

NO MORE HIDING: ASIC PURSUES CRIMINAL CHARGES FOR DEFECTIVE DISCLOSURE OF SUBSTANTIAL HOLDINGS

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Legal Briefings - By **Rodd Levy, Jason Jordan and William Kunstler**

ASIC has ramped up its enforcement of substantial holding disclosure by pursuing criminal charges against former Bellamy's director, Jan Cameron, for alleged disclosure breaches. These charges follow the recent sentencing of a Nowra man to two years' jail for giving misleading information to ASIC about substantial shareholdings.

IN BRIEF

- ASIC has brought criminal charges against former Bellamy's director, Jan Cameron, alleging that she failed to disclose that she and her associate, the Curaçao domiciled Black Prince Foundation (**Black Prince**), had a substantial holding in Bellamy's of 14.74%.
- These charges follow the recent sentencing of a Nowra man to two years' jail for giving false or misleading information to ASIC about his substantial holding in Northwest Resources.
- These examples highlight the importance of fulsome and accurate disclosure of substantial holdings and that ASIC is increasingly willing to prosecute where it considers there to be deliberate attempts to conceal material information from the market.

BACKGROUND

The Corporations Act requires a person who controls 5% or more of the shares in a listed company to lodge a substantial holder notice. The objectives of these provisions are to promote market transparency and enable shareholders and directors of a listed company to identify controllers of substantial blocks of voting shares (and their associates).

The Corporations Act also prohibits a person from making a false or misleading statement in documents lodged with ASIC.

If found guilty of either offence, the person may be required to pay a fine and/or be subject to a period of imprisonment. As such, these provisions should not to be taken lightly.

CHARGES AGAINST JAN CAMERON

BACKGROUND

Jan Cameron was a director of Bellamy's, the baby food and formula producer, between 2007 and 2011. Bellamy's became an ASX listed company on 1 August 2014.

When Bellamy's was listed in August 2014, the Black Prince lodged an initial substantial holder notice stating that it held 14 million Bellamy's shares (representing 14.74% of Bellamy's issued capital).

In February 2017, in the midst of a bitter board spill, entities associated with Jan Cameron lodged a series of substantial holder notices with differing claims as to the relationship between them and the Black Prince.

ASIC INVESTIGATION

On 14 February 2020, ASIC announced that, following an investigation, Jan Cameron will be charged with:

- failing to disclose in August 2014 the substantial holding in Bellamy's held by herself and her associate, the Black Prince (maximum sentence of imprisonment of six months); and
- lodging a substantial holder notice in February 2017 that was misleading on the basis that it failed to properly disclose her relationship with the Black Prince and the basis upon which she had an interest in the 14 million Bellamy's shares (maximum sentence of imprisonment of five years).

The charges are listed for mention at the Hobart Magistrates' Court on 12 March 2020.

JAIL TERM FOR MISLEADING STATEMENTS

BACKGROUND

Northwest Resources, an Australian based mining company, was listed on the ASX between 2004 and 2015.

In 2009 and 2010, ASIC enquired about the identities of parties who had an interest in approximately 17 million Northwest shares that were held by two entities incorporated in the British Virgin Islands.

In response to ASIC's enquiries, John Merity of Nowra, New South Wales, stated that he had no interest in the 17 million Northwest shares, when in fact he did.

ASIC subsequently obtained freezing and cancellation orders from the Federal Court of Australia with respect to a portion of the 17 million Northwest shares (representing approximately 11.46% of Northwest's issued capital at the time of the orders).

ASIC INVESTIGATION

On 7 November 2018, ASIC announced that, following an investigation, John Merity had pleaded guilty to two counts of making false or misleading statements to ASIC.

On 14 February 2020, the District Court of New South Wales sentenced John Merity to an overall term of two years' imprisonment, with a minimum period of one year in custody.

After the sentence was given, ASIC Commissioner John Price fired off this warning shot:

"ASIC views seriously any attempt by individuals to hide their identities in holding substantial interest in shares by offshore entities, as well as, any attempt to provide false or misleading statements. ASIC will hold to account persons who seek to obstruct or hinder its investigations."

COMMENTARY

Substantial holder notices are technical in nature, and often difficult to prepare due to the breadth of the concepts of relevant interests and associations. A technical error is unlikely to result in serious consequences where the market is generally well informed as to who controls parcels of shares.

However, these examples demonstrate that deliberate attempts to conceal material information or mislead the market are taken very seriously by ASIC, which appears to be increasingly willing to use its enforcement powers to bring criminal proceedings.

These examples also serve as a further illustration of the push for transparency in relation to company ownership, which has been a focus of the Australian Government in its efforts relating to anti-corruption, combatting tax evasion and improving tax transparency.¹

ENDNOTES

1. See [our article](#) on the Federal Government's consultation paper on transparency of beneficial ownership of companies in Australia.

KEY CONTACTS

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



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