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A TIMELY REMINDER ABOUT AUSTRALIA'S INSIDER TRADING LAWS

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Legal Briefings – By **Rodd Levy, Simon Walker and Mariia Artemenko**

Recent prison sentences for insider trading should be concentrating minds on the need for robust confidentiality protocols

A recent case relating to the 2015 takeover of PanAust serves as a timely reminder of the willingness of Courts to impose custodial sentences for breaches of the insider trading laws.

IN BRIEF

- The long-running insider trading case recently reached its conclusion in the District Court of Queensland with the accused, who pled guilty earlier this year, being sentenced to nine months imprisonment.
- The case indicates that the Australian Securities & Investments Commission (ASIC) will take action in appropriate cases.
- While it is difficult to stop a determined insider trader, there are some steps that parties to a transaction can take that may reduce the likelihood of it happening.

BACKGROUND

In 2015, Australian miner PanAust was the subject of a successful $1.2 billion takeover by Guangdong Rising Assets Management (**GRAM**), a Chinese state-owned investment group. GRAM had previously made a failed bid for PanAust in April 2014.

After the failure of the first bid, but before the second bid was announced, a Sunshine Coast-based investor contacted an acquaintance in China to find out whether it was possible that GRAM may make another bid for PanAust. The contact informed him that loan documents were being prepared for GRAM to obtain finance for another bid and later confirmed that a finance contract would be signed.

A few days prior to GRAM's second bid being announced on 30 March 2015, the investor acquired (and also procured his wife to acquire) a large number of contracts for difference (**CFDs**) in respect of PanAust. A CFD is a financial product the value of which roughly corresponds to the value of another underlying financial product, in this case, shares of PanAust traded on the ASX. The investor made a $343,000 profit as a result of the trades.

Sometime later, ASIC's Market Surveillance Team identified the suspicious trading and, following an investigation, the investor was charged in 2017 with a range of insider trading offences. At the time, the maximum penalty for each charge was 10 years. This has since increased to 15 years.

CUSTODIAL SENTENCE IMPOSED

After pleading guilty to two counts of insider trading earlier this year, the accused in the PanAust case was sentenced to nine months imprisonment. In sentencing remarks, Judge Rinaudo said that the accused 'took an unfair advantage when trading, and having regard to the principles of general and specific deterrence, a term of imprisonment is the appropriate sentence.'

Other recent insider trading cases have had similar sentencing outcomes. Recently, a former general manager of Sigma Healthcare was sentenced to 14 months imprisonment after pleading guilty to selling shares in Sigma while he was aware that negotiations to renew a material contract with Chemist Warehouse were going poorly. When it was announced that the material contract would not be renewed, Sigma's shares dropped by 40%. The Judge noted that, had the former manager not pleaded guilty, a two year sentence would have been imposed.

INSIDER TRADING BASICS

The insider trading provisions are designed to prohibit the misuse of price sensitive information. A person may breach the provisions if they have 'inside information' and, amongst other things, trade or procure another person to trade in securities. 'Inside information' is information that is not generally available but which, if it were, a reasonable person would expect to have a material effect on the price or value of the securities.

Sometimes, it is difficult to make a judgment about what information is price sensitive and what is not. This may especially be the case when a person does their own research in order to better understand a company's business.

However, in the M&A context, usually it is very clear that anything that suggests a bid will be made is price sensitive and anyone know knows the information should not trade.

SOME STEPS TO CONSIDER

In an M&A transaction, there are some practical steps that parties can be take to reduce the likelihood of insider trading occurring. Although it is unlikely these steps will have much impact in clear-cut cases of wrongdoing (such as in the PanAust and Sigma cases), they may assist in avoiding inadvertent breaches. They also help to keep the rules at front of mind.

- **Keep insider lists** — Maintaining a list of who is 'in the tent' on the transaction will help manage confidentiality and keep track of who knew what and when. This can also be useful when responding to a routine market surveillance enquiry from ASIC.
- **Maintain strict confidentiality** — Ensuring that proper confidentiality protocols and procedures are strictly observed will reduce the risk of information being received by people who may not be aware of its price sensitive nature.
- **Reinforce it with a contract** — Bidders and other insiders should be signed up to confidentiality deeds which contain an obligation to comply with insider trading laws before any price sensitive information is disclosed by the target. Entities should be required to procure that their employees and other representatives comply with those provisions.
- **Ensure employees are educated** — Listed companies in Australia should have a securities dealing policy in place which explains to officers and employees what their obligations are under insider trading laws. Ensuring the policy is well understood through routine training is important.

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If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

RODD LEVY
PARTNER, MELBOURNE
+61 3 9288 1518
rodd.levy@hsf.com

SIMON WALKER
SENIOR ASSOCIATE, MELBOURNE
+61 3 9288 1280
Simon.Walker@hsf.com

MARIIA ARTEMENKO
SOLICITOR, MELBOURNE
+61 3 9277 2838
Mariia.Artemenko@hsf.com