

## R v SHAWN DARRELL RICHARD

### ADDITIONAL CROWN SUBMISSIONS

1. Pursuant to leave granted on 22 July 2011, the Crown makes these additional written submissions about the two matters addressed in reply:
  - a. *R v Rau* [2010] VSC 370;
  - b. the Superannuation Industry (Supervision) Act 1993 (Cth).

#### ***R v Rau* [2010] VSC 370**

2. In oral address senior counsel for Mr Richard referred to a decision of the Victorian Supreme Court in *R v Rau* [2010] VSC 370. The following submissions are addressed to the significance of that case in the present sentence proceedings.
3. *R v Rau* [2010] VSC 370 is related to *R v Hoy* [2011] VSC 95 (a copy of *Hoy* is attached to these additional submissions). The offenders in each case were jointly involved in an enterprise over a 15 month period from 8 January 2007 to 23 April 2008 during which approximately \$22 million was dishonestly obtained from investors (approx. \$16 million) and a creditor (approx. \$5.83 million). Mr Rau was a company secretary and Mr Hoy was the sole director and owner of 50% of the company the subject of the offending.
4. Mr Rau pleaded guilty to 3 State offences (charges 6 to 8) and 5 Commonwealth offences (charges 1 to 4) committed between 8 January 2007 and 23 April 2008, including 4 offences against s.1041G of the *Corporations Act 2001* (charges 2 to 5). The latter offences were committed "late in the offending window" over a period of less than three months between December 2007 and February 2008 and involved the dishonest making of false statements to pre-existing investors relating to the status of investments they had already made. For the 5 Commonwealth offences Rau received a total effective sentence of 27 months imprisonment to be released after serving 18 months upon entering into a

recognisance release order. The total effective sentence for the four s.1041G offences was 15 months imprisonment, having regard to partial accumulation.

5. Mr Hoy pleaded guilty to 44 State offences (charges 1 to 44) and 3 Commonwealth offences (charges 45 to 47) committed between 8 January 2007 and 23 April 2008, including 1 of being an accessory to an offence against s.1041G of the *Corporations Act 2001* (charge 46). The latter offence merely involved being complicit in the making of dishonest statements to pre-existing investors relating to the status of investments they had already made. For the State offences Hoy received a total effective sentence of 13 years and 9 months imprisonment with non-parole period of 9 years. For the three Commonwealth offences he received sentences of imprisonment for 12 months (charge 45), 9 months (charge 46) and 18 months (charge 47), which were wholly concurrent with the State sentences.
6. It is submitted that the evidence in the related cases demonstrates:
  - a. Mr Hoy was the "front man" for the scheme and made the false representations to investors, whereas Rau was involved in "backroom activities".<sup>1</sup>
  - b. Mr Hoy was the driving force of the scheme and responsible for misdirecting funds once they had been received from investors, whereas Rau was unaware of the precise misapplication of all monies received.<sup>2</sup>
  - c. Mr Hoy and Mr Rau were not "like offenders in any meaningful way" the principles of parity did not have "any real application" in relation to their sentencing. In particular, Rau pleaded guilty to obtaining only \$40,000 by deception for the company. Hoy pleaded guilty to obtaining over \$20 million by deception for the company.<sup>3</sup>
7. To the extent that the total sentences imposed upon Rau and Hoy are useful comparative authorities in the present case, the Crown submits that the overall criminality of the Mr Richard in the present case is substantially greater than that of Mr Rau but significantly less than that of Mr Hoy.

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<sup>1</sup> *R v Rau* [2010] VSC 370 at [11].

<sup>2</sup> *R v Rau* [2010] VSC 370 at [12].

<sup>3</sup> *R v Hoy* [2011] VSC 95 at [39].

**Part 23 of the Superannuation Industry (Supervision) Act 1993 (Cth)**

8. In submissions on 22 July a question arose about the payment of financial assistance to some of the persons who had suffered loss by reason of the collapse of Trio and related entities (as referred in Exhibit D).
9. The following submissions address the relevant legislative background.
10. Part 23 of the *Superannuation Industry (Supervision) Act 1993 (Cth)* makes provision for the grant of financial assistance to certain superannuation entities that have suffered loss as a result of fraudulent conduct and theft, which is defined as an "eligible loss": s 228.
11. A regulated superannuation fund or approved deposit fund may lodge an application for assistance with the Minister where the loss has caused a substantial diminution of the fund leading to difficulties in paying benefits: s 229.
12. Self-managed superannuation funds are specifically excluded from being able to make an application for assistance: s 229(1)(aa)(i).
13. If the Minister (after seeking advice from the regulator of regulated superannuation entities, the Australian Prudential Regulation Authority (APRA)) is satisfied that the fund has suffered an eligible loss then he is to determine whether it is in the public interest to provide assistance, and if so the amount of the assistance: s 231.

***Funding Financial Assistance***

14. Financial assistance is initially paid by an appropriation from consolidated revenue: s.231(4).
15. The *Superannuation (Financial Assistance Funding) Levy Act 1993 (Cth)*, provides a mechanism for levies to be imposed on superannuation funds and approved deposit funds in order to fund assistance provided under part 23 of the SIS Act: s.3 Levies Act.
16. Self-managed superannuation funds are specifically excluded from the definition of funds that can be levied: s.5 Levies Act.
17. The funds that can be subject to the levy are regulated funds or approved deposit funds: s.5 Levies Act. If the Minister decides to provide assistance to a fund under part 23 of the

SIS Act, the Minister may via regulation impose levies on other funds to pay for the assistance: s.6 Levies Act.

*Amount of the Assistance*

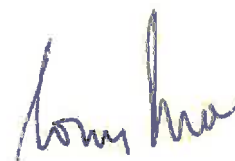
18. The assistance provided to superannuation funds for which Trio Capital Ltd was responsible was approximately \$55 million: Exhibit D.

*Exclusion of SMSF from the financial assistance regime*

19. The exclusion of self-managed superannuation funds from eligibility for compensation under Part 23 has been in place since the original *Superannuation Industry (Supervision) Act 1993 (Cth)* was enacted in 1993. The original Act contained a provision that funds eligible for assistance under this part did not include "excluded funds" (a precursor to self-managed superannuation funds): s 228.
20. The Parliamentary Secretary to the Treasurer in the Second Reading speech that the Bill provided for the Government to impose a levy to cover fraud or theft but the intent was not to guarantee those funds that sit in private superannuation schemes: Hansard, House of Representatives, Monday 27 September 1993, 1103.

*Current Parliamentary Inquiry*

21. On 23 June 2011 the Parliamentary Committee on Corporations and Financial Services resolved to inquire into the collapse of Trio Capital Ltd and related matters. The terms of reference for this inquiry include:
  - a. Access to compensation and insurance for Trio Capital investors including in circumstances of fraud;
  - b. Whether there are adequate protections against fraud for those who invest through self managed superannuation funds as opposed to other investment vehicles.



Tony Payne

25 July 2011