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Weekly Corporate Governance

A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Corporate Governance Law

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Executive Summary (One Minute Read)

AB (a pseudonym) v Independent Broad-based Anti-corruption Commission (HCA) - the "adverse material" the IBAC has to provide to a proposed subject of adverse comment includes, not only the comment, but the evidence on which the comment is based - however, the IBAC had largely complied with its obligations

Global Risk Alliance Group Services Pty Ltd & Anor v Harmer & Ors (No 2) (NSWSC) - Court refused to order interest on nominal damages, and refused to declare a breach of director's duties where it had found such breaches as part of its basis for awarding damages

HABEAS CANEM

Expectant

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Summaries With Link (Five Minute Read)

AB (a pseudonym) v Independent Broad-based Anti-corruption Commission [2024] HCA 10

High Court of Australia

Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ

Administrative law - the Victorian Independent Broad-based Anti-corruption Commission conducted an investigation into allegations of unauthorised access to, and disclosure of, internal email accounts of a public body - a senior officer of a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) gave evidence in a private examination - the IBAC provided the officer with a draft report containing proposed adverse findings against the officer and others - the IBAC provided the officer with the transcript of his examination and copies of the documents shown to him, but refused to provide the transcripts of the other witness examinations or the other documents it had relied on - the officer commenced proceedings in the Supreme Court of Victoria, seeking a declaration that the IBAC had failed to comply with s162(3) of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), which required it to provide the officer with a reasonable opportunity to respond to "adverse material" - a single judge held the IBAC had adequately complied with s162(3) - the Court of Appeal refused leave to appeal - the officer was granted special leave to appeal to the High Court - held: the Court of Appeal had erred in construing "adverse material" as meaning an adverse comment or opinion of the IBAC - rather, "adverse material" referred to the evidentiary material said by IBAC to justify an adverse comment or opinion - notwithstanding this error of construction, the Court of Appeal's findings meant that, with the exception of one statement in the draft report, the officer failed to establish it had not complied with s162(3) - the IBAC had provided the officer with the substance or gravamen of the matters adverse to him, and afforded him a reasonable opportunity to respond to that material - regarding the one exception, the IBAC undertook to the Court that it would not submit to Parliament a report containing that comment or opinion - appeal formally allowed to a limited extent but in substance dismissed.

AB (a pseudonym)

[From Benchmark Thursday, 14 March 2024]

Global Risk Alliance Group Services Pty Ltd & Anor v Harmer & Ors (No 2) [2024] NSWSC 234

Supreme Court of New South Wales

Nixon J

Damages - the Court had found in favour of the plaintiffs against three former employees who had breached their contractual, fiduciary, and statutory duties by taking steps to divert two valuable contracts with the Royal Australian Navy from the second plaintiff to a competitor - the Court had also upheld the first defendant's cross-claim for unpaid salary and bonuses against the first defendant - the parties largely agreed that on the amounts of the judgments and interest - however, although it was agreed that nominal damages should be awarded in favour of the first defendant against the first to third defendants in the amount of $100, there was a dispute

about whether or not interest was payable on that sum - the parties also could not agree on whether the Court should declare that the third defendant had contravened s181 and s182 of the *Corporations Act 2001* (Cth) by improperly using his position as COO, Acting CEO, and Project Manager of the second defendant to gain advantage for a competitor company in which he had a personal financial interest - held: the Court has a discretion as to whether or not to award interest under s100 of the *Civil Procedure Act 2005* (NSW) - having regard to that principle that damages are compensatory, the Court has refused to award interest on exemplary damages, since such damages are not paid as compensation for the damage that the plaintiff has suffered - similarly, nominal damages are vindicatory, not compensatory - it was therefore inappropriate to make any order for pre-judgment interest in respect of an award of nominal damages - the only basis on which a declaration was sought against the second defendant was s1317E of the *Corporations Act* - no declaration of contravention could be made under that provision, since the balance of authority indicated that it applied only to proceedings in which relief was sought by ASIC - there was also no utility in making a free-standing declaration of contravention in circumstances where the Court had found various breaches of duty - the Court was also not satisfied there were any public interest in making the declaration - declaration refused.

View Decision

[From Benchmark Wednesday, 13 March 2024]

Executive Summary and (One Minute Read)

Smith v Fonterra Co-Operative Group Ltd et al (NZSC) - Supreme Court of New Zealand rejects attempt to strike out claim in tort relating to damage caused by climate change. Court affirms that principles of Maori customary law (tikanga Maori) inform the common law of New Zealand

Summaries With Link (Five Minute Read)

Smith v Fonterra Co-Operative Group Ltd et al [2024] NZSC 5
Supreme Court of New Zealand
Winkelmann CJ, Glazebrook, Ellen France, Williams, & Kos JJ
Mr Michael Smith as an elder and as a climate changes spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders, brought suit against Fonterra and other large New Zealand corporations that were engaged in mining or manufacturing. Seeking an injunction, he raised three tort causes of action: public nuisance, negligence, and a new tort - damage to the climate system. All three counts were stricken by the Court of Appeal. In reversing this decision, the Supreme Court examined both climate change as well as legal remedies available in New Zealand. The Court was very clear that it was appropriate for the traditional or customary Maori law (tikanga Maori) to be considered in formulating the common law of New Zealand. The Court accepted as indisputable that climate change threatens human well-being and planetary health and that the evidence was unequivocal that humans had warmed the atmosphere principally through the emission of Green House Gasses (GHG). The Court also reviewed treaty obligations and New Zealand's comprehensive legislation - the *Climate Change Response Act 2002* (NZ) (CCRA). Mr Smith alleged that the defendants were responsible for more than one-third of New Zealand's GHG emissions. Mr Smith relied on the principles of tikanga Maori that establish various obligations and relationships with respect to land, the environment and that a breach creates a hara (issue) requiring utu (compensatory action) to restore ea (a state of harmony). The relief sought for all of the causes of action was an injunction requiring the defendants to reduce net emissions annually under supervision of the Court to achieve zero-net emissions by 2050. After rejecting the defendants' claim that the tort claims were excluded by the CCRA, the Court engaged in a comprehensive review of the law of nuisance as it developed in New Zealand, the UK, Canada, and the USA, and found that the claim had evolved with the passage of time. However, to maintain a claim, the plaintiff must establish that the harm was a reasonably foreseeable consequence of defendant's conduct, and that the defendant's act must unreasonably interfere with public rights. The Court held that the standard required to strike out a claim had not been met and that Mr Smith was entitled to bring his case to trial

where he would have an opportunity to present full evidence. As to claims arising from climate change, the Court found that these were in principle in accord with traditional nuisance cases where one party contaminated a water course to the detriment of the public and private parties. The Court said, 'climate change engages comparable complexities [of proof], albeit at a quantum leap scale enlargement'. As to liability of a single party where multiple parties contribute to the harm, the Court stated that it was no defence to creating a nuisance that others were engaged in the same conduct - it is unnecessary that the defendant be the sole polluter, only that the defendant was a significant cause of the harm - all questions of fact. Relying on Canadian and American decisions, the Supreme Court adopted the view that everyone who contributes to a nuisance is liable providing that in the aggregate a nuisance is proven. The Supreme Court reinstated all three claims for trial where questions include: (1) whether New Zealand's law of public nuisance should sanction GHG emissions - And (2) whether the actions of the corporate respondents amounted to a substantial and unreasonable interference with public rights? The Court added that the likely legal battleground would involve: causation, substantiality, unreasonableness, and remedy. With respect to the nuisance cause of action, the Court concluded that the principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity. The Common law, where it is not clearly excluded, responds to challenge and change in a considered way, through trials involving the testing of evidence. As the Court allowed the claim for nuisance to survive for trial, the Supreme Court declined to rule on the remaining claims for negligence and the proposed new climate change tort. The Court found that ruling on these claims was unnecessary because the same evidence supported all claims and that they all should go to trial where they could be fully developed. As to the effect of tikanga on the common law of tort, the Supreme Court rejected the Court of Appeal decision that the CCRA statutory scheme satisfied tikanga Maori. Instead, the Supreme Court held that the trial court must engage with tikanga because part of Mr Smith's loss is based on tikanga. The Court added that tikanga has been applied to common law tort actions since 1840. For example, the Court cited to a 2003 Court of Appeal decision affirming that Maori land rights derived from tikanga were cognisable at common law. The Court reiterated the continued vitality of tikanga in New Zealand: To summarise the essential conclusions reached, tikanga was the first law of New Zealand, and it will continue to influence New Zealand's distinctive common law as appropriate according to the case and to the extent appropriate in the case. Inasmuch as the plaintiff Mr Smith is acting not only in individual capacity but also on behalf of traditional entities, the Supreme Court held that the trial court must consider tikanga concepts of loss that are neither physical nor economic.
Smith

Poem for Friday

Near Avalon

By: William Morris (1834-1896)

A ship with shields before the sun,
Six maidens round the mast,
A red-gold crown on every one,
A green gown on the last.

The fluttering green banners there
Are wrought with ladies' heads most fair,
And a portraiture of Guenevere
The middle of each sail doth bear.

A ship with sails before the wind,
And round the helm six knights,
Their heaumes are on, whereby, half blind,
They pass by many sights.

The tatter'd scarlet banners there
Right soon will leave the spear-heads bare.
Those six knights sorrowfully bear
In all their heaumes some yellow hair.

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