

SUPREME COURT OF QUEENSLAND

CITATION: *Coeur de Lion Investments Pty Ltd v Lewis & Ors* [2020] QCA 111

PARTIES: **In CA No 178 of 2019:**
COEUR DE LION INVESTMENTS PTY LTD
ACN 006 334 872
(applicant)
v
LEWIS, Ian George
(respondent)

In CA No 179 of 2019:
COEUR DE LION INVESTMENTS PTY LTD
ACN 006 334 872
(applicant)
v
KELLY, Patrick John
(respondent)

In CA No 180 of 2019:
COEUR DE LION INVESTMENTS PTY LTD
ACN 006 334 872
(applicant)
v
WALLIS, Bruce Murdoch
(respondent)

FILE NO/S: CA No 178 of 2019
CA No 179 of 2019
CA No 180 of 2019
DC No 4641 of 2018
DC No 4642 of 2018
DC No 4643 of 2018

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Criminal)

ORIGINATING COURT: District Court at Brisbane – [2019] QDC 90 (Smith DCJA)

DELIVERED ON: 29 May 2020

DELIVERED AT: Brisbane

HEARING DATE: 4 March 2020

JUDGES: Philippides JA and Bond and Bowskill JJ

ORDERS: **In each of the proceedings CA 178 of 2019, CA 179 of**

2019 and CA 180 of 2019:

- 1. The application for leave to appeal is granted.**
- 2. The appeal is dismissed, with costs.**

CATCHWORDS: CRIMINAL – APPEAL AND NEW TRIAL – OTHER MATTERS – STATUTES – INTERPRETATION – where the applicant shareholder of a company attempted to commence private prosecutions against the respondents, directors of the company, for alleged offences under s 601ED of the *Corporations Act* 2001 (Cth), relying upon s 13 of the *Crimes Act* 1914 (Cth) – where the directors successfully applied to the Magistrates Court to strike out the complaint made against each of them, on the basis the applicant had no standing to bring a private prosecution against them, having regard to s 1315 of the *Corporations Act* – whether there remains an enforceable right of private prosecution for offences under the *Corporations Act* – whether, on the proper construction of the words used in s 1315 of the *Corporations Act*, having regard to the context for and purpose of the provision, a contrary intention, for the purposes of s 13 of the *Crimes Act*, appears in s 1315 of the *Corporations Act*, so as to preclude the private prosecution of an offence against the *Corporations Act*

Acts Interpretation Act 1901 (Cth), s 15AA, s 15AB
Corporations Act 2001 (Cth), s 1315, s 601ED
Crimes Act 1914 (Cth), s 4J, s 4H, s 13
District Court of Queensland Act 1967 (Qld), s 118
Judiciary Act 1903 (Cth), s 69

Attorney-General (Cth) v Oates (1999) 198 CLR 162; [1999] HCA 35, cited
Brebner v Bruce (1950) 82 CLR 161; [1950] HCA 36, cited
Bropho v Western Australia (1990) 171 CLR 1; [1990] HCA 24, cited
Certain Lloyd's Underwriters v Cross (2012) 248 CLR 378; [2012] HCA 56, cited
R v A2 (2019) 93 ALJR 1106; [2019] HCA 35, cited
Taylor v Attorney-General (Cth) (2019) 93 ALJR 1044; [2019] HCA 30, cited

COUNSEL: C S Ward SC, with E L Robinson, for the applicant in each proceeding
 G J Handran, with N D Boyd, for the respondent in each proceeding

SOLICITORS: Alexander Law for the applicant in each proceeding
 McBride Legal for the respondent in each proceeding

[1] **PHILIPPIDES JA:** I agree with the orders proposed by Bowskill J for the reasons given by her Honour.

- [2] **BOND J:** I agree with the reasons for judgment of Bowskill J and with the orders proposed by her Honour.
- [3] **BOWSKILL J:** In May 2019, the applicant, a shareholder of The President’s Club Ltd (the **company**) filed complaints in the Magistrates Court against each of Mr Lewis, Mr Kelly and Mr Wallis, directors of the company, alleging that the company had operated a managed investment scheme that was not registered as required, contrary to s 601ED of the *Corporations Act 2001* (Cth),¹ and that each of those directors had aided, abetted, counselled or procured the company to commit that offence, under s 11.2 of the *Criminal Code* (Cth).
- [4] In doing this, the applicant attempted to commence private prosecutions against the directors, relying upon s 13 of the *Crimes Act 1914* (Cth). The directors applied to strike out the complaint made against each of them, on the basis that the applicant had no standing to bring a private prosecution against them, because s 1315 of the *Corporations Act* evinces a contrary intention, preventing any person, other than those specified in s 1315, from prosecuting offences under the *Corporations Act*.
- [5] The Magistrate allowed the directors’ applications, and struck out the complaints. The Magistrate’s decision was upheld on appeal to the District Court: *Coeur de Lion Investments Pty Ltd v Lewis* [2019] QDC 90.
- [6] The applicant now seeks leave to appeal the District Court’s decision to this Court.²
- [7] The issue in the case is whether, in light of s 1315 of the *Corporations Act*, there remains an enforceable right of private prosecution for offences under the *Corporations Act*.
- [8] For the following reasons, in each matter I would give the applicant leave to appeal, but dismiss the appeal, as the decision of the District Court was correct as a matter of law.
- [9] Section 13 of the *Crimes Act* provides:

“13 Institution of proceedings in respect of offences

Unless the contrary intention appears in the Act or regulation creating the offence, any person may:

- (a) institute proceedings for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth; or
- (b) institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction.”³

¹ See s 601ED(5), which provides that “[a] person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered ... unless the scheme is so registered”. Failure to comply with this subsection is an offence, by operation of s 1311(1) of the *Corporations Act 2001*.

² Section 118(3) of the *District Court of Queensland Act 1967* (Qld) and *McDonald v Queensland Police Service* [2018] 2 Qd R 612.

³ Underlining added.

[10] The offence alleged in this case (contravention of s 601ED(5)) is an indictable offence.⁴ By operation of s 4J(1) of the *Crimes Act* 1914, such an offence may, unless the contrary intention appears, be heard and determined summarily, with the consent of the prosecutor and the defendant. Section 4J(2) provides that subsection (1) does not apply in relation to an indictable offence where, under a law of the Commonwealth other than the *Crimes Act*, that offence may be heard and determined by a court of summary jurisdiction. There does not appear to be any such provision in the *Corporations Act*, or any other Commonwealth law, with the result that unless the putative defendants consented, the Magistrates Court would not have jurisdiction to hear and determine the offence complained of summarily.⁵ Further submissions were requested from the parties, after the hearing, on the question whether the Magistrates Court would have jurisdiction to hear the complaints, even apart from the issue of law raised on this appeal; for if it would not, it would not be appropriate to consider the issue raised on this appeal.⁶ It is clear from those submissions that the respondents had not consented to the proceedings being dealt with summarily, nor are they to be taken, by their actions in applying to strike out the proceedings, to have so consented. But nor does the lack of consent, at this early stage, deprive the Magistrates Court of any jurisdiction. Up until an election is made by a defendant, the Magistrates Court's jurisdiction would extend to taking an examination of witnesses in relation to the indictable offence, for the purposes of determining whether to commit the defendant for trial (a committal proceeding). It is open to a defendant to consent to the matter being dealt with summarily, at any time before the hearing of the evidence commenced.⁷ It is therefore appropriate to proceed to determine the question raised on this appeal.

[11] Section 1315 of the *Corporations Act* provides:

“1315 Proceedings: how taken

- (1) Subject to this Act, in any proceedings for an offence against this Act, any information, charge, complaint or application may be laid or made by:
 - (a) ASIC; or
 - (b) a Commission delegate; or
 - (c) another person authorised in writing by the Minister to institute the proceedings.
- (2) A delegation for the purposes of paragraph (1)(b), or an authorisation for the purposes of paragraph (1)(c), may

⁴ As the maximum penalty at the time the complaint was issued (May 2018) was 200 penalty units or imprisonment for 5 years or both (see s 1311 and schedule 3 to the *Corporations Act*, as in force at 12 April 2018 (compilation no. 87) and s 4G of the *Crimes Act*). Cf [19] and footnotes 5 and 6 of the reasons for judgment below, which appear to refer to the version of the *Corporations Act* in force in May 2019, when the District Court's decision was made (which provided for a maximum penalty of 5 years imprisonment (see ss 1311A, 1311E and schedule 3 to the *Corporations Act* in force in May 2019 (compilation no. 94)) or a fine of 600 penalty units (see s 1311B(1), (2) and (3) of the same version of the *Corporations Act*). That is the same position under the Act in force now.

⁵ See, for example, *Morgan v District Court of New South Wales* (2017) 94 NSWLR 463 at [1], [8] and [23].

⁶ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266.

⁷ *Perry v Nash* (1980) 32 ALR 177 at 179; see also *Smart v Clarke* (2014) 283 FLR 456 at [31]-[43].

relate to all offences, or to specified offences, against this Act.

- (3) Nothing in this section affects the operation of the *Director of Public Prosecutions Act 1983*.”

[12] The question is whether a contrary intention appears in s 1315 of the *Corporations Act*, such that the right otherwise conferred by s 13 of the *Crimes Act* is abrogated, in so far as proceedings for an offence against the *Corporations Act* are concerned. The answer depends on the proper construction of s 1315 of the *Corporations Act*.

Relevant principles of statutory construction

[13] The task in construing a statute is to ascertain the intended meaning of the words used, a process which must be undertaken having regard to the context for the provision.⁸ In *R v A2* (2019) 93 ALJR 1106; [2019] HCA 35 Kiefel CJ and Keane J reiterated that:

“[32] The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete.⁹ This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.¹⁰

[33] Consideration of the context for the provision is undertaken at the first stage of the process of construction.¹¹ Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy.¹² ‘Mischief’ is an old expression. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The mischief may point most clearly to what it is that the statute seeks to achieve.

[34] This is not to suggest that a very general purpose of a statute will necessarily provide much context for a particular provision or that the words of the provision should be lost sight of in the process of construction....

⁸ *R v A2* (2019) 93 ALJR 1106; [2019] HCA 35 at [32]-[33] and [36] per Kiefel CJ and Keane J.

⁹ Referring to *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].

¹⁰ Referring, inter alia, to *Project Blue Sky* at [78].

¹¹ Referring to *CIC Insurance* at 408 and *Project Blue Sky* at [69].

¹² Referring to *CIC Insurance* at 408.

- [35] [Their Honours referred to cases, including *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47], emphasising the importance of the text of the provision]...
- [36] These cases serve to remind that the text of a statute is important, for it contains the words being construed, and that a very general purpose may not detract from the meaning of those words. As always with statutory construction, much depends upon the terms of the particular statute and what may be drawn from the context for and purpose of the provision.
- [37] None of these cases suggest a return to a literal approach to construction. They do not suggest that the text should not be read in context and by reference to the mischief to which the provision is directed. They do not deny the possibility, adverted to in *CIC Insurance Ltd v Bankstown Football Club Ltd*, [at 408], that in a particular case, ‘if the apparently plain words of a provision are read in light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance’. When a literal meaning of words in a statute does not conform to the evident purpose or policy of the particular provision, it is entirely appropriate for the courts to depart from the literal meaning. A construction which promotes the purpose of a statute is to be preferred.”¹³
- [14] The relevance of the purpose of a statutory provision to the task of statutory construction is also confirmed by s 15AA of the *Acts Interpretation Act* 1901 (Cth).¹⁴
- [15] Appropriate reference to extrinsic materials, and the legislative history of a provision, form part of the relevant context and may assist to elucidate the purpose of the Act (or provision).¹⁵ But as French CJ and Hayne J said in *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378 at [25]:
- “Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect,

¹³ Underlining added; references omitted (other than where indicated). See also at [124] per Bell and Gageler JJ, at [148] per Nettle and Gordon JJ (expressing their agreement generally with the reasons of Kiefel CJ and Keane J) and at [163] per Edelman J.

¹⁴ The relevant version, for the purposes of construing the *Corporations Act* 2001 (Cth) is that which was in force on 1 January 2005. See s 5C of the *Corporations Act* 2001; and s 2 of the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act* 2003 (Act No. 140 of 2003) (providing that s 4 commences on 1 January 2005).

¹⁵ See s 15AB of the *Acts Interpretation Act* 1901 (Cth). See also *CIC Insurance Ltd v Bankstown Football Club Ltd*, *ibid*, at 408; *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at [28]; *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378 at [25] per French CJ and Hayne J, at [70] per Crennan and Bell JJ and at [88]-[89] per Kiefel J (as her Honour then was); see also *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at [22]; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [103] and [107] per Keane, Nettle and Gordon JJ and *Australian Securities and Investments Commission v King* [2020] HCA 4 at [29] per Kiefel CJ, Gageler and Keane JJ and [71] per Nettle and Gordon JJ.

as in others, to recognise that to speak of legislative ‘intention’ is to use a metaphor. Use of that metaphor must not mislead. ‘[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have’¹⁶ (emphasis added).

....

The search for legal meaning involves application of the processes of statutory construction. The identification of statutory purpose and legislative intention is the product of those processes, not the discovery of some subjective purpose or intention.”¹⁷

What is required for the contrary intention to appear?

- [16] Section 13 of the *Crimes Act* applies “[u]nless the contrary intention appears in the Act ... creating the offence”. A preliminary matter, arising from the competing arguments of the parties, is what is required for “the contrary intention” to appear in the Act?
- [17] The applicant emphasised the importance of the common law right of any individual to bring a private prosecution for an offence,¹⁸ and the consequent requirement for very clear and unambiguous language in order for a statutory intention to abrogate or restrict that right to be found. In this way, the applicant essentially invokes the principle of legality, as a canon of construction applying to the interpretation of s 1315 of the *Corporations Act*.¹⁹
- [18] The respondents submit that the determination which s 13 of the *Crimes Act* requires is not fettered by cases which consider or apply the common law, including the principle of legality, because s 13 has been held to operate to the exclusion of the common law. Accordingly, the question whether the contrary intention appears is to be answered by application of the well accepted principles of statutory construction: construing the words used in s 1315, having regard to the purpose and context of the provision, to ascertain whether a contrary intention appears.
- [19] The respondents’ submission should be accepted.
- [20] In *Taylor v Attorney-General (Cth)* (2019) 93 ALJR 1044 the majority (Kiefel CJ, Bell, Gageler and Keane JJ) (at [3]) confirmed that s 13 of the *Crimes Act* “operates to the exclusion of the common law in relation to prosecutions for Commonwealth offences”. They did so by reference to *Brebner v Bruce* (1950) 82 CLR 161 at 169-170 (McTiernan J) and 174-5 (Fullagar J).²⁰

¹⁶ Referring to *Project Blue Sky* at [78].

¹⁷ Some references omitted.

¹⁸ Referring, inter alia, to *Gouriet v Union Post Office Workers* [1978] AC 435 at 477 and *Sankey v Whitlam* (1978) 142 CLR 1 at 79.

¹⁹ See, for example, *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 523; *Bropho v State of Western Australia* (1990) 171 CLR 1 at 18; *Coco v The Queen* (1994) 179 CLR 427 at 437-438; and *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [86]-[87] and [158]. See also See, for example, *R v OC* (2015) 90 NSWLR 134 at [99]-[103] (and the authorities there referred to) per Bathurst CJ, Hulme and Bellew JJ agreeing.

²⁰ See also at [52]-[53] per Nettle and Gordon J, who said that section 13 “replaced the long-established common law right”; and at [122] per Edelman J, referring to the alteration of the previous common law position, “by the creation of a new regime for prosecution of Commonwealth offences”, including s 13.

- [21] As to the qualification in s 13 of the *Crimes Act* (“unless the contrary intention appears”), in *Brebner v Bruce* the approach adopted by Latham CJ (with whom Webb and Kitto JJ agreed) was to consider whether the necessary contrary intention appeared, either expressly or impliedly (see at 167); McTiernan J said that the qualification would apply if the contrary intention were expressly declared and “if an intention to depart from the general rule introduced by s 13 could be inferred from [the Act or regulation creating the offence]” (at 170); and Fullagar J held that a contrary intention may appear “from express words or necessary implication” (at 174 and 175).
- [22] I do not discern any substantive difference between the approaches as articulated, nor as applied, in *Brebner*. It has long been held that a contrary intention may appear in an Act either expressly or by necessary implication.²¹ In times gone by, the phrase “necessary implication”, in some contexts at least, was construed in a stringent and inflexible way.²² But in *Bropho v Western Australia* (1990) 171 CLR 1 it was acknowledged that the phrase had also often been used in the “flexible and non-technical sense” of requiring only that the requisite intention [in that case, to bind the Crown] can be discerned when the words of the statute are construed in the general context of the subject matter, disclosed policy and mischief to be redressed.²³ In *Bropho* the Court held that a stringent and rigid test was no longer acceptable, and that the question whether a statute evinces an intention to bind the Crown is to be answered by application of the contemporary (noting that was a decision made 30 years ago) approach to statutory construction, namely, to construe the words of the provision, having regard to its purpose and policy, in the context of permissible extrinsic aids.²⁴
- [23] There is nothing to be gleaned, from either *Brebner v Bruce* or *Taylor v Attorney-General (Cth)*, which suggests that in order for a contrary intention to appear, for the purposes of s 13 of the *Crimes Act*, a stringent or rigid test is to be applied, nor that the principle of legality applies. A contrary intention may appear in the Act (or regulation) which creates the offence either by express words or implication, to be determined by construction of the words of the relevant provision, having regard to purpose and context.²⁵

Textual considerations

- [24] On its face, the text of s 1315 appears to make exhaustive provision for how proceedings for an offence against the *Corporations Act* may be taken. It applies “in any proceedings for an offence against this Act...”, and provides that “any information, charge, complaint or application may be laid or made by”:
- (a) ASIC; or
 - (b) a Commission delegate; or

²¹ See, for example, *Sweeney v Fitzhardinge* (1906) 4 CLR 716 at 735 per Isaacs J.

²² See, for example, the discussion in *Bropho v Western Australia* (1990) 171 CLR 1 at 16-18, in relation to the rule of construction that a statute does not bind the Crown unless an intention to do so appears either expressly or by necessary implication from the words of the statute.

²³ *Bropho* at 16-17, referring to *Roberts v Ahern* (1904) 1 CLR 406 at 418; and *Minister for Works (WA) v Gulson* (1944) 69 CLR 338 at 358 and 367.

²⁴ *Bropho* at 20-23.

²⁵ See also *Taylor v Attorney-General (Cth)* at [10]-[11] per Kiefel CJ, Bell, Gageler and Keane JJ.

- (c) another person authorised in writing by the Minister to institute proceedings.
- [25] The reference to “any proceedings”, and “any information [*etc*]”, together with an exhaustive list of persons or entities which/who can bring such proceedings, culminating in the catch-all in (c), tends to suggest that the purpose of the section was to define how any [in the sense of all] proceedings for an offence against the *Corporations Act* may [in the sense of capacity²⁶] be taken.
- [26] The applicant submits the word “may” in the chapeau of sub-s 1315(1) indicates the section is “facultative in its intended operation”, relying upon *Attorney-General (Cth) v Oates* (1999) 198 CLR 162, which held that s 1316 (which provides that, “[d]espite anything in any other law, proceedings for an offence against this Act may be instituted within the period of 5 years ... or, with the Minister’s consent, at any later time.”) was facultative, not restrictive. In *Oates* the point was that s 1316 *facilitated* proceedings being commenced despite something in another law providing for a shorter time limitation (for example, in the case of offences dealt with summarily); but did not *restrict* proceedings to being commenced within five years, where there was otherwise no such time limitation (for example, in the case of offences prosecuted on indictment). The analysis in *Oates* does not assist in resolving the construction of s 1315. Section 1316 is concerned with an entirely different “mischief”, namely, to prevent persons escaping prosecution due to the shorter time limit applicable to summary prosecutions.²⁷
- [27] In the context of s 1315, the word “may” conveys two things: firstly, as already noted, in the sense of identifying the person or body with capacity to bring the proceedings; and, secondly, that the initiation of proceedings may be done at the discretion of the person or body concerned.²⁸
- [28] The applicant’s submission that the use of the word “may” supports a construction that s 1315 simply facilitates the persons or bodies referred to in s 1315(1) bringing proceedings, leaving the right of any other person to do so unaffected, is rejected, as a matter of textual analysis, and also having regard to broader contextual considerations, including the legislative history of s 1315, discussed below.
- [29] Since the 2005 version of the *Acts Interpretation Act* applies in the construction of the *Corporations Act*,²⁹ the heading to s 1315 is not part of the Act (s 13(3)). But the heading is extrinsic material that may be taken into account (s 15AB(1) and (2)(a)), albeit as a minor aid only.³⁰ As discussed further below, the heading “Proceedings: how taken” has consistently appeared in the predecessors to s 1315,³¹ and also appeared in the Bill which became the *Corporations Act* 2001. Accordingly, it has consistently been part of the material before the legislature. The heading is consistent with the apparent ordinary meaning of the words used in s 1315 – as defining how proceedings for offences may be taken.

²⁶ See, for example, *Taylor v Attorney-General (Cth)* at [35] and [36].

²⁷ See *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at [27].

²⁸ See s 33(2A) of the *Acts Interpretation Act* 1901 (Cth) (as at 1 January 2005).

²⁹ See footnote 14 above.

³⁰ See Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed), at [4.72], in particular the reference to *R v Schildkamp* [1971] AC 1 and *Ombudsman v Moroney* [1983] 1 NSWLR 317.

³¹ Including s 381 of the *Companies Act* 1961 (Qld), albeit at that time s 381 combined what now appears in ss 1315 and 1316 [time for instituting criminal proceedings], with the marginal note: “proceedings how and when taken”.

- [30] More broadly, section 1315 is found within division 2 of part 9.4 (headed “Offences”) of the *Corporations Act*. Division 1A (“Application of the Criminal Code”) contains only s 1308A, which provides that “[s]ubject to this Act, Chapter 2 of the *Criminal Code* applies to all offences against this Act”. Division 1 (“Specific offences”) contains provisions creating various offences, arising from the making of false or misleading statements about share capital (s 1308B), false or misleading documents more generally (s 1308); making available or giving false information (s 1309), and obstructing or hindering ASIC (s 1310).
- [31] Division 2 (headed “Offences Generally”³²) includes s 1311 which provides, among other things, that a person who does not do an act or thing that the person is required to do under a provision of the Act is guilty of an offence (s 1311(1)(b)); provisions dealing with penalty (ss 1311A to 1311F and schedule 3); provision for where offences are committed partly in and partly out of the jurisdiction (s 1313A); continuing offences (s 1314); the subject provision about how proceedings for an offence under the Act may be taken (**s 1315**); the time limit for institution of proceedings for an offence (s 1316); a provision dealing with the non-availability of the privilege against self-incrimination to bodies corporate in criminal proceedings under the Act (s 1316A); and a provision enabling ASIC to require certain persons to assist in prosecutions (s 1317).
- [32] Construing s 1315 in the context of part 9.4, in particular division 2, supports the interpretation of the section as intended to define, in an exhaustive way, how proceedings for offences under the *Corporations Act* may be taken. The provisions in relation to offences generally are grouped together in division 2. If it was the intention of the legislature that other persons, than those specified in s 1315(1), would be entitled (or permitted) to bring proceedings for an offence against the Act, objectively, it would be expected to be addressed in this part of the Act.
- [33] The applicant contrasts the language used in s 1317J(4)³³ and s 534³⁴ of the *Corporations Act*, as well as s 12HC³⁵ of the *Australian Securities and Investments Commission Act 2001*, as examples of provisions in which the intention to exclude or limit rights of action is expressed clearly and unequivocally. It may be fair to say that, if s 1315 was worded differently, the argument in this proceeding would never have been sustainable at all. But I am not persuaded that the use of different language in other provisions overrides what appears to me to be the clear construction of s 1315.
- [34] The applicant also submits that s 1315(3), which preserves the operation of the *Director of Public Prosecutions Act 1983* (Cth), is a further textual indication that section 1315 is not intended to be exhaustive. The threads of this argument are that the *Director of Public Prosecutions Act* preserves the right of any person to

³² The heading to a Division is part of the Act: see s 13(2) of the *Acts Interpretation Act 1901* (as at 1 January 2005).

³³ Section 1317J(4) provides that “No person may apply for a declaration of contravention, a pecuniary penalty order or a compensation order unless permitted by this section.”

³⁴ Section 534 provides that “Where (a) a report has been lodged under section 533; and (b) it appears to ASIC that the matter is not one in respect of which a prosecution ought to be begun; it must inform the liquidator accordingly, and the liquidator may begin a prosecution for any offence referred to in the report”.

³⁵ Section 12HC(3) provides that “Proceedings before the Court under this section, other than proceedings instituted by: (a) ASIC; or (b) a person authorised in writing by ASIC; must not be instituted except with the consent in writing of the Minister or of a person authorised by the Minister in writing to give such consents”.

commence a prosecution,³⁶ therefore, since the operation of that Act is preserved, the right of any person to commence a prosecution must also be preserved by s 1315. There is no substance to this argument. As the discussion of the legislative history of s 1315 below makes clear, the inclusion of s 1315(3) was plainly, and only, to preserve the statutory functions and powers of the Director of Public Prosecutions in relation to Commonwealth offences; not, inferentially or otherwise, to preserve the rights of other persons generally to bring proceedings, of the kind contemplated by s 13 of the *Crimes Act*.

Other relevant provisions

[35] Further provisions relating to the criminal jurisdiction of courts to deal with criminal matters arising under the *Corporations* legislation are contained in part 9.6A, division 2 (ss 1338A to 1338C). Section 1338A(1) provides that “[t]his Division provides in relation to the jurisdiction of courts in respect of criminal matters arising under the Corporations legislation and so provides to the exclusion of sections 68, 70 and 70A of the *Judiciary Act 1903*.”³⁷

[36] Section 69(1) of the *Judiciary Act* provides that:

“Indictable offences against the laws of the Commonwealth shall be prosecuted by indictment in the name of the Attorney-General of the Commonwealth or of such other person as the Governor-General appoints in that behalf.”

[37] Section 69(2A) provides:

“Nothing in subsection (1):

- (a) affects the power of the Director of Public Prosecutions to prosecute by indictment in his or her official name; or
- (b) affects, or shall be taken to have affected, the power of a Special Prosecutor to prosecute by indictment in his or her own name;

indictable offences against the laws of the Commonwealth.”

[38] As explained by the plurality in *Taylor v Attorney-General (Cth)* the general procedure for the prosecution of offences under Commonwealth law for which provision is made in ss 68 and 69 of the *Judiciary Act* forms the background to s 13 of the *Crimes Act*.

³⁶ Although the applicant refers broadly to ss 9 and 10 of the *Director of Public Prosecutions Act 1983*, the only relevant provision seems to be s 10(2), which provides that nothing in this Act, other than s 9(5) (which permits the DPP to take over such proceedings) affects the right of a person to institute proceedings for the commitment of persons for trial in respect of indictable offences against the laws of the Commonwealth, or the summary conviction of persons in respect of such offences (a clear reference to s 13 of the *Crimes Act*).

³⁷ Section 68 operates to apply State and Territory criminal procedure to persons charged with Commonwealth offences; s 70 deals with offences committed in several States and s 70A deals with offences not committed in any State. The general subject matter of these provisions is dealt with in ss 1338B and 1338C of the *Corporations Act 2001*.

- [39] In *Taylor* at [18] the plurality addressed the distinction between the procedure typically applicable to offences heard and determined summarily and to offences tried on indictment, saying:

“‘There is’, as Dixon J said in *Munday v Gill* [(1930) 44 CLR 38 at 86] in words which remain as true today as they did at the time of enactment of the *Judiciary Act*, ‘a great distinction in history, in substance and in present practice between summary proceedings and trial upon indictment’. Trials on indictment are in traditional parlance ‘pleas of the Crown’: proceedings in form and in substance between an individual and the State. A prosecution for an offence punishable summarily is in contrast ‘a proceeding between subject and subject’.”

- [40] Their Honours go on (at [19]) to address the distinction between two distinct stages of the procedure typically applicable to offences tried on indictment: examination and commitment for trial on indictment, and trial and conviction on indictment, saying:

“In *R v Murphy* [(1985) 158 CLR 596] it was held that these two distinct stages form part of the one curial process that results in the resolution of the ‘matter’ in respect of which federal jurisdiction is conferred by s 68(2). In the language of that case ‘[e]ven though they are properly to be regarded as non-judicial in character, committal proceedings themselves traditionally constitute the first step in the curial process, possibly culminating in the presentation of the indictment and trial by jury’ such that ‘[t]hey have the closest, if not an essential, connexion with an actual exercise of judicial power’.

- [41] Section 69(1) speaks to the second of these two distinct stages of the procedure (*Taylor* at [20]), vesting the right and duty to prosecute indictments exclusively in the Commonwealth Attorney-General or in appointed officers, subject to the carve out from its operation by s 69(2A) (*Taylor* at [22]).

- [42] As further explained by the plurality in *Taylor* at [23]:

“The exclusive nature of the right and duty vested in the Attorney-General or in an appointed officer by s 69(1) of the *Judiciary Act* is also recognised in s 13 of the *Crimes Act*. Where it is applicable, s 13(a) goes no further than to allow a person other than the Attorney-General or an appointed officer to institute proceedings for the commitment for trial of a person in respect of an indictable offence against a law of the Commonwealth. Where a person is committed for trial, filing or refusing to file any subsequent indictment is outside the scope of the capacity to prosecute conferred by s 13(a) of the *Crimes Act* and solely within the province of the Attorney-General or appointed officer under s 69(1) of the *Judiciary Act* subject only to the carve-out in s 69(2A) of the *Judiciary Act*.
...”

- [43] Section 69(1) does not speak to the alternative procedure provided for by s 13(b) of the *Crimes Act*, of instituting proceedings for the summary conviction of a person in

respect of an offence against a law of the Commonwealth punishable on summary conviction.

- [44] Section 69(1) of the *Judiciary Act* has been in the form set out above since enacted in 1903. Subsection 69(2A) was inserted by amendment in 1983 (coincident with the enactment of the *Director of Public Prosecutions Act 1983* (Cth)). It can be seen that, at the time of enactment of s 1315 (and indeed the earlier version of it, in 1961), the legislation then existing allowed any person to institute summary proceedings for an offence against a law of the Commonwealth (s 13 of the *Crimes Act*) and for prosecutions on indictment, required that the indictment be in the name of the Attorney-General, or some other person appointed by the Governor-General (s 69 of the *Judiciary Act*). The enactment of s 1315 (and its predecessors, s 381 of the *Companies Act 1961* (Qld) and later s 36 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980* (Cth)) altered that pre-existing law in two respects: first, as in the case of the provision considered in *Taylor*, s 1315 makes no distinction between summary proceedings and proceedings on indictment, and refers to the totality of the prosecutorial process, whatever form that may take in a particular case;³⁸ and, second, by defining the person(s) or entity(ies) capable of initiating any proceedings for an offence against the *Corporations Act* (whether summarily or on indictment).³⁹
- [45] In that context, vesting the responsibility for the bringing of proceedings for offences against the *Corporations Act* in ASIC, the statutory body charged with the administration and enforcement of the *Corporations Act*, to the exclusion of any entitlement of another person to bring such proceedings, makes obvious sense.⁴⁰
- [46] The construction supported by the textual considerations discussed above is confirmed when one has regard to the legislative history of s 1315.

Legislative history and purpose

- [47] The original companies legislation in Australia was enacted based on the *Companies Act 1862* (England), with the first Queensland statute being the *Companies Act* of 1863. However, for present purposes, it suffices to begin with the 1931 Act.
- [48] Under the *Companies Act 1931* (Qld),⁴¹ s 146 provided that if it should appear to a Crown Law Officer, from a report into the investigation of the affairs of a company (under s 145) that an offence has been committed, that a prosecution ought to be instituted and, further, “that it is desirable in the public interest that the proceedings in the prosecution should be conducted by him or by the Crown Prosecutor”, the Crown Law Officer “shall institute proceedings accordingly”. Power to institute a prosecution was also conferred on a liquidator (under s 201). In addition, under s 286(1), if it appeared to the court in the course of a winding up by, or subject to the supervision of, the court that any past or present director, manager or other officer or any member of the company is guilty of any offence in relation to the company, the court may, either on the application of any person interested in the

³⁸ Cf *Taylor v Attorney-General (Cth)* (2019) 93 ALJR 1044 at [38]-[39].

³⁹ See, by analogy, *R v Judd* (1919) 26 CLR 168, in relation to s 6(3A) of the *War Precautions Act*, discussed in *Taylor v Attorney-General (Cth)* at [28]-[32].

⁴⁰ See the detailed analysis of the legislative scheme at [53]-[75] of the decision below.

⁴¹ http://www.austlii.edu.au/au/legis/qld/hist_act/cao193122gyn53198.pdf.

winding up or of its own motion, direct the liquidator to prosecute the offender, or refer the matter to the Crown Law Officer, who may decide to institute proceedings (s 286(6)).

[49] Section 370 of the *Companies Act* 1931 provided that:

“All offences under this Act made punishable by any penalty may be prosecuted in a summary way under and subject to ‘*The Justices Acts, 1886 to 1929*’.⁴²

[50] Section 375 of the *Companies Act* 1931 expressly saved the right of private prosecution, providing as follows:

“Nothing in this Act relating to the institution of criminal proceedings by the Crown Law Officer shall be taken to preclude any person from instituting or carrying on any such proceedings.”⁴³

[51] There was no provision in the 1931 Act about how or when proceedings for an offence may be taken, but one was added, by s 56 of the *Companies Act Amendment Act* of 1942, under which a new subsection (2) was added to s 370, providing that “[p]roceedings for offences under this Act may be instituted at any time within six months after the commission of the offence or within four months after the commission of the offence came to the knowledge of the complainant, whichever is the later period”.⁴⁴

[52] Between 1961 and 1962 each state and territory enacted uniform companies legislation, in an effort to remove difficulties caused by differing legislation between the states. In Queensland, the *Companies Act* 1961 (Qld) was enacted as part of this uniform legislation.

[53] Similarly to the 1931 Act, the *Companies Act* 1961 provided, in s 169, for the Governor in Council to refer a matter to the Crown Law Officer, where it appears from a report of an investigation into the affairs of a company that any person has been guilty of any offence in relation to the company, and enabling the Crown Law to cause a prosecution to be instituted; and, in s 306, for the Court, to whom it appears, in the course of a winding up, an offence has been committed, of its own motion or on the application of a person interested in the winding up of a company, to direct the liquidator to prosecute the offender, or refer the matter to the Crown Law Officer.

[54] The general provision dealing with proceedings for an offence, s 381 of the *Companies Act* 1961 provided as follows:

“381 (1) Except where provision is otherwise made in this Act proceedings for any offence against this Act may be taken by the Registrar or, with the written consent of the Crown Law Officer, by any person.

(2) Notwithstanding anything in any Act proceedings for any offence against this Act may be brought within the period of three years after the commission of the alleged

⁴² http://www.austlii.edu.au/au/legis/qld/hist_act/cao193122gvn53198.pdf.

⁴³ It appears a provision to this effect first appeared as s 95 in the *Companies Act* 1928 (UK).

⁴⁴ http://www.austlii.edu.au/au/legis/qld/hist_act/caaao19426gvn23307.pdf.

offence or, with the consent of the Crown Law Officer, at any later time.

- (3) Unless otherwise provided, all offences against this Act may be prosecuted in a summary way under ‘*The Justices Acts, 1886 to 1960*’.
- (4) Penalties under this Act when recovered shall, notwithstanding anything in any other Act, be paid into the Consolidated Revenue Fund.”⁴⁵

[55] This represented a marked difference from the 1931 Act, because of the inclusion of sub-s (1) and the omission of any equivalent of s 375 (protecting the right of private prosecution).

[56] The parties did not identify any extrinsic material which shed any light on the reasons for this change.

[57] However, the combination of providing in sub-s 381(1) for proceedings for an offence to be taken by the Registrar or, with the written consent of the Crown Law Officer, any person; and omitting the express provision saving a private right of prosecution, strongly supports the conclusion that it was the objective intention of the legislature to exhaustively define, in s 381, the person(s) with capacity to bring such proceedings. That is, to provide a clear contrary intention to the operation of the general provision in s 13 of the *Crimes Act*.

[58] The scheme of national companies legislation which is now in force began with the *National Companies and Securities Commission Act 1979* (Cth), the *Companies (Acquisition of Shares) Act 1980* (Cth) and the *Companies Act 1981* (Cth).⁴⁶

[59] There was no equivalent of s 381 of the 1961 Queensland Act in the 1981 Commonwealth Act. There was, however, separate Commonwealth legislation enacted, which contained an equivalent provision: the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980* (Cth).⁴⁷ Section 36 of that Act provided:

“Proceedings how and when taken

36. (1) Except where provision is otherwise made in the relevant Act⁴⁸ concerned, proceedings for an offence against a provision of a relevant Act may be instituted only –

- (a) by the Commission;
- (b) by a person to whom the Commission has delegated the power to institute the proceedings;

⁴⁵ Underlining added.

⁴⁶ Applied in Queensland by operation of the *Companies (Application of Laws) Act 1981* (Qld), and referred to as the *Companies (Queensland) Code* (see s 10 of the 1981 Queensland Act).

⁴⁷ Which also applied in Queensland, by operation of the *Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act 1981* (Qld), s 8.

⁴⁸ See s 3 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980* (Cth) for the meaning of “relevant Act”.

- (c) by a person authorized by a person referred to in paragraph (b) to institute the proceedings; or
- (d) by another person authorized in writing by the Ministerial Council to institute the proceedings.

(2) A delegation for the purposes of paragraph (1)(b) or an authorization for the purposes of paragraph (1)(c) or (d) may relate to all offences against relevant Acts, to all offences against a particular relevant Act or particular relevant Acts, to a particular offence or particular offences against a relevant Act, to any offences against, or constituted by any contravention of, or failure to comply with, a particular provision or particular provisions of a relevant Act or to a class of offences against a relevant Act.”

[60] Section 36(1) was amended, in 1981,⁴⁹ so that the opening words read “Except where provision is otherwise made in the relevant Act concerned, in any proceedings for an offence against a provision of a relevant Act, any information, charge, complaint or application may be laid or made only” by a person mentioned in (a), (b), (c) or (d).

[61] As amended in 1981, s 35 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act* 1980 (Cth) provided:

- (a) by s 35(1) that an offence against a relevant Act that is not punishable by imprisonment, or is punishable by imprisonment for a period not exceeding 6 months, is, unless the contrary intention appears, punishable summarily; and
- (b) by s 35(2) that an offence against a relevant Act that is punishable by imprisonment for a period exceeding 6 months is, subject to sub-section (3), punishable on indictment. Sub-section 35(3) provided:

“(3) Where –

- (a) proceedings for an offence against a relevant Act that is punishable by imprisonment for a period exceeding 6 months are brought in a court of summary jurisdiction; and
- (b) the prosecutor requests the court to hear and determine the proceedings,

the offence is punishable summarily and the court shall hear and determine the proceedings.”

[62] The amendments to the *Crimes Act* 1914, by which ss 4G (indictable offences), 4H (summary offences) and s 4J (indictable offences which may be dealt with summarily) were enacted, were made in 1987.⁵⁰

[63] In 1988 the Bill which became the *Corporations Act* 1989, was presented in Parliament. Clause 1315 of the *Corporations Bill* 1988 provided as follows:

⁴⁹ See s 5 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) Amendment Act* 1981 (Cth).

⁵⁰ *Crimes Legislation Amendment Act* (1987) (Cth) Act No. 120 of 1987.

“Proceedings: how taken

1315. (1) Subject to this Act, in any proceedings for an offence against this Act, any information, charge, complaint or application may be laid or made only by:

- (a) the Commission;
- (b) a Commission delegate; or
- (c) another person authorised in writing by the Minister to institute the proceedings.

(2) A delegation for the purposes of paragraph (1)(b), or an authorisation for the purposes of paragraph (1)(c), may relate to all offences, or to specified offences, against this Act.”⁵¹

[64] The explanatory memorandum to the 1988 Bill said, in relation to clause 1315 (at [3929]):

“This provision is based on s 36 of the C&S Interpretation Act and will provide that unless the Bill provides otherwise, any information, charge, complaint or application in relation to proceedings for an offence against the Bill will only be able to be laid or made by the ASC or a delegate of the ASC, or any other person authorised by the Minister to institute proceedings.”⁵²

[65] Amendments to clause 1315 were proposed. A supplementary explanatory memorandum said the following, about the amendments proposed to clause 1315:

“282. Clause 1315 requires the ASC, an ASC delegate or a person authorised by the Minister to have the sole duty to cause proceedings to be begun for offences against the Bill.

283. The amendments to cl. 1315 seek to preserve the statutory functions and powers of the Director of Public Prosecutions and, in particular, the DPP’s general functions which are to institute and carry on proceedings for commitment for trial, and to institute and carry on proceedings for summary conviction, in relation to Commonwealth offences.

284. The amendments will empower the ASC, an ASC delegate or a person authorised by the Minister to commence and carry on prosecutions, but without prejudice to the DPP’s statutory functions and powers. In particular, the DPP’s powers to take over, to carry on or to terminate a proceeding for commitment for trial or summary conviction and to give directions or furnish guidelines with respect to the prosecution of offences will not be prejudiced.”⁵³

⁵¹ Underlining added.

⁵² Underlining added.

⁵³ Underlining added.

[66] Although the supplementary explanatory memorandum is not dated, the parties are agreed that the Court can act on the basis that it was in existence, and before Parliament,⁵⁴ prior to the following statement recorded in the Official Hansard on 28 September 1988:

“Clause 1315 (Proceedings: how taken).

Mr LIONEL BOWEN (Kingsford-Smith – Attorney-General)
(11.49) – by leave – I move:

(230) Clause 1315, page 904, line 40, omit ‘only’.

(231) Clause 1315, page 905, at the end of the clause add the following subclause:

‘(3) Nothing in this section affects the operation of the *Director or Public Prosecutions Act 1983*.’

Under clause 1315 an Australian Securities Commission (ASC) delegate or a person authorised by the Minister has the sole duty to cause proceedings to be commenced for offences against the Bill. The proposed amendments will preserve the statutory functions and powers of the Director of Public Prosecutions in relation to offences against Commonwealth laws. In particular, the amendments clarify that the powers of the Director of Public Prosecutions to take over, carry on or terminate a proceeding for commitment for trial or summary conviction and to give directions with respect to the prosecution of offences will not be prejudiced.

Amendments agreed to.

Clause, as amended, agreed to.”⁵⁵

[67] Accordingly, as enacted in the *Corporations Act 1989*, s 1315 provided:

“Proceedings: how taken

1315. (1) Subject to this Act, in any proceedings for an offence against this Act, any information, charge, complaint or application may be laid or made by:

- (a) the Commission;
- (b) a Commission delegate; or
- (c) another person authorised in writing by the Minister to institute the proceedings.

(2) A delegation for the purposes of paragraph (1)(b), or an authorisation for the purposes of paragraph (1)(c), may relate to all offences, or to specified offences, against this Act.

(3) Nothing in this section affects the operation of the *Director of Public Prosecutions Act 1983*.”

[68] There was no equivalent provision to s 35 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980*, in the *Corporations Act*

⁵⁴ By reference to what appears at p 1077 of the Official Hansard for 28 September 1988.

⁵⁵ At p 1146 of the Official Hansard for 28 September 1988. Underlining added.

1989, dealing with whether or when an offence could be dealt with on indictment or summarily.

- [69] Section 1315 was re-enacted, in almost identical terms (save for the reference to “ASIC” rather than “the Commission” in s 1315(1)(a)) when the *Corporations Act* 2001 (Cth) was enacted, and remains in that form today.
- [70] Having regard to the legislative history set out above it is clear that the purpose of s 1315, and its predecessors, was to confine the persons having capacity to cause proceedings for offences against the *Corporations Act* (and its earlier equivalents) to be commenced. That was patently the intention of the legislature when s 36 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act* 1980 was enacted, and remained the case when clause 1315 of the 1988 Bill was drafted. The only purpose of the amendments made to clause 1315 of the 1988 Bill – to remove the word “only” from clause 1315(1) and to add sub-clause 1315(3) – was to preserve the statutory functions and powers of the Director of Public Prosecutions. It nevertheless remained Parliament’s intention that the ASC (or its delegate or a person authorised by the Minister) have the sole duty to cause proceedings to be commenced for offences against what would become the Act (without prejudice to the powers of the Director of Public Prosecutions). It is clear that the omission of the word “only” from clause 1315(1) was in aid of the amendment to preserve the functions and powers of the Director of Public Prosecutions, and not for any other purpose.

Conclusion and orders

- [71] In my view, on the proper construction of the words used in s 1315, having regard to the context for and purpose of the provision, s 1315 clearly exhibits a contrary intention for the purpose of s 13 of the *Crimes Act* so as to preclude the private prosecution of an offence against the *Corporations Act*.
- [72] The conclusion reached by the learned District Court judge was correct.
- [73] In each matter, I would give the applicant leave to appeal, but dismiss the appeal, with costs.