

**IN THE MATTER OF:**

**SOUTH AUSTRALIAN MARINE PRODUCTS INDUSTRIES PTY LTD**

**PRELIMINARY ADVICE**

**TO: MR J ANDERSON**  
**JENKINS ANDERSON SOLICITORS**

**FROM: S D OWER**  
**Edmund Barton Chambers**  
**ADELAIDE SA**

## Background

1. I am asked to advise Mr Peter Laughton, in respect of the recent management of the affairs of South Australian Marine Products Industries Pty Ltd ("SAMPI"). Mr Laughton is a director of SAMPI and controls 45% of its shares through a further company, Quotila Pty Ltd. The other directors of SAMPI are Mr Romara and Mr Franchino, who through their respective entity, Fishtrade International Pty Ltd ("**Fishtrade**"), own another 45% of the shares in SAMPI. The final 10% of the shares are owned by a third party, Discovery III Pty Ltd.
2. I have read the letter dated 24 August 2010 from my instructors, which contained some information concerning SAMPI. In addition to the matters set out in that letter, I have also been informed that a directors' meeting of SAMPI was held on Friday, 24 August 2010, at which the directors resolved to undertake a rights issue to raise further capital to discharge the debt to Fishtrade. I understand that Mr Laughton voted against the decision.
3. I do not have sufficient information to express a final opinion in the matter. Mr Laughton needs to obtain SAMPI's books and records (including its financial records) and provide you with a complete statement as to his involvement with SAMPI, etc, and the conduct of its affairs from his perspective since incorporation. In this advice, I set out some options that Mr Laughton may wish to undertake once he has obtained that information.
4. It appears that Mr Laughton's issues with the management of SAMPI are threefold:
  - 4.1 First, that he has been excluded from the management of the affairs of SAMPI;
  - 4.2 Secondly, that he is concerned that Romara and Franchino are not acting in the best interests of SAMPI, but rather acting in the interests of Fishtrade, in particular, in respect of the grant of a charge over the assets of SAMPI granted to Fishtrade; and
  - 4.3 Thirdly (and somewhat related to the other two issues), that he is concerned about various management decisions, including a decision to relocate the business to Western Australia. ?

5. I note that, in respect of SAMPI's dealings with Fishtrade, the related party transaction provisions in Chapter 2E of the *Corporations Act 2001* (Cth) do not apply as SAMPI is not a public company.
6. I also note that Mr Laughton on behalf of Quotila has requested a shareholders' meeting. It is not clear to me on the information provided whether such a meeting has been scheduled or is to be held. Obviously, success at such a meeting is dependent upon the 10% shareholder, Discovery III Pty Ltd, siding with Mr Laughton.

### **Directors' duties**

7. Directors of a company owe various duties to that company both as a matter of general law and under the provisions of the *Corporations Act 2001* (Cth) (ss. 180, 181 and 182). Those duties include acting in the best interests of the company and not acting in the interests of other persons. If a person purports to make a decision as a director which is not in the interests of the company, then the company may make an application to a court for either an injunction to restrain the purported conduct or damages in circumstances where the company has suffered loss.
8. On the basis of the information provided, I am not able to say whether Romara and Franchino have breached their duties to SAMPI. There appears to be a warranted suspicion that their actions in respect of granting the charge, the notice of demand and SAMPI's response is not in the interests of SAMPI, but rather those of Fishtrade. The commercial dealings with Fishtrade also warrant scrutiny. Finally, the decision to make a further capital issue also raises a question of their motives.
9. As discussed below, further information should be obtained via an application to the Court. Subject to that, and if potential wrongdoing is confirmed, Laughton could ask the Court for leave to commence a "*statutory derivative action*" against Romara and Franchino. As stated, the party who may sue Romara and Franchino for any breach of directors' duty is SAMPI itself. Obviously, as they have a majority of directors' votes, they will prevent SAMPI from doing so.
10. Pursuant to s. 236 and 237 of the *Corporations Act 2001* (Cth), a person may bring proceedings on behalf of a company if the Court grants them leave to do so. The Court will grant leave where it considers that (a) the company will not bring the

proceedings itself, (b) the applicant is acting in good faith and (c) it is the best interests of the company and (d) there is a serious question to be tried.

11. Assuming that the further information does reveal a serious question to be tried by the Court as to the wrongdoing of Romara and Franchino, I believe that a Court would grant leave to Mr Laughton to commence proceedings on behalf of SAMPI against them. The conditions of such leave would be a matter for determination by the Court but it is possible that the Court would grant leave on the basis that Mr Laughton be personally liable for any costs that may be ordered against SAMPI in the event that the claim is unsuccessful.

### **Oppressive conduct**

12. The Court, in addition to powers to enforce and remedy breaches of directors duties, also has a more general power in respect of conduct that is "*oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity*" (s. 232 of the *Corporations Act 2001* (Cth)).
13. The question of whether any conduct falls within the above description requires an objective assessment of whether there has been some unfairness in the conduct of SAMPI's affairs affecting Quotila. In doing so, the Court has regard to the context in which the conduct occurs and considers whether, in all of the circumstances, the conduct complained of imposed a disadvantage or burden on a member, according to ordinary standards of reasonableness and fair dealing, was unfair: *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459 at 472.
14. On the basis of my present instructions, this seems to be a *prima facie* case of oppression. Exclusion from management in a small company is a textbook example. Again, however, further information is required as to the history of the establishment of SAMPI, the contributions (financial and non-financial) made by the respective parties and the decisions since that time. The decisions involving the charge, the notice of demand and SAMPI's response to that demand, even if otherwise not in breach of the directors' duties, also appear to constitute conduct designed to remove Mr Laughton and Quotila from the business and therefore oppressive. The holding of the directors' meeting on Friday, together with the apparent reluctance to hold a shareholders' meeting, also possibly constitutes oppressive conduct.

15. The advantage of an oppression action is that, pursuant to s. 233 of the *Corporations Act 2001* (Cth), the Court has a very general power to make any order it considers appropriate to remedy the oppression. The exact limits of that power have not been declared by the Courts, but it has been stated that the power should be read broadly and not subject to any "judge-made limitations on their scope": *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [72]. As such, many of the matters that are sought by Mr Laughton in his proposed shareholders meeting such as the appointment of new directors and specific directions as to the company's activities could be the subject of an order under s. 233 in the event that oppression is found. In addition, these orders could include an order declaring the charge to be void.

### **Further information**

16. I note that Mr Laughton states that he has been refused information in respect of the affairs of SAMPI. Furthermore, many of the matters that are proposed to be raised in the shareholders' meeting sought by Mr Laughton relate to the provision of information. Mr Laughton as a director, and Quotila as a shareholder, have certain rights to information at both general law and under the *Corporations Act*, including those arising under ss. 198F, 247A and 290.
17. In the circumstances, I consider that the first step to be taken by Mr Laughton is to bring an urgent application on behalf of Quotila and on his own behalf of the Corporations Act for the production of SAMPI's books and records to Mr Laughton, his legal representatives and his accountants. While it is possible that SAMPI (through the agency of Romara and Franchino) will try and resist the application, I consider that there are good grounds for the Court ordering the information be provided, at the cost of SAMPI or, at possibly, Romara and Franchino.
18. In light of the various concerns that Mr Laughton has in respect of the current decisions being made by the business, there would appear to be grounds for making such an application urgently. Given that the registered office of SAMPI is in Western Australia, the application should be brought in the Federal Court, rather than the Supreme Court of South Australia, in order to ease some of the paperwork requirements.

19. Once such an order has been obtained, Mr Laughton could consider the information and, if so desired, amend his application to bring either a statutory derivative action or an action for oppression against Romara and Franchino. It may also be that once he has such information, he could use it at the upcoming shareholders' meeting without the need for further Court action.

#### **Costs**

20. The cheapest way to proceed is simply to hold the shareholders' meeting. An application to the Federal Court for the provision of books and records could, in most cases, cost anywhere up to \$10,000, although the costs would be recoverable from SAMPI and/or the other directors.
21. Any further application would involve an interlocutory injunction, followed by a trial in due course. It is difficult to give any particular estimate but this could cost anywhere up to \$100,000.

Date: 2 September 2010

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