

CIVIL LIABILITY FOR ERRORS AND OMISSIONS IN INFORMATION MEMORANDA IN THE WHOLESALE CAPITAL MARKETS

QUESTIONS AND ANSWERS

Comment - Mark Grolman (Commentator):

Mr Chairman, can I just say one thing about something that Brian said. Brian commented in relation to the Task Force recommendations. The Task Force proposals that Brian discussed seem to me to be - and I disagree with Brian on this - doing something very strange. They are pushing the market to use Part 7.12 prospectuses in wholesale capital markets because if the way to limit the liability and the way to have defences is to use a 7.12 prospectus, and the other way lies madness in terms of strict liability under sections 52 and 995 and so on, commercial people are going to say: well what will it cost me to get a prospectus? Is the cost of the prospectus worth incurring to avoid the liability that I would otherwise face? And as Brian said, that is directly contrary to the original policy that underlay that part of the Corporations Law. I hope the powers that be will think about that and go back to the drawing board in thinking about who it was that they were trying to protect and why when they originally framed these laws.

Question - Ian Davidson (Barrister, New South Wales Bar):

I just wonder whether another argument in respect of what Brian said about the ridiculous fact of having professional investors in a much stronger position than where there are registered prospectuses, would it be the case that you might find a higher number of professional investors being perhaps overseas corporations or interests as against members of the Australian public taking registered prospectuses? And if that is right, again there may be some sort of narrow nationalistic argument suggesting that the lack of a due diligence defence really penalises Australian corporations in a way that is highly inappropriate. I fully agree with Brian's comments on that part. And is there something that this organisation can do in terms of the Task Force approach in terms of influencing that discussion?

Response - Brian Salter (Speaker):

I am not too sure where this will all go. I think we clearly have a problem in relation to the application of sections 52 and 995 to the securities industry as a whole, which is my proposition to you, but also to Part 7.12 prospectuses. There are clearly two conflicting regimes operating here. We have sections 52 and 995 which are very much an Australian home-grown invention - there are similar regimes overseas, but none as potent as ours. Then we have the prospectus regulation regime which we have inherited from England and also with variations from the United States. And the two are just incompatible. You have one which has strict liability, no defences; and you have another that has limited liability, and you have the opportunity of being able to shield yourself against a breach with defences. So ultimately at the end of the day something has to be done about that because the two cannot sit together in relation to Part 7.12 prospectuses.

But at the same time I think that there is going to be a very strong resistance from the trade practices community to the proposition because it will involve the watering down of the universal application of section 52 and it opens the floodgates. Persons such as myself will come along and suggest that perhaps we should open those floodgates a little bit wider and exempt further and further particular areas of business activity. And also there might be other areas of Australian business that have a legitimate claim. Take the insurance sector, for example. If they are regulated in terms of their insurance products and the disclosures they make then it is a fair argument on their behalf to say that if they comply with those regulations they should not be subject to section 52. So you can see from a trade practices perspective that to adopt the Task Force's proposal involves a lot of difficulties. But at the same time, the two regimes are quite inconsistent and something needs to be done. As I said at the very outset, I am not too sure where this process is going to lead us. I am sure that we have to do something, but I am not confident about the speed and the manner in which we will address the problem.

Comment - Clive Craven (Chairman):

If there are no other questions I would just like to thank the speakers, Brian Salter, Mark Grolman and David East on behalf of you and on behalf of the Association for their presentations. I hope, as I indicated at the beginning of the session, that they delivered more than a very worthy topic, they actually contributed to a discussion on this topic because at the end of the day, as Mark just indicated, market participants are living daily with this and a series of other legal risks of which we are all aware.

The *Trico* case a couple of years ago caused concerns in the syndicated bank market. The *Transurban* litigation in the last couple of weeks I would have thought would cause even more concern. And at the end of the day we want our capital markets to work. We do not want them distorted in the same way as stamp duty, for example, distorts a number of our structures in this country.

So our objective, as lawyers and as part of this Association, must be to try and limit or, perhaps, even eliminate these identifiable risks so that our clients can get on and operate in this case in the capital markets without this sort of risk hanging over their head. And again, as Mark and David have indicated, perhaps we have opportunities now with the Task Force.

So I would ask you to thank our speakers in the usual way.

Closing Comments - John Abbott (Chairman, Banking Law Association):

Just before the beginning of this session Clive suggested that I formally close the Conference. I am not sure that any of you who are left could possibly absorb any more information whatsoever. So I will simply thank you for staying to the end. However, judging by your numbers and what I have just heard from Brian, Mark and David, I can only conclude that Clive was right when he suggested that the healthy attendance is a reflection of the quality and content of this session. Indeed, and of course I may be biased, I think the quality and content of all these sessions and the dedication of all the presenters were excellent. I must confess it even exceeded my expectations. In fact I heard some complimentary comments on the content of Peter Switzer's address last night. I can only assume that this was a reference to his encouraging predictions on the economy and not some of his other utterances!

I think I have thanked just about everybody involved in this Conference except one important group. It is pretty plain to everybody, I think, that a conference such as this is just not successful without the participation of you, the delegates. So on behalf of the Association, I thank you all for your attendance and I do hope you have enjoyed the Conference as much as we have putting it together, and of course we do hope and look forward to you coming to our Conference in 1997, wherever it may be. Thank you.