LegalTalk

Electronic Bulletin of Australian Legal Developments

Issue 28: September 2008

Clarendene Estate Planning Lawyers joins PricewaterhouseCoopers

On 1 September 2008, PricewaterhouseCoopers (PwC) continued our focus on offering our clients a multi-disciplinary approach through a merger with Clarendene, one of Australia's leading estate planning law firms.

Established in 2001 by Mike Fitzpatrick, Clarendene has quickly grown to provide services to clients in Brisbane, Sydney, Newcastle and Canberra (and soon in Melbourne). Clarendene is well-known within accounting and financial planning circles, chiefly through the numerous educational presentations Mike Fitzpatrick makes to the accounting, financial planning and legal professions and also for its innovative approach to modern estate planning. The Clarendene team has also developed a wide reputation as being the only law firm in Australia solely specialising in the delivery of sophisticated estate planning services involving the use of creatively drafted testamentary trusts.

The merger will provide clients with access to deep skills and sophisticated advice on all aspects of estate planning, including Wills with specialised testamentary trusts, preparation of and advice on family trusts and self-managed superannuation funds, and probate services. The Clarendene team will operate primarily as part of Private Client Services (PCS), providing entrepreneurs and private businesses with tailored estate planning solutions.

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Carbon Pollution Reduction Scheme – opportunities for investors in clean technology

The introduction of the Carbon Pollution Reduction Scheme (CPRS) as outlined in the Federal Government's Green Paper, and the resulting demand that will be placed on emitters to find innovative clean technology (cleantech) solutions, will create many opportunities for investors and particularly for the venture capital sector. In this article we discuss the reason for the almost certain increase in demand for cleantech solutions that will follow implementation of the CPRS, and consider the investment vehicle structure – the Early Stage Venture Capital Limited Partnership (ESVCLP) – most suitable for the venture capital sector's entry into investment opportunities fuelled by climate change and the CPRS.

How does the CPRS work?

The proposed CPRS is a 'cap and trade' scheme. Essentially, this means the Government will cap the total amount of carbon pollution allowed in the economy by covered sectors and will then issue and auction off CPRS permits up to the annual cap each year. At the end of each year, emitters will be required to surrender one CPRS permit for each tonne of carbon pollution produced that year. Firms covered by the CPRS are required to monitor their emissions and report to government. Arrangements for the assurance of reported emissions data are also required and penalties for non-compliance will apply.

The only way to acquire CPRS permits will be to purchase them at the annual auction or to acquire them on the secondary market. CPRS permits will have the legal status of personal property and will be transferable. It is also proposed that CPRS permits would be a financial product for the purposes of the *Corporations Act 2001*.

Demand for cleantech solutions to escalate

The production of carbon as part of any commercial process will soon have a quantifiable cost as emitters acquire permits, or pay penalties under the CPRS where emissions exceed permitted levels. As a result, the prices of goods and services which rely on processes which produce high levels of carbon will increase, and the competitive advantages that currently exist in the market may change profoundly. The Federal Government's goal to reduce the level of carbon production by 60 per cent below 2000 levels by 2050 means that the way we produce, price and buy will all need to change.

Cleaner processes which produce less carbon pollution will create more competitive goods and services by avoiding the additional costs of CPRS permit acquisition. As a result, there will be an increasing number of opportunities for the creation of clean technologies aimed at reducing the production of carbon as part of commercial processes, where the cost to business of the solution is less than the cost of CPRS permit acquisition.

The market pricing mechanisms of the CPRS, the introduction of a cap on emissions for the first time and the limited availability of CPRS permits are likely to result in a relatively high initial market value for CPRS permits. Emitters will need to either compete with each other at auction or on the secondary market to purchase CPRS permits which cover the level of carbon pollution they emit, or seek to reduce those emissions in some other way. Those emitters with the greatest need (and the deepest pockets) will set the price. Emitters who are unable to acquire the CPRS permits which they need, will have little choice but to reduce their emissions or face legislative penalties.

In the meantime, innovators are assessing the opportunities for solving the carbon reduction problem and seeking to produce solutions which offer business a more cost effective alternative to CPRS permit acquisition. The level of innovation in the 'cleantech' space must increase as demand, driven by the costs of the CPRS, forces business to find solutions. This demand will create investment opportunities for investors, and will require investors to consider the alternative structures available to them to make their investment. The ESVCLP structure is perfectly suited to investment in clean technology innovation in many situations.

Tax-free investment through an ESVCLP

The ESVCLP offers investors a tax-free return for limited partners and ensures that the carried interest of the general partner is on capital account where the investment rules of the program are met. An ESVCLP may have a fund size of up to $100 million and may invest in entities whose gross asset value is up to $50 million as shown on its last audited accounts. Arguably, neither the maximum fund size of an ESVCLP nor the maximum gross asset value of investee targets is inconsequential.

The ESVCLP must divest itself of an investment whose gross assets (not market value) reach $250 million. The divestment rule has been criticised as a burdensome restriction on the divestment flexibility of a general partner. However, market analysis reveals that a substantial majority of initial public offerings (IPOs) which occurred in 2007 were capitalised at below $250 million (*Survey of Sharemarket Floats in 2007*, PricewaterhouseCoopers Corporate Finance). In addition, the ESVCLP legislation contains no restrictions on the transfer of such an investment into a 'companion fund' in circumstances where the fund wishes to retain the investment. While there are costs associated with such a transfer, the tax-free gain made on the investment up until that time and the future potential growth of the investment (evidenced by the desire to retain the investment) may well outweigh this cost.

For further information in relation to how to take advantage of the clean technology opportunity or on the details of the ESVCLP program, contact:

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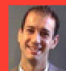
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New limitation on recovery from proceeds of court proceedings brought by liquidators

In a recent decision involving a third party litigation funding for a negligence action, the Federal Court of Australia has effectively limited the ability of litigation funders and unsecured creditors to recover from the proceeds of such actions where there are secured creditors with a charge over the assets of the Company.

In the decision of *Meadow Springs Fairway Resort Ltd (in liq) v Balanced Securities Ltd (No 2)* (2008) 245 ALR 726, the Federal Court ruled that the proceeds from a settlement of a negligence claim brought by the liquidator against a commercial property valuer on behalf of the company were subject to the floating charges on the company's assets. Therefore, such assets were not available to a third party litigation funder or the unsecured creditors of a company until the liability owed to the secured creditor was paid out.

Facts of the case

In this case, Meadow Springs Fairway Resort Ltd (the Company) was incorporated to build and sell some serviced apartments. In deciding whether to take on the project, the Company relied on a valuation provided by Colliers International Consultancy and Valuation Pty Ltd (Colliers). Both debt and equity finance was obtained on the basis of the valuation and the debt financiers that advanced funds to the Company were granted fixed and floating charges over the assets of the Company.

The Company was unable to sell the apartments and the liquidator of the Company entered into a funding arrangement with Insolvency Litigation Fund Pty Ltd (ILF) to bring proceedings against Colliers for negligence and misleading or deceptive conduct. This arrangement was later replaced with one on essentially the same terms between the liquidator and IMF Australia Ltd (IMF), the parent company of ILF. The claim was settled for $6.4 million, being the proceeds from the settlement, paid to the liquidator. Pursuant to the arrangement between IMF and the liquidator, IMF claimed fixed fees as well as 35% of the

proceeds from the settlement. The secured creditors of the Company resisted this claim on the basis that the settlement, proceeds were assets of the Company that were subject to their registered charges.

Decision of the Court

The Court held that the floating charges had crystallised on the date of the appointment of administrators to the Company in accordance with the terms of the charges. Because the conduct of Colliers which gave rise to the legal action occurred before that date, the legal rights that the Company had against Colliers were part of the assets of the Company, which were then subject to the charges. Because the charges were registered, IMF was not able to assert that it had a better claim to the proceeds when it was fully aware of the existence of the charges at the time that it entered into the funding arrangement. IMF was entitled to recover the fixed fees, but not the percentage of the amount recovered.

This decision is in contrast to the position taken by courts in relation to third party litigation funding for recovery by the liquidator of voidable transactions, such as actions to recover unfair preferences, uncommercial transactions and unfair loans. This is because the moneys recovered in such actions are not part of the assets of a company, and therefore cannot be subject to secured interests at the time that company goes into liquidation. In those cases, the terms of funding from third party litigation funders are not subject to similar challenges by the secured creditors of the company.

Incidentally, it is worth noting that while the liquidator of the Company had convened a meeting of creditors to approve the original arrangement with ILF as required under section 477(2B) of the *Corporations Act 2001* (Cth), the liquidator did not do so when he entered into the replacement arrangement with IMF. The liquidator did not believe that he needed approval for the IMF arrangement as he already had approval for the previous arrangement with ILF. It was necessary for the Court to effectively grant retrospective approval for IMF to be able to recover its assessment and management fees from the liquidator.

Conclusion

In effect, the decision in *Meadow Springs Fairway Resort Ltd* means that:

- proceeds from legal actions brought by the liquidator on behalf of the company, such as contract, tort and property law claims, may be available to fulfil the security granted under fixed and/or floating charges in priority to the claims of other creditors
- third party litigation funders and unsecured creditors would rank in priority behind secured creditors in sharing in the recovery from such proceeds
- the effect of third party litigation funding arrangements in respect of, and the sharing of any proceeds from recovery from, voidable transactions by the liquidator, such as unfair preferences, uncommercial transactions and unfair loans, remains unaffected; and
- further approval under section 477(2B) of the *Corporations Act* is required when a liquidator enters into a contract in replacement of an existing contract, even if it is on essentially the same terms as the contract it is replacing.

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