



HIGH COURT OF AUSTRALIA

Public Information Officer

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X AND Z AND Y v AUSTRALIAN PRUDENTIAL REGULATORY AUTHORITY AND MARK GODFREY

Notices to two insurance company managers to show cause why they should not be disqualified from operating in Australia, which referred to evidence given by them to the HIH Royal Commission, were not in breach of the *Royal Commissions Act*, the High Court of Australia held today.

Z, an international reinsurance business based in Germany, is authorised by the Australian Prudential Regulatory Authority to carry on business in Australia. X and Y are employed by Z as senior managers outside Australia. Z handed over documents to the Royal Commission into the 2001 collapse of the HIH Insurance Group and X and Y each travelled to Australia in 2002 to make statements and to give oral evidence. In 2005, Mr Godfrey, APRA's senior manager, wrote to both X and Y seeking submissions on why APRA should not disqualify them under the *Insurance Act* as not being fit and proper people to act as managers or agents in Australia of a foreign insurer. The show cause notices stated that APRA's preliminary view that each was not a fit and proper person was based on their involvement in certain arrangements entered into between Z and HIH, as revealed to the Royal Commission. X and Y's lawyers responded that any decision to disqualify X and Y would be beyond power and would involve the commission of an offence under the *Royal Commissions Act*. They said such a decision would disadvantage X and Y, including the need to meet obligations to inform regulatory authorities in other countries.

X, Y and Z instituted proceedings in the Federal Court of Australia to restrain APRA from taking action against X and Y pursuant to the *Insurance Act* and for a declaration that APRA did not have the power to disqualify X and Y. Justice Kevin Lindgren and the Full Court on appeal rejected their submission that APRA could only disqualify persons holding senior insurance positions in Australia. Justice Lindgren and the Full Court also rejected a submission that the use by APRA or Mr Godfrey of X and Y's evidence to the HIH Royal Commission contravened section 6M of the *Royal Commissions Act*. The High Court granted X, Y and Z leave to appeal in regards to section 6M. This provides that any person who uses, causes or inflicts any violence, punishment, damage, loss or disadvantage to any person for or on account of the person having appeared as a witness before a royal commission or for any evidence given by him or her before a royal commission is guilty of an indictable offence which attracts a penalty of \$1,000 or one year's jail. Justice Lindgren concluded that neither APRA nor Mr Godfrey has caused or inflicted any disadvantage on X, Y or Z on account of X and Y having given evidence to the HIH Royal Commission.

The High Court unanimously dismissed the appeal. It held that X, Y and Z could not demonstrate, within the meaning of section 6M, that APRA and Mr Godfrey proceeded "for or on account of" the appearance by X and Y at the HIH Royal Commission or any evidence they gave there. The Court held that Mr Godfrey was proceeding in discharge of the statutory powers of a regulatory nature conferred upon APRA by the *Insurance Act*. There was not the connection between X and Y's attendance at the Royal Commission with the past or threatened conduct of Mr Godfrey or APRA that is captured by the expression "for or on account of". Any disadvantage suffered by X or Y would not be "for or on account of" their attendance at the Royal Commission or the evidence they gave. Neither Mr Godfrey nor APRA victimised or proposed to victimise X, Y or Z in the sense required for the commission of an offence under section 6M.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*