

NSW COURT OF APPEAL DISMISSES DIRECTORS' CHALLENGE TO ICAC FINDINGS OF CORRUPT CONDUCT

01 July 2016 | Australia, Brisbane, Melbourne, Perth, Sydney
Legal Briefings - By **Anna Sutherland**, **Tania Gray** and **Julian Brezniak**

IN BRIEF

The NSW Court of Appeal has dismissed the appeals of a number of company directors who sought to challenge findings of 'corrupt conduct' made by the Independent Commission Against Corruption (**ICAC**).

The Court's decision has established that, at least in certain circumstances, directors will be under a positive duty to disclose facts extending beyond their interest in a transaction with the company. Failure to do so may result in a criminal offence.

The Court's decision is also a reminder of the breadth of the ICAC's jurisdiction to make findings of corrupt conduct. Findings of corrupt conduct often involve the ICAC making a decision that it is satisfied that criminal conduct has occurred. Such conclusions are not made on the criminal standard.

BACKGROUND

Following a public inquiry in 2012 and 2013, the Independent Commission Against Corruption (**ICAC**) made findings of 'corrupt conduct' in respect of a number of individuals including Mr Obeid (a former NSW Legislative Councillor), Mr McDonald (the Minister responsible for granting an exploration licence the subject of the inquiry), and the appellants.

In summary, the ICAC made the following findings.

- In 2009, a coal exploration licence was granted by the NSW Government to Cascade Coal

Pty Ltd (Cascade), over land partially owned by entities associated with Mr Obeid (Obeid interests).

- Before granting the exploration licence, Cascade had entered into a JV with the Obeid interests, and had agreed to acquire the Obeid interests' land at four times its value.
- The appellants were directors and shareholders in Cascade. All but one of the appellants were also directors of the purchaser, an ASX listed company (appellant directors).
- Following the grant of the exploration licence, the appellants began negotiations with the purchaser company for the sale of their shares in Cascade.
- Before the commencement of those negotiations, the involvement of the Obeid interests was effectively terminated and hidden by a series of assignments. Ultimately, it was found that \$30 million made its way into bank accounts of the Obeid family.
- A number of the appellant directors were asked questions about the involvement of the Obeid interest by an Independent Board Committee of the potential purchaser company, and that the appellant directors deliberately misled the chair of that Committee, or failed to disclose the fact of the Obeid interests' involvement.

ICAC'S FINDINGS OF 'CORRUPT CONDUCT'

Relevantly, the ICAC found that the appellants had engaged in 'corrupt conduct' (within the broad definition set out in the *Independent Commission Against Corruption Act 1988* (NSW) (**ICAC Act**)) on the basis that:

- the appellants knew that if the NSW Government discovered the Obeid interests' involvement, it might not grant a mining lease, and
- the appellants conduct constituted a criminal offence of:
 - intentionally failing to exercise their powers as directors in good faith contrary to s 184(1) of the *Corporations Act 2001* (Cth), and / or

- obtaining a financial advantage by deception contrary to s 192E of the *Crimes Act 1900* (NSW).

The appellants challenged those findings.

THE NSW COURT OF APPEAL'S DECISION

The appeal concerned a range of different issues. The Court of Appeal dismissed all of the appeals.

A POSITIVE DUTY OF DISCLOSURE

The Court of Appeal held that the appellant directors were in a position of conflict involving a conflict between their interests as vendors and their duties as directors of the purchaser company.

The Court held that it was not sufficient that the directors disclose their interest in the transaction and avoid participation in the decision-making process of the purchaser company.

The appellants believed that if the true position was disclosed, the transaction would not proceed. Given that, the Court decided that it was open for the ICAC to find that the appellant directors contravened their duty to act in the interests of the purchaser company by seeking to proceed with a transaction involving the sale of effectively a flawed asset to a company to which they owed fiduciary duties without making a full disclosure of the involvement of the Obeid interests.

To establish a criminal offence in this context, an absence of good faith and dishonesty must also be shown. The Court held that intentional dishonesty may be established when a director remains silent while under a positive duty of disclosure.

The consequence of this for the appellant directors was that the Court considered that there was a sufficient basis for ICAC to be satisfied that there had been an offence under section 184(1) of the *Corporations Act 2001* (Cth), and that the appellant directors had engaged in corrupt conduct. In addition, the Court was also satisfied that the conduct could amount to the offence under section 192E of the *Crimes Act 1900* (NSW) of obtaining a financial advantage by deception. On the element of dishonesty in this offence, where there is a legal obligation to make a disclosure, the failure to do so may be dishonest in appropriate circumstances.

KEY TAKEAWAYS

Individuals in a position of conflict between their interest as vendor, and with their duties as directors of a company, face heightened disclosure obligations. Disclosure of the interest itself and abstention from decision-making may not be sufficient. In circumstances where a full disclosure of all relevant facts may cause the transaction to fall over, a failure to disclose the true position may constitute a criminal offence.

In addition, where the conduct could also adversely affect the exercise of official functions by a public official, it might also amount to 'corrupt conduct' for the purposes of the ICAC Act.

MORE INFORMATION

For information regarding possible implications for your business, contact [Anna Sutherland](#) or [Grant Marjoribanks](#).

KEY CONTACTS

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



**ANNA
SUTHERLAND**
MANAGING PARTNER,
DISPUTES, AUSTRALIA
+61 2 9225 5280
Anna.Sutherland@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2022

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close