

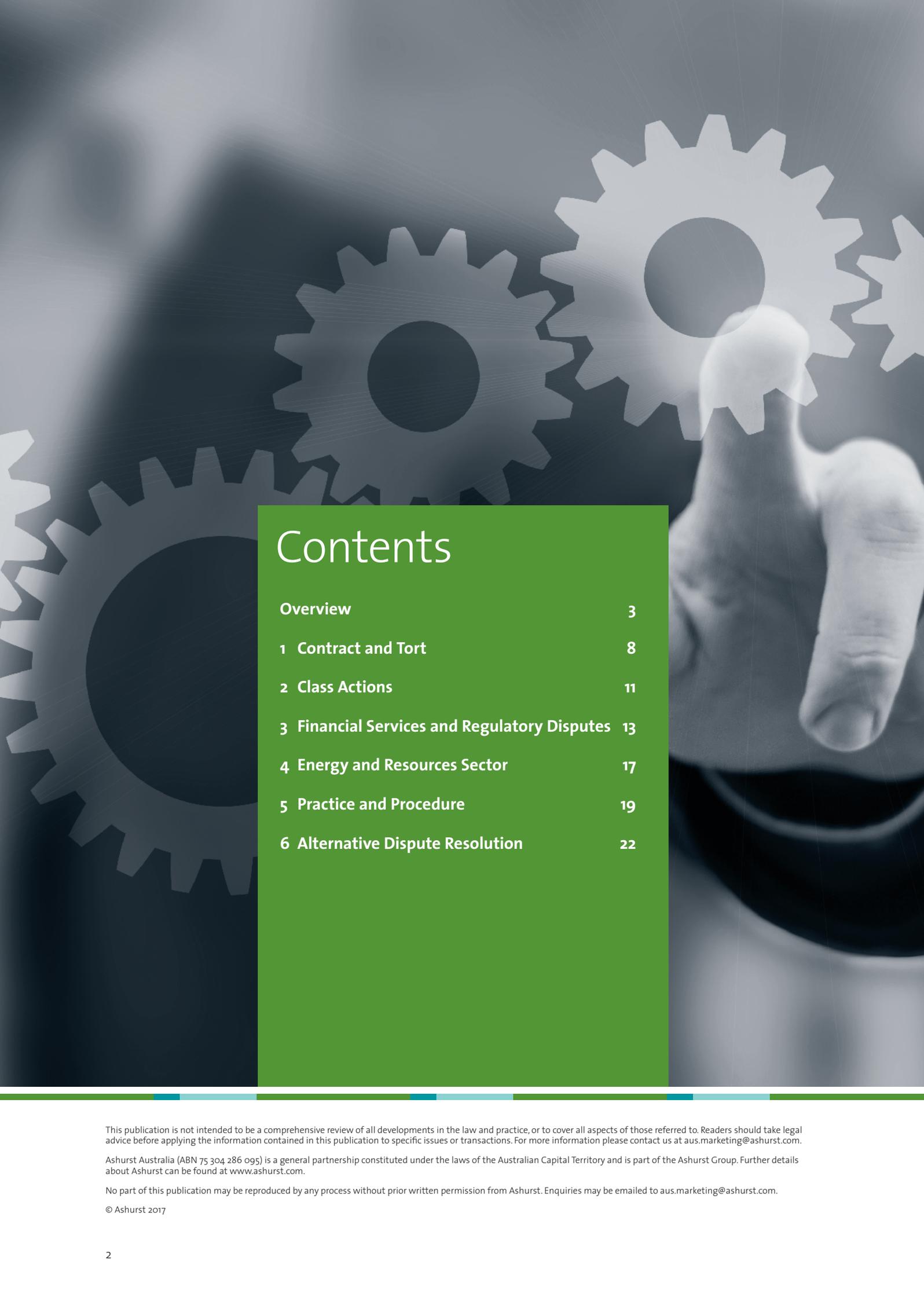
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# Australian Disputes Year in Review 2016

KEY COMMERCIAL CASES AND AREAS TO WATCH IN 2017

February 2017





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This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at [aus.marketing@ashurst.com](mailto:aus.marketing@ashurst.com).

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# Overview

Welcome to the *Ashurst Australian Disputes Year in Review* for 2016.

This publication recaps the most important developments of 2016 across commercial disputes, and identifies areas to watch in 2017.

This overview provides a snapshot of key developments and trends. The five sections that follow briefly explain each development and its implications. There are links at the end of many of the articles to our more detailed updates, and of course please contact your usual Ashurst contact or any of the partners listed on the back page for more information.

I hope you find this publication useful, particularly if you are navigating commercial disputes in 2017.



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## CONTRACT AND TORT

### Penalty doctrine recognises performance interests

In *Paciocco* the High Court clarified the law in relation to the doctrine of penalties. As a result, it is now harder to show that a contractual provision is an unenforceable penalty on the grounds that the amount is extravagant and unconscionable. Following this decision, the amount stipulated will be compared with not only the damages that may have been recoverable at law but also wider commercial interests in performance of the obligation.

### Government contracts and regulatory change

The risks inherent in government contracting were highlighted by two High Court decisions which adopted a narrow reading of the statutory and contractual entitlements of Tabcorp and Tatts Group to claim compensation due to regulatory change. Changes to the gaming industry's regulatory framework ultimately deprived both plaintiffs of their rights to compensation when their licences to operate gaming machines in Victoria expired.

### Pre-contractual statements

In two further decisions the High Court resolved discrepancies between pre-contractual statements and the text of the contracts, emphasising the primacy of the document finally agreed. In one case, the Court looked at when a pre-contractual representation will give rise to a promissory estoppel. A representation that tenants "would be looked after at renewal time" was not sufficiently clear, precise and unambiguous to found an estoppel. In the other, the Court ordered the rectification of an unconditional bank guarantee which named the wrong party.

### Corporate liability for employee wrongdoing

The approach to be taken in determining whether an employer should be held vicariously liable for intentional wrongdoing by an employee was clarified in *Prince Alfred College Incorporated v ADC*. The test looks first at the role an employer has assigned to the employee, and then considers whether this provided the occasion for the wrongdoing.

### Contractual interpretation

While the controversy over when surrounding circumstances can be used in interpreting a contract remained live in 2016, a High Court decision on the relevant principles is pending. The case concerns the use of words deleted from a standard form agreement as an aid to interpreting an ambiguous clause. This was said to be an example of where the parties' actual intention in pre-contractual negotiations can be used to rebut an inference to be drawn from the surrounding circumstances.

*Ashurst's team of 'very smart technicians' has a particular focus on financial services, energy, and infrastructure disputes.*

ASIA PACIFIC LEGAL 500 2016/17

## CLASS ACTIONS

### Fraud on the market theory recognised in Australia

For the first time in Australia a court accepted that shareholders can establish causation via “indirect market based” (or fraud on the market) causation where the share price is artificially inflated by reason of misleading or deceptive conduct.

### Can you achieve finality in a class action?

The High Court confirmed that a failed class action against Timbercorp did not prevent class members from litigating certain issues in a new proceeding arising out of the same facts. This decision casts doubt on the finality of successfully defended class actions, arguably one of the main benefits enjoyed by corporate defendants looking to avoid multiple proceedings and the associated time and cost.

### Court supervised common fund orders – a new direction for class action funding?

In *Money Max Int Pty Ltd v QBE Insurance Group Ltd* the Full Federal Court endorsed a common fund order, requiring all class members of an open class to contribute to the funder’s commission out of any settlement or judgment, even if they had not signed a funding agreement.

### The Federal Court scrutinises funding commissions, legal costs and equalisation orders

Building on the Full Federal Court’s judgment in *Money Max*, the Federal Court in *Earglow Pty Ltd v Newcrest Mining Limited* confirmed that it has power to reduce a litigation funder’s commission rate or quantum when approving a class action settlement.

## FINANCIAL SERVICES AND REGULATORY DISPUTES

### Current regulatory inquiries

A suite of regulatory inquiries and reviews was commenced in 2016 including: a review of the four major banks by the House Standing Committee on Economics; an inquiry into regulation of lending to small business; a consultation by ASIC and FOS about the widening of FOS’s small business jurisdiction; a review of the effectiveness of external dispute resolution and complaint bodies; and an independent review of the Australian Bankers’ Association Code of Banking Practice.

### ASIC enforcement: key trends

Corporate culture, values and ethics were key priorities for ASIC in 2016 and will likely remain a significant priority throughout 2017, particularly in light of the recommendations by the cross-party committee in its “*Review of the Four Major Banks*”. Other areas of focus in 2016 included life insurance reforms, digital financial advice, the mortgage brokering market and managed discretionary accounts. These, along with gatekeepers’ conduct, the misalignment of retail products and undesirable collective industry practice in relation to the design, disclosure and marketing of financial products will remain a focus in 2017.

### Regulatory court action

In addition to bringing high profile civil penalty proceedings against NAB, ANZ and Westpac for unconscionable conduct and market manipulation in relation to BBSW, ASIC had mixed success with enforcement outcomes in 2016. In particular, ASIC won its civil proceedings against the directors of Storm Financial for breach of their statutory directors' duties in *ASIC v Cassimatis (No 8)* and obtained injunctions preventing Macro Realty from promoting and marketing a Pilbara property investment scheme in *ASIC v Macro Realty Developments Pty Ltd*. On the other hand, ASIC lost civil penalty proceedings against directors of the Prime Retirement and Aged Care Property Trust in *Lewski v ASIC* and took the unusual step of discontinuing proceedings against two of the directors of LM Investment Management Ltd.

### Code of Banking Practice incorporated into guarantees

Two recent Victorian Court of Appeal cases *Dogett v Commonwealth Bank of Australia* and *National Australia Bank Ltd v Rose* have shown that Code of Banking Practice protections may be available to guarantors.

### Bribery and corruption remains a hot topic for business and government

Anti-bribery and corruption stayed at the forefront of corporate and legislative agendas in Australia in 2016. Developments included the Senate inquiry into Australia's foreign bribery laws, new criminal offences for false accounting and public consultation on deferred prosecution agreements.

## ENERGY AND RESOURCES SECTOR

### Compensation awarded to native title holders

The Federal Court handed down a landmark decision awarding compensation for the impact of land grants and public works on native title. The \$3.3 million award included compensation for economic loss, non-economic loss and interest. The valuation methodology adopted in this case will be given further consideration by the Full Federal Court in February 2017.

### Motive is not relevant to assessing the validity of a railway access proposal

Further guidance was given on proposals to access a railway network under the *Railway (Access) Code 2000* (WA) by the Western Australian Court of Appeal in *The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd*. The Court of Appeal adopted a purposive approach to statutory construction and considered the requirements for a valid access proposal.

*International Arbitration  
Firm of the Year*

THE ASIAN LAWYER'S EMERGING  
MARKETS AWARDS 2016

## PRACTICE AND PROCEDURE

### Federal Court streamlines its approach to case management

After a long period of consultation, the National Court Framework came into full effect in the Federal Court on 25 October 2016 when the Court replaced all its practice notes with a suite of 26 redrafted national practice notes. The goal of the reforms is to organise and manage the Court's work nationally by reference to nine National Practice Areas, fostering consistent national practice, using specialist judges and registrars, and streamlining case management in the Court.

### Privilege after limited disclosure and uncertainties created by subpoenas

The key decisions on legal professional privilege in 2016 looked at when disclosure to a third party will amount to a waiver, and the complexities of claiming privilege when documents are required to be produced under subpoena. In two cases it was held that the disclosure of privileged documents on a confidential basis to third parties did not amount to a waiver of privilege where the privileged documents had not been inconsistently deployed in litigation. On the other hand, parties seeking to defend privilege in documents produced on subpoena faced challenges due to the technicality of the law in this area.

### Proportionate liability – failure to take care must be an element of cause of action

In *Cassegrain v Cassegrain*, the New South Wales Court of Appeal considered whether a claim for equitable compensation arising from the knowing receipt of property transferred in breach of a fiduciary duty was an apportionable claim. Justice Basten found that the basis of the defendant's liability was not a failure to take reasonable care as she *knowingly* accepted the property (a share transfer) and the defendant was therefore not entitled to rely on the proportionate liability defence.

### Court makes non-party costs order against director and shareholder of litigation funder

In *Carter v Caason Investments Pty Ltd*, the Victorian Court of Appeal upheld a decision to award non-party costs against a litigation funder, its director, and another company that was its sole shareholder.

## ALTERNATIVE DISPUTE RESOLUTION

### Update of major arbitration rules

A number of major arbitral institutions published updated arbitration rules in 2016, including the Australian Centre for International Commercial Arbitration, the Singapore International Arbitration Centre and the DIFC-LCIA Arbitration Centre. Amongst other things, these updates related to consolidation of multiple disputes, the joinder of additional parties and summary determinations.

### Courts generally willing to enforce dispute resolution clauses

A decision of the Supreme Court of Queensland in *Santos Limited v Fluor Australia Pty Ltd* again shows that proceedings will be stayed where commenced before compliance with a contractually agreed dispute resolution process.

### Guidance on corporate structuring and investment treaties

In May 2016, the Permanent Court of Arbitration released reasons for the tribunal's refusal to hear Philip Morris' investment treaty claim against Australia and in doing so provided some helpful guidance on when it is permissible to structure an investment to maximise investment treaty protection.

### Are banks making the most of arbitration?

Apparently not. That was the finding of a report published in November 2016 by a task force commissioned by the arbitration branch of the ICC to study financial institutions' perceptions and experience of international arbitration.

*In 2016 we adopted the updated National Model Equitable Gender Briefing Policy to drive cultural change in the legal profession and address the underrepresentation of women in the superior courts.*



# Contract and Tort

# 1

## PENALTY DOCTRINE RECOGNISES PERFORMANCE INTERESTS

One of the key commercial cases of 2016 was the High Court's decision in the long running bank fees class action: *Paciocco v ANZ* [2016] HCA 28. In this judgment the Court emphasised the value of freedom of contract and made it harder to establish that a provision is an unenforceable penalty.

In *Paciocco*, the High Court held that a credit card late payment fee was not a penalty. In a key development of the penalty doctrine in Australia, the High Court looked "not merely to the damages that may have been recoverable at common law by the innocent party upon default, but to the wider interest of the innocent party in the performance of the primary obligation."

The "tests" proposed by Lord Dunedin in the leading case of *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 remain authoritative, albeit not determinative, guidance on interpreting a provision said to be a penalty. A key issue the courts consider is whether the sum stipulated is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. The decision in *Paciocco* demonstrates that for the purpose of this enquiry the courts are not limited to a comparison with the damages that might have been recoverable at common law for breach. Rather, the party's legitimate commercial interests in performance can be taken into account.

In applying these principles, and in considering ANZ's legitimate commercial interests, the majority accepted that ANZ had a clear interest in timely payment by its credit card customers, and the evidence showed ANZ's financial interests were affected when customers paid late. The judgment also demonstrates that in future cases it will be difficult to establish that an amount is extravagant and unconscionable. Indeed, the Court's observations suggest that the penalty doctrine will rarely have any practical application in Australia in the context of commercial contracts. This is because, in the majority of cases, even if a provision has a punitive effect, its inclusion will be to protect a legitimate commercial interest.

A handful of cases which consider the penalty doctrine have been handed down since *Paciocco*, the most notable of which is *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* [2016] NSWCA 328. In that case it was held that default interest payable under a commercial loan facility was not in that case a penalty. The default rate, payable when monthly payments were late, was 2% above the ordinary rate. The Court applied the principles outlined by the High Court in *Paciocco* and held that in view of the cost to the bank of making provisions against impaired loans, the default interest could not be regarded as extravagant or unconscionable. Sackville AJA observed that the costs associated with penalty litigation add to the overall costs of borrowing and suggested that there may be a case for statutory law reform in this area. A similar conclusion in relation to whether a default interest rate was a penalty was reached in *Wu v Ling*. For more details, see our [Financial Services Disputes – "What's New"](#) publication dated 8 February 2017.

## GOVERNMENT CONTRACTS AND REGULATORY CHANGE

The cases of *Tabcorp Holdings v Victoria* [2016] HCA 4 and *Victoria v Tatts Group* [2016] HCA 5 are a salutary reminder that changes to the regulatory structure of an industry can have significant commercial implications for investors.

In *Tatts Group*, the High Court unanimously held that Tatts was not entitled to a payment of \$540 million plus interest from the State of Victoria under an agreement between those parties. The agreed payment was to be a refund of the fee Tatts paid to the State for its gaming operator's licence under the regulatory regime for gaming machines which had been introduced in Victoria in 1992 and which was abolished with effect from 2012.

In *Tabcorp Holdings*, which was heard concurrently, the High Court unanimously held that Tabcorp Holdings Limited was not entitled to a termination payment from the State under the *Gambling Regulation Act 2003* (Vic).

The High Court adopted a narrow reading of the statutory and contractual entitlements of Tabcorp and Tatts Group in these two cases, which meant that changes to the gaming industry's regulatory framework effectively deprived them of their rights to compensation when their licenses to operate gaming machines in Victoria expired.

These cases demonstrate both that sovereign risk is a relevant consideration in commercial dealings with government and that legislation has the potential to undermine contractual rights despite the parties' intentions at the time of contracting.

## PRE-CONTRACTUAL STATEMENTS

The High Court also gave useful guidance in 2016 on the use of pre-contractual statements to go behind the language of an agreement. The decisions exemplify the Court's preference that the parties' rights are reflected in the text of documents agreed except in a clear case.

In *Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26 the High Court, by majority, held that a representation that tenants "would be looked after at renewal time" was not sufficiently clear, precise and unambiguous to found an estoppel. The representation was not capable of conveying to a reasonable person that the tenants would be offered a further lease. According to Keane J such an assumption was unreasonable as Crown had made very clear during the course of negotiations that it would not bind itself to a further lease.

Before the expiry of two restaurant leases, negotiations for renewal took place between a landlord and tenants. The landlord offered a five-year lease term and required that both restaurants be substantially refurbished at the tenants' expense. Given the significant financial outlay involved in the refurbishment, the tenants sought a longer lease period. Ultimately, the parties entered into a five-year lease. The tenants claimed that this outcome was the result of a statement by the landlord to the effect that the tenants would be "looked after at renewal time". Subsequently the landlord gave notice requiring the tenants to vacate the premises when the leases expired.

In addition to the uncertainty of the representation, the majority of the High Court held that it was not possible to show that the tenants acted on the assumption. It was unclear whether the tenants expected that they would be offered a further five year lease on terms to be decided by Crown, or a renewal of the leases on the same terms and conditions as the previous lease – an expectation that could not have been created by the representation.

In *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47 the High Court ordered the rectification of unconditional bank guarantees which named the wrong beneficiary. The guarantees were required as security for a construction contract by the New South Wales Land and Housing Corporation. The contractor mistakenly obtained guarantees in favour of the non-existent “New South Wales Land & Housing Department”. The Courts below overcame the mistake by construing the bank guarantee as referring to the correct entity. The High Court rejected this approach, as the conditions stipulated in such an instrument must be complied with strictly. Nevertheless, the Court ordered the rectification of the bank guarantees on the basis that there had been a mutual mistake.

## CORPORATE LIABILITY FOR EMPLOYEE WRONGDOING

The decision of the High Court in *Prince Alfred College Incorporated v ADC* [2016] HCA 37 has clarified the approach to be taken in determining whether an employer should be held vicariously liable for intentional wrongdoing by an employee.

The Court’s approach was to first consider any special role the employer has assigned to the employee, and to ask how that role places the employee in relation to the victim. The relevant inquiry then becomes whether the employer “provided the occasion” for the wrongful act by looking to particular features of the employee’s role, such as authority, power, trust and control.

The application of this test to the facts required a careful examination of the role that the defendant had assigned to the employee. As such an examination was not possible on the evidence available, the Court declined to extend the limitation period.

## CONTRACTUAL INTERPRETATION

In 2016 the controversy highlighted in *Australian Disputes Year in Review 2015* over the use of surrounding circumstances when interpreting contracts was re-agitated by the intermediate appellate courts, notably in *Apple and Pear Australia Ltd v Pink Lady America LLC* [2016] VSCA 280 and *Zhang v ROC Services (NSW) Pty Ltd* [2016] NSWCA 370. Although the High Court is yet to resolve this question, it will soon have an opportunity to restate the principles of contractual construction when it delivers judgment in the appeal from *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* [2016] VSCA 23.

In *Gee Dee Nominees* the Court of Appeal relied on the deletion of words from a standard form agreement as an aid to construing ambiguous words. The Court held that this was an application of the exception to the rule against admissibility of pre-contractual negotiations which allows evidence of mutual intention to negative an inference sought to be drawn from surrounding circumstances.



# Class Actions

## 2

### FRAUD ON THE MARKET THEORY OF CAUSATION RECOGNISED IN AUSTRALIA

For the first time in Australia, a court accepted that shareholders can establish causation via “indirect market based” (or fraud on the market) causation, where the share price is artificially inflated by reason of misleading and deceptive conduct.

Fraud on the market theory is used to argue that individual shareholders do not need to show that each trading decision was made directly in reliance on the alleged wrongful conduct of the company. Instead, once it is established that (a) the alleged misrepresentations were publicly known, (b) the securities traded in an efficient market and (c) the alleged conduct affected the share price, there is a rebuttable presumption of reliance for each shareholder.

In *HIH Insurance Limited (in liquidation) & Ors* [2016] NSWSC 482, a key issue was whether indirect market based causation allowed shareholders to prove loss or damage as a result of the conduct of HIH that artificially inflated its share price. Justice Brereton distinguished an earlier line of authorities (in which reliance was found to be an indispensable element of a cause of action) and found that there were no binding authorities that had held that indirect market based causation was unavailable in Australia.

Although this decision is significant and may encourage more shareholder class actions against companies, it is a first instance decision of a single judge. Until this issue has been considered by the appellate courts, it will remain in a state of flux. For more details, see our [\*Trending in Restructuring and Class Actions Update\*](#) dated 21 April 2016.

## CAN YOU ACHIEVE FINALITY IN A CLASS ACTION?

In *Timbercorp Finance Pty Ltd (in liq) v Collins & Tomes* [2016] HCA 44, an investor class action was brought against Timbercorp for alleged deficiencies in product disclosure statements. The action was dismissed and Timbercorp commenced loan recovery proceedings against the investors.

Timbercorp contended that the investors should have raised individual defences in the class action and that they were therefore precluded from raising them in the loan recovery proceedings in accordance with the principles in *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589. *Anshun* estoppel is the legal doctrine that a party cannot raise an issue in a subsequent proceeding if it was so connected with the subject matter of an earlier proceeding that it was unreasonable not to have raised the issue in that earlier proceeding.

The High Court dismissed Timbercorp's appeal and found that the investors were not precluded from raising certain defences despite having not raised the issues in the class action.

This decision casts doubt on the finality of successfully defended class actions, arguably one of the main benefits enjoyed by corporate defendants looking to avoid multiple proceedings and the associated time and cost.

For further information, see our [Class Actions Update](#) dated 11 November 2016.

## COURT SUPERVISED COMMON FUND ORDERS – A NEW DIRECTION FOR CLASS ACTION FUNDING?

The decision in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148 suggests that the courts will grant common fund orders where they can regulate the returns to funders.

In *Money Max*, the Full Federal Court endorsed a common fund order, requiring all class members of an open class to contribute to the funder's commission out of any settlement or judgment, even if they had not signed a funding agreement.

However, the common fund order was limited by additional orders to protect class members' interests such that the Court is essentially regulating the return to the funder. The limitations included a cap on the total return to the funder, to ensure that class members could not be worse off as a result of the common fund orders being made, and a requirement that the Court approve the total return to the funder at the time of settlement or decision, having regard to the risks undertaken by the funder.

The Court suggested, without deciding, that a return in excess of \$100 million on a hypothetical settlement of \$400 million might be regarded as excessive. It also signalled its expectation that the commission ultimately awarded to the funder upon resolution was unlikely to be as high as the 32.5% or 35% provided for in the funding agreements.

Over time, it is likely that courts will develop an indicative range of returns that will be permitted depending on the nature of the case. In setting the level of commission, the courts will consider the agreed rate in any funding agreement, the level of information provided to class members before entering the agreement, benchmarking against other cases, litigation and costs risks assumed by the funder and the amount of any settlement or judgment.

For further information, see our [Class Actions Update](#) dated 27 October 2016.

## THE FEDERAL COURT SCRUTINISES FUNDING COMMISSIONS, LEGAL COSTS AND EQUALISATION ORDERS

Building on the Full Federal Court's judgment in *Money Max*, the Federal Court in *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 confirmed that it has power to reduce a litigation funder's commission rate or quantum when approving a class action settlement.

In *Newcrest*, Murphy J held that the Federal Court has power to approve a class action settlement and, importantly, to reduce the percentage litigation funding commission in all class actions, not just where there is a common fund order.

Murphy J outlined the broad powers conferred on the Court when approving settlements, noting that they should be construed liberally. He held that if the Court considers the proposed settlement to be fair and reasonable except that the funding commission is excessive or exorbitant, the Court has the power to approve the settlement but reduce the funding commission. In evaluating the reasonableness of the funding commission, Murphy J adopted nine relevant considerations suggested by the Full Court in *Money Max*. These included scrutinising funding commissions, legal costs and class member distribution orders. In assessing funding commissions, the Court had regard to factors including the risks taken on by the funder and benchmarking against other cases.

Murphy J concluded that an aggregate funding commission of \$6.78 million at rates of between 26% and 30% was fair and reasonable in light of the \$36 million total settlement. This conclusion was reached after his Honour found that the rates were towards the lower end of the scale of commission rates paid in comparable cases.

For further information, see our [Class Actions Update](#) dated 1 December 2016.



# Financial Services and Regulatory Disputes

3

## UPDATE ON CURRENT REGULATORY INQUIRIES

2016 began with calls for a Royal Commission and an announcement by the Federal Government of a \$127.2 million reform package to equip ASIC with stronger powers and additional funding. The proposals were a direct response to the ASIC Capability Review paper of December 2015, which made 34 recommendations for improving ASIC's capabilities. While calls for a Royal Commission have somewhat abated, this pressure gave rise to a number of different regulatory inquiries. These included:

- 1. A review of the four major banks by the House Standing Committee on Economics:**  
In November 2016, the Standing Committee on Economics published its first report "*Review of the Four Major Banks*" with potentially significant legislative reform for the financial sector recommended by the Committee. For further information in relation to the findings of the report and this proposed reform, see our *Financial Services Disputes – What's New* publication dated 8 February 2017.
- 2. An inquiry by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) into regulation of lending to small business.**
- 3. A consultation by ASIC and FOS about the widening of FOS's small business jurisdiction.**

4. **A review by an independent panel of the effectiveness of external dispute resolution and complaint bodies:** On 6 December 2016, the panel published its interim report “Review of the financial system external dispute resolution and complaints framework”. For details of the interim report, see our *Financial Services Disputes – What’s New* publication dated 8 February 2017.
5. **An independent review of the Australian Bankers’ Association Code of Banking Practice commissioned by the ABA:** The review of the Code of Banking Practice was due to be completed in December 2016, however, it is now expected by mid February 2017. In the meantime, an issues paper in relation to retail remuneration was issued on 17 January 2017, with submissions requested by 10 February 2017; and the third quarterly report on the progress of the review was issued on 20 January 2017.

Regulatory change is likely to accelerate in 2017 as these reviews are finalised and consideration is given to their recommendations.

## ASIC ENFORCEMENT: KEY TRENDS

In 2016, ASIC saw corporate culture, values and ethics as its key priority. ASIC regards poor culture as a driver of misconduct and focussed on how culture is regulated, what good corporate culture looks like, and how poor culture should be addressed. ASIC’s position is that in order to drive cultural change, individuals need to be responsible for a company’s culture and actions, and that senior management are responsible in setting the “tone from the top”. This is consistent with the cross-party Committee’s recommendation in its *Review of the Four Major Banks* that senior executives involved in significant breaches be named and shamed (see *Financial Services Disputes – What’s New* publication dated 8 February 2017). Such developments highlight that the importance of good culture will remain a key priority throughout 2017.

ASIC targeted a number of areas for intensive surveillance and enforcement activity in 2016. In particular, ASIC continued to focus on financial advisers. This included publishing a Regulatory Guide which sets out principles for developing and implementing remediation programs and releasing a report “*Financial advice: Fees for no service*” which found that there has been a systemic failure by advice licensees within some major banks to provide ongoing advice in return for ongoing fees (See our *Financial Services Update*).

ASIC increased its use of infringement notices and continued to address conduct issues with financial advisers and other intermediaries by seeking banning orders. During the period July 2015 to June 2016, 51 individuals were banned from providing financial services. ASIC also took action against 30 companies, banning them from providing financial services or imposing conditions on their AFS licences.

Other areas of particular focus included:

- **Digital disruption and cyber resilience:** ASIC published a new regulatory guide on digital financial advice (robo advice) and the Regulatory Sandbox Framework, a package of regulatory guidance and instruments to support innovation in financial services. See further our *Financial Services Update* dated 7 September 2016.
- **Retail life insurance reforms:** including the reintroduction of the *Corporations Amendments (Life Insurance Remuneration Arrangements) Bill 2016*; the launching of the Life Insurance Code of Practice by the Financial Services Council; and the publication of ASIC Report 298 “*Life Insurance Claims: An industry review*”. See further Issue 5 of our *Global Insurance Focus* dated 22 November 2016.
- **The mortgage brokering market:** ASIC undertook a review of the remuneration structures of the mortgage brokering market (ASIC expected to complete the review and report publicly on the review by the end of the year, but, the Minister for Revenue and Financial Services has provided ASIC with a short extension); and the publication of a report on mortgage brokers’ responsible lending practices in relation to interest only home loans. Responsible lending is likely to remain a key focus in 2017.
- **Managed discretionary accounts:** including the release of updated Regulatory Guide 179 and the replacement of Class Order 04/194 with ASIC Corporations (Managed Discretionary Accounts) Instrument 2016/968.

ASIC’s Corporate Plan 2016-2017 indicates that these issues will remain a focus in 2017. Other areas of focus include gatekeepers’ conduct, the misalignment of retail products and consumer understanding, undesirable collective industry practices in relation to the design disclosure and marketing of financial products and cross-border businesses, services and transactions.

## INTERNATIONAL FINANCIAL SERVICES REGULATION DEVELOPMENTS

Trends in financial services regulation in the UK and Hong Kong may influence developments in Australia.

### United Kingdom

In the UK, 2016 saw the introduction of the Senior Managers, Certification and Conduct Rules Regime (the SMCR), which comprises extensive new requirements and responsibilities for Senior Managers in banks and large investment firms, the introduction of a class of “certification” employees who firms need to certify as fit and proper (with other accompanying requirements) and new rules of conduct. Since the introduction of the SMCR, the Financial Conduct Authority (the FCA) is yet to take enforcement action against senior individuals but these new cases can be expected to start filtering through. In 2016, there was a decline in the number of enforcement cases brought and penalties imposed by the FCA, although there were some notable and significant cases. In particular:

- The FCA continues to emphasise the importance of dealing with the FCA (and other regulators) in an open and cooperative way, and aggressively pursues breaches of this obligation (both in respect of firms and individuals).
- The FCA also demonstrated its willingness to use alternatives to fines as a deterrent in enforcement cases, in particular imposing prohibitions on firms from accepting new customers. Such measures are likely to impact on a firm’s reputation and business more significantly than a fine alone.
- 2016 saw a (perhaps unexpected) increase in enforcement action by the Prudential Regulation Authority (the PRA). The PRA published five enforcement decisions in 2016, which is over a 100% increase from 2014 and 2015 respectively, and the most enforcement decisions issued by the PRA in a single year since the PRA was created in 2013. It remains to be seen whether this trend will continue in 2017.

### Hong Kong

From the second half of 2016, the Securities and Futures Commission (SFC) began requesting that licensed firms who were the subject of investigations related to systems and control failures agree to the appointment of independent reviewers to assess their compliance with regulations and identify areas for remediation. This move appears to be in order to clear the backlog of SFC enforcement cases and to enable its enforcement team to focus on more “high impact” investigations. This marks a significant departure from the SFC’s prior enforcement approach. As there is no provision for such independent review processes contained in the Hong Kong legislation the reviews are voluntary, and there remain a number of open questions as to how the statutory protections against self-incrimination and secrecy will fit with this new way of resolving open enforcement cases.

## REGULATORY COURT ACTION

Last year saw the commencement of two notable proceedings by ASIC. First, between March and June, ASIC commenced three high profile civil penalty proceedings against NAB, ANZ and Westpac for unconscionable conduct and market manipulation in relation to setting the bank bill swap reference rate (BBSW). Provisional trial dates for the three cases have been set for September of this year. The banks have denied liability and the proceedings are likely to be complex and protracted. Secondly, ASIC for the first time brought proceedings alleging contraventions of the best interests obligations that were introduced as part of the FOFA reforms. The defendant, NSG Services Pty Ltd, holds an AFSL and provides advice to retail clients about life risk insurance and superannuation products. ASIC is seeking declaratory relief and civil penalties against NSG Services, alleging that its representatives contravened the best interests obligation in s 961B and its appropriate advice obligation in s 961G of the *Corporations Act*. See further our [Financial Services Disputes – What’s New](#) publication dated 18 October 2016.

ASIC received mixed success in obtaining enforcement outcomes in the 36 proceedings determined in 2016. Its successes included winning civil proceedings against the directors of Storm Financial for breach of their statutory directors' duties in *ASIC v Cassimatis (No 8)* [2016] FCA 1023. The win for ASIC was an interesting example of so called "stepping stones" liability, in which the directors breached their statutory duty of care because they did not take appropriate steps to ensure that the company complied with its legal obligations (the breach by the company being the stepping stone to the directors' liability).

ASIC was also successful in obtaining injunctions preventing Macro Realty from promoting and marketing a Pilbara property investment scheme in *ASIC v Macro Realty Developments Pty Ltd* [2016] FCA 292.

On the other hand, ASIC lost civil penalty proceedings against directors of the Prime Retirement and Aged Care Property Trust in *Lewski v ASIC*, with the Full Federal Court overturning a judgement in ASIC's favour at first instance, holding that directors of a responsible entity did not breach their duty in s601FD to act in the best interests of members by making payments to related entities. ASIC also took the unusual step of discontinuing proceedings against two of the directors of LM Investment Management Ltd. See further our *Financial Services Disputes – What's New* publication dated 18 October 2016.

## CODE OF BANKING PRACTICE INCORPORATED INTO GUARANTEES

Two recent Victorian Court of Appeal cases (*Doggett v Commonwealth Bank of Australia* [2015] VSCA 351 and *National Australia Bank Ltd v Rose* [2016] VSCA 169) have shown that Code of Banking Practice protections may be available to guarantors. The High Court of Australia has now refused special leave in one of them, so attention is on a review of the Code, with the ABA submission to the independent review seeking greater clarification of what a "diligent and prudent banker" means – but whatever the outcome, the Code is set to feature more prominently in future claims. See further our *Financial Services Disputes – What's New* publication dated 18 October 2016.

## BRIBERY AND CORRUPTION REMAIN A HOT TOPIC FOR BUSINESS AND GOVERNMENT

Anti-bribery and corruption remained at the forefront of corporate and legislative agendas in Australia in 2016. We briefly touch on some of the highlights below.

Two new federal criminal offences for false accounting were created and came into effect in March 2016. The offences are targeted so that any corporation, any employee, officer or director of a corporation, or any supplier or other third party provider to a corporation will be in breach if they intentionally or recklessly falsify accounting records in the context of any illegitimate benefit or loss, the most obvious being a monetary bribe. For further information, see our *Regulatory Update* dated 7 March 2016.

In the area of enforcement, the Australian Government has established a new fraud and anti-corruption team within the Australian Federal Police, based in Perth. This step followed high-profile corruption allegations against certain Western Australian companies. New teams are also being established in Sydney and Melbourne, and it has been reported that the Federal Police have been working closely with counterparts in the UK and Europe in relation to global investigations.

In addition, the Minister for Justice released a public consultation paper on a possible Australian scheme for deferred prosecution agreements (DPAs) to facilitate a more effective response to corporate crime by increasing levels of self-reporting. The discussion paper set out 14 questions directed at matters such as whether DPAs would be a useful tool for investigators/prosecutors, what offences DPAs should be available for, and the extent of oversight of any such scheme. Of the 16 submissions received on the consultation paper, 14 were in favour of the introduction of a DPA regime.

The launch of two Australian parliamentary inquiries suggests that further legislative and policy reform is likely. First, the 2015 inquiry by the Australian Senate economic references committee into Australia's foreign bribery laws was relaunched by the new Parliament on 11 October 2016. The committee is due to report by 30 June 2017.

Secondly, the Joint Parliamentary Committee on Corporations and Financial Services commenced an inquiry into whistle-blower protections in the corporate, public and not-for-profit sectors. The committee will seek to identify improvements to corporate whistle-blower protections (which have traditionally lagged behind equivalent protections in the public sector). The committee is due to report by 30 June 2017.

2017 is shaping up to be a year of substantial activity in the anti-bribery and corruption space – look out for our 2017 "ABC year ahead" publication shortly.



## Energy and Resources Sector

# 4

### ARBITRATION TRENDS IN THE ENERGY AND RESOURCES SECTOR

As a result of the downturn in the energy and resources sector, there has been an increase in disputes as parties look to protect their interests. The trend is for these disputes to be resolved in confidential arbitrations rather than being litigated in the court system. As such, there is little or no information publically available. However, based on our experience, a number of these disputes have involved payment terms, such as royalties and take or pay provisions.

We anticipate that there will be an increase in arbitrations connected to the major LNG projects in Western Australia, the Northern Territory and Queensland as they move towards the production phase. In particular there are likely to be a number of delay claims brought by contractors or claims for liquidated damages brought by the operators.

### COMPENSATION AWARDED TO NATIVE TITLE HOLDERS

In the landmark decision of *Alan Griffiths and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory (No. 3)* [2016] FCA 900, the Federal Court handed down the first award of compensation under the *Native Title Act 1993* (Cth) to native title holders whose traditional rights or interests had been impaired or lost.

The Court had previously recognised the native title rights and interests of the Ngaliwurru and Nungali Peoples over land and waters in Timber Creek, approximately 400km south of Darwin, and held that the Northern Territory was liable to pay compensation under section 61 of the *Native Title Act*.

In 2016, Mansfield J determined that the Northern Territory was liable to pay the Ngaliwurru and Nungali Peoples a total of \$3,300,261. The amount comprised of \$512,000 for economic loss, \$1,488,261 for interest on the amount of economic loss and \$1,300,000 for non-economic loss.

In relation to economic loss, Mansfield J held that the freehold value of the land was the appropriate starting point of the inquiry, and rejected an argument that native title rights should have a lesser value because they are inalienable and non-transferable. However, his Honour held that a deduction to the freehold value was appropriate where the native title holders did not have exclusive possession. After considering the evidence regarding the exercise of the native title rights and interests by the Ngaliwurru and Nungali Peoples, Mansfield J held that a deduction of 20% was appropriate.

The Court ordered the payment of \$1,488,261 for simple interest on the economic loss component of the compensation from the time of the extinguishment until the date of judgement. This is almost three times the economic loss because of the approximately 30 years since the compensable acts took place. Although the Court rejected the native title holders' arguments for compound interest in this case, Mansfield J noted that there was nothing precluding the Court from awarding compound interest if appropriate to secure fair compensation on just terms.

The Court ordered the Northern Territory to pay an "in globo" sum of \$1,300,000 for non-economic loss (caused by a loss of traditional attachment to the land). Mansfield J began his consideration by noting that it was not in dispute that an award for solatium was appropriate in this case. The term "solatium" is used to describe compensation for injured or hurt feelings. In this instance, solatium reflected the loss and diminution of traditional attachment to the land.

In relation to non-economic loss, Mansfield J held that a determination of the relevant compensable intangible disadvantages, with a view to assessing an amount that is fair and reasonable, requires an appreciation of the relevant effects on the native title holders concerned. The Court adopted the evidence and findings in the hearing of the original native title claim about the native title holders' relationship with the claim area. This included evidence from elders and anthropological experts about significant sites and the travels of major Dreamings through the claim area.

The Commonwealth, States and Territories are largely liable for native title compensation, but this liability may be passed on to third parties in some circumstances (either by legislation or contractually).

Almost every aspect of the decision has been appealed. The appeal will be heard by the Full Federal Court in February 2017.

We set out some of the ramifications for mining and resources companies in our [Native Title Alert: Timber Creek compensation – native title worth \\$3.3 million](#) dated 24 August 2016.

## MOTIVE IS NOT RELEVANT TO ASSESSING THE VALIDITY OF A RAILWAY ACCESS PROPOSAL

In *The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd* [2016] WASCA 36, the Western Australian Court of Appeal provided valuable guidance for proponents seeking access to, and the operators of, railway networks in Western Australia. Access is governed by the *Railway (Access) Code 2000* (WA).

Brockman holds a mining tenement and had plans to develop an iron ore project in the Pilbara region. In 2013, Brockman sought access to the railway network managed and controlled by Pilbara Infrastructure so that Brockman could operate rolling stock to transport iron ore to Port Hedland. The access sought was stated to be "subject to conditions precedent which are typical for a below rail access agreement". Pilbara Infrastructure disputed that Brockman's access proposal was valid.

The WA Court of Appeal held that Brockman's access proposal was valid under the Code. This was despite the fact that the Supreme Court had found, and Brockman accepted, that a number of factors meant that it could not realistically commence transporting ore in 2016 as planned.

In reaching its decision, the Court of Appeal adopted a purposive approach to statutory construction and decided a number of important issues in relation to applications for access under the Code. The key points from the case are as follows.

- Assessing the validity of a proposal made under the Code is an objective process, based on the terms of the written proposal, not the subjective intention of the proponent.
- As long as the purpose of the proposal is to carry on rail operations, a proposal is not invalid merely because the proponent may have other motives for bringing it (for example, to simultaneously pursue other commercial arrangements, or to endeavour to negotiate an access agreement where there is an unrealistic possibility of access being made available on the dates specified).
- A proposal may be subject to conditions precedent and need not be unqualified.

For more information, see our [Dispute Resolution Update](#) dated 10 March 2016. In September 2016 the High Court refused Pilbara Infrastructure's application for special leave.



# Practice and Procedure

## 5

### **FEDERAL COURT STREAMLINES ITS APPROACH TO CASE MANAGEMENT WITH THE COMMENCEMENT OF THE NATIONAL COURT FRAMEWORK**

After a long period of consultation, the National Court Framework came into full effect in the Federal Court on 25 October 2016. The Court considers that the changes amount to a fundamental reform of the Court and the way it operates.

The goal of the National Court Framework is to organise and manage the Court's work nationally by reference to the following nine National Practice Areas (or NPAs): Administrative and Constitutional Law and Human Rights; Native Title; Employment and Industrial Relations; Commercial and Corporations; Taxation; Intellectual Property; Admiralty and Maritime; Federal Crime and Related Proceedings; and Other Federal Jurisdiction. The aim is to foster consistent national practice, using specialist judges and registrars.

The reforms include the following key measures which seek to make case management more efficient:

- The court issued 26 new national practice notes and revoked all 60 pre-existing practice notes and administrative notices;
- Parties must now consider a range of “Case Management Imperatives” before any case management hearing;
- Parties will be permitted, where appropriate, to use expedited or truncated hearing processes and/or a tailored or concise pleading process in any NPA where previously these were only available to a limited range of cases in the Fast Track list (which has now been abolished);
- Attempting to minimise the burden of discovery through the adoption, where appropriate, of discovery techniques from international arbitration, namely the Redfern discovery procedure and the memorial procedure for evidence and early document disclosure;
- Using a two judge system for the management of class actions (a “Docket Judge” in the relevant NPA and, where appropriate, a “Case Management Judge” with experience in the conduct of class actions);
- Streamlining the processes for making costs orders and determining the quantum of costs, for example, by encouraging lump sum costs orders;
- Using advanced analytics technologies, or other electronic discovery solutions such as predictive coding, to assist in identifying key documents and minimising the document review process.

## PRIVILEGE AFTER LIMITED DISCLOSURE AND UNCERTAINTIES CREATED BY SUBPOENAS

The key 2016 decisions on legal professional privilege considered when disclosure to a third party will amount to a waiver, and the complexities of claiming privilege when documents are required to be produced under subpoena.

In both *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391 and *Hastie Group Ltd (in liq) v Moore* [2016] NSWCA 305 it was held that the disclosure of privileged documents on a confidential basis to third parties did not amount to a waiver of privilege where the privileged documents had not been inconsistently deployed. *Hastie Group* involved the disclosure of an expert report to a litigation funder for a purpose connected with the claim against the company’s auditor. In *Audi Australia*, the fact that Volkswagen AG had disclosed its legal advice on “defeat devices” to a German regulator did not constitute a waiver for the purpose of Australian class actions.

On the other hand, the NSW Supreme Court took a technical approach where privileged documents were subpoenaed in *Hancock v Rinehart (Privilege)* [2016] NSWSC 12 and *Tavcol Pty Ltd v Valbeet Pty Ltd* [2016] NSWSC 1002.

*Hancock* confirmed that the court must rule on an objection to production of documents under a subpoena on the grounds of legal professional privilege *before* production can be compelled. The objection should be taken at the first stage – before the documents are produced to the court – because the privilege is a privilege from production to the court.

In *Tavcol*, the Court held that where an objection is made by the person required to produce a document on subpoena, the privilege claim is decided under the *Evidence Act 1995* (NSW), but where someone else objects the claim is decided under the common law. Significantly, documents that are privileged under the *Evidence Act* may not be privileged at common law. In this case, the common law applied, and documents prepared by an expert which did not expose communications were not privileged.

## PROPORTIONATE LIABILITY – FAILURE TO TAKE CARE MUST BE ELEMENT OF CAUSE OF ACTION

Proportionate liability is a statutory defence available for certain claims where multiple defendants are each partly responsible for a plaintiff's loss or damage, such that the liability for each defendant is limited to its share of responsibility for the loss. This creates significant risk for the plaintiff, particularly where a potential defendant is insolvent.

The various State and Territory Civil Liability Acts set out the type of claims (apportionable claims) that are subject to proportionate liability. For example, under section 34 of the *Civil Liability Act* (NSW), these include claims for economic loss in an action for damages arising from a failure to take reasonable care.

In *Cassegrain v Cassegrain* [2016] NSWCA 71, the New South Wales Court of Appeal considered whether a claim for equitable compensation arising from the knowing receipt of property transferred in breach of a fiduciary duty was an apportionable claim within the meaning of the New South Wales proportionate liability provisions. The defendant had knowingly received shares in two companies which had been transferred to her by certain family members (her co-defendants) for consideration which was far less than the true value of the shares.

Justice Basten found that the basis of the defendant's liability was not the failure to take reasonable care, as she *knowingly* accepted the share transfer. The failure to inquire as to the circumstances of the transfer (which might amount to a failure to take reasonable care) was not an element of the defendant's liability and was insufficient to ground liability. Instead, the defendant had a higher level of moral responsibility as her duty was to not receive the property of the company with knowledge of circumstances which would allow an honest and reasonable person to recognise that an impropriety had been committed. The defendant was therefore not entitled to rely on the proportionate liability defence and remained jointly and severally liable for the loss.

## COURT MAKES NON-PARTY COSTS ORDER AGAINST DIRECTOR AND SHAREHOLDER OF LITIGATION FUNDER

In *Carter v Caason Investments Pty Ltd* [2016] VSCA 236, the Victorian Court of Appeal upheld a decision to award non-party costs against a litigation funder, its director, and another company that was its sole shareholder.

In that case, there was a litigation funding agreement between the plaintiff and the funder, pursuant to which the funder was entitled to a significant portion of any amount the plaintiff received from the litigation, together with funding costs and interest. The funder had a right to closely monitor the conduct of the proceedings and any settlement discussions (and in fact participated in a mediation). The litigation funder had only \$100 in paid-up capital and no significant assets.

At first instance, the trial judge held that the funder was not merely a passive funder, but by reason of what it stood to gain could be properly characterised as a "party" to the proceedings. Noting the financial position of the funder, the trial judge held that it would not be in the interests of justice if corporate funders were able to be established with limited paid up capital and virtually no assets, so that those truly standing behind the litigation would not be exposed to an adverse costs order.

The Court of Appeal agreed, noting that costs are awarded dependent upon the justice of the case, and it would not be a just outcome to leave a successful party exposed and out of pocket where the unsuccessful party is impecunious and the funder has no substantial assets.

*Superb – the impression of the team as a whole is of one that is highly skilled, well managed and has the ability to get things done within very tight timelines and demands.*

CHAMBERS ASIA PACIFIC 2017



# Alternative Dispute Resolution

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### COURTS GENERALLY WILLING TO ENFORCE DISPUTE RESOLUTION CLAUSES

In *Santos Limited v Fluor Australia Pty Ltd* [2016] QSC 129, the Supreme Court of Queensland held that the proceedings should be stayed where they had been commenced before the parties complied with a contractually agreed dispute resolution process.

Santos sought to avoid the operation of a dispute resolution clause by applying for a court order compelling Fluor to produce certain materials to which it claimed to be entitled pursuant to the relevant contract. It argued that the nature of the dispute – a confined legal question of contractual construction – made it much better suited to being determined speedily in court rather than by agreement between the parties. It also argued that Fluor was unlikely to compromise its position in view of its approach to previous disputes dealing with similar issues, meaning the contractual regime was unlikely to bring about a final resolution.

The Court was not persuaded that a departure from the parties' agreed dispute resolution process was justified in the circumstances. Santos was unable to show that compliance with the process would be "obviously futile" or that the likelihood of the process being productive was so slight as to not justify enforcing the parties' agreement. The fact that the dispute concerned a confined legal question of contractual construction would not necessarily detract from the policy reasons for enforcing the clause, and would not of itself displace the agreement between the parties. The Court also considered it significant that Santos failed to take any action for a period of three months after receiving correspondence from Fluor making its position clear and before commencing proceedings, noting that the contractual dispute resolution process could have been initiated and completed within that period.

## UPDATE OF MAJOR ARBITRATION RULES

A number of major arbitral institutions published updated arbitration rules in 2016, including the Australian Centre for International Commercial Arbitration (ACICA), the Singapore International Arbitration Centre (SIAC) and the DIFC-LCIA Arbitration Centre (DIFC-LCIA).

All three institutions took the opportunity to include new or updated provisions dealing with the consolidation of multiple disputes and the joinder of additional parties. As highlighted in our *International Arbitration Update* dated 20 July 2016, the inclusion of these consolidation and joinder provisions in the arbitration rules goes some way to overcoming the risks of parallel arbitration proceedings where a dispute concerns multiple parties and multiple contracts. However, the ACICA, SIAC and DIFC-LCIA rules do not provide for every eventuality and careful drafting will be required to ensure consolidation and joinder is possible.

One of the most significant changes to the SIAC Rules 2016 is the introduction of a procedure for early dismissal of claims and defences in a process similar to summary judgment and strike out in common law courts. Rule 29 provides for summary disposal where claims and defences are manifestly without legal merit or manifestly outside the jurisdiction of the tribunal. As noted in our *International Arbitration Update* dated 29 July 2016, this may be of particular interest to the financial services sector, which has been slow to opt for arbitration in part due to the absence of summary disposal provisions in major arbitration rules.

For a more detailed overview of the changes to the SIAC Arbitration Rules 2016, see our *International Arbitration Update* dated 14 July 2016 and for the changes to the DIFC-LCIA Arbitration Rules 2016, see our *International Arbitration Update* dated 4 October 2016.

Continuing the trend, revised Stockholm Chamber of Commerce Arbitration Rules and Rules for Expedited Arbitrations came into effect on 1 January 2017. The new rules incorporate an innovative summary determination procedure, which is of broader application than that found in Rule 29 of the SIAC Rules 2016. We expect the application of the new rules will be closely followed over the coming year in light of these innovative changes.

## GUIDANCE ON CORPORATE STRUCTURING AND INVESTMENT TREATIES

In May 2016, the Permanent Court of Arbitration released reasons for the tribunal's refusal to hear Philip Morris' investment treaty claim against Australia and in doing so provided some helpful guidance on when it is permissible to structure an investment to maximise investment treaty protection.

Most importantly, the tribunal considered that in general, corporate groups can legitimately structure investments in order to maximise investment treaty protections. However, that right is subject to the doctrine of "abuse of rights".

Relevantly:

- an abuse will arise where an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was reasonably foreseeable;
- for a dispute to be "foreseeable" there must be a reasonable prospect that a measure giving rise to a treaty claim will materialise; and
- a restructure will be abusive where obtaining protection under an investment treaty was the main and determinative purpose of the restructuring.

The tribunal held that the plain packaging claim was an "abuse of rights" because the group restructuring that took place in February 2012, to ensure that Philip Morris' investment in Australia was held by a Hong Kong company rather than a Swiss entity, was done after the plain packaging dispute was foreseeable and for the purpose of enabling a claim under the Australia-Hong Kong SAR, China Bilateral Investment Treaty.

For more detailed discussion of the reasons for the decision, see our *International Arbitration Update* dated 24 May 2016. For a discussion of the potential impact of Australia's success before the Permanent Court of Arbitration in relation to the Philip Morris plain packaging arbitration on the debate regarding investor-state dispute settlement mechanisms in Australia, see our *Arbflash* publication dated 1 May 2016.

## ARE BANKS MAKING THE MOST OF ARBITRATION?

Apparently not. That was the finding of a report published in November by a task force commissioned by the arbitration branch of the ICC to study financial institutions' perceptions and experience of international arbitration.

Through interviews with approximately 50 financial institutions and banking counsel from around the globe, the task force found that while financial institutions do use arbitration, it is not used on a consistent basis or large scale. The report attempts to dispel misconceptions about arbitration and makes recommendations as to how financial institutions can tailor arbitration procedures to suit their specific needs. For example, parties can expressly authorise tribunals to dispose of claims on a summary basis, and can encourage arbitral institutions to publish redacted awards in order to promote transparency and consistency.

For further guidance on the use of arbitration in financial transactions, see our Quickguide, Use of arbitration in financial transactions dated 9 January 2017.

For more detail about developments in international arbitration during 2016, see our *International Arbitration 2016 in review*.



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