

## Whitlam v ASIC (2003) 57 NSWLR 559

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### Facts

- Mr Whitlam was the chair of a members' meeting of the National Roads and Motorists' Association (NRMA).
- There had been to that point a dispute between various membership factions. This discontent mainly originated from the NRMA's poor financial performance.
- At this meeting, a resolution was proposed to grant the directors a pay rise. This was opposed by many members.
- It looked like the vote would fail due to proxy votes. Mr Whitlam was responsible for receiving and voting the proxy votes. He failed to sign a large number of proxy votes that were against the resolution to increase the directors' remuneration.
- The resolution passed. ASIC commenced proceedings against Mr Whitlam for breaching directors duties by deliberately failing to sign the proxies.
- The trial court found Mr Whitlam liable for breach of directors duties and banned him from being a director. Mr Whitlam appealed

### Issues

- Did Whitlam breach his directors duties by failing to count proxy votes which opposed the resolution?

### Held

- The NSW Court of Appeal held that Mr Whitlam's duties as proxy holder were not directors' duties owed to the company, but were duties which were owed to the proxy voting members.
- By failing to cast the votes correctly, Mr Whitlam could not breach the relevant sections of the *Corporations Law 1998* (Cth) and therefore not be banned from being a director.

### Quotes

**"A director who accepts appointment as a proxy will, as agent for the member who made the appointment, have the fiduciary duties of an agent towards the member as principal.** If the member has directed the director as proxy to vote in a particular way, then generally those fiduciary duties will require the director as proxy to do so, although there may be some exceptions to this. In addition, the director is subject to statutory requirements, such as those of s 250A that we have considered, but only in his or her capacity as proxy, not as a director. **Further, these duties and requirements are not duties owed to the company: the fiduciary duties are owed to the particular member who appointed the director as proxy,** and the statutory requirements do not appear to give rise to any duty owed to any legal

entity other than that member and/or the State."

(Hodgson JA, Ipp JA and Tobias JA at pages 600-601 [152])

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