Rivkin v Vizard:

insiders on the outside

By **Mark Farquhar**, Solicitor, Clayton Utz

The cases of *R v Rivkin* [2003] NSWSC 447 and *ASIC v Vizard* [2005] FCA 1037 have attracted much media attention, not only as they relate to insider trading and corporate offences generally, but also as to the disparity between the punishments measured out to the two individuals. Indeed, the apparent lack of consistency between the treatment of the two cases, especially when considering the offences themselves, has drawn allegations of favouritism and inconsistency from interested parties and the public alike.

In particular, the corporate watchdog has been accused of "going soft" on white-collar crime, especially when the perpetrator is a high-flying philanthropic funny man, rather than a misunderstood and eccentric oddball. Whether or not this is a fair accusation is yet to be seen, however, when one looks at the disparate treatment of the two individuals, it is certainly open to debate.

Rene Rivkin

In 2001, Rene Rivkin was privy to a conversation with the chief executive officer of Impulse Airlines regarding an imminent merger between Impulse and Qantas. Relying on this information, Rivkin proceeded to purchase 50,000 shares in Qantas, which ultimately resulted in a profit of about $1200.

Rivkin was aggressively pursued on a charge of, and was ultimately convicted for, insider trading. In order to prove the charge of insider trading, it was necessary to show that Rivkin knew, or ought to have known, that the information to which he was privy was not generally available, and that knowledge thereof would have materially impact on the share price of the company.

Rivkin was ultimately convicted of criminal charges and sentenced with nine months' periodic detention.

Steve Vizard

In contrast to Rivkin, Vizard did not act on information to which he was inadvertently exposed in the course of his dealings, but rather acted on information obtained by virtue of his position as a director of Telstra. Vizard's conduct can further be differentiated on the basis that he engaged in three separate transactions on the basis of the information obtained, as opposed to Rivkin's one.

Notwithstanding these differences, and arguably the fact that this evidences a far stronger *prima facie* case, Vizard was not charged with insider trading, but instead with the far more lenient charge of breaching his duties as a company director. When considered in light of the Rivkin case, this is particularly peculiar, given that the difficulty of proving such a charge was far more onerous than it would have been against Vizard.

In other words, based on the fact that Vizard obtained the information on which he relied by virtue of his position as a director of Telstra, it could far more easily have been proved that he knew that both that the information was not generally known, and that it would have impacted materially on the share price of the company.

Vizard was ultimately fined $390,000.00 and disqualified from managing a corporation for 10 years.

What does this mean?

Much criticism has been levelled over the way in which the *Vizard case* was conducted, particularly when compared to the cases of Rene Rivkin and even, to a lesser extent, former HIH director Rodney Adler. What is more important, however, is the impact that such incongruent treatment of corporate misconduct has on public confidence and the overall regulation of directors' behaviour.

In allowing such errant behaviour to occur without pursuing the perpetrator to the full extent of the law, ASIC has essentially run the risk of delivering a message that there is one set of rules for the lay person, and another for "corporate celebrities". Such a message has the potential of seriously undermining the public's respect for the corporate watchdog, as well as bringing into question ASIC's ability to regulate companies and to police the responsibilities and duties of directors.

However, given the high profile nature of the case and the individual in question, ASIC was placed in an unenviable position. As the investigation into corporate crimes rarely involves a "smoking gun" or a strong paper trail, the difficulty of securing a criminal conviction should not be understated. In this regard, had ASIC chosen to pursue Vizard for criminal charges, it would have run the risk of failing to secure any penalty whatsoever. That is to say, Vizard's cooperation and acknowledgment of his misconduct was achieved only after ASIC agreed not to pursue criminal charges, thereby guaranteeing that sanctions would be imposed, but to a lesser extent than may otherwise have been the case.

Ultimately, whether or not a criminal conviction could have been obtained against Steve Vizard will never be known. What is clear, however, is that ASIC was expected by the public at large to secure a penalty. While it seems that Steve Vizard may have been let off lightly, in the end the public humiliation and loss of dignity probably had a far greater impact, and sent a far louder message, than Vizard could ever have foreseen. ■