

In the Loop

Is ASIC really to blame for recent failings?

Sparked by failing to obtain convictions in three high-profile cases in the space of six weeks, the Australian Securities and Investments Commission (ASIC) has received a barrage of criticism from certain members of the media in recent months. The proceedings issued against Jodee Rich, Andrew Forrest and Andrew Lindberg (though reversed on appeal) had been ongoing for years and had cost the taxpayers millions of dollars. There is no doubt that a review is warranted for such public failures, but is ASIC really deserving criticism? Norman O'Bryan SC, a Melbourne barrister, considered the issue in his article in *The Age* on 3 March 2010.

Norman O'Bryan looked at ASIC's role in Australia's corporate legal and regulatory systems. Essentially, ASIC investigates possible breaches of company and financial services laws.



The Department of Public Prosecution's (DPP) role is to then prosecute these breaches upon receiving a "handover brief" from ASIC – this division of roles is set out in the "memorandum of understanding" between ASIC and the DPP. The DPP has the last say as to whether a prosecution will go ahead or not.

If an ASIC investigation fails at trial, and the decision to initiate the proceedings was made by the DPP alone, then it may be the DPP who should bear the brunt of any criticism that follows. However, because of this misunderstanding as to the role ASIC plays in prosecuting corporate crime; ASIC has become a popular target for media criticism.

Unfortunately, this is not where the misunderstanding on criticism has stopped. ASIC has also come under fire for not taking a strong enough

stance on corporate crime due to the fact that a majority of the proceedings issued are civil rather than criminal. Norman O'Bryan suggests that there are many practical benefits to running civil cases. These benefits include:

- The proceedings can be controlled from start to finish;
- They can be settled under court supervision;
- The standard of proof in civil proceedings is lower; and
- More cases have been successfully concluded in the past decade because of the increased use of civil proceedings.

In summary, condemning ASIC for these public failures, and for not being tough enough on corporate crime, appears to be unfair.

David Levesque
Trainee Lawyer

Free Seminars at HOCW

Next Seminar: Family Law

Details to be announced shortly on our website: www.hocw.com.au

Recent Seminar: Essentials for Corporate Management

This seminar dealt with:

- director's obligations
- employment
- essential documentation
- risk management

An extensive questionnaire was handed out to businesses and included a vital 'health' check. On completion HOCW to provide a free evaluation and prognosis.

To register for future seminars email enquiries@hocw.com.au indicating areas interest.

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Family Law Appointment - Amanda Rajah

Amanda Rajah joins Dorothy Pellew, in our family law department.

Amanda brings with her extensive experience and an understanding of the complex issues that can arise following the breakdown of a marriage, de facto or same sex relationship.

A special interest of Amanda's is forensic investigation in property matters. Attention to detail is vital and extends to advising clients of the impor-

tance of protecting assets before, during and after relationships/marriages.

Amanda is highly skilled in all aspects of family law including :

- drafting court documents & agreements
- negotiation
- alternative dispute resolution & litigation

Amanda and Dorothy are able to provide clients with cost

effective options in order to achieve the best possible outcome during what can be a very stressful period.

Amanda obtained her LL.B from Monash University. During her time as a student there Amanda worked as a research assistant for Professor Graeme Hodge and Dr Sue McNicol. Amanda is admitted to the Supreme Court of Victoria and the High Court of Australia.

Our aim is to achieve the best result for our client in the most cost effective way.



Separation & Divorce—FAQ's

1. Do I need legal advice to get separated?

Yes. You will need to make appropriate arrangements for your children and to restructure your financial affairs. The law which governs these matters can be complicated as it often involves taxation and corporate law in addition to family law matters. A lawyer will assist you to avoid making any decisions which can adversely effect the time you spend with your children and your asset position.

Many people think they can successfully work out their own arrangements for their settlement, however, any private arrangements parties make without appropriate documents filed with the Court, or a Binding Financial Agreement (BFA) appropriately witnessed, will not be binding and can be overturned. It is not uncommon for people to make a successful application to the Court years after separation for the (further) division of their assets.

2. Does it make any difference if we were not married?

The *Family Law Act 1975 (Cth) (Act)*, as amended, applies to children of all relationships. It also applies to the division of the assets of married couples and also to non-married couples who have separated after 1 March 2009.

3. Do the children have to spend equal amounts of time with each parent?

A consideration of what is in a Child's Best Interest (CBI) is the guiding principal of the Act. The concept of the CBI includes things such as what is reasonably practical for the child and the quality of care provided to the child. It is important to remember the situation of every

child is different. If parents are not available to care for children due to work commitments and the other party is free to care for the children, then an equal sharing of the children is unlikely.

4. My friend got "taken to the cleaners" by his former partner. Will this happen to me?

It is very important for you to keep records about your assets and debts before you reach any agreement about the division of your matrimonial property. The things which come into consideration when dividing assets include where the children will live, the type of contributions by each party to the assets, the future needs of each party, the discrepancy in incomes and the receipt of any inheritances. There is no presumption assets will be split 50-50. You should obtain advice before dividing your assets.

The court can set aside property settlements in some situations where appropriate valuations of assets were not obtained and especially in circumstances of fraud, misrepresentation and duress or in some circumstances in situations relating to a child.

5. Do I have to go to court?

Litigation is always a last option. Negotiation, mediation and alternative dispute resolution frequently provide clients with more satisfactory results. If the matter is resolved by consent orders or a BFA no appearance at Court should be necessary.

Dorothy Pellew
Accredited Family Law Specialist

Amanda Rajah
Family Lawyer

HICKS
OAKLEY
CHESSELL
WILLIAMS

Lawyers & Notary