

Update

Corporate & Commercial

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ASIC banning order overturned

Last week, the Administrative Appeals Tribunal (**AAT**) overturned a banning order imposed by ASIC on Mr Lance Rosenberg, a director of Tricom Equities Limited (**Tricom**), from providing any financial services for a period of 4 years. While the decision may be open to review, some interesting comments were made.

The facts

The conduct giving cause to the banning order related to actions of Mr Rosenberg in relation to securities that Tricom, as a lender and held by it as security for loans, had on-lent to Opes Prime. Opes Prime had administrators appointed on 27 March 2008. Having on-lent securities to Opes Prime, and being concerned about Tricom's ability to recover those securities, Mr Rosenberg spent a number of days on and after 27 March 2008 obtaining advice from corporate advisers and insolvency specialists about the best way to recover them. A number of alternatives were considered and Mr Rosenberg facilitated an off market transaction known as a "special crossing" between two related Tricom entities in relation to 12 particular parcels of securities in an attempt to seek to generate a contractual right for their recovery (a "special crossing" is a transaction between two parties off market at a price agreed between the parties).

During the days prior to putting in place the special crossing, Mr Rosenberg was in constant communication with the ASX about the position. Having put in place this special crossing, Mr Rosenberg negotiated with lenders and was then able, before the obligation to settle the crossing was due, to finance the acquisition of those securities and to cancel the special crossing.

ASIC'S contentions

ASIC alleged that, in breach of the Corporations Act, the entering into of the off market special crossing transaction:

- (a) created a false or misleading appearance of active trading; and
- (b) was likely to mislead or deceive the market.

The AAT considered a range of expert evidence and, in particular, the ASX Listing Rules (**Rules**), to the extent that they relate to off market transactions such as special crossings, and the information that is available to investors about these sorts of transactions.

The AAT took the view that the special crossings, being "off market" transactions, were transactions specific to the ASX and provided for under the Rules. To the extent that the transactions were reported to ASX as "special crossings", which by definition are transacted off market at a special crossings price that may bear no relation to the market price for a security, the market is on notice of this fact and, accordingly, there is no false market.

The AAT came to the conclusion that the evidence provided by ASIC did not make out that the relevant sections of the Corporations Act were contravened. In addition to the question of evidence about the particular contraventions, the context of making of the banning order was considered.

The AAT considered the fact that banning orders are discretionary and not required to be imposed by ASIC. Further, the purpose of a banning order is primarily to protect the public and to act as a deterrent to the person concerned and other market participants as to other potential breaches of the law. The AAT found that, having regard to the exceptional circumstances in which Mr Rosenberg found himself, the order was excessive.

The case should provide some comfort to directors that while an ASIC delegate may consider that action taken under extreme time pressure at a difficult time is in breach of the law, the AAT may take a view which considers a broader set of circumstances, in particular the various options available to a director, including those available to Mr Rosenberg to seek recovery of the securities and the fact that an off market transaction of this nature was unlikely to prejudice the investing public.

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