternatives that were before his Honour in the trial (including orders that the shares acquired by Yandal be disposed).

On 10 December 1999 the Full Court of the Federal Court published reasons for decision but did not make any orders. Its reasons stated that the Federal Court had jurisdiction to hear the matter but did not have the powers to make remedial orders (in particular, the order for payment of \$28.5 million) under the Corporations Law on the basis that such powers were confined to a court exercising State jurisdiction.

On 9 March 2000, after hearing further oral and written submissions, the Full Federal Court handed down orders and published further reasons for decision. The Full Court declared that:

- the Federal Court’s order that Edensor pay \$28.5 million to ASIC was invalid for want of jurisdiction;
- the Federal Court had no jurisdiction to hear and determine the proceedings under the Corporations Law; and
- the appeal be stood over until a date to be fixed on the basis of ASIC’s undertaking to appeal to the High Court.

In its reasons, the Full Court of the Federal Court stated that:

those powers [to make the remedial order for payment under the Corporations Law] could not be exercised by the Federal Court because the State of Victoria could not, by the *Corporations (Victoria) Act 1990* (Vic), give to this Court jurisdiction to exercise the jurisdiction of the State of Victoria. It found that the exercise of powers under the *Corporations Law* was restricted by the definition of “court” in section 58AA of the *Corporations Law* to this Court when it was exercising the jurisdiction of the State of Victoria. The decision of the High Court in *Re Wakim; Ex parte McNally* (1999) 163 ALR 270 (“*Wakim*”) made it clear that Victoria could not confer that jurisdiction on the Federal Court.³⁸

The Full Court also considered whether its accrued jurisdiction, in consequence of the claim under the Trade Practices Act, could support the making of remedial orders under the Corporations Law. ASIC submitted that once it was seised of the matter under the accrued jurisdiction, it was exercising State jurisdiction under the Corporations Law to make remedial orders. The Full Court did not agree. It noted that “[w]hen a federal court exercises accrued jurisdiction it is exercising federal jurisdiction”: *Stack v Coast Securities (No 9) Pty Ltd* at 290.”³⁹ That, the Full Court reasoned, did not satisfy section 58AA of the Corporations Law:

Section 58AA of the *Corporations Law*, when read with the substantive provisions to which it attaches, including ss 737 and 739 [upon which the order for payment of \$28.5 million depended], purports to confer on this Court the jurisdiction of the State of Victoria. It empowers the Court to

³⁸ *Edensor Nominees Pty Ltd -v- ASIC* [2000] FCA 231 (9 March 2000) at para 4.

³⁹ *Edensor Nominees Pty Ltd -v- ASIC* [1999] FCA (10 December 1999) at para 25.

make orders under provisions such as ss 737 and 739 only when it is “exercising the jurisdiction” of that State. That is not accrued federal jurisdiction but State jurisdiction.⁴⁰

The Full Court also found that the order for the payment of \$28.5 million constituted an “ineffective judgment” under the Federal Courts (State Jurisdiction) Act 1999 (Vic). It would therefore apply as if it had been made by the Supreme Court of Victoria.⁴¹ The Full Court declined to make any orders disposing of the \$28.5 million which it still holds.

ASIC, Edensor and Yandal/Normandy each applied to the High Court for special leave to appeal the decision.

ASIC’s special leave application was heard on 18 April 2000 and was referred to the Full Bench to be heard as an appeal on 29 and 30 August 2000.

At the High Court’s suggestion, the parties also made applications for a writ of certiorari and a writ of mandamus essentially directing the High Court to hear and determine the appeal. These applications were adjourned and heard with the special leave applications.

On 30 August 2000 the Full Bench allowed ASIC's appeal and ordered that the orders of the Full Court of the Federal Court be set aside; the matter be remitted back to the Full Court of the Federal Court; and that the respondents pay ASIC's costs.

The High Court has not yet published reasons for its decision.

Edensor's and Normandy/Yandal's applications to the High Court for special leave to appeal the decision of the Full Court of the Federal Court were dismissed with no order as to costs.

It is worthwhile noting that the merits of the orders made by Merkel J, involving fundamental questions about the propriety of joint takeover bids, and the orders which a

⁴⁰ *Edensor* [1999] (*supra*) at para 25.

⁴¹ *Edensor* [2000] (*supra*) at paras 8 - 13.

court should make and the range of remedies which might be available if a contravention of the Corporations Law is found, remain to be addressed by the Full Court of the Federal Court.

4. O'HALLORAN

I would now like to turn to the *O'Halloran* matter which is a good example of a challenge to the basis of the Commonwealth DPP's power to prosecute in relation to Corporations Law offences.

James O'Halloran and his wife were both directors and beneficiaries of Fame Decorator Agencies (**Fame**). As at 28 April 1995 Fame held 217,430 ordinary shares and 66,125 convertible preference shares in Jeffries Industries Ltd (**Jeffries**), then a public company listed on the Australian Stock Exchange. Up until December 1994 Mr O'Halloran was a director and the Chairman of Jeffries.

The Jeffries Articles of Association provided that if Jeffries failed to declare a dividend in respect of the convertible preference shares they were able to be converted to ordinary shares based on a formula. The formula provided that the lower the "aggregate weighted average sale price" the higher the number of ordinary shares a preference shareholder would receive on conversion. The aggregate weighted average sale price was a price determined by the average price of the ordinary shares sold on the Australian Stock Exchange (**ASX**) in a 20 day trading period immediately preceding the dividend payment date.

At around 2.44pm on 28 April 1995 Jeffries issued an announcement to the ASX, advising that it would not pay a dividend to preference share holders, thus giving the opportunity for preference share holders to convert their shares.

At 3.30pm on 28 April 1995 Mr O'Halloran contacted Clive Powell, stockbroker with the then ABS White & Co Ltd, and placed an order to sell 170,000 of Fames' ordinary shares in Jeffries down to 13 cents per share. He also had some prior conversations with Mr Powell earlier in the day. Between 3.56pm and 3.58pm ABS White sold

170,000 Jeffries ordinary shares on behalf of Fame at prices from 35 cents down to 13 cents. Prior to this sale the last sale price was at 45 cents.

According to ASIC's calculations, the effect of this trading would have been that upon conversion Fame would have received 42 ordinary shares for each preference share. Without the trading Fame would have only received 24 ordinary shares for each preference share. Assuming a value of 30 cents per ordinary share, this would have translated into Fame's convertible preference shareholding being worth approximately \$833,175 instead of \$476,100.

Deborah Fenwick, a Jeffries converting preference shareholder, commenced civil proceedings in the Equity Division of the Supreme Court of New South Wales to determine whether two share transactions, being the sales of 20,000 Jeffries shares at 14c and 74,000 Jeffries shares at 13c on 28 April 1995, contravened section 995 and 998 of the Corporations Law (relating to "Misleading or Deceptive Conduct" and "False Trading and Market Rigging Transactions").

On 13 June 1995 the ASC intervened in these civil proceedings. Fame was later joined as a cross-defendant by Jeffries.

On 18 August 1998 Cohen J in the Equity Division held that the two share transactions referred to above contravened sections 995 and 998 of the Corporations Law and made declarations accordingly. In particular, the two share transactions were excluded from the determination of the aggregate weighted average sale price. Fame challenged that finding and sought to have the declarations set aside by the Court of Appeal.

The Court of Appeal by majority⁴² dismissed the appeal. It found that "Cohen J was right to conclude that both the purpose and the effect of Fame's conduct was to create an artificial market price for shares in Jeffries and that such conduct contravened s998."⁴³ Such conduct was also "likely to mislead or deceive third parties who were interested in the market for shares in Jeffries, who were entitled to assume that market

⁴² *Fame Decorator Agencies Pty Limited -v- Jeffries Industries Limited & Ors* (1998) 28 ACSR 58, Gleeson CJ and Powell JA (Priestly JA dissenting).

⁴³ *Fame Decorator (supra)* per Gleeson CJ at 63.

prices reflected the genuine interaction of forces of supply and demand, and who would not have expected that the seller on 28 April 1995 was seeking to sell to the lowest bidder and eliminate the possibility of a higher bidder emerging.”⁴⁴ Accordingly, the finding of a contravention of section 995 was also found to be correct.

Mr O’Halloran then applied for special leave to the High Court to appeal this decision, but was refused.

On 3 April 1997 a charge under sections 998(1) and 1311(1)(a) of the Corporations Law had been laid against Mr O’Halloran. After various adjournments tied up with challenges to the civil verdict, the trial was set down for 22 May 2000.

On 22 May 2000 the defence lodged a constitutional challenge to the power of the Commonwealth DPP to prosecute the charge based on the *Hughes* decision. In particular, it was asserted that there was no relevant head of legislative power in the Commonwealth Constitution authorising the Commonwealth DPP’s prosecution of the State offences in this matter.

The Crown disagreed. Before Barr J in the Supreme Court of New South Wales on 13 and 14 June 2000 evidence from two ASX witnesses and the former Managing Director of Jeffries was led to establish that the DPP did have the constitutional power to prosecute based on:

- (a) 51(i): “Trade and commerce with other countries, and among the States.”
- (b) 51(v): “Postal, telegraphic, telephonic, and other like services.” (This includes telecommunications powers.)
- (c) 51(xx): “Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.”

The defence asserted that because the two key trades at 13 cents and 14 cents (which were the subject of the civil verdict) were transacted between brokers in Sydney those trades did not involve interstate trade and commerce. The Crown led evidence from

⁴⁴ *Fame Decorator (supra)* per Gleeson CJ at 63. Priestly JA, dissenting, did not accept that there was market manipulation or conduct which was misleading or deceptive or likely to mislead or deceive.

ASX witnesses asserting that these trades were part of a pattern of interstate trading in Jeffries shares and, in particular, that there was significant share trading between brokers in Sydney, Melbourne and Brisbane on the day in question. There was also trading with a broker in Perth. The Crown led evidence that the ASX trading system, ie the Stock Exchange Automated Trading System (**SEATS**), operated across the country. The mainframe computer was connected through telecommunication lines to on-line terminals installed in stockbrokers' offices in all States and those lines were used to send and receive messages and process and match the buy and sell share orders/transactions on SEATS. The defence sought to rely on the fact that all the processing was done by the SEATS computer after messages were received through the gateway to indicate that this did not involve the use of telecommunication lines.

The defence seemed to rely heavily on the assertion that Jeffries was not a trading or financial corporation. Jeffries was a holding company which did not have many assets other than shares in its subsidiaries, did not generate much income other than dividends from subsidiaries and did not have any separate staff. The group's trading was conducted through its subsidiaries. The Crown led evidence by Jeffries' former Managing Director who advised that Jeffries exercised tight cash and management control over all companies in the group, including borrowing on behalf of the group and lending to each of the subsidiaries, which indicated that it was a type of finance corporation, and operated as a trading corporation through its subsidiaries.

On 7 July 2000 Barr J dismissed the appeal, holding that the Commonwealth DPP did have the power to prosecute.⁴⁵ His Honour accepted that "SEATS is a national system, and the mainframe computer is no less essential than the terminals situated in a ASX-licensed stockbrokers' offices in all States of Australia. I think that SEATS is a national system and that the trade in securities to which it gives affect is national."⁴⁶ Accordingly, his Honour thought that the buying and selling of securities by means of SEATS was trade and commerce among the States.⁴⁷

⁴⁵ *R -v- O'Halloran* 70065/99 (Supreme Court of New South Wales, Common Law Division).

⁴⁶ *O'Halloran (supra)* at para 29.

⁴⁷ *O'Halloran (supra)* at para 31.

With regard to the defence's assertion that the two key trades were wholly within New South Wales and, as such, did not involve interstate trade and commerce, his Honour stated that:

It would be unreasonable in my view to regard as excluded from the regulatory power of the Commonwealth Parliament some transactions made in a national system of marketing solely because the buyer and seller happened to be in the same State. No such restriction would apply to intrastate banking transactions carried out as part of the national system. I do not think that such transactions can effectively be segregated. It is necessary for a significant part of a national system like banking or trade in securities to be regulated in the interests of the regulation of the whole.⁴⁸

Barr J did not think that constitutional power to prosecute in this case could be based on the power with respect to postal, telephonic, and other like services. His Honour observed that "such use of the media would be no more than a mere incident of the prohibited conduct. I do not think... that the conduct made unlawful by s 998 is so relevant to the subject of postal, telephonic, telegraphic or other like services as to be a law with respect to those services."⁴⁹

Barr J however did think that constitutional power to prosecute in this case could be based on the corporations power, as a trading *and* financial corporation. Barr J. reasoned:

It seems to me that although Jeffries never directly traded with the clients of its subsidiaries, it did involve itself so closely and directly in the trading activities of each of them that it can properly be said that it carried on trading activities and that they formed a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation.

The facts lead me to the conclusion that the activities of Jeffries in raising capital and in directly involving itself in the payment and receipt of monies properly payable and receivable by subsidiaries, Jeffries made a substantial and significant part of its activities financial so that it might properly be said that it was a financial corporation.⁵⁰

Mr O'Halloran has appealed this decision to the Court of Appeal.

⁴⁸ *O'Halloran (supra)* at para 33.

⁴⁹ *O'Halloran (supra)* at paras 37 - 38.

⁵⁰ *O'Halloran (supra)* at paras 51 - 52.

5. MACLEOD

I would now like to turn to the *Macleod* matter which is an interesting example of a challenge to ASIC's power of appeal inspired by the *Bond* case.

In 1993 a company called Cambridge Gulf Explorations NL (**the company**) was exploring the seabed in the waters north-west of Western Australia with a view to finding diamonds. Mr Macleod, a geologist, was engaged by the company to prepare independent reports for inclusion in a prospectus that the company intended to issue with a view to it being listed on the ASX. The company was later listed. In October 1993 the company made an announcement to the ASX that a purpose-built marine alluvial diamond sampling ship had arrived on location and had commenced bulk sampling. In November 1993 the company announced that gem quality diamonds and precious metals were being recovered. Following rumours about the company's results in the marketplace, the ASX lodged a query with the company. The company responded by saying that exploration results would be disclosed in the quarterly report for the period ending 31 December 1993. The ASX took no further action. Between 1 December 1993 and 14 December 1993 the share price increased from \$0.88 to \$2.05. On 14 December the company, as requested by the ASX, sought a voluntary suspension from quotation pending the delivery of a statement concerning the exploration results. Mr Macleod was asked by the company to assist in preparing a report. He was briefed by various company officers and employees and prepared a draft report. On 16 December 1993 the company issued the report entitled "Exploration results for [the company]". The ASX requisitioned further information which was provided. On 22 December 1993 the suspension was lifted and the share price continued to rise. It peaked at a high of \$4.10 on 24 December 1993.

The report contained two statements which were later impugned. The first was that six carats of diamonds were recovered at the rate of 4.0 carats to the tonne. The second statement indicated that the annual profit of the company would be in the sum of \$US1,374,000,000.

Ultimately, the exploration program experienced problems and the results did not match the claims in those statements.

In 1996 the Commonwealth DPP commenced a prosecution on indictment against Mr Macleod and the Chairman of the company, Brian Conway, for offences against section 999 of the Corporations Law (relating to “False or Misleading Statements in Relation to Securities”). The prosecution was based upon a brief of evidence prepared by the ASC.

Before the matter could go to trial Mr Conway died. The Commonwealth DPP and the ASC then decided to proceed summarily against Mr Macleod. Accordingly, the Commonwealth DPP entered a *nolle prosequi* in respect of the indictment and the ASC swore a complaint against Mr Macleod in early 1998 that the statements contained within the report were materially misleading and likely to induce the purchase of securities in the company by other persons when he ought reasonably have known that the statements were materially misleading. In particular, the statement in relation to the recovery of diamonds did not take into account the overburden which had to be penetrated and removed in order to recover them and there were no reasonable grounds for the predicted annual profit of the company in the sum of \$US1,374,000,000. Although the ASC was the complainant it was represented by the Commonwealth DPP.

Mr Macleod was convicted by a magistrate in the Western Australia Court of Petty Sessions and fined \$2,500. He then appealed his conviction to the Supreme Court of Western Australia and his appeal was allowed and the conviction quashed. ASIC, still represented by the Commonwealth DPP, appealed this decision to the Full Court of the Supreme Court.

The High Court handed down its decision in *Bond* after the Full Court hearing in Macleod, but before the Full Court’s judgment was delivered. As a consequence of *Bond*, the Full Court sought further submissions from the parties about the competency of the appeal before it. Not surprisingly, Mr Macleod argued that the appeal was invalid and ASIC and the Commonwealth DPP argued the contrary.

On 13 April 2000 the Full Court upheld the competency of the appeal.⁵¹ In reaching its decision, the Full Court considered *Byrnes -v- The Queen*⁵², *Bond* and *ASIC -v- Hosken*⁵³. In respect of *Byrnes* (which raised issues about the competency of appeals against sentence brought by the Commonwealth DPP in prosecutions under the Corporations Law), Owen J in the Full Court noted that the High Court held that the South Australian equivalent to section 91 of the Corporations (Western Australia) Act 1990 defined the scope of “enforcement powers” which the Commonwealth DPP could exercise under the national scheme laws. While the section authorised the Commonwealth DPP to institute and carry on a prosecution of an offence, it did not include the power to institute an appeal against sentence. Owen J noted that:

[Gaudron, McHugh, Gummow and Callinan JJ of the High Court] construed section 91(5) (which does not contain a specific manifestation of an intention to include appeals within the scope of the enforcement powers of the C[ommonwealth] DPP) against:

“... the underlying principle that a convicted person should not be deprived of the liberty left after sentencing at first instance except by procedures which have been expressly authorised and strictly complied with in a court of competent jurisdiction.”⁵⁴

The High Court in *Byrnes* held that the appeal was not competent.

Owen J also noted that ‘*Bond* proceeds on the same underlying principle as *Byrnes* and simply applies the reasoning to other statutory provisions but with the same ultimate result.’⁵⁵ In *Bond* nothing in section 91 of the Corporations (Western Australia) Act 1990 authorised the Commonwealth DPP to instigate an appeal against sentence. It was noted that the Criminal Code 1913 (WA) provided some authority for the course of action undertaken. However, this could not operate because of section 109 of the Commonwealth Constitution - there was no Commonwealth law authorising officers of the Commonwealth DPP to institute appeals. The Director of Prosecutions Act 1983 (Cth) allowed the Commonwealth DPP to institute and carry on the prosecution of offences against the laws of a State, but not the commencement of appeals. Its capacity

⁵¹ *ASC -v- Macleod* [2000] WASCA 101.

⁵² (1999) 164 ALR 520.

⁵³ [1991] TASC 120.

⁵⁴ *Macleod (supra)*, per Owen J at 28 citing Gaudron, McHugh, Gummow, and Callinan JJ of the High Court in *Byrnes* at 1303.

to appeal was restricted to prosecutions for offences against the laws of the Commonwealth.⁵⁶ Consequently the High Court in *Bond* held that the appeal was not competent.

In respect of *Hosken*, Owen J noted that it was almost identical to *Macleod*. ASIC had launched a successful prosecution against a director in the Court of Petty Sessions for breaches of section 229(4) of the Companies (Tasmania) Code. The director appealed successfully to a single Judge of the Supreme Court and the convictions and penalty were set aside. Section 123 of the Justices Act 1959 (Tas) provides: “If a party to ... an appeal, ... is dissatisfied with a rule or order of the Supreme Court ... he may ... appeal from the rule or order to the Full Court.” ASIC appealed and this was challenged. The Full Court unanimously rejected the challenge.⁵⁷

The Full Court in *Macleod* followed *Hosken* noting that “there are clear points of distinction between the situation in *Bond* and *Byrnes*, on the one hand, and *Hosken* and this case [ie *Macleod*], on the other.”⁵⁸

First, *Byrnes* and *Bond* concerned prosecutions on indictment and appeals against sentence whereas *Hosken* and *Macleod* involved summary offences and an appeal seeking to reinstate a conviction that had been obtained at first instance. The significance of the distinction is best explained in the following extract from the judgment of Evans J in *Hosken*, to which Owen J referred, that:

the rule of construction that a power to appeal should be expressed in clear language has little force when considering a power to appeal against a summary decision or a power to appeal a decision on an appeal from a conviction. ... The power of appeal under challenge before this Court is a power to appeal from a decision reached on an appeal against a conviction in a court of summary jurisdiction. The rule of construction has minimal, if any, relevance to a determination of whether such a power of appeal exists. The rule does not apply so as to deny the words used in the *ASIC Act* ss 49(2) and 11(4) their full scope and meaning. Those provisions empower the Commission to institute and carry on a prosecution and do whatever is necessary for or in

⁵⁵ *Macleod (supra)* at 29.

⁵⁶ *Macleod (supra)* at 29.

⁵⁷ *Macleod (supra)* at 30.

⁵⁸ *Macleod (supra)* at 32.

connection with, or reasonably incidental to, the prosecution. In my opinion that power includes power to appeal in the circumstances before this Court.⁵⁹

Second, the appellant in *Byrnes* and *Bond* was the Commonwealth DPP whereas in *Hosken* and *Macleod* the appellant was ASIC. While it may have acted through the Commonwealth DPP, ASIC was the one that needed to demonstrate that it had the requisite power.⁶⁰ The Full Court noted that the powers of ASIC in sections 49(2) and 11(4) of the ASIC Act applied equally to the situation in *Hosken* and in *Macleod*.⁶¹ The Full Court also noted that there was no relevant distinction between the Tasmanian provision that applied in *Hosken* (ie section 123 of the Justices Act 1959 (Tas), which provides that a party to an appeal to a single Judge may appeal to the Full Court) and the provision that applied in *Macleod* (ie section 206A(2)(a) of the Justices Act 1902 (WA)).⁶² The Full Court was reluctant to come to a different conclusion to *Hosken*. In following *Hosken* the Full Court was also mindful of the desirability of State Supreme Courts being uniform in their interpretation of the national scheme laws.⁶³

Mr Macleod has applied for special leave to appeal to the High Court but this application has not been determined. Mr Macleod has submitted that the main question to be determined is whether the decision in *Bond* can apply to ASIC's appeal. Mr Macleod argues that if the answer is yes, this would render the appeal incompetent. On 27 October 2000 the application was adjourned by the High Court and will probably proceed in February or March next year. At the hearing on 27 October, observations were made by the Court which make it plain that the Court thought Mr Macleod's application raised a number of significant issues which ought to be examined.

6. CONCLUSION

ASIC is increasingly deploying its efforts to dealing with challenges to its regulatory and enforcement activities. In many cases, the challenges are at an early stage and may

⁵⁹ *Macleod (supra)* per Owen J, citing Evans J in *Hosken*, at 31 - 32.

⁶⁰ *Macleod (supra)* at 32.

⁶¹ *Macleod (supra)* at 32.

⁶² *Macleod (supra)* at 32.

⁶³ *Macleod (supra)* per Owen J, citing *ASC v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492, at 32.

not develop into litigation. Nonetheless, all of these challenges must be taken seriously. ASIC's resources are consequently being distracted from more productive uses.

ASIC looks forward to early resolution of the constitutional crisis and, in particular, the enactment of the new Corporations Law which will give effect to the historic agreement announced on 25 August 2000 by the joint Standing Committee of Attorneys-General and Ministerial Council for Corporations.⁶⁴

⁶⁴ "Historic Agreement on Corporations Law" Joint News Release of the Attorney-General and Minister for Financial Services and Regulation dated 25 August 2000.