



JUNE 2013

AUSTRALIAN SECURITIES & INVESTMENT COMMISSION IN THE MATTER OF NORTHWEST RESOURCES LIMITED V CRAIGSIDE COMPANY LIMITED BVI COMPANY NUMBER 74124 NAMED IN THE SCHEDULE [2013] FCA 201

DIRECTORS & OFFICERS UPDATE

This case, [*Australian Securities & Investment Commission \(ASIC\) in the matter of Northwest Resources Limited v Craigside Company Limited BVI company number 74124 named in the Schedule \[2013\] FCA 201*](#) considered when it is appropriate for civil proceedings to be stayed where there is a possibility of criminal prosecution relating to the same subject matter.

ASIC commenced proceedings seeking declarations that the second and third defendants (Defendants) had breached the *Corporations Act 2001* (Cth). The Defendants sought orders to stay the proceedings until ASIC determined whether or not it would prosecute them criminally for the breach. ASIC acknowledged that future criminal proceedings were a possibility.

The Defendants argued it would be an abuse of process for the civil proceedings to continue given the possible future prosecution for the same or related conduct because:

- (a) forensic decisions would be made knowing a future prosecution is possible;
- (b) the privilege against self-incrimination would be undermined by the need to defend the civil proceeding;
- (c) it would be unduly burdensome to deal with two proceedings regarding the same subject matter, and
- (d) the court should not make declarations of contraventions of offence provisions where the declaration would be based on the civil standard of proof and may later be falsified by acquittals in the criminal prosecutions.

ASIC said there was also the possibility that the Defendants would not be prosecuted, and that at the stage in the proceedings where defences have been filed and ASIC's evidence is complete it is not appropriate to stay the proceedings denying ASIC the right to have the proceedings heard and determined in the ordinary course. ASIC argued that the undermining of the privilege against self-incrimination was only speculation, and if a real threat emerged further applications could be made at that time.

ASIC relied on *McMahon v Gould* (1982) 7 ACLR 202 (*McMahon*) which sets out guidelines for the court when determining whether to stay civil proceedings in light of criminal proceedings for the same conduct. In *McMahon* the Court held there is no right to have the civil proceedings stayed, and the burden is on the defendant to prove the plaintiff's rights should be interfered with. The Defendants pointed to an inconsistency between *McMahon* and the High Court decision of *Reid v Howard* (1995) 184 CLR 1 (*Reid*) which recognised the privilege against self-incrimination as a fundamental common law right.

The Defendants raised *ASIC v HLP Financial Planning (Aust) Pty Ltd* (2007) 164 FCR 487 where it was held that in circumstances where the facts are in dispute and there is potential for an adverse impact on the jury, declarations should not be made.

The Court referred to the recent decision of *Websyte Corp Pty Ltd v Alexander (No 2)* [2012] FCA 562 (*Websyte*) where a stay was granted pending the completion of a criminal proceeding already on foot concerning the same subject matter as the civil proceeding. It was held that as in *Reid*, prejudice may result from indirect or derivative evidence, and the risk of prejudice extends to the hardship on the defendants in preparing for two cases simultaneously.

The following points were made in *Websyte*:

- the matter is one of judicial discretion;
- there is no automatic entitlement to a stay of a civil proceeding because there are or may be parallel criminal proceedings involving the same or related subject matter;
- *McMahon v Gould* did not purport to establish a rigid code, the relevant considerations will vary according to each case; and
- the real risk of injustice can relate to an actual or potential criminal proceeding.

The Court considered sections 1331 and 1317 of the *Corporations Act 2001* (Cth), which provide that civil proceedings do not need to be stayed if they relate to an offence, and allow for criminal proceedings to be commenced for conduct which is a civil matter. It was held that these provisions do not prevent a stay where there is a risk of substantial injustice by the continuation of a civil proceeding, which outweighs the interest in all

proceedings being heard and determined in the ordinary course.

The Court was satisfied that prosecution of the Defendants in respect of the same subject matter was on the cards, and the obtaining of indirect evidence by ASIC through the civil proceeding if continued may prejudice the Defendants in a future prosecution. The next step in the proceedings would be for the Defendants to file evidence, which would certainly involve them considering whether they might incriminate themselves in future prosecution. They would also have the burden of defending the civil proceeding while at risk of being prosecuted for the same events, involving another proceeding and the expense and inconvenience that involves.

There was no prejudice to ASIC or the public by granting the stay other than that the proceeding would not be heard and determined until ASIC decides whether it intends to prosecute the Defendants in respect of the same subject matter. Therefore the interest of the Defendants not having to defend the proceeding with the threat of criminal prosecution outweighed ASIC's interest.

Orders were made to stay the proceeding until ASIC notifies the Defendants that it will not prosecute them or brief the Director of Public Prosecutions with respect to any charge or indictment relating to the same subject matter as this proceeding, or if ASIC notifies that it will prosecute them, the stay will continue until further order.

This update was co-authored by DLA Piper Solicitor, Emma Bourke.

More information

For more information, please contact:



Jacques Jacobs
Partner
T +61 2 9286 8284
jacques.jacobs@dlapiper.com

Contact your nearest DLA Piper office:

BRISBANE

Level 29, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3246 4000
F +61 7 3229 4077
brisbane@dlapiper.com

CANBERRA

Level 3, 55 Wentworth Avenue
Kingston ACT 2604
T +61 2 6201 8787
F +61 2 6230 7848
canberra@dlapiper.com

MELBOURNE

Level 21, 140 William Street
Melbourne VIC 3000
T +61 3 9274 5000
F +61 3 9274 5111
melbourne@dlapiper.com

PERTH

Level 31, Central Park
152–158 St Georges Terrace
Perth WA 6000
T +61 8 6467 6000
F +61 8 6467 6001
perth@dlapiper.com

SYDNEY

Level 38, 201 Elizabeth Street
Sydney NSW 2000
T +61 2 9286 8000
F +61 2 9286 4144
sydney@dlapiper.com

www.dlapiper.com

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