

NEWSLETTER

AUGUST 2013

Corporate & Commercial Newsletter

Welcome to our August Corporate & Commercial newsletter

This month we have included news on:

- the new ASIC regulatory guides for takeovers
- personal liability for corporate fault
- the importance of registration under the *Personal Property Securities Act 2009* (**PPSA**) and the decision in *Maiden Civil (P&E) Pty Ltd & Ors v Queensland Excavation Services Pty Ltd*
- the ATO's increased scrutiny of GST recovery in mergers and acquisitions
- unfair contract terms and *ACCC v ByteCard Pty Ltd*
- the National Disability Insurance Scheme (**NDIS**).

Please don't hesitate to contact us if you would like more information on any topic, whether covered in this newsletter or not. We hope you find the newsletter informative and useful.

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ASIC releases new regulatory guides on takeovers

The Australian Securities and Investments Commission (**ASIC**) has released four new regulatory guides that consolidate and replace ASIC's 17 existing regulatory guides to takeovers.

The new regulatory guides cover ASIC's updated policies on takeover bids, substantial holdings, compulsory acquisition and buyouts. In addition, the regulatory guides are accompanied by 11 new class orders and associated forms.

Background

The aim of the consolidation was to make regulatory guidance clearer, more certain and more accessible for investors and companies. The new regulatory guides were borne out of a 2012 consultation paper that proposed a more cogent body of takeovers policy to reflect ASIC's current views on takeovers.

ASIC Commissioner John Price stated that: 'The update also means our guidance is more relevant for the market and makes ASIC's approach to many key M&A issues more transparent'.

New guides

The new regulatory guides are:

- Regulatory Guide 5: Relevant Interests and substantial holding notices;
- Regulatory Guide 6: Takeovers: Exceptions to the general prohibition;
- Regulatory Guide 9: Takeover bids; and
- Regulatory Guide 10: Compulsory acquisition and buyouts.

Key changes

Key changes under the new regulatory guides include:

- practical guidance on relevant interests and completing substantial holding notices;
- changes to ASIC's policy on financiers exercising security interests under the exception to the general takeovers prohibition and under what circumstances ASIC may take regulatory action;
- changes to ASIC's policy on what constitutes an underwriting arrangement;
- the extension of acceptance facilities to all shareholders (not just institutions) for unconditional bids;
- the broadening of ASIC's policy on joint bids; and
- ASIC's confirmation that a wider 'inducement' test will be applied over a 'net benefits' test relative to the collateral benefits prohibition.

More information, including a copy of the regulatory guides, can be accessed [here](#).

Personal liability for corporate fault

Background

The *Personal Liability for Corporate Fault Reform Act 2012* (Cth) (**Reform Act**) commenced on 11 December 2012. It aims to harmonise the laws relating to personal criminal liability for breaches by a corporation (also known as 'derivative liability') by

implementing the Council of Australian Governments' principles on director's liability (**COAG principles**). In general, the COAG principles provide that a director or officer of a company should not be held criminally responsible for a company's misconduct as a matter of course, and that personal criminal liability should only be imposed if it is appropriate and reasonable in the circumstances (eg compelling public policy concerns, where the director or officer assisted or encouraged the commission of the offence, or was negligent or reckless in respect of the corporation's offending).

Importantly, the Reform Act amends personal liability provisions under the *Corporations Act 2001* (Cth) (**Corporations Act**), *Foreign Acquisitions and Takeovers Act 1974* (Cth), *Health Insurance Act 1973* (Cth) and *Insurance Contracts Act 1984* (Cth). In this Alert, we consider the key implications of these changes for company directors and officers.

Key changes

Corporations Act

Previously, a company secretary could be held personally criminally liable for a fault by the corporation regarding administrative and reporting defects. The Reform Act removes these provisions and replaces them with civil penalties that are consistent with the COAG principles. Consequently, secretaries are liable for a civil penalty of up to \$3,000 for a corporation's contravention of administrative and reporting obligations. Directors are also liable if the company does not have a secretary. In addition, directors or secretaries may still be fined a maximum of \$200,000 if the breach materially prejudices the interests of the company or its members, the company's ability to pay its creditors, or is a serious breach.

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However, a director or secretary may raise a defence if they took reasonable steps to ensure compliance.

The imposition of a civil penalty reflects the Reform Act's intention of ensuring that directors and secretaries 'turn their mind' to the need for their company to comply with the law, but that criminal sanctions are not imposed where they are not justified under the COAG principles.

Other changes include removing the criminal penalty for officers in relation to:

- an officer's involvement in a company's failure to offer forfeited shares for sale by public auction or advertise such a sale in the prescribed manner. Only the corporation will be criminally liable for the failure; and
- a person's reckless or intentional involvement in a breach

of the primary duties of a responsible entity of a managed investment scheme. However, civil penalties remain applicable to the person.

The Reform Act also clarifies the offences that retain personal criminal liability for corporate fault. These apply if a director or officer was 'dishonestly involved' in the contravention. The Reform Act makes clear that 'involved' is broadly defined under s 79 of the Corporations Act as:

- aiding, abetting, counselling or procuring the contravention; or
- inducing (by threats, promises or otherwise) the contravention; or
- being in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to the contravention; or
- conspiring with others to effect the contravention.

Penalties applying to corporations that breach the administrative and reporting provisions are also substantially increased to a maximum of 60 penalty units or 1 year imprisonment, or both.

Foreign Acquisitions and Takeovers Act 1974 (Cth)

The Reform Act provides that where an offence is committed by a corporation, personal criminal liability will only be imposed on an officer if the officer authorised or permitted the commission of the offence. This means that officers will no longer be held automatically criminally liable if the offence is committed by the corporation. However, specific offences relating to compliance with the Treasurer's orders about certain acquisitions and arrangements continue to apply personal criminal liability.

Health Insurance Act 1973 (Cth)

The Reform Act removes the personal criminal liability provisions relating to officers of a private hospital proprietor where the proprietor offers, accepts or gives a bribe to a medical practitioner, midwife or nurse in exchange for enabling patients to be admitted to the hospital. Under the new provision, officers are only personally criminally liable if they were directly involved in the conduct.

However, the personal liability provisions continue to apply to executive officers of a company where the company engages in conduct intended to induce a person to request pathology or diagnostic imaging services from a provider. This is aimed at deterring inappropriate referrals for pathology and diagnostic services.

Insurance Contracts Act 1984 (Cth)

The Reform Act repeals the blanket provision that imposed personal criminal liability for corporate fault for all offences under the *Insurance Contracts Act 1984* (Cth). Instead, a new provision was inserted that retains personal criminal liability for corporate fault for specific breaches relating to an insurer's obligation to comply with ASIC's power to obtain documents, and not to supply false or misleading information to ASIC. Under these provisions, a director, employee or agent of an insurer commits an offence if they permit or authorise the insurer to breach these obligations.

Comments

These legislative changes reduce the regulatory burden and risk of personal criminal liability for company directors, executive officers and managers of corporations. This should give more clarity to the



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scope of legal obligations and standard of conduct expected of directors and officers under the various Acts.

However, while the Reform Act purports to increase certainty and consistency, it is not wholly consistent in applying the COAG principles. For example, the major amendment to the Corporations Act relates only to administrative and reporting defects. Derivative liability remains and the only significant change is a switch from criminal to civil penalties. A director or officer still has the onus of proving reasonable steps. Therefore, it is questionable whether the legislative intent of the Reform Act has been fully achieved.

The importance of registration under the PPSA

Maiden Civil (P&E) Pty Ltd & Ors v Queensland Excavation Services Pty Ltd [2013] NSWSC 852

Background

The New South Wales Supreme Court recently handed down a decision relating to the first substantive priority dispute under the *Personal Property Securities Act 2009* (PPSA). Now, an owner of goods who creates a lease under the PPSA but fails to register their security interest under the Personal Property Securities Register (PPSR) will lose those goods to another party who has perfected their security interest over the same goods. Additionally, the lessor who fails to register their goods on a 'transitional register' (Northern Territory register) prior to the registration commencement time will not be afforded the 24-month temporary perfection.

Summary

In May 2010 Westpac and Esanda financed the lessor, Queensland Excavation Services Pty Ltd (**QES**), to purchase Caterpillars (a wheel loader and two excavators) (**Equipment**). QES and its financiers failed to register their interests in the Equipment on the Northern Territory register of motor vehicles prior to the commencement of the PPSR. Shortly after QES leased the Equipment to Maiden Civil (P&E) Pty Ltd (**Maiden**), whereby Maiden took possession of the Equipment and used it in civil construction works in the Northern Territory.

In March 2012, Maiden entered into a short-term loan agreement with Fast Financial Solutions Pty Ltd (**Fast**), which included a General Security Deed (**GSD**) granting a security interest over all of its assets including the Equipment. Fast then registered their security interest on the PPSR. Shortly thereafter, Fast became aware of a number of events of default under the GSD; hence Fast appointed receivers and managers of 'all of the company's assets', claiming possession of the Equipment.

Decision

The court found in favour of the receivers. The lease was found to be a PPS lease, meaning it was a lease of a serial numbered good for more than 90 days. Following New Zealand and Canadian case law, the court determined that Maiden as lessee had both a possessory interest and a proprietary interest in the Equipment, sufficient to enable them to grant a security interest in the property itself and not just in the leasehold interest.

As a result, QES as lessor/owner and Fast as holder of the perfected security interest had a competing interest in the Equipment. Ordinarily, QES would have had a superior security

interest and attracted temporary perfection under the PPSA. However, in this instance QES failed to register the security interest under a 'transitional' register required in the Northern Territory. QES had also failed to register the security interest on the PPSR, leaving it with an unperfected security interest in the Equipment. Consequently, the receivers of Maiden were entitled to the Equipment, to sell and realise the value in order to satisfy the debt owing to Fast.

Impact

The case highlights the need for lessors to consider whether their agreement falls within 'PPS leases' or 'in substance security interests'. Property owners who lease their goods (and financiers of those goods) must be vigilant in registering their interests on the PPSR. It is also prudent for owners to bear in mind that the grace-period of 24 months for temporary perfection may not apply if the security interest was registrable on a transitional register but was not registered before the commencement date of the PPSR (30 January 2012). Owners may stand to lose their security interest in the goods for failing to perfect registration.

The ATO increases its scrutiny of GST recovery in mergers and acquisitions

The line between tax avoidance and tax planning is increasingly prominent as the ATO steps up its tax collection and anti-avoidance activities in an effort to curtail revenue 'leakage'. In this Alert, we consider the legitimacy of certain transaction structures that are designed to maximise GST recovery in mergers and acquisitions involving input taxed financial supplies.



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Background

The Australian Goods and Services Tax (**GST**) regime in its most basic form involves a supplier of goods or services charging an additional GST amount (being 10% of the price of the goods or services) to the purchasers of its products. The supplier is entitled to claim an 'input tax credit' (**ITC**) for the GST amounts that it has outlaid on goods and services that are utilised in the course of carrying out its commercial enterprise.

Certain transactions that are integral features of mergers and acquisitions (eg transfers of shares and units) are 'input taxed financial supplies' for GST purposes. This means that while there is no GST payable on the provision, acquisition or disposal of securities, the purchaser is not permitted to claim ITCs for the GST expended in the course of acquiring goods and services related

to the M&A transaction (eg accounting advice, legal services, business valuations). This results in a net GST liability payable by the acquirer of the securities.

The general rule that ITCs are not creditable on the acquisitions of goods and services that preceded the 'financial supply' is subject to a category of acquisitions that are eligible for 'reduced input tax credits' (**RITCs**). These acquisitions are listed in regulation 70-5.02(2) of the *A New Tax System (Goods and Services Tax) Regulations 1999* (Cth) and include the provision of 'arranging services' by a 'financial supply facilitator'. Eligibility to claim an RITC results in recovery of 75% of the GST amount charged on goods and services acquired in relation to the financial supply.

The alleged scheme

While the ability of an acquirer of securities to claim an RITC for certain arranging services (eg investment bank services) is uncontroversial, the fees charged by other providers of services (eg accountants and lawyers) in connection with the M&A transaction generally do not give rise to an entitlement to claim an RITC. The imperative to extend the availability of RITCs to legal and accounting services has given rise to a particular transaction structure that has attracted the ATO's scrutiny in recent times.

The structure in question involves Entity A (**Acquirer**) engaging a related entity, Entity B (**Arranger**) to provide arranging services to facilitate the acquisition of shares in the target company. The Arranger organises various professional services (including accounting and legal advice) for the Acquirer in relation to the transaction. The Arranger makes a single collective 'supply' of professional services to the Acquirer in its role as 'financial supply

facilitator'. The Acquirer then claims an RITC on the supply of arranging services by the Arranger (**Transaction Structure**).

The ATO issued TA 2010/1 outlining its concerns that arrangements sharing characteristics with the Transaction Structure potentially contravened the anti-avoidance provisions contained in Division 165 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth). The ATO has also now expanded powers under the Promoter Penalty Regime to prosecute persons who promote tax exploitation schemes or who implement schemes in a manner that fails to accord with relevant ATO product rulings.

Implications

TA 2010/1 indicates that the Commissioner will consider the substance of the relationship between an Acquirer and Arranger when determining whether the 'sole or dominant purpose' of an Arranger's involvement in a Transaction Structure is to 'derive a tax benefit', thus contravening the general anti-avoidance provisions.

Nevertheless, the provision of arranging services by a related entity may enable businesses to claim RITCs (increasing net GST recovery) for services that would not otherwise be creditable provided (among other things) that the:

- arrangement has commercial substance (eg the Arranger is remunerated on commercial terms);
- Arranger plays a meaningful role in engaging service providers (eg the Arranger oversees and monitors service delivery); and
- Arranger routinely provides arranging services to the Acquirer and/or unrelated entities.



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Comment

Businesses considering implementing an arrangement that is identical or similar to the Transaction Structure described in this Alert should be adequately informed about the risk of contravening anti-avoidance provisions and carefully assess whether there are genuine commercial imperatives underpinning the arrangement. It may be advisable to obtain a private ruling from the ATO regarding a proposed transaction structure. Businesses should also consider whether engaging an unrelated party to provide a bundled supply of 'arranging services' would yield similar commercial benefits to those provided by the Transaction Structure.

For further information regarding seeking a private ruling or structuring your transaction to maximise GST recovery, please contact Michael Kohn, Andrew Cromb or Lesley Naik.

Too many bytes of the apple: unfair contract terms under Australian Consumer Law

The nation's top watchdog, the Australian Competition and Consumer Commission (**ACCC**), has instituted proceedings in the Federal Court of Australia against ByteCard Pty Ltd (**ByteCard**) for unfair terms in their standard form contracts. The ACCC argues that certain terms in these contracts breach the *Competition and Consumer Act 2010* (Cth) (**Act**). This case is significant for all commercial clients who use standard contracts.

Background

ByteCard trades as Netspeed Internet Communications and is an Internet Service Provider whose services include domain registration and web design. This proceeding is the first case based solely on allegations of breaches of the unfair contract provisions of the Act. In effect, it will be a test case for the ACCC in enforcing the new Act.

The unfair terms test

The Act provides a **3 step test** in determining whether a term of a consumer contract is regarded as **unfair**.

The court will consider whether the term:

1. causes a significant **imbalance in the parties' rights and obligations** arising under the contract;
2. is **not reasonably necessary to protect the legitimate interests of the party** who would be advantaged by the term; and
3. causes **detriment** (whether financial or otherwise) to a party if it were to be applied or relied on.

The court must be satisfied that all three elements of this test have been proven, and will have regard to the transparency of the term and to the contract as a whole.

If the test is satisfied, the court may hold that the term is void and the contract is treated as if the unfair term never existed.

ByteCard's standard contract

According to the ACCC, the unfair terms of ByteCard's standard terms and conditions contract include terms that:

- allow ByteCard to unilaterally vary the price without providing the consumer with a right to terminate the contract;
- require the consumer to indemnify ByteCard in any circumstances, even where there has not been a breach and where the liability, loss or damage may have been caused by ByteCard's breach; and
- allow ByteCard at any time to unilaterally terminate the contract without providing cause or reason.

The corporate sector is looking to this proceeding with great anticipation, and the case has been brought forward on the Federal Court's list. It commenced on **Thursday 13 June 2013**.



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The National Disability Insurance Scheme Act 2013 – An Overview

The *National Disability Insurance Scheme Act 2013* (Cth) (**Act**) was passed through federal parliament with several amendments on 21 March 2013.

The purpose of the Act is to give effect to Australia's obligations as a party to the United Nations *Convention on the Rights of Persons with Disabilities* and to support the independence and social and economic participation of Australians with a disability.

What does the Act do?

The Act provides for the National Disability Insurance Scheme (**NDIS**), which has been renamed DisabilityCare Australia. It also establishes the NDIS Launch Transition Agency (**Agency**), which will implement the scheme from 1 July 2013 in the Barwon region of Victoria, South Australia, Tasmania and the Hunter Valley in New South Wales. The Agency will also be responsible for facilitating innovation and best practice in the disability sector as well as increasing awareness of disability in the community.

What is the function of the NDIS?

When fully implemented, the NDIS will adopt a nationally consistent approach in the provision of:

- referral services and activities for people with disabilities;
- funding for individuals or entities to enable them to assist people with disabilities to participate in economic and social life; and
- individual plans under which reasonable and necessary supports will be funded for scheme participants.

The operation of the scheme is supported by administrative provisions in the Act, which will include provisions relating to children, nominees, confidentiality, the review of decisions and the treatment of compensation.

To participate in the scheme, a potential participant must meet various requirements regarding age, place of residence and either disability or early intervention.

How will it be funded?

The provision of support under the NDIS will not replace existing entitlements to compensation. The Act enables the Agency to conduct legal proceedings on behalf of persons with disabilities and to recover costs funded by the NDIS prior to a compensation claim being settled.

The NDIS will take an insurance-based approach, informed by actuarial analysis, to the funding and provision of support.

It is estimated that the first stage of the scheme will have a cost to the commonwealth of \$1 billion over a four year period.

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Team member profile
Carolyn Falcone,
Partner, Corporate & Commercial

Carolyn is the newest Partner in our Corporate & Commercial team, having been promoted to the partnership on 1 July 2013.

Carolyn advises on a wide range of telecommunications projects including managed network services and network rollouts.

She also advises our corporate and commercial clients on various matters including commercial contracts, capital raising, financial services, structuring and restructuring, trade practices, energy and resources transactions, trusts and companies, corporate governance and fundraising.

Carolyn also has in depth experience in the financial services industry and advises clients in all areas of commercial lending, including syndicated and construction loans.