

Commercial Dispute Resolution Update

ASIC database weaknesses exposed

Background: Companies Registers - ASIC

Under the Corporations Act the register maintained by the Australian Securities and Investment Commission (**ASIC**) provides a critical public record of the nation's companies.

Companies must be registered with an ACN and provide to the ASIC (and keep updated) details of name, status, registered office details, officers (directors, company secretaries), shares and securities.

Those dealing with companies have access to the ASIC register to check, search and verify data.

Security and reliability of ASIC data

Parties seeking information from the ASIC need to be aware that the published data on the ASIC registers is not always reliable, or secure.

Reliance on the corporate key system is also fraught.

The issues were highlighted in the recent case of *Van de Velde v Mind Challenge* QSC 8164/2011

Mind Challenge Limited (**Mind Challenge**), was an unlisted public company facing internal factional disputes.

On 14 September 2011, an Extraordinary General Meeting (**EGM**) was held at which resolutions were put forward by a dissenter group to vote for the appointment of their candidates as directors in place of the existing board of directors.

In each case, the resolution failed.

Notwithstanding this the ASIC records revealed that a notice of Change to Company Details (ASIC Form 484) was lodged after the EGM by solicitors acting on instructions from the dissenter group. The form purported to change the officers and directors of the Company.

The corporate key was overridden by the simple request of the solicitors. The ASIC duly recorded all the changes.

The signatories and authorities on the Company's bank account were then changed at the bank using the Form 484 as lodged with ASIC as evidence, which the Bank accepted at face value.

The "new board" then purported to appoint an administrator with whom they had prior dealings and the ASIC duly recorded the appointment. The ASIC's database showed that the company had been placed into external administration.

In the Supreme Court of Queensland, Mind Challenge successfully obtained orders declaring that the appointment of new directors was invalid, as was their purported appointment of the external administrator.

ASIC Response

The Company complained to the ASIC about the problems caused to it by the ASIC's acceptance of the Form 484 without the corporate key.

In response the ASIC stated that it will issue a new corporate key to a company where all officeholders and addresses (including contact address and registered office) are changing, and a letter is included from an incoming officeholder advising that all officeholders and addresses are changing, requesting that the form be processed and a new corporate key be issued. The ASIC will issue a new corporate key to a new address, and process a Form 484 without the corporate key.

The ASIC's position is that it will accept all documents, including a Form 484 notifying the ASIC that a company has changed all officeholders and addresses, in good faith.

The ASIC says that it is not required by law to undertake further enquiries as to whether information provided in such documents is legitimate or otherwise.

Issues

It is only in circumstances where the ASIC is aware or has been notified that a document contains matter contrary to law or information that is misleading and false, that the ASIC will refuse to register the document pursuant to section 1274(8) of the Act.

This means that, unless the ASIC has reason to doubt the bona fides of a request to by-pass the corporate key, the ASIC will register the forms and update its database accordingly. The changes will appear as if correct unless and until the ASIC is persuaded that the information is misleading and false.

There is no process such as a caveat or other warning process in the ASIC system, as such, to enable disputed interests to be notified, or to prevent the ASIC from registering contentious documents.

Conclusion

This case again exposes weaknesses in the ASIC's registration process and the reliability of its data. Those using the ASIC's database should be alert to issues about the reliability of information recorded.

The ASIC's view is clear: the information it receives typically will be accepted at face value and entered.

The corporate key cannot be relied on to prevent unauthorised changes being notified to the ASIC, and provides little in the way of security or safeguards.

**This article was produced by Herbert Geer Lawyers.
It is intended to provide general information in summary form on legal issues.
The contents do not constitute legal advice and should not be relied upon as such.**

For further enquiries contact:

Robert Gallagher

Partner

Commercial Dispute Resolution

rgallagher@herbertgeer.com.au

Phone: +617 3853 8909

Fax: +617 3853 8800

Chris Newby

Lawyer

Commercial Dispute Resolution

cnewby@herbertgeer.com.au

Phone: +617 3853 8956

Fax: +617 3853 8800