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THE GLOBAL FINANCIAL CRISIS AND AUSTRALIAN COURTS

Hon J J Spigelman AC

Nearly two years after the collapse of Lehman Brothers, the effects of the global financial crisis are increasingly discernible in Australian courts. In this speech, Chief Justice Spigelman surveys the range of legal proceedings that have accompanied recent corporate collapses. The litigation discussed is characterised by its complexity, which is partly a consequence of the highly leveraged and interlocked nature of failed companies and investment schemes, and by the significance of cross-border issues. With respect to the latter, the crisis has highlighted the need for cross border judicial co-operation. 615

THE JUSTIFICATION OF LEGAL PROFESSIONAL PRIVILEGE WHEN THE CLIENT IS THE STATE

Liam Brown

Legal professional privilege allows a person to keep confidential communications made with their lawyer. According to instrumental rationales it has been principally justified as an integral part of the administration of justice. Under this rationale, the public interest in having clients represented by lawyers outweighs the public interest in full disclosure of information. Legal professional privilege is also seen as a fundamental right itself or a necessary condition for the enjoyment of other rights. This article examines legal professional privilege according to its traditional rationales in light of contemporary democratic theories and greater rights, and government commitment to, public access to government-held information. This article concludes that legal professional privilege is generally difficult to rationalise when the client is the state. Rather than a "blanket" exception for legal advice, it would be better if governments substantiated the need for secrecy on a case-by-case basis according to the doctrine of public interest immunity. 624

WHERE TO FROM INGOT CAPITAL INVESTMENTS V MACQUARIE EQUITY CAPITAL MARKETS?

Lesia Richards

The Court of Appeal in *Ingot Capital Investments v Macquarie Equity Capital Markets* (2008) 73 NSWLR 653 recognised that due diligence certification is capable of being misleading and deceptive conduct in terms of the Corporations Act 2001 (Cth), s 1041H(1), and that such conduct may indirectly cause the plaintiff investor's loss where the plaintiff is a "passive victim of misleading conduct" (at [617]). No further investment decision by the plaintiff affects their loss because either loss flows regardless or any investment decision is effectively removed from the investor or reversed by the effect of the misleading conduct on a third party. In both cases, there is no break in the chain of causation and the investor can be regarded as a passive victim. The misleading conduct comprised in the due diligence certification must be so material that "by its very nature"

(at [12]), it causes loss or would result in no prospectus being issued or one so different that no investor including the plaintiff would invest (at [26], [80], [591]) It is the view of the author that the approach of the Court of Appeal throws up the potential for other sign-off processes to be subject to court scrutiny in misleading conduct claims in light of how banks structure and market transactions, both in direct and indirect causation cases. 645

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