



# Express law

*fast track information for clients*

23 MAY 2017

**A current issue arising in *ASIC v Whitebox* (NSD383 of 2016) (*Whitebox*), with potential significance for other civil regulatory proceedings, has now been listed for separate hearing before the Full Court of the Federal Court on 8 June 2017.**

This note briefly summarises the details for other regulators potentially affected or interested.

## **Summary**

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In *Gore v ASIC* [2017] FCAFC 13, (2017) 341 ALR 189 (*Gore*), the Full Federal Court considered s 727 of the *Corporations Act 2001* (Cth). Like other provisions in the Act it prohibited certain conduct and provided a foundation for either (i) criminal proceedings under Part 9.4 of the Act or (ii) civil remedies under the Act. ASIC had not alleged criminal offences and sought only relief for civil contraventions. However, the Full Court held that the physical and fault elements applying under the Criminal Code to an offence arising in relation to s 727 were also applicable in civil remedy proceedings where ASIC was required to establish a contravention of the 'offence provision' in aid of the civil remedy sought.

It should be noted *Gore* was not a civil penalty proceeding: ASIC was seeking civil injunctive relief, rather than a penalty, against the defendant for her accessorial liability for a contravention of s 727, which is made an offence provision by s 1311 of the Act. Because s 1308A of the Act provides that the Criminal Code applies to 'offences against [the] Act', the Court reasoned that the Criminal Code applied.

ASIC has sought that the question be dealt with by a Full Court in *Whitebox*. As *Whitebox* is a civil penalty proceeding, the question referred is as follows:

'In proceedings brought for the imposition of a civil penalty for a contravention of s 1041A or s 1041B of the *Corporations Act 2001* (Cth) is the *Criminal Code* being the Schedule to the *Criminal Code Act 1995* (Cth) engaged?'

In referring the question to the Full Court, Allsop CJ observed:

The consequences to ASIC (and, indeed, other regulators where this position might obtain, that is, an identified body of conduct giving rise to separate and distinct civil and criminal remedies) are significant.

*ASIC v Whitebox* (No 4) [2017] FCA 505 at [15].

Having regard to the structure of the provisions considered in *Gore* and to be considered in *Whitebox*, the decisions will be most relevant to regulators where a specific provision of the legislation can be either a civil breach or criminal offence by reason of other provisions in the legislation. While each statute will depend upon its terms, the decisions may be distinguishable where the principal civil breaches and criminal offences are clearly separately framed in different provisions.

ASIC is conducting the litigation. The Solicitor-General will appear for ASIC on the question; a contradictor is also briefed. ASIC is consulting the Office of Legal Services Coordination in relation to the *Whitebox* proceedings.

Other regulators with any similar issues arising, or queries in relation to the ambit of this proceeding, are invited to contact Katrina Close at AGS on 03 9242 1230, or get in touch with the Office of Legal Services Coordination by calling Rosa Pezzella on 02 6141 3671.

For further information please contact:

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