



Supreme Court of New South Wales

NEW SOUTH WALES BAR ASSOCIATION
SYDNEY CPD CONFERENCE

13 March 2021

Update on corporations law

Topics to be covered

- Directors' and officers' duties
- Continuous disclosure
- Insolvency – case law and legislative changes
- Financial service regulation – Case law, legislative changes
- Outcomes of the Hayne Royal Commission

Directors' duties and continuous disclosure

- Directors' liability arising from a company's breach of other statutory obligations – “stepping stones” - *Cassimatis v Australian Securities and Investments Commission* (2020)
- Statutory definition of “officer” - *ASIC v King* (2020)
- Breach of executive and non-executive directors' duties - *Australian Securities and Investments Commission v Mitchell (No 2)* (2020)
- Legislative amendments – s 184 of the Act (dishonest) and Part 9.1A (director identification numbers)
- Reliance on indirect or “market-based” causation in continuous disclosure class actions and accessorial liability
 - *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd* (2019)
 - *Masters v Lombe (liq): Re Babcock & Brown Ltd (in liq)* (2019)
 - *Crowley v Worley Limited* (2020)
 - *Australian Securities and Investments Commission v Big Star Energy Ltd (No 3)* (2020)
- Proposed continuous disclosure amendments

Insolvency

- Case law
 - Cases arising from Virgin administration
 - Payment of priority employee claims from circulating assets - *Re RCR Tomlinson Ltd (admins apptd)* (2020)
 - Preferences and payments by third parties - *Cant (as liquidator of Eliana Construction and Developing Group Pty Ltd (in liq) v Mad Brothers Earthmoving Pty Ltd* (2020)
 - Preferences and running accounts – *Gunns Ltd*
 - Preference payments while a company is under a DOCA - *Yeo, Re Ready Kit Cabinets Pty Ltd (in liq) v Deputy Commissioner of Taxation* (2020); on appeal *Commissioner of Taxation v Yeo as Liquidator of Ready Kit Cabinets Pty Ltd (in liq)* (2020)
 - Liquidators' examinations - *ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq) v Walton* (2020) (special leave granted)
- Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2019 (Cth)
- Debt restructuring and liquidation reforms - Corporations Amendment (Corporate Insolvency Reforms) Act 2020

Financial services regulation

- *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* (2021) - marketing campaign for consolidation of superannuation accounts involved giving “personal advice” and failed to comply with the provider’s “best interests” duty under s 961B
- Part 7.9A of the Corporations Act, introduced by Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (Cth), confers a product intervention power on ASIC
- Wider range of and substantially increased civil penalties and profit disgorgement remedies – introduced by Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act

Outcomes of the Hayne Royal Commission

- Terms of reference not limited to unlawful conduct - focus on conduct in the retail sector – consumers and small and medium enterprises
- Multiple issues in financial advice – ongoing advice fees where no service provided – conflicts of interest – confusion between sales and advice and issues as to bonus and commission structures
- Other issues – consumer credit insurance, superannuation funds, responsible lending, access to finance for remote and indigenous communities
- 76 recommendations largely accepted by Government
- Issues as to commission and fee regulation, vertical integration of financial intermediaries, individual accountability, enforcement