NEWSLETTER

cornwallstodart
ENHANCING SUCCESS

NOVEMBER 2012

Corporate & Commercial Newsletter

Welcome to our November Corporate & Commercial newsletter

This month we have included news on:

- the High Court's decision in *Forrest v ASIC*
- *Walton Construction v Plumber By Trade*
- the new incorporated associations law in Victoria
- revisions to Listing Rules 3.1 - 3.1B and continuous disclosure guidelines
- the Personal Liability for Corporate Fault Reform Bill 2012 (Cth).

We hope you find the newsletter informative and useful. Please contact us should you require further information on any topic, whether covered in this newsletter or not.

Ian Sinclair
Partner
Phone (direct) **+61 3 9608 2166**
Mobile **+61 412 906 896**
Email **i.sinclair@cornwalls.com.au**

*Click on image to view Ian's profile

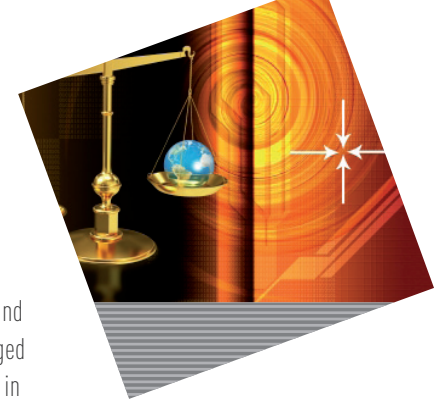
High Court rules in favour of Fortescue Metals Group Ltd and Andrew Forrest

Background

In March 2006, ASIC commenced proceedings in the Federal Court of Australia against Fortescue Metals Group Ltd (**Fortescue**) and Andrew Forrest (chairman, CEO and substantial shareholder of Fortescue: **Forrest**), impugning Fortescue's announcements to the media and the broader market regarding a series of 'Framework Agreements' between Fortescue and three state-owned Chinese corporations (**Announcements**).

The Framework Agreements concerned building and financing services that were to be provided in connection with Fortescue's Pilbara Iron Ore and Infrastructure Project. The Announcements described each of the Framework Agreements as constituting a 'binding contract'. However, the terms of the agreements lacked certainty and were therefore unlikely to be legally enforceable. At trial, Justice Gilmour dismissed ASIC's claims but on appeal to the Full Court of the Federal Court, ASIC was successful in obtaining orders that:

- Fortescue engaged in misleading or deceptive conduct in contravention of section 1041H of the *Corporations Act 2001* (Cth) (**Act**);



- Fortescue had breached the continuous disclosure requirements contained in section 674 of the Act; and
- Forrest failed to exercise his powers and discharge his duties with reasonable care and diligence, and infringed section 180(1) of the Act.

Fortescue and Forrest appealed against the decision of the Full Court of the Federal Court and sought reinstatement of the orders made by Justice Gilmour at first instance.

The High Court decision

The issues that were live on appeal were further narrowed by the High Court's summary dismissal of ASIC's contention that Fortescue, its Board and Forrest had acted dishonestly in making the Announcements. The court focused its inquiry on whether Fortescue's use of the term 'binding contract' in the Announcements was misleading or deceptive or likely to mislead or deceive. The court conducted a close analysis of the meaning of the term 'binding contract' as understood with reference to the intended audience. The intended audience was defined as *'investors ... and, perhaps some wider section of the commercial or business community'*.

The court held that, notwithstanding the literal meaning of the term 'binding contract', the term did not necessarily convey that an agreement would be legally enforceable. Their Honours stated that a person should not, in certain circumstances, be required to assess the validity of the contract (ie valid formation) or whether it would be 'practicable to force performance' (according to the enforcement measures of the governing jurisdiction) prior to making a statement to the public that a contract was 'binding'. Consistent with the fact-dependent nature of claims concerning misleading or deceptive conduct, the court's approach relied upon the following two key issues of fact:

a. the Announcements accurately summarised the content of the Framework Agreements; and

b. the Announcements conveyed that the parties had intended each of the Framework Agreements to constitute a 'binding contract'.

The court also relied on its finding in respect of a preliminary issue: whether or not the intended audience would have reasonably believed that any disagreement between the parties would be determined in accordance with Australian law. The court rejected ASIC's submission that the term 'binding contract' implied that the Framework Agreements would be governed by the laws of Australia. The contracts involved foreign state-owned entities, were executed in China and did not contain a 'choice of forum' clause. Their Honours stated at [45]:

> *'[t]he intended audience for the impugned statements would have recognised from the very content of the statements that the agreements to which they referred had important international features'.*

ASIC also contended that Forrest's attempts to alter the terms of the Framework Agreements indicated that the agreements were not intended to be binding. The court rejected this argument and held that post-contractual negotiations did not amount to a repudiation of a prior agreement and it was legitimate commercial conduct to continue to attempt to 'strike a better bargain'.

The High Court upheld the appeal and found that Fortescue had not engaged in misleading or deceptive conduct in contravention of section 1041 of the Act. The claims that Fortescue and Forrest had breached section 674 (continuous disclosure) and section 180(1) (directors duties) of the Act respectively, were contingent on a breach of section 1041 of the Act and were dismissed accordingly.

Implications

The court was critical of ASIC's pleadings and stated that allegations regarding an absence of a 'genuine or reasonable basis for the belief' did not establish any of the necessary elements of a claim of misleading or deceptive conduct and should be pleaded in separate and concurrent claims in tort (ie deceit and negligent misrepresentation).

While the court emphasised the limited transferability of the principles relied upon in the present matter (given the broad and arguably imprecise nature of statutory misleading or deceptive conduct provisions), companies that release information to the media or the ASX should be mindful that:

- the term 'binding contract' may be misleading or deceptive if used to describe an unenforceable agreement in a communication with an intended audience who is 'unsophisticated' with regard to matters concerning business and financial investment;
- terms with a specific legal or technical meaning may be misleading or deceptive depending on the imputed knowledge

and characteristics of the intended audience; and

- announcements that contain the term 'binding contract' must accurately summarise the terms of the relevant agreement(s) and should be supported by evidence that the parties intended the agreement(s) to be binding.

The ASX issued a 'Review of ASX Listing Rules Guidance Note 8', which deals with continuous disclosure obligations, for public consultation on 17 October 2012. In its review the ASX noted the recent decisions concerning James Hardie and Fortescue Metals Group. The contents of the revised Guidance Note and an outline of the proposed amendments to ASX Listing Rules 3.1-3.1B are discussed in the next article.

The ASX revises Listing Rules 3.1 – 3.1B and continuous disclosure guidelines

On 17 October 2012, the ASX released a 'Review of ASX Listing Rules Guidance Note 8' for public comment (**Review**). The Review considers the practical impact of the High Court decisions involving James Hardie Industries and Fortescue Metals Group on corporate disclosure and provides a much anticipated revision of Guidance Note 8. Guidance Note 8 indicates how the ASX and ASIC will interpret and apply ASX Listing Rules 3.1 – 3.1B, which deal with the continuous disclosure of market sensitive information.

Each of the Review documents can be viewed by following the links below:

- consultation paper entitled Review of ASX Listing Rules Guidance Note 8 – Continuous Disclosure: Listing Rules 3.1 – 3.1B;
- revised Guidance Note 8: Continuous Disclosure: Listing Rules 3.1 – 3.1B;
- abridged version of Guidance Note 8 entitled Continuous Disclosure: An Abridged Guide; and
- proposed amendments to ASX Listing Rules 3.1 – 3.1B in a document entitled Proposed Disclosure Related Amendments to the ASX Listing Rules.

The revised Guidance Note 8 reframes continuous disclosure obligations within the primary purpose of the ASX Listing Rules – which is to prevent the ASX markets trading on an uninformed basis. It advocates for greater utilisation of trading halts to manage delay between an entity becoming aware of market sensitive information and the dissemination of that information in accordance with its disclosure obligations. Guidance Note 8 also introduces flexibility to the ASX's approach to regulating an entity's responsibility to disclose market sensitive information 'immediately'.

Board approval and the requirement to disclose information 'immediately'

ASX Listing Rule 3.1 states that an entity must disclose information to the ASX 'immediately' after the entity becomes aware of that information. Guidance Note 8 provides that the word 'immediately' should not be taken to mean 'instantaneously' but rather 'promptly and without delay'. The length of time that accords with the requirement to disclose information 'promptly and without delay' will depend on factors including the amount and complexity of the information, the need to verify its accuracy and any forewarning the entity has had with regard to the matters that are the subject of the announcement.

In light of the James Hardie decision, Guidance Note 8 makes it clear that boards should not sacrifice a considered review of significant market announcements in the pursuit of expeditious disclosure. Directors are reminded of the need for the company to balance its concurrent legal duties, which include an obligation to ensure the content of announcements is not misleading or deceptive or likely to mislead or deceive.

A board meeting must be convened as soon as is practicable for the purpose of approving a significant disclosure announcement to satisfy the requirement to act 'promptly and without delay'. It will not be sufficient to postpone the announcement to accommodate

board approval at a pre-scheduled meeting. Entities are encouraged to utilise a trading halt in circumstances where board approval of an announcement is required. A trading halt is also indicated where the entity becomes aware of information within trading hours.

Market sensitive information

The test for the requirement to disclose information remains in its present statutory form, which is whether or not the information *'would, or would be likely to, influence persons who commonly invest in securities … to acquire or dispose of'* those securities. The ASX acknowledged the difficulty faced by entities when applying this test but suggested that this difficulty is 'inescapable'. Guidance Note 8 emphasises the need to assess the likely impact of the information on trading behaviour against the backdrop of prior announcements by the entity. It outlines two practical tests that officers of disclosing entities may use to identify market sensitive information:

- Would the information influence his or her personal decision to buy or sell securities in the entity at their current price?
- Would he or she feel exposed to an action for insider trading if they were to buy or sell securities in the entity at their current price, if the information had not been disclosed to the market at the time of the transaction?

If the answer to either of these questions is yes, the entity is required to disclose the relevant information to the ASX 'immediately' (subject to the exceptions in Listing Rule 3.1A).

Market monitoring

A disclosing entity that delays the release of information without first arranging a trading halt, is encouraged to monitor the market during the period of delay for fluctuation in the price of its securities. Entities are also encouraged to formalise their procedures for monitoring newspapers, investor blogs and social media and to assess enquiries by analysts and journalists for indications of an unauthorised release of information.

Next steps

Public consultation regarding Guidance Note 8 is due to conclude on 30 November 2012, after which the proposed amendments will be finalised and enter into force. In light of the extensive practical assistance provided by Guidance Note 8, a comprehensive disclosure policy with accompanying procedures is likely to become a valuable tool in minimising the risk of non-compliance with the *Corporations Act 2001* (Cth) and the ASX Listing Rules. Policies and procedures that address continuous disclosure should focus on the management of high risk events including inadvertent disclosure, general delays and delay as a consequence of a requirement to obtain board approval.

Personal Liability for Corporate Fault Reform Bill 2012 (Cth): Implementing a nationally consistent approach to director and company officer liability

On 2 November 2012, the Personal Liability for Corporate Fault Reform Bill 2012 (Cth) (**Bill**) was read for the second time in parliament. The Bill is the culmination of three tranches of proposed legislative amendments that give effect to the Council of Australian Governments' Directors' Liability reform project (**COAG Reform**). The COAG reform is part of a broader COAG initiative to 'deliver a seamless national economy' by implementing 27 deregulation reforms aimed at reducing the effects of regulatory uncertainty on directors' decisions, thereby improving the productivity of businesses.

The Bill will amend various Acts to the extent necessary to:

- remove provisions that impose personal criminal liability on directors for corporate fault in circumstances that are not 'justifiable';
- abolish offences that 'reverse' the onus of proof and require directors to establish a defence to avoid conviction;
- substitute personal criminal liability with civil liability where a non-criminal penalty is appropriate; and
- provide practical guidance regarding the circumstances that would constitute a breach of a provision which imposes a personal criminal liability on directors and company officers.

The Bill will amend a number of Acts including the *Corporations Act 2001* (Cth) (**Corporations Act**); *Foreign Acquisitions and Takeovers Act 1975* (Cth); *Income Tax Assessment Act 1936* (Cth) (**Income Tax Assessment Act**), *Taxation Administration Act 1953* (Cth); and *Superannuation Guarantee (Administration) Act 1992* (Cth). Legislation that governs director liability for matters concerning workplace health and safety and environment protection fall outside the ambit of the COAG Reform and the Bill.

Changes to existing legislation

The Bill will amend the Corporations Act to remove the criminal liability that is currently imposed on company secretaries and directors for a breach of a listed statutory function (eg lodgement of accounts, maintenance of registers). Under the new law, secretaries and directors may be liable for a civil penalty of up to $3,000 for a breach of section 188 of the Corporations Act (which contains a list of prescribed statutory functions).

A company officer will no longer be personally liable for an offence in the event that the company fails to offer forfeited shares for public auction in accordance with section 254Q of the Corporations Act. The Bill also inserts notes into the Corporations Act which highlight the offences that impose personal criminal liability for corporate fault.

Section 252(1)(j) of the Income Tax Assessment Act currently allows the Commissioner of Taxation (**Commissioner**) to 'give serve or take' that same action against an officer of the company where the Commissioner has commenced proceedings against a company for a breach of its taxation obligations. The Bill will amend the section to clarify that the provision does not impose personal liability on company officers for the breach of a company's taxation responsibilities. The provision continues to entitle the Commissioner to serve notices on directors and company officers in respect of a company's outstanding taxation liability.

What to expect in the future

The enactment of legislative provisions that impose personal liability on directors (**Director Liability Offence**) must be justified with reference to the COAG Principles. In determining whether a Director's Liability Offence is indicated, the legislature will consider the following criteria:

- Whether there is a compelling public policy reason for the provision (eg to prevent insolvent trading, which undermines confidence in the financial markets).
- The extent to which the offence that carries the risk of personal liability is central to the relevant regulatory regime (eg a failure of a company to hold a licence may give rise to a Director Liability Offence given that the absence of a licence will undermine the core purpose of the particular legislation).
- The degree of control that a director is able to exercise over the offending corporate conduct (eg it may not be reasonable to impose personal liability on directors for operational breaches of licence conditions).
- The likelihood that stand-alone corporate liability will promote compliance with the relevant regulatory regime.
- The availability of reasonable steps that may be taken by directors to ensure regulatory compliance by the corporation.

Implications

While the COAG Principles may assist directors to understand the rationale underpinning personal liability provisions, whether corporate conduct gives rise to personal liability remains a matter for determination on a case-by-case basis. Directors and company officers seeking to assess and manage their risk exposure should be aware of the personal liability offences that are likely to apply in light of the particular company's operational activities. The COAG Principles also do not displace the laws that apply in circumstances where a director has been directly involved in (or knowingly authorised) the commission of corporate misconduct.

New Incorporated Associations Law in Victoria

On 26 November 2012 a complete rewrite of the laws affecting incorporated associations in Victoria will commence. The *Associations Incorporation Reform Act 2012* (**Act**) replaces the old 1981 legislation. The Act implements some significant changes and includes new Regulations and Model Rules.

Changes include:

1. The prohibition on trading activities is removed, provided that any trading relates to the purposes of the association.

2. A three tiered approach is introduced in relation to financial reporting:
    - Tier 1 associations with revenue under $250,000 – do not require independent review or audit unless required by a majority of members in a general meeting;
    - Tier 2 associations with revenue between $250,000 and 1,000,000 – require an independent accountant to review the financial statements, but the members can vote to require an audit;
    - Tier 3 associations – must have the financial statements audited.
3. The Rules must now include a statement of purposes.
4. Meetings can be conducted with the use of technology.
5. There are specific requirements for grievance and disciplinary procedures.
6. There is some extension of the matters that must be covered by the Rules.
7. An association must indemnify its office holders against any liability incurred in good faith in the performance of his or her duties.

Are you or your company appropriately licensed?

Background

In a recent decision by the Supreme Court of Queensland, a subcontractor was held not to be appropriately licensed and therefore not entitled to be paid under the contract. Under the *Queensland Building Services Authority Act 1991* (Qld) (**QBSA**) a person must not undertake to carry out building work unless that person holds a contractor's licence of the appropriate class. For a company to be appropriately licensed, one of the directors of the company must be licensed. Where a person or company does not hold an appropriate licence, they will be limited to recovering only their costs for the building work carried out and not payment for their labour or profit.

The decision

In the case of *Walton Construction v Plumber By Trade Pty Ltd & Ors* [2012] QSC 264, the subcontractor issued a payment claim under the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIP**). The contractor in turn issued a payment schedule in which it disputed the claim. The subcontractor made an application for adjudication and was awarded the payment by the adjudicator. The contractor subsequently applied to the court to have the adjudication decision or the payment claim declared as invalid because the subcontractor was not appropriately licensed and therefore not entitled to make a payment claim under the BCIP. The subcontractor was a partnership between two corporate trustees, neither of which was licensed, and therefore the court held that the subcontractor did not hold an appropriate licence. It was also held that the payment claim was invalid and the adjudication decision was void.

Unfortunately for the subcontractor, it had changed the structure of the partnership and had not ensured it was appropriately licensed as required by the QBSA under the new structure.

Comment

The lessons learnt from this case are that, when setting up a new business or restructuring an existing business, it is essential that the parties obtain legal and accounting advice regarding the structure of the business/company, and also ensure that the entity holds all proper licences and certifications. It is also advisable to contact the governing licensing body and confirm that the appropriate licences are in place for the new entity.

Corporate & Commercial team member profile

Ian Sinclair, Partner, Corporate & Commercial

Ian has over 25 years' experience in corporate and commercial law, including acting as in-house counsel with a private investment bank.

He advises publicly listed and private companies in general corporate law, including corporate governance, business acquisitions, takeovers, capital raisings and private equity across a diverse range of industries, from energy and resources to media, financial services, biotechnology and transport. Ian has a strong commercial focus and works closely with his clients in the pursuit of their business strategies and objectives.

Dean Katz appointed Co-chair of YBP

Congratulations to Dean Katz, Senior Associate, who has been appointed as the new Co-chair of Cornwall Stodart's Young Business People (**YBP**) program. Dean joins Jarrod Munro in this role and they are set to take YBP to a whole new level!

For those who don't know, our YBP program provides important networking opportunities for our young lawyers, clients and colleagues. We run YBP events throughout the year, enabling attendees to build their networks and expand and share their knowledge in a fun and social atmosphere.

No doubt Dean will bring style and enthusiasm to the role.

Look out for details of our YBP end of year event – it promises to be an exciting end to 2012 and will be a great demonstration of how Jarrod and Dean have collaborated to bring something new to the YBP program.

For more information about the Cornwall Stodart YBP program, please visit:
www.cornwalls.com.au

Tanya Nguyen, Appointment to Business Law Committee

Cornwall Stodart would like to congratulate Tanya Nguyen, a Lawyer at our firm, on her recent election to the Business Law Committee of the Law Institute of Victoria (**Committee**).

The Committee has jurisdiction over a range of business legal activities and is the principal intellectual sponsor of numerous LIV commercial publications, including the Sale of Business Contract.

As a lawyer, Tanya advises corporate and commercial clients on various matters including commercial contracts, corporate structuring, trade practices, trusts and companies, corporate governance, fundraising and capital finance. She also has experience in the financial services industry and property law.

Tanya is looking forward to her work with the Committee. Congratulations Tanya! We can't wait to see what you bring to your new role.