HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

ALAN DAVID DOYLE APPELLANT

AND

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION & ANOR RESPONDENTS

Doyle v Australian Securities and Investments Commission [2005] HCA 78
14 December 2005
P41/2005

ORDER

1. Appeal dismissed.

2. Appellant to pay the first respondent's costs of the appeal.

On appeal from the Supreme Court of Western Australia

Representation:

M J McCusker QC with K L Christensen for the appellant (instructed by Christensen Vaughan)

K J Martin QC with C H Thompson for the first respondent (instructed by Australian Securities and Investments Commission)

Submitting appearance for the second respondent

CATCHWORDS

Doyle v Australian Securities and Investments Commission

Company law – Duties of directors – Claim against director for contravention of the Corporations Law, s 232(6) – Appellant was a director and shareholder of Doyle Capital Partners Pty Ltd ("DCP") and at the relevant times, either an alternate director or director of Chile Minera Ltd ("the Company") – DCP had been allotted shares in the Company in consideration of a payment of $400,000 with an assurance that its shares would rank *pari passu* with existing shareholders – Allotment was in breach of the listing rules of the Australian Stock Exchange – As an alternate director of the Company, appellant signed a circular resolution authorising the company secretary to procure the issue of a bank cheque for $400,000 payable to DCP, held pending further advice from ASX – Subsequently, as a director of the Company, appellant voted to cancel DCP's allotment of shares in the Company and to ratify the decision made in the circular resolution – Whether appellant made improper use of his position to gain an advantage for DCP – Whether appellant's conduct could be said to be improper if the other directors of the Company knew about his interest in DCP – Whether there could be any advantage to DCP if it had an arguable claim for return of the $400,000 on the basis that the Company's representation regarding DCP's shares ranking *pari passu* with existing shareholders had been denied effect by the intervention of ASX.

Words and phrases – "improper", "advantage".

Corporations Law, s 232(6).

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ. The events giving rise to this litigation occurred in 1996 in Western Australia. At that time, the applicable corporations law was the Law set out in s 82 of the *Corporations Act* 1989 (Cth), as rendered applicable in Western Australia by s 7 of the *Corporations (Western Australia) Act* 1990 (WA).

2 After a trial in the Supreme Court of Western Australia, Roberts-Smith J made a declaration pursuant to s 1317EA of the Law. This declared that the appellant, Mr Alan David Doyle, by his presence and voting at board meetings of Chile Minera NL ("the Company") on 21 and 22 November 1996 and by signing a Circular Resolution dated 21 November 1996, while being a director of the Company, had made improper use of his position as a director to gain directly an advantage for other persons and thereby had contravened s 232(6) of the Law.

3 Thereafter, on 17 September 2002, Roberts-Smith J ordered that Mr Doyle pay to the Commonwealth the sum of $30,000 and that he be prohibited from managing a corporation for a period of two years from the date of that order. The pecuniary penalty was imposed after the finding required by s 1317EA(5) that the contravention of s 232(6) was a serious one. His Honour also noted that the burden of proof was that explained in *Briginshaw v Briginshaw*[1].

4 An appeal to the Full Court was heard by Wheeler, McLure and Jenkins JJ[2]. The Full Court varied the order of 17 September 2002 by reducing the period of the prohibition to a period of six months. Otherwise the appeal was dismissed. In this Court, the appellant seeks to have the finding of breach of s 232(6) of the Law set aside.

The statutory provisions

5 The text of s 232(6) has been considered by this Court in *R v Byrnes*[3] and *Angas Law Services Pty Ltd (In liq) v Carabelas*[4]. The sub-section stated:

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1 (1938) 60 CLR 336 at 368.

2 [2005] WASCA 17.

3 (1995) 183 CLR 501.

4 (2005) 79 ALJR 993; 215 ALR 110.

> "An officer or employee of a corporation must not, in relevant circumstances, make improper use of his or her position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation."

An "officer" included a director (s 82A). Section 232(6) was a civil penalty provision for the purposes of the provisions respecting civil penalty orders made in Div 2 of Pt 9.4B of the Law (ss 1317EA-1317EH)[5]. Section 1317EB(1)(a) authorised the making by the Australian Securities and Investments Commission ("ASIC") of an application for a civil penalty order. Hence the role of ASIC as the first respondent in this appeal. The second respondent, Mr D W Satterthwaite, entered a submitting appearance.

6 At the trial, a prayer for a declaration that Mr Doyle had contravened s 232A(1) of the Law had been abandoned.

7 Section 232A(1) stated:

> "A director of a public company who has a material personal interest in a matter that is being considered at a meeting of the board, or of directors, of the company:
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> (a) must not vote on the matter ...; and
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> (b) must not be present while the matter ... is being considered at the meeting."

Section 232A(1) did not apply if at any time the board had passed a resolution specifying the director, the interest and the matter and stating that the directors voting for the resolution were satisfied that the interest should not disqualify the director from considering or voting on the matter (s 232A(3)). There were no steps taken in the present case to attempt to enliven s 232A(3). The maximum penalty for a contravention of s 232A(1) was $500 (s 1311(5)).

The commercial context

8 The Company had been incorporated in Western Australia on 8 February 1985 under the name Ascot Mining NL. In 1991, this was changed to

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5 Section 1317DA identified s 232(6) as a civil penalty provision. It did not identify s 232A.

InterChrome NL. At an extraordinary general meeting held on 18 October 1996 ("the October EGM") to which it will be necessary to make further reference, a resolution was passed changing the name of the Company to Chile Minera NL. At that meeting, the Company also adopted new Articles of Association ("the Articles").

9 At all relevant times, Mr Doyle was a director of Doyle Capital Partners Pty Ltd ("DCP") and held 50 per cent of the issued shares in DCP. In August 1996, DCP was engaged as consultant to the Company with respect to potential mining interests in Chile, and to provide professional independent advice on technical and financial issues and to assist in raising capital. DCP was to be paid a fee of 6 per cent of the new capital raised.

10 There were three directors of the Company at the time of the events upon which this litigation is centered. Mr B R Mountford was chairman; he was in Chile during the relevant period. The other directors were Mr Satterthwaite and Mr J D Hopkins. However, Mr Hopkins resigned on 15 November 1996. Mr Doyle became a director on 22 November and resigned on 28 November; on 21 November, he had been an alternate director for Mr Mountford. Mr C B Murphy was Company Secretary.

11 The Company had held mining interests in various countries. In the course of the 1995-1996 financial year, the Company ceased its involvements in Ghana, the Philippines and New Zealand. The consolidated results for that financial year showed accumulated losses of $12,379,042. On 25 September 1996, Mr Satterthwaite wrote to shareholders that the board had resolved to concentrate in Chile all of its exploration efforts and, in particular, to acquire a 75 per cent interest in the Carrizal Alto Prospect. At the October EGM, held on 18 October, a resolution approving that acquisition was passed on a show of hands, but with signs of strong minority shareholder dissent.

12 Following the engagement of DCP, there had been discussion between Mr Doyle and Mr Satterthwaite respecting the placing of shares and options to raise working capital for the Company. The trial judge found that the Company had represented to Mr Doyle that the shares would rank *pari passu* with existing shareholders.

13 Thereafter, on 16 October, the Company allotted 8 million ordinary 50 cent shares to three parties, Banque Privée Edmond de Rothschild SA (1 million shares), Cramm Nominees Pty Ltd (3 million shares) and DCP (4 million shares). The new shares were issued at a discount of 45 cents per share, thereby raising for the Company an additional share capital of $400,000.

Each of the new shares had attached to it an option to require the Company to allot to the holder one fully paid share, the option being exercisable before 20 June 2000 at an exercise price of 20 cents. The Company paid DCP a fee of $24,000 for bringing about the share placement. The subscription moneys of $400,000 were paid by DCP to the Company on 16 or 17 October.

14 At the time of these events, the Company had been admitted to the official list of the Australian Stock Exchange ("ASX") and its ordinary shares were listed for official quotation at a par value of 50 cents. As McLure J emphasised in her reasons in the Full Court, it was an implied term of any contract for allotment of shares that the Company comply with the ASX Listing Rules. One of those Rules (LR 7.1) prohibited a company from issuing more than 10 per cent of its capital in one class in any 12 month period without the approval of the holders of ordinary securities. The Law also[6] placed restrictions upon the acquisition of shares.

15 On 17 October 1996, the ASX wrote to the Company referring to the placement and pointing to the apparent infringement of LR 7.1. On 18 October, Mr Murphy, the Company Secretary, responded conceding that the placement had exceeded by 51,242 shares the 10 per cent limit and stating that the situation would be remedied at the Annual General Meeting set down for 22 November 1996 ("the November AGM"). In his reasons, Roberts-Smith J noted that there had been a difference of opinion as to the extent of the breach of LR 7.1 and that the ASX records showed that the 10 per cent limit had been exceeded by a much more significant figure.

16 Further correspondence with the ASX followed. One matter of concern to the ASX was whether the allottees of the placement organised by DCP had voted those shares at the October EGM. On 13 November, the Australian Securities Commission, the precursor to ASIC, instituted proceedings in the Federal Court seeking orders setting aside the resolution passed at the October EGM to approve the acquisition of the Carrizal Alto Prospect. On 22 November, Carr J granted interim relief. By final orders made on 2 December, the Company was restrained from proceeding with the acquisition until it had shareholder approval as required by the Law and by LR 7.1.

17 Section 195 of the Law set down a detailed procedure for the reduction of share capital, requiring a special resolution of members and subject to court

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6 Sections 615, 623.

confirmation. However, in *Commonwealth Homes and Investment Co Ltd v MacKellar*[7], this Court held that a bona fide dispute between a company and a person whose name appears on its share register which arises from a claim that the allotment of shares is void or voidable may, consistently with the provisions of company law respecting reduction of capital, be the subject of a compromise resulting in the cancellation of allotment of the shares and the removal of the name of the person from the share register. On the other hand, as Street CJ in Eq held in *Reinvestment (Australia) Ltd v Murray Securities Ltd*[8], the reasoning in *Commonwealth Homes* did not apply where no more appeared than that subsequent difficulties with the ASX had caused the company and the allottee to decide that it would be preferable to terminate their arrangement and to remove the issued shares from the register.

The board meetings

18 On 21 November 1996, during the pendency of the Federal Court litigation, Mr Doyle, on behalf of DCP, wrote to the directors of the Company. He demanded repayment by the Company of the placement moneys of $400,000 as a result of the ASX stating that the placement had been in breach of LR 7.1. A board meeting was convened in Perth later on that day. Messrs Doyle, Satterthwaite and Murphy were present, Mr Doyle as alternate for Mr Mountford. Messrs Doyle and Satterthwaite voted in favour of resolutions that (a) the $400,000 be returned to the trust account of DCP but with release of these funds only to be made upon return to the Company of its 8 million shares and options, and (b) the placement fee be returned by DCP to the Company. Further, a document entitled "Circular Resolution of the Directors on Thursday 21st November, 1996" was signed by Mr Satterthwaite, and by Mr Doyle as alternate for Mr Mountford; this contained a resolution authorising the Company Secretary to procure the issue of a bank cheque for $400,000 payable to DCP "to be held pending advice from [ASX] as to their ruling on the ability of these new shareholders to exercise their vote".

19 Before the board meeting of 21 November, Mr Nash, a partner of the firm which was solicitors to the Company, had advised Mr Murphy "off-the-cuff" to the effect that the money could be returned to DCP provided it went into a trust account pending the advice of counsel. Counsel's written advice was received by

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7 (1939) 63 CLR 351.

8 [1974] ACLC ¶40-105.

the Company after the critical events, on 17 December. The advice noted deficiencies in the materials and facts briefed but concluded that the payment of $400,000 was a reduction in share capital requiring a special resolution of shareholders and court confirmation. Counsel noted the absence from the material briefed of evidence of grounds on which the issue might be set aside in accordance with *Commonwealth Homes*[9]; the facts appeared to go no further than those in *Reinvestment*[10].

20 At the other critical board meeting, that held on 22 November, Messrs Doyle, Satterthwaite and Mountford voted in favour of resolutions that the placement of shares be cancelled and that the decision of the 21 November board meeting for the return of the placement moneys be ratified provided that the Company receive the refund of the placement fee. Mr Doyle earlier that day had consented to act as a director of the Company. Mr Mountford was shown in the minutes as participating "by phone". Thereafter, $400,000 was paid into a trust account maintained by DCP with the National Australia Bank.

The aftermath

21 This board meeting of 22 November was held later on the day of the November AGM. At that meeting, there was noted a requisition by one of the disaffected shareholders, Metalsearch NL, for an extraordinary general meeting to elect new directors.

22 The trial judge found that the Company became insolvent by 26 November, and that the payment out of the $400,000 was a dominant contributing factor to that state of affairs. On 17 January 1997, after Mr Doyle refused to return the $400,000 to the Company, an administrator was appointed by the directors of the Company, they then being of opinion that the Company was insolvent.

23 On 4 February 1997, the Company instituted proceedings in the Supreme Court of Western Australia against DCP seeking, among other relief, repayment of the placement moneys. Thereafter, on 7 February, at an extraordinary general meeting, the directors were removed and other persons appointed. On 7 March, proceedings in the Supreme Court of Western Australia were taken by the

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9 (1939) 63 CLR 351.

10 [1974] ACLC ¶40-105.

Company against Messrs Doyle, Satterthwaite and Mountford. Both proceedings were eventually settled with payment by DCP to the Company of $250,000, less the placement fee of $24,000.

24 Two further points should be noted at this stage. The first is that Mr Doyle had been acting on 21 and 22 November in such a fashion as to render him a director within the meaning of s 60 of the Law[11]. Paragraph (a) of s 60(1) included within the meaning of the scope of the term "director" as found in the Law:

> "a person occupying or acting in the position of director of the body, by whatever name called and whether or not validly appointed to occupy, or duly authorised to act in, the position".

It followed that he was an "officer" within the meaning of s 232(6) of the Law[12].

25 The second concerns the Articles. Provision for alternate directors was made by Art 15.6. Article 15.2 provided that, subject to Art 15, the directors might regulate their meetings as they thought fit. Article 15.3 stated that no business was to be transacted unless there was present a quorum comprising two directors present in person. Article 16.1 provided for meetings linking together by instantaneous communication a number of directors being not less than the quorum. The result of reading Arts 15.3 and 16.1 together was that, if a quorum was present at the place where the meeting was held, other directors might participate through the means of instantaneous communication from elsewhere. However, at the meetings of 21 and 22 November, Mr Doyle's presence (with that of Mr Satterthwaite) had been necessary for the constitution of a quorum. The participation of Mr Mountford by telephone at the 22 November meeting did not alter that situation.

26 Article 15.15 dealt with disclosure of interests. It stated:

> "Subject to the Listing Rules, no Director shall be disqualified by his office from contracting with the Company whether as vendor purchaser or otherwise, nor shall any such contract or any contract or arrangement entered into by or on behalf of the Company in which any Director shall

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11 See *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236.

12 See the definition of "officer" in s 82A.

> be in any way interested be avoided or prejudiced on that account ... but the nature of his interest must be disclosed by him at a Directors' meeting as soon as practicable after the relevant facts have come to his knowledge and *such Director shall not vote on any resolution relating to a contract or arrangement in which he has directly or indirectly a material interest*." (emphasis added)

27 The trial judge held that "the return of [the $400,000] to DCP and [Mr Doyle's] control when the allottees had [not] established lawful entitlement to it, or when any such entitlement to it was in question, was an advantage to them", and that Mr Doyle used his position improperly to put the interests of the allottees ahead of those of the Company.

The Full Court

28 In the Full Court, the principal reasons were delivered by McLure J. Her Honour noted the absence of a finding as to what had actually been resolved and agreed with DCP as to the repayment arrangements. However, the documentary evidence and the unchallenged findings of the trial judge enabled the Full Court itself to consider those arrangements.

29 The trial judge had found a common intention of Messrs Doyle, Satterthwaite and Mountford that DCP hold the placement moneys on trust pending the provision of counsel's opinion and resolution of the legal issues. McLure J further concluded that, although the parties differed as to whether or not counsel's opinion would be accepted by the parties as determinative, the arrangement was that:

> "in the event the cancellation of the allotment was accepted by both parties as valid or was established to be valid, the moneys would be paid to the allottees and if the cancellation was invalid, the money would be returned to the Company".

30 The next question considered by McLure J was whether the purported avoidance by DCP of the placement and cancellation of the allotment by the Company effected a reduction in the capital of the Company. Her Honour held that there had been a reduction in capital, but that there had been a bona fide compromise of an arguable claim, with the result that there had been no unauthorised reduction of capital. The appeal to this Court may be decided without detailed consideration of the correctness of that conclusion. It may be assumed in favour of the appellant that DCP and the other investors had at least an arguable claim against the Company to the return of the $400,000.

31 McLure J held that Mr Doyle had contravened s 232(6) of the Law. The crux of the reasoning of her Honour respecting the contravention of s 232(6) appears in the following passage:

> "The relevant improper conduct was, as found by the trial Judge, [Mr Doyle's] presence at the board meetings on 21 and 22 November and his voting on the [resolutions] and Circular Resolution. Such conduct was itself improper as it breached s 232A(1) [of the Law]. [Mr Doyle's] purpose and intention in attending and voting at the board meetings has to be garnered from the surrounding circumstances at the time of the conduct in question, including his then state of knowledge. The trial Judge found that [Mr Doyle] was aware of [Mr Nash's] advice and concluded that his purpose in engaging in the conduct (objectively determined to be improper) was to advantage the allottees, including DCP, that advantage being the return of the money to DCP and [Mr Doyle's] control when the allottees had no established lawful entitlement to it or when any such entitlement was in question. That finding was clearly open and consistent with the weight of the evidence. It is not negatived or undermined by what in due course is found to be the correct legal position or that the course of action was consistent with legal advice given to the Company."

The appellant's submissions

32 McLure J had introduced her statement of conclusions with an analysis of the elements of s 232(6). It is, of course, true that the sub-section must be read as a whole, but the analysis assists an understanding of the submissions made by the appellant in this Court. McLure J had said:

> "[I]n order to breach s 232(6) [of the Law] the following elements have to be established: (1) the defendant was at the relevant time an officer or employee of a corporation; (2) he used his position as such officer or employee; (3) his use of his position was improper; (4) he made that improper use for the purpose of gaining, directly or indirectly, an advantage, alternatively he made that improper use for the purpose of causing detriment; (5) the advantage was either for himself or for another person, alternatively, the detriment was to the corporation."

33 Mr Doyle at the relevant time was an officer of the Company, namely a director, and he used that position to vote on resolutions relating to matters in which he had a material interest as a director and a 50 per cent shareholder of DCP. Elements (1) and (2) were present.

34 However, as to element (3), counsel for Mr Doyle asked how could it be that a director made *improper* use of that position by being present at, and participating in, a meeting of directors when the matter in which the director had an interest was disclosed to, and known to, those present and the decision was to do something neither unlawful nor improper, or one as to which the director held a reasonable belief that it was not unlawful or improper.

35 The framing of the issue respecting element (3) in that way presents it at a level of excessive generality. Impropriety on the part of Mr Doyle would consist in a breach of the standards of conduct that would be expected of a person in his position by reasonable persons with knowledge of the duties, powers and authority of his position as director, and the circumstances of the case, including the commercial context[13]. Such standards, expressed according to objective criteria, are ultimately stated, as necessary, by the courts.

36 An account has been given earlier in these reasons of the circumstances leading to the events of 21 and 22 November 1996 and the situation in which the actors then found themselves. The activities of the Company in Chile had attracted dissent among the shareholders, the placement arranged by Mr Doyle was disputed by the ASX, the Federal Court had granted interim relief respecting the resolution at the October EGM approving the Carrizal Alto Prospect, and there was an unresolved question respecting an unauthorised reduction in the capital of the Company and a threat of delisting. The investment by DCP and the other parties who, together, had provided the $400,000 appeared to be in jeopardy; hence the means adopted to advance the position of the investors towards recovery of their $400,000.

37 On the part of Mr Doyle, there was, as McLure J noted, the engagement in conduct in contravention of s 232A(1) of the Law. He also disobeyed the prohibition in Art 15.15 of the Articles upon directors voting on any resolution relating to a contract or arrangement in which the director has directly or indirectly a material interest. There may be in some cases of unconscious inadvertence a question whether there necessarily has been an improper use of position. The interrelation between s 232A and the civil penalty provisions including s 232(6) was not explored in submissions or argument. But those

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13 *R v Byrnes* (1995) 183 CLR 501 at 514-515; *Angas Law Services Pty Ltd (In liq) v Carabelas* (2005) 79 ALJR 993 at 1006-1007 [65], 1008 [72]; 215 ALR 110 at 127-128, 129.

questions may be put to one side. That is because the present is not a case of unconscious inadvertence. In any event, as was emphasised in *R v Byrnes*[14], impropriety may consist in the doing of an act for which the officer ought to know there was an absence of authority; there is no safe haven for the morally obtuse.

38 The existence of the conflict of interest was known to Mr Doyle, Mr Satterthwaite and Mr Mountford; the contrary is not asserted. Rather, the appellant seeks to rely upon the very disclosure and knowledge of the existence of the conflict as an answer to the suggested improper use of position by Mr Doyle.

39 The difficulty with that submission lies in the particular circumstances of the case. The disclosure of the interest of Mr Doyle could provide no answer in the situation where those to whom he made the disclosure were his confederates in the activity generating the interest. Those shareholders who were unhappy with the Carrizal Alto mining project and whose dissatisfaction had been apparent at the October EGM lacked any voice on the board on 21 and 22 November.

40 In oral argument, counsel for Mr Doyle spoke of his client as having acted under "a claim of right" to the return of the placement moneys. It was said that DCP and the other investors were "entitled" to a return of their money by the Company, and there could be no improper use by Mr Doyle of his position, within the meaning of s 232(6), in taking the steps he took on 21 and 22 November.

41 There is no scope when applying s 232(6) to the facts of this case for an incorporation of the doctrine of "a claim of right". Section 232(6) is a civil penalty provision. In *Macleod v The Queen*[15], Gleeson CJ, Gummow and Hayne JJ referred to the claim of right as a manifestation of the principle in criminal law that an honestly held belief, whether reasonable or otherwise, may be inconsistent with the existence of that intent which forms an ingredient of a particular crime. Whilst the presence of intention or purpose may be relevant in

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14 (1995) 183 CLR 501 at 514-515.

15 (2003) 214 CLR 230 at 242-243 [39].

assessing impropriety, it is not an ingredient in the requirement of improper use of position[16].

42 Counsel for Mr Doyle also asked how could it be that Mr Doyle had sought to gain an advantage (element (4) of s 232(6)) when DCP and the investors it represented had at least an arguable claim for the return of the subscription moneys on the footing that the representation by the Company to Mr Doyle respecting listing had been denied effect as a result of the intervention of ASX.

43 However, on the facts established in the Full Court, not only was there a purpose of gaining an advantage, but the advantage had been achieved. In place of an unsecured claim to the recovery of moneys by DCP, steps were followed in November 1996 which produced the result that a segregated fund was held on trust for a beneficiary which would be DCP if the opinion of counsel proved favourable. That put DCP a step well ahead of what otherwise was its position. The point may be illustrated as follows. Given the situation in November 1996, it would have required the high degree of caution spoken of in *Cardile v LED Builders Pty Ltd*[17] on the part of a court asked to make an asset preservation order against the Company at the suit of DCP. Furthermore, even if made, such an order would not have deprived the Company either of title to or possession of any assets to which the order extended[18].

Orders

44 The attack on the decision of the Full Court fails. The appeal should be dismissed and the costs of ASIC of the appeal should be borne by the appellant.

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16 *R v Byrnes* (1995) 183 CLR 501 at 512, 513-515, 521-522; *Angas Law Services Pty Ltd (In liq) v Carabelas* (2005) 79 ALJR 993 at 1006-1007 [65]; 215 ALR 110 at 127-128.

17 (1999) 198 CLR 380 at 403 [50].

18 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 403 [50].