FEDERAL COURT OF AUSTRALIA

Nelson v Commissioner of Taxation [2017] FCA 819

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| File number: |  |
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| Judge: | **GILMOUR J** |
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| Date of judgment: | 20 July 2017 |
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| Catchwords: | **TAXATION** – taxation administration – notice requiring recipient to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner under s 353-10(1)(b) of the *Taxation Administration Act 1953* (Cth) (s 353-10 notices)  **PRACTICE AND PROCEDURE** – application for interlocutory relief – injunctions – Court’s power to suspend the operation of the decision to issue the notices and stay the conduct of the interviews required by the Commissioner’s issue of s 353-10 notices, pursuant to s 15(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 13(1), 15(1)  *Income Tax Assessment Act 1936* (Cth) ss 100A, 100A(5), 100A(13), 264(1)(b)  *Judiciary Act 1903* (Cth) s 39B  *Taxation Administration Act 1953* (Cth) Part IVC, ss 14ZY, 14ZYA, 14ZZ, Schedule 1 s 350-10 |
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| Cases cited: | *Binetter v Deputy Commissioner of Taxation* [2012] FCA 377  *Binetter v Deputy Commissioner of Taxation (No 3)* [2012] FCA 704  *Binetter v Deputy Commissioner of Taxation* [2012] FCAFC 126  *Deputy Commissioner of Taxation v Clarke and Kann* (1984) 1 FCR 322  *Federal Commissioner of Taxation v De Vonk* (1995) 61 FCR 564  *Industrial Equity Limited v Deputy Commissioner of Taxation* (1990) 170 CLR 649  *Watson v the Federal Commissioner of Taxation* (1999) 169 ALR 213 |
| Date of hearing: | 19 July 2017 | |
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| Registry: |  | |
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| Division: |  | |
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| National Practice Area: | Taxation | |
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| Category: | Catchwords | |
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| Number of paragraphs: | 55 | |
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| Counsel for the Applicants: | Mr JW Fickling | |
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| Solicitor for the Applicants: | Brand Barristers & Solicitors | |
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| Counsel for the Respondent: | Mr JE Scovell | |
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| Solicitor for the Respondent: | Australian Taxation Office | |

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| **Table of Corrections** |  |
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| 26 July 2017 | In [7], the date has been corrected from 4 February 2017, to 4 February 2016. |
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| 26 July 2017 | In [32], the name has been amended to read ‘Mr Brand’. |

ORDERS

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|  | | WAD 351 of 2017 |
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| BETWEEN: | PETER NELSON  Applicant  **SOPHIE NELSON**  Second Applicant  **HARRY NELSON** (and others named in the Schedule)  Third Applicant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

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| JUDGE: | GILMOUR J |
| DATE OF ORDER: | 20 JULY 2017 |

THE COURT ORDERS THAT:

1. The Applicants’ application for interlocutory relief be refused.
2. The Applicants pay the Respondent’s costs of the interlocutory application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GILMOUR J:

1. The substantive proceedings concern an application for judicial review of purported decisions made by the Respondent, the Commissioner of Taxation (Commissioner), under s 353-10 of Schedule 1 of the *Taxation Administration Act 1975* (Cth) (TAA), by which the Commissioner had issued notices received by the First to Third Applicants requiring them to attend closed-door interviews in relation to an unresolved objection from the Fifth Applicant, the Trustee of the Nelson No. 2 Family Trust (Nelson Trust)
2. At the hearing on 19 July 2017, the application before me, to which these reasons relate, was for interlocutory relief, in effect, to suspend the operation of the decision to issue the notices and stay the conduct of the interviews pursuant to s 15(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act).

## Background

1. The history of this dispute begins with original assessments issued by the Commissioner against the Trustee in respect of income arising under s 100A of the *Income Tax Assessment Act 1936* (Cth) (ITAA36).
2. Over the years ended 30 June 2008, 2010 and 2011, the Trustee made distributions to the Second to Fourth Applicants (Children). The Children, each of adult age, then purportedly gifted these distributions to their father, Mr Peter Nelson, the First Applicant.
3. On 1 April 2015, the Commissioner placed the Trustee under review or audit, and issued a position paper proposing to issue the abovementioned original assessments against the Trustee.
4. The Commissioner sought and was provided with answers to questionnaires from the Applicants in December 2015. Subsequently, on 1 February 2016, the then-Deputy Commissioner issued a finalisation letter and reasons for decision in relation to the original assessments, which incorporated the Commissioner’s consideration of the Applicants’ answers to the questionnaires.
5. On or about 4 February 2016, the Trustee was issued with notices of assessments and notices of administrative penalty assessments imposing 25% administrative penalties alleged for lack of reasonable care (Assessments). The Commissioner, in his Assessments, labelled the distributions and gifts between the beneficiaries, outlined at [4], as a reimbursement arrangement which was contrary to s 100A of the ITAA36.
6. On or about 21 April 2016, the Trustee filed a Notice of Objection with the Commissioner against the Assessments. The Applicants provided written submissions to the Commissioner on 26 October 2016, and an affidavit of the First Applicant on 8 December 2016, as sole director and shareholder of the Trustee.
7. The Trustee disputes the Commissioner’s Assessments, as outlined in its objection, claiming that the one or both or the following necessary elements for the imposition of liability under s 100A could not be established because:
8. the Children would have received exactly the same amount of distributions regardless of the purported gifts, in contrast to s 100A(5); and
9. there is no ‘agreement’ as required by s 100A(13) as the Trustee, Children and First Applicant are in an ‘ordinary family dealing’, existing in one family group with no requirement to account to each other.
10. Further to its objection, on 6 June 2017, the Trustee through its tax agent issued a notice under s 14ZYA of Part IVC of the TAA to the Commissioner requiring that he finalise the objection decision. The Trustee claimed that the failure to finalise this decision was obstructing the Trustee from commencing appeal proceedings pursuant to s 14ZZ of Part IVC of the TAA against the Commissioner.
11. Under s 14ZYA of the TAA, the relevant period for the Commissioner to make its objection decision is 60 days. Here, as the Trustee issued a notice to the Commissioner requiring it to make the objection decision, the 60-day period commenced from the date of that notice (6 June 2017), and will lapse on 5 August 2017.
12. It is by no means certain that the Applicants’ proposed proceedings under Part IVC of the TAA will occur because the objection decision has not yet been finalised and does not require to be finalised until 5 August 2017. It may well be that the objection will be resolved in favour of the Trustee.
13. On 16 June 2017, Mr Bradley Fawcett, an Australian Taxation Office (ATO) employee in the Review and Dispute Team in Perth, attempted to contact Mr Kris Elliot, the tax agent representative for each of the Applicants, by telephone and again on a number of occasions on 19 June, in order to inform him that the Commissioner would be issuing the s 353-10 notices. On 16 June 2017, Mr Fawcett spoke to the Third Applicant be telephone, advising him that the Commissioner would be issuing the s 353-10 notice to him.
14. On 19 June 2017, Mr Fawcett telephoned Mr Daniel Brand, the Applicants’ solicitor, acknowledging receipt of the s 14ZYA notice and informing him that the Commissioner would be issuing the s 353-10 notices to the First to Third Applicants.
15. On 20 June 2017, Mr Brand wrote to the Commissioner seeking that the s 353-10 notices should not be issued on the alleged basis that the Commissioner:
16. had already received answers to the questionnaires from the Applicants;
17. had legitimately made a decision that the answers in (1) adequately addressed the Commissioner’s information requirements, by accepting those questionnaires; and
18. would be abusing the powers contained in s 353-10 of Schedule 1 of the TAA in the circumstances of the proposed use.
19. The Commissioner provided a response to this letter on the same day, in which he reaffirmed his intention to issue the notices, referring to the Applicants’ lodgement of a s 14ZYA notice on 6 June 2017, and noting that:

The issue of notices is not a misuse of the Commissioner’s statutory power observing that the 14ZYA notice gives us until 5 August 2017 to determine the objection.

1. On 21 June 2017, the Commissioner issued the notices to the First to Third Applicants. The notices required the Applicants to attend a closed door interview, with the possibility of doing so under oath, with representatives of the Commissioner. These interviews are scheduled to take place on 21 July 2017 for the First and Third Applicant, and on 24 July 2017 for the Second Applicant.
2. Twenty-five days later, on Sunday 16 July 2017, Mr Brand wrote by email to the Commissioner seeking written reasons for the purported decisions to issue the notices, relying on s 13(1) of the ADJR Actand foreshadowing judicial review proceedings that it intended to file in this Court, pursuant to s 39B of the *Judiciary Act 1903* (Cth) (Judiciary Act).
3. The foreshadowed proceedings, which are the current proceedings, were instituted on 17 July 2017, four days before the first interviews were to be conducted.

## The relief sought

1. The application seeks relief through orders in the nature of writs of injunction or prohibition or certiorari under the Judiciary Act, and, alternatively, judicial review pursuant to the ADJR Act.
2. Broadly, the relief sought is to:
   1. stay the effect of the notices, or the purported decision to issue them, until further order of this Court;
   2. set aside the purported decision to issue the notices;
   3. compel the Commissioner to finalise the objection decision; and
   4. quash the Assessments and prevent the Commissioner from acting reliance upon them.
3. The interlocutory application concerns only the relief in (a) above.

## Interlocutory relief

1. As Rares J stated in *Binetter v Deputy Commissioner of Taxation* [2012] FCA 377 at [15]*,*

In determining whether interlocutory relief should be granted, the addressee, *first*, must make a *prima facie* case in the sense that if the evidence remains as it is there is a probability that at the trial of the action she will be held entitled to final relief.  *Second*, she must establish that the inconvenience or injury which she would be likely to suffer were an injunction refused outweighs or is outweighed by the injury which the Commissioner would suffer if an injunction were granted:  *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 at 81-82[65] per Gummow and Hayne JJ, and at 68[19] per Gleeson CJ and Crennan J, applying *Beecham Group Limited v Bristol Laboratories Limited* (1968) 118 CLR 618 at 622-623 per Kitto, Taylor, Menzies and Owen JJ.

1. In assessing the interlocutory relief sought by the applicant, I will first consider whether there is a prima facie case for the proceedings commenced in relation to the Commissioner’s exercise of its discretion to issue s 353-10 notices. It is only if that can be made out that I would be required to consider any detriment that the Applicants and the Commissioner are likely to suffer if relief is refused or granted, respectively, on the balance of convenience.

### The Commissioner’s discretion

1. Section 353-10 of Schedule 1 of the TAA, pursuant to which the Commissioner issued the notices to the beneficiaries of the Nelson Trust, provides:

(1)  The Commissioner may by notice in writing require you to do all or any of the following:

(a)  to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a \* taxation law;

(b)  to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law;

(c)  to produce to the Commissioner any documents in your custody or under your control for the purpose of the administration or operation of a taxation law.

Note:          Failing to comply with a requirement can be an offence under section 8C or 8D.

(2)  The Commissioner may require the information or evidence:

(a)  to be given on oath or affirmation; and

(b)  to be given orally or in writing.

For that purpose, the Commissioner or the officer may administer an oath or affirmation.

(3)  The regulations may prescribe scales of expenses to be allowed to entities required to attend before the Commissioner or the officer.

1. In *Binetter* [2012] FCA 377, Rares J in relation to s 264(1)(b) of the ITAA36, a predecessor to s 353-10, stated at [19] that:

The discretion to issue a notice conferred by s 264(1) is one that is unconfined. Indeed, in *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Limited* (Smorgon's case) [1979] HCA 67; (1979) 143 CLR 499 at 524, 536 the High Court held that the Commissioner was entitled to, in the words of Gibbs ACJ, "make a roving inquiry" or in the words of Mason J, "fish".

1. The exercise of the statutory power under s 353-10 of Schedule 1 of the TAA is a decision for the purposes of s 13(1) of the ADJR Act: see *Deputy Commissioner of Taxation v Clarke and Kann* (1984) 1 FCR 322 at 325–326, applied in *Industrial Equity Limited v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 662.

### Prima facie case

#### Section 39B

1. The challenge under s 39B of the Judiciary Act is that the s 353-10 notices, described as ‘Purported Notices’, are infected with jurisdictional error on the basis that the decisions failed to take into account required considerations, did not take into account relevant considerations, are an improper exercise of power, and are illogical and wholly unreasonable. There is no specificity as to any of these asserted categories of jurisdictional error.
2. The Originating Application, at page 4[2], provides a summary of the history of the dispute between the Trustee and the Commissioner. In particular, it appears to rely upon the fact that the Trustee’s objection prior to the Trustee’s issue of the s 14ZYA notice on 6 June 2017 had been unresolved for more than 400 days. It then asserts that on 21 June 2017, in complete disregard to the Trustee’s desire to commence legal proceedings forthwith against the Commissioner, the Commissioner purportedly issued the Purported Notices. Further, it is asserted that the Commissioner has been and is obstructing the validity of the Trustee’s assessment being tested, under Part IVC of the TAA. In particular, the Applicants submit that their application ‘…is about the Court protecting the integrity and necessary fairness of the impending Part IVC trial’.

#### ADJR Act

1. Under the ADJR Act, the Applicants challenge the purported issue of the Purported Notices on the asserted grounds that:
   1. a breach of the rules of natural justice occurred in connection with the making of the decision to issue the purported notices;
   2. the making of the decision to issue the purported notices did not take into account relevant or required considerations, or took into account irrelevant considerations;
   3. the making of decision to issue the purported notices was an improper exercise of power;
   4. the making of the decision to issue the purported notices involved an error of law; and
   5. the making of the decision to issue the purported notices was contrary to law.
2. None of the above grounds are particularised.
3. A further allegation is made that the Commissioner, within six hours of receiving Mr Brand’s letter of 20 June 2017 as to why the Purported Notices should not be issued, rejected that request.

#### Alleged Improper Purpose

1. The Applicants submit that it is the Commissioner’s alleged improper purpose in issuing the notices which is at the heart of its interlocutory application.
2. The Applicants submitted that if the notices had been issued earlier, then it would be difficult to discern jurisdictional error in relation to the decision to issue them. For example, they submit that if the notices had been issued during the assessment stage, after a request by the Commissioner for the First to Third Applicants to attend an interview which they had refused, then it would be very difficult to question the validity of the notice. Further, they submitted that if the notices had been issued during the objection stage ‘quite a bit earlier’ after the Commissioner had requested the First to Third Applicants to attend an interview and they had refused, again it would be very difficult to question the validity of the notices.
3. However, they claim that the fact that the notices were issued after the s 14ZYA notice was served on the Commissioner on 6 June 2017, requiring him to finalise the Trustee’s objection, raises the spectre of an improper purpose. Thus, the Applicants’ complaint is primarily about the Commissioner’s delay in making his objection decision, and the timing of the notices issued under s 353-10 of Schedule 1 of the TAA.
4. Against the background of these allegations, and in oral submissions, counsel for the Applicants submitted that it was an ‘inescapable inference’ from the timing and circumstances that the Commissioner’s exercise of its discretion was not to assist him in his investigations, which the Applicants acknowledge would be a legitimate purpose, but rather an inference arises, as was put to the Commissioner in the letter of 20 June 2017 from Mr Brand, in the following way:

We put it to you that the attempt to issue notices to the Children at this time is a misuse of the Commissioner’s statutory powers to gather information where it is manifestly clear that the Trustee wishes to commence legal proceedings… there is no bona-fide reason to be using information gathering powers to be seeking to further bolster evidence (using the Commissioner’s statutory powers) held by the Commissioner in the shadow of legal [Part IVC] proceeding.

1. These submissions do not, in my opinion, establish a prima facie case for a number of reasons.
2. First, the Applicants seek to insinuate conditions for the exercise by the Commissioner of the power under s 353-10. There is no requirement for the Commissioner to have first called upon proposed recipients to attend an interview voluntarily or for them to have refused such a request. The discretion under s 353-10 is unconfined: *Binetter* [2012] FCA 377 at [19].
3. Second, I reject the submission that if the interviews proceed, the integrity of the subsequent Part IVC trial will be compromised as the Commissioner, on the Applicants’ submission, will have illicitly obtained an unfair advantage. The Trustee submits that trying to conduct a trial in the Part IVC proceedings where the respondent Commissioner would have recently, on the same issue, cross-examined its potential witnesses, would compromise the integrity of the trial. It is this alleged improper purpose which the Applicants submit is at the core of their application, and that the relief sought is necessary for the purpose of the Court protecting the integrity and necessary fairness of the impending Part IVC trial.
4. This last submission appears to be drawn from what Foster J said in *Federal Commissioner of Taxation v De Vonk* (1995) 61 FCR 564 at 569. That case concerned a s 264 notice under the ITAA36 which was issued by the Commissioner after the recipient of the notice had been charged with criminal proceedings, namely an alleged conspiracy to defraud the Commonwealth by making a dishonest representation to the ATO. An issue before the Court was the fact that the intended questioning of Mr De Vonk would cover factual areas germane to the existing criminal proceedings, and which overlapped. It was held that he was entitled to rely upon the doctrine of contempt of court as a result of the issue of the notice. The plurality at [50] adopted what had been said by Foster J at 569, that this issue:

…focuses upon a Court’s right and, indeed, its obligation, to protect the integrity of its operations and to prevent interference with its administration of justice.

1. The case of *De Vonk* was applied by Heerey J in *Watson v the Federal Commissioner of Taxation* (1999) 169 ALR 213.
2. The present case is clearly distinguishable from the threat to the administration of justice outlined in *De Vonk* and *Watson*. First, no criminal proceedings have been instituted against any of the Applicants. Indeed, no civil proceedings have been instituted, nor can it be assumed that they will. The Applicants’ assumption that the objection decision will be resolved against them and will lead inevitably to appellate proceedings under Part IVC is an assumption that, at this time, is not open. The objection may be resolved in favour of the Trustee.
3. Third, I reject the Applicants’ submission that it is an ‘inescapable inference’ from the timing and circumstances that the Commissioner’s exercise of his discretion was not to assist him in his investigations, but was to misuse his powers to gather information for use in the foreshadowed Part IVC proceedings by the Trustee. Indeed, I do not consider it even to be a likely inference. Rather, the likely inference is that the Commissioner, having been served with the s 14ZYA notice on 6 June, requiring him as a consequence to determine the objection by 5 August, issued the notices in order to obtain as much information as possible in order to do what he was required to do. Indeed, that inference is bolstered by the Commissioner’s response to Mr Brand’s letter of 20 June 2017, to which I referred above at [15], and in which it was said on behalf of the Commissioner, the issue of notice is not a ‘…misuse of the Commissioner’s statutory power observing that the 14ZYA notice gives us until 5 August 2017 to determine the objection’. This response from the Commissioner was saying, in effect, that the power had been exercised for the very reason that the Commissioner was required to resolve the objection by 5 August 2017.
4. Fourth, I reject the submission that the Commissioner ought to have sought further information either voluntarily or by notice, shortly after the response by the adult Children Applicants to questionnaires. The responses were received in December 2015. Their submission was that the appropriate time for the Commissioner to bona fide issue the notices were late December 2015 or early the following year. The thrust of this submission was that if the Commissioner was not satisfied with the responses, he should have moved earlier to gather the information. In relation to the objection which issued on 21 April 2016, again the Applicants seek to impose conditions upon the Commissioner as to when he issues such notices. Moreover, in the Commissioner’s reasons for decision relating to this Assessments, it is apparent, from what he wrote, that he had noted discrepancies in the answers given to the questionnaires.
5. Fifth, the notices were issued to, and received by, beneficiaries of the Nelson Trust and, in the case of Mr Peter Nelson, in that capacity and as a director of the Trustee. The recipients, in their capacity as beneficiaries, do not have in contemplation the commencement of Part IVC proceedings or any other proceedings.
6. It is difficult to discern the rationale for the improper purpose submissions. I am far from persuaded that a prima facie case has been established that the s 353-10 notices were issued in order to obstruct the Trustee’s foreshadowed proceedings or otherwise to interfere with the administration of justice as between the parties.
7. It is to be expected that, in obtaining the fullest of information with a view to resolving the objection, the Commissioner should seek information from the beneficiaries of the Nelson Trust as well as their father, the First Applicant, both in his capacity as a beneficiary and as a direction of the trustee company, given the fact that the assessment was based upon a finding or a conclusion that there was an arrangement between the adult children beneficiaries and their father, the First Applicant. The adult children and their father are not minor figures in the factual matrix. Rather, they are central to it and therefore central to the resolution of the objection.
8. The Commissioner is entitled to seek the fullest information he can. Robertson J in *Binetter v Deputy Commissioner of Taxation (No 3)* [2012] FCA 704, which involved a challenge to notices under analogous legislative provisions (s 264 of the ITAA), at [108] stated:

In my opinion it is clear that the objection decisions had not been made and indeed there is no evidence that they have yet been made. To contend that the decisions could have been made without the material sought or had been held up to obtain that material is to invert the inquiry… These contentions do not recognise that the better the information before the Commissioner at the objection stage the better the decision on the objection.

1. This passage was referred to with approval by the Full Court on appeal: *Binetter v Deputy Commissioner of Taxation* [2012] FCAFC 126 at [37].
2. Accordingly, for the above reasons, I am satisfied that, if the evidence remains as it is, there is no probability that at the trial of this action, the Applicants will be held entitled to final relief.

### Balance of Convenience

1. As I do not find that the Applicants have shown that there is a prima facie case in respect of their s 353-10 notice proceedings, I do not need to consider a balance of convenience test in respect of granting or refusing the relief.

### Delay

1. In any event I would, in the exercise of my discretion, have refused the injunctive relief sought because of the unreasonable and unexplained delay on the part of the Applicants in instituting this application for interlocutory injunctive relief. As I have explained, the impugned notices were issued on 21 June 2017. The Third Applicant was aware on 16 June 2017 of the Commissioner’s intention to issue a notice to him. Furthermore, on 19 June 2017, the Mr Fawcett spoke to Mr Brand, and told him, among other things, that the Commissioner would be issuing s 353-10 notices to the First to Third Applicants. Mr Brand, again as I have explained, on 20 June 2017, sought to persuade the Commissioner not to issue the notices. Thereafter, seven days after the notices were issued, both Mr Brand and Mr Fickling of counsel contacted Mr Fawcett in relation to the notices.
2. The effect of the delay is that the Commissioner, who would, under s 13(1), have as much as 28 days to respond, has been given only four working days prior to the interviews to be conducted on Friday 21 July and five working days before the interview to be conducted in Melbourne on Monday 24 July 2017.

## Conclusion and orders

1. I am, for these reasons, satisfied that the Applicants have failed to establish a prima facie case to challenge the s 353-10 notices. Even were it otherwise, I would in the exercise of my discretion, refuse the relief on the grounds of the inexcusable and unreasonable delay on the part of the Applicants.
2. Accordingly, the application for interlocutory injunctive relief will be refused with costs.

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| I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour. |

Associate:

Dated: 20 July 2017

SCHEDULE OF PARTIES

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| Applicants |  |
| Fourth Applicant  Fifth Applicant | JAMES NELSON  CAERUS (WA) PTY LTD |