The powers of the Minister to issue protection declarations and stop orders, and the powers of inspectors to issue stop orders, apply whether or not the activities concerned are being done in conformity with a cultural heritage permit, an approved cultural heritage assessment, or a registered ILUA. Hence, obtaining an approved cultural heritage assessment or a cultural heritage permit, while it may give protection from criminal liability for harming Aboriginal cultural heritage, gives a mining or infrastructure company no guarantee of being able to carry out its project activities without disruption.

The establishment of a Victorian Aboriginal Heritage Register, recording all known "Aboriginal places" in Victoria, all known private collections of Aboriginal objects in Victoria, all approved cultural heritage assessments, cultural heritage permits, and "cultural heritage agreements". However, this register will be open for inspection only by limited classes of persons such as registered Aboriginal parties, public servants administering the Act, cultural heritage advisers for cultural heritage assessments, land owners (it is unclear whether this will include Crown lessees or holders of mining or exploration tenements), or "persons with appropriate heritage qualifications" appointed by a proposed developer. Moreover, those who search the register and find nothing there are not necessarily protected from prosecution under section 23 if they proceed and ultimately harm Aboriginal cultural heritage, although in appropriate circumstances having done so may afford a defence to a charge of having "knowingly or recklessly" harmed Aboriginal cultural heritage.

The Bill contains no "cultural heritage duty of care" provisions mirroring those in the *Aboriginal Cultural Heritage Act* 2003 (Qld), requiring developers to take all reasonable and practical measures to ensure that their activities do not harm Aboriginal cultural heritage. Under the Queensland Act, discharge of that duty affords a 'catch-all defence', but a breach of that duty is itself an offence. Suggestions to Aboriginal Affairs Victoria to include such provisions have not been adopted.

EQUITY AND ASSIGNMENT OF INTERESTS IN CONTRAVENTION OF PRE-EMPTIVE RIGHTS[*]

Rathner v Lindholm & Ors [2005] VSC 399 (Whelan J)

Pre-emptive rights – purported assignment of shares in breach of pre-emptive rights provisions – rights of the assignee of such shares.

Background

The case concerned a purported transfer of shares in breach of pre-emptive rights provisions of a company's constitution. The background to the case is complex and the questions considered by the court form part of a "labyrinth of claims and interests" relating to the arrangements between the various companies concerned. Only those facts which are essential to understand the context of the decision as it relates to the issue of effectiveness of a purported transfer in contravention of pre-emptive rights are summarised below.

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[*] Andrea Blake, Senior Associate and Bronwyn Thomas, Articled Clerk, Blake Dawson Waldron, Melbourne.

Advanced Communications Technologies (Australia) Pty Ltd ("ACTP") owned 57.5% of the issued share capital of Australian Enterprises Pty Ltd ("AEPL") ("Shares"). AEPL's constitution provided that a member was not entitled to transfer shares unless rights of pre-emption in favour of other members were first exhausted.

ACTA granted Global Communications Technologies Pty Ltd ("Global") a debenture charge over all its assets, including its shares in AEPL. When ACTA was placed under administration, Global appointed Mr Rathner ("Plaintiff") as the administrator of ACTA.

Pursuant to a Deed of Settlement dated 17 August 2004 ("Deed"), the Plaintiff, Global and the directors of Global agreed that Global, as mortgagee in possession of the Shares, would assign the Shares to the Plaintiff. The Plaintiff attempted to have the share transfer registered, as required under AEPL's constitution. However, the directors of AEPL refused to register the transfer and accordingly it was never registered.

In December 2004 Mr Lindholm and Mr Georges were appointed by Global as receivers and managers (the first two defendants of nine in the matter) ("Defendants")) of ACTA and the they entered into an agreement in June 2005 with the other defendants to the proceedings (which included the other shareholders of AEPL) which, amongst other things purported to deal with the Shares. The Plaintiff contended that the Defendants were not entitled to deal with the Shares because, as a consequence of the operation of the Deed, the interest in the Shares had been transferred to the Plaintiff.

The Defendants argued that the Deed did not confer any interest in the Shares on the Plaintiff because the purported transfer was in breach of the pre-emptive rights provisions in the constitution which applied to all sales, transfers and/or assignments of AEPL shares

The Plaintiff argued that:

(a) he held an interest in the shares by virtue of the provisions of the Deed which purported to transfer the Shares to him; and

(b) the pre-emptive rights provisions did not apply as there was no assignment of the Shares, rather a mere change in control under which he was appointed the trustee of a trust created over the equitable interest in the Shares, the beneficiaries being the Deed creditors.

Were the shares assigned and did the Plaintiff have any interest in the shares?

The Plaintiff submitted that there was no "assignment" of shares that would contravene the pre-emptive rights provisions of AEPL's constitution and shareholder's agreement as all that happened was that control of the shares changed from ACTA's mortgagee (Global), to ACTA's agent (the Plaintiff, in his capacity as the deed administrator). This submission was rejected by the Court which held that there had clearly been a purported assignment of the Shares to the Plaintiff (in his capacity as administrator). The clause in the Deed concerning the transfer was titled "Assignment of AEPL Shares". The Deed specified that Global was to "assign" the Shares to the Plaintiff, acknowledged the Plaintiff as the "Owner" of the shares, and stated that Global was to execute and forward to the Plaintiff, a share transfer form in the Plaintiff's favour.

Accordingly, the Plaintiff was held to have an equitable proprietary interest in the Shares as a consequence of the assignment resulting from the Deed. However, this interest was stated to be subject to resolution of issues in deferred proceedings relating to ACTA's obligations under a

settlement deed entered into in May 2003 ("May 2003 Deed"). The Plaintiff accepted that he would be bound by any valid obligations ACTA was under pursuant to the May 2003 Deed.

Did the assignment contravene the pre-emptive rights of the other members of AEPL and what is the effect of such a contravention?

This assignment by Global and its directors of the interests in the Shares to the Defendant was held to contravene the pre-emptive rights provisions of AEPL's constitution. The Defendants generally proceeded on the basis that any assignment or transfer in contravention of the constitution was necessarily entirely void. However, the Court noted that the trend of modern authorities was against this approach.

Whelan J engaged in an instructive analysis of case law concerning the issue of whether, "a purported transfer in contravention of pre-emptive rights is ineffective to transfer any relevant interest to the transferee".

Historically, the courts have found that a transfer in contravention of pre-emptive rights is ineffective and unenforceable. This was the case in *Hunter v Hunter* ("Hunter")[1], however, recent case law strongly suggests that this is not the approach that the courts will take. Whelan J noted Hunter was a case which was often distinguished on a factual basis and was not generally applicable to other cases involving a contravention of pre-emptive rights.

In the case of *Hawks v McCarthur* ("Hawks")[2] it was held that where a shareholder sold his shares in breach of a pre-emptive rights provision and the transfer was never registered, the purchaser held an equitable interest in those shares. The judge in Hawks stated that such a transaction was not, "a complete nullity", and would prevail over a competing equitable interest which was second in time. Accordingly, and consistent with decisions such as *Coachcraft Ltd v SVP Fruit Co Ltd & Champman*[3]*, Tett v Phoenix Property & Investment Co*[4]*, Belmont Holdings Ltd v Permanent Trustee Co Ltd* [5], *Hunters Beach Investments Pty Ltd v Bramms*[6] and *Hurst v Crampton Bros (Coopers) Ltd*[7] which have broadly followed the approach in Hawks, the Court held that the competing interests to be determined were not between the purchaser and the shareholders, but rather between the purchaser and parties with a competing equitable interest.

Whelan J also noted that a seller, who attempts to transfer their shares in breach of pre-emptive rights cannot rely on this breach to avoid the contract. However, the purchaser is not so prohibited and may avoid the contract on this basis.

The Court held that although the purchaser may have an equitable right in the shares, the company and other shareholders are not bound by a share transfer by a shareholder in breach of the pre-emptive rights provisions. The directors are entitled to refuse registration of the transfer, and, in the event that the transfer is registered the shareholders may request that the registration be

1 [1936] AC 222.
2 [1951] 1 All ER 22.
3 [1978] VR 706.
4 [1984] BCLC 599.
5 (1989) 7 ACLC 420.
6 (2001) ACSR 701.
7 [2003] 1 BCLC 304.

reversed. An equitable interest held by a purchaser will not prevail over an interest held by a valid shareholder.

Helpfully, Whelan J condensed the main principles of his decision into the following four main points:

1. A sale and transfer in contravention of pre-emption provisions in a company's constitution is not a complete nullity.
2. The purchaser under such a sale and transfer has no right as against the company.
3. Such a purchaser does have equitable proprietary rights which bind the vendor of the shares. If the vendor receives a higher purchase price as a result of compliance with the pre-emption provisions, or receives dividends, or the proceeds of a capital reduction, it is liable to account to the purchaser.
4. The purchaser's equitable proprietary rights may come into conflict with the rights of shareholders other than the vendor. In so far as such a conflict is between other shareholders wishing to enforce the rights of pre-emption and the purchaser, the equitable rights of the other shareholders will almost inevitably prevail.

Decision

Whelan J held that whilst legal title to the Shares had not passed by operation of the Deed because of the contravention of the pre-emptive rights provisions of the shareholders' agreement and constitution of AEPL, the Plaintiff did have an equitable proprietary interest in the Shares as a consequence of the assignment in the Deed. However, the relief, if any, that the Plaintiff was entitled to could not be determined until the proceedings concerning the May 2003 deed were determined. That relief would also need to reflect and take into account all of the competing claims connected with the multitude of arrangements associated with the proceedings.

WESTERN AUSTRALIA

JURISDICTION OF WARDEN TO STAY OR STRIKE OUT PLAINTS FOR FORFEITURE AND OBJECTIONS TO EXEMPTION APPLICATIONS AFTER CORPORATE TENEMENT HOLDER PLACED IN ADMINISTRATION OR LIQUIDATION[*]

Mining Act 1978 (WA) - objection to exemption application and related plaint for forfeiture when tenement holder is a company in liquidation, administration or voluntary winding up – whether leave of the Court pursuant to section 440D, 471B or 500(2) of the Corporations Act 2001 (Cth) required before the warden sitting in open court can hear the matter – stay granted in both cases for plaint proceedings but for objection in one case only

Shields Contracting Pty Ltd (In Liq) V Glintan Pty Ltd [2005] WAMW 5(Warden Calder SM, 24 June 2005)

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