



Property Investment Schemes and the *Corporations Act*

Australian Securities and Investment Commission v Macro Realty Developments Pty Ltd [2016] FCA 292

St. John Hibble and Ian Benson discuss the financial services provisions of the *Corporations Act 2001* (Cth) in light of this recent Federal Court of Australia case in which the Australian Securities and Investment Commission ("ASIC") brought proceedings against the promoters and operators of a property investment scheme.

Discussion Includes

- Explanation of scheme under investigation
- Requirements for an Australian Financial Services license
- Definition of "financial product" under the *Corporations Act 2001* (Cth)
- Fettering of directors' discretion under s 181, *Corporations Act 2001* (Cth)
- Counselling or procuring a breach of s 181, *Corporations Act 2011* (Cth)
- Misleading and deceptive conduct in advertising material for investment schemes
- Advice for practitioners in advising clients about obligations under financial services provisions

Précis Paper

Property Investment Schemes and the *Corporations Act*

1. In this edition of BenchTV, St. John Hibble (Barrister, List A Barristers – Melbourne) and Ian Benson (Solicitor, AR Conolly and Company – Sydney) discuss the financial services provisions of the *Corporations Act 2001* (Cth) in light of the decision in *Australian Securities and Investment Commission v Macro Realty Developments Pty Ltd* [2016] FCA 292, proceedings brought by ASIC against the promoters and operators of a property investment scheme.

Explanation of the Scheme under Investigation

2. The scheme at issue in this proceeding was a property investment scheme that was being marketed in Victoria through a series of property investment seminars. Following the investigation of several other property-related investments in Victoria, ASIC became aware of this scheme and took prompt action in the Federal Court, initially to injunct the promoters and operators from further continuing the proposal and subsequently to shut down the venture and seek relief under the appropriate provisions of the *Corporations Act*.
3. The scheme involved an unusual investment product, whereby investors were offered the opportunity to become directors of shelf companies which would hold two residential properties in specified areas, which would be rented out. The investors were to be paid \$200 per month for their services as directors of the shelf companies, and would ostensibly be given the opportunity to purchase the properties at some later point in time. As directors, however, the investors were required to obtain financing to purchase these properties. The scheme was marketed with the hook "Purchase property with no money down".
4. In addition to concerns about the financing that investors were required to obtain, ASIC raised two issues. First, it was argued that the scheme was caught by the financial services provisions of the *Corporations Act* as a "financial facility". Second, when the investors became directors of the shelf companies, pursuant to the terms of the contract, they were required to follow the instructions of the promoter, including by using particular services or specialists supplied by the promoters. ASIC took the view, with which the Court ultimately agreed, that these requirements fettered the directors' obligation to act in the best interests of the company

Requirements for an Australian Financial Services License and Definition of "Financial Product" under the *Corporations Act 2001* (Cth)

5. Under the financial services provisions of the *Corporations Act*, an individual who is promoting, issuing, dealing or providing advice about a financial product requires an Australian Financial Services license or must be an authorised representative: see s 911A.
6. As was the case in this proceeding, Mr Hibble explained that some operators are coming up with products with very unusual structures in order to try to avoid the licensing requirements contained in the *Corporations Act*. Here, for instance, a scheme whereby investors became directors of a company may not, on its face, seem to be a financial product. However, the way that the financial services provisions are interpreted require the Court to look at the *substance* of what is happening in the investment scheme.
7. The definition of a "financial product" under s 763A of the *Corporations Act* is quite broad. First, the inquiry focuses on whether a person is making an investment, that is, whether they are giving money (or money's worth) in the hope of receiving a return in the future. Second, the investor must not have day-to-day control over those funds.
8. This definition mirrors the definition of a managed investment scheme under the *Corporations Act*, but is also slightly broader as it includes such things as a "facility". A facility is defined to include intangible property, an arrangement, or a combination of both (s 762C). In this scheme, investors were not contributing money upfront, but were incurring an obligation (agreeing to become a director) in the hope of achieving a gain in the future (being able to buy properties at some later point).
9. The breadth of the financial services provisions are giving ASIC additional leverage to cast schemes of this nature as "financial products" that require an Australian Financial Services license.

Fettering of Directors' Discretion under s 181, *Corporations Act 2001* (Cth)

10. Pursuant to s 181 of the *Corporations Act*, a director must act in the best interests of the company. This obligation requires a director to have regard to circumstances as they exist at the time that they are making decisions about the company.
11. Here, the directors were effectively outsourcing their decision making responsibility to the promoters of the scheme, in breach of their responsibility to act in the best interests of the company. A practical example of this was the requirement, pursuant to the scheme contract, for the directors to use certain service providers supplied by the promoters, rather than obtaining the best service available at market.

Counselling or procuring a breach of s 181, *Corporations Act 2011* (Cth)

12. Section 181 of the *Corporations Act* can be contravened by counselling or procuring someone to breach their directors' duties.
13. Here, there was no active representation or request to investors that the promoters wanted them to breach the law. However, by fettering the discretion of the directors by instructing them on how to act, the promoters were counselling or procuring a breach of s 181. Having become directors, the investors were obliged to act in accordance with the *Corporations Act*, and the full suite of obligations applied to the position. Although directors can take advice about the exercise of their duties, they cannot outsource their obligations altogether.
14. Mr Hibble cautioned that by trying to avoid the financial services provisions of the *Corporations Act*, some corporations or individuals may end up further breaching the *Act* in ways such as this.

Misleading and deceptive conduct in advertising material for investment schemes

15. The advertising material for the investment scheme in this case was found by the Court to be misleading and deceptive, primarily because the material was inchoate and riven with internal inconsistencies. It was not possible to read the "puff" document and obtain a clear understanding of what was going on in the investment scheme, i.e. what obligations investors would have, what their returns would be, and the exact nature of their contractual relationship with the promoters of the scheme.
16. The *Corporations Act* provides that, unless certain criteria are met, all investors are deemed to be retail investors. The general expectation, then, is that the investors who are receiving the advertising material have limited financial literacy. Misleading and deceptive conduct is viewed from the perspective of these investors and their capability to understand the documents provided. Here, the word "guarantee" was used frequently in the material promoting the scheme, however what was guaranteed was not clear from the material, contrary to the perspective that may have been gleaned.

Advice for practitioners in advising clients about obligations under financial services provisions

17. It is important to advise clients that the reach of the financial services provisions of the *Corporations Act* is wide. Courts are becoming more and more comfortable with finding that schemes fall within the definition of a "financial product" and thus attract the operation of those provisions.

18. Again, it is important to note that if a client is trying to structure a product in an unusual way, they may well end up in breach of other provisions of the *Corporations Act* by trying to avoid machinations of the financial services provisions.

BIOGRAPHY

St. John Hibble

Barrister, List A Barristers – Melbourne

St. John practises in all areas of corporate, commercial and public law. Prior to his admission to the Bar in 2003, St. John conducted investigations for ASIC and was also a Senior Associate at Mallesons Stephen Jacques (now King & Wood Mallesons).

Ian Benson

Solicitor, AR Conolly & Company – Sydney

Ian Benson is a Solicitor at AR Conolly and Company and holds a First Class Honours degree in Law.

BIBLIOGRAPHY

Focus Case

Australian Securities and Investment Commission v Macro Realty Developments Pty Ltd [2016] FCA 292

Benchmark Link

Where do I find this?

Judgment Link

[http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2016/292.html?stem=0&synonyms=0&query=title\(%222016%20FCA%20292%22\)](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2016/292.html?stem=0&synonyms=0&query=title(%222016%20FCA%20292%22))

Legislation

Corporations Act 2001 (Cth)