

NOTICE OF FILING

Details of Filing

Document Lodged:	Concise Statement
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	30/08/2023 3:07:10 PM AEST
Date Accepted for Filing:	30/08/2023 3:20:33 PM AEST
File Number:	NSD935/2023
File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v RONALD JOSEPH PATTENDEN & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



CONCISE STATEMENT

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

No. NSD of 2023

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

RONALD JOSEPH PATTENDEN and others named in the schedule

Defendants

A. IMPORTANT FACTS GIVING RISE TO CLAIM

Introduction

1. The First to Fifth Defendants were directors or officers of the ACBF Entities (collectively, the **Directors**). The ACBF Entities were beneficially owned by the First (**Mr Pattenden**) and Second Defendants (**Mr Law**).
2. The ACBF Entities comprised Aboriginal Community Benefit Fund No 2 Pty Ltd (**ACBF 2**), ACBF Funeral Plans Pty Ltd (**ACBF Plans**) and Community Funeral Plans Pty Ltd (**ACBF Community**). During the Relevant Period, each of the ACBF Entities operated funds for the purpose of providing funeral cover (**Funds**) predominantly marketed to Indigenous Australians. ACBF 2 was the trustee of **Fund 2**, established by trust deed in 1993. ACBF Plans operated **Fund 3**, and ACBF Community operated **Fund 4**, which were established in 2005 and both were registered under the *Funeral Funds Act 1979* (NSW) and subject to plan rules.
3. Crown Insurance Services Limited (**Crown**) was a company registered in Vanuatu which was beneficially owned and controlled by Mr Pattenden and Mr Law.
4. ASIC alleges that during the period 4 September 2017 to 30 November 2018 (**Relevant Period**), the directors breached their duties under ss 180 to 182 of the *Corporations Act 2001* (Cth) (**Corporations Act**) by failing to pursue alternatives to and maintaining insurance arrangements with Crown, where those arrangements were not in the interests of the ACBF Entities and the members of the funds they operated. As a result, substantial sums were paid by the ACBF Entities to Crown which was not in the ACBF Entities' interests, impacting their viability and putting at risk their ability to meet their commitments to members.

Filed on behalf of the Plaintiff, Australian Securities and Investments Commission

File ref: 22004985

Prepared by: Jody Marshall
AGS lawyer within the meaning of s 55I of the *Judiciary Act 1903*

Address for Service:
The Australian Government Solicitor
Level 33, 300 George Street, BRISBANE QLD 4000
jody.marshall@ags.gov.au
48943691

Lawyer Telephone: 07 3360 5751
Lawyer's Email:
jody.marshall@ags.gov.au
Facsimile: 02 6169 3054

The Defendants

5. Mr Pattenden founded the ACBF Entities in the 1990s and 2000s and was a director of the ACBF Entities from at least 3 May 2010 to 30 November 2018. Mr Law was a director of the ACBF Entities from 18 May 2017 until 30 November 2018.
6. The Third Defendant (**Mr Wilson**) was a director and the financial controller of the ACBF Entities from 18 November 2014 until 23 October 2017 (for ACBF Community) and until 19 December 2017 (for ACBF 2 and ACBF Plans).
7. The Fourth Defendant (**Mr Jones**) was a director of ACBF 2 and ACBF Plans from 18 December 2017 until 29 January 2021 and ACBF Community from 23 October 2017 until 29 January 2021. Between October 2017 and 18 December 2017, Mr Jones acted in the position of a director of ACBF 2 and ACBF Plans within the meaning of the term “director”, or was involved in the management of their affairs within the meaning of the term “officer”, as defined in s 9(1) of the Corporations Act.
8. The Fifth Defendant (**Mr Clayton**) was a director of ACBF Community from 23 October 2017 until 20 November 2018. Between October 2017 and 30 November 2018, Mr Clayton acted in the position of a director of ACBF 2, ACBF Plans and ACBF Community within the meaning of the term “director”, or was involved in the management of their affairs within the meaning of the term “officer”, as defined in s 9(1) of the Corporations Act.

Crown Insurance Arrangements

9. The ACBF Entities were required under the applicable trust deed or plan rules to hold insurance that underwrote the value of fund members’ claims. From June 2002 (for ACBF 2) and January 2005 (for ACBF Plans and ACBF Community) until on or around February 2022, Crown was the insurer for the ACBF Entities.
10. Crown was incorporated in Vanuatu by Mr Pattenden. During the Relevant Period, Mr Pattenden and Mr Law were directors of Crown and each of them indirectly owned all or most of the shares in Crown. The ACBF Entities were the sole customers of Crown.
11. The Crown policies were renewable annually. It was a term of the policies that during each policy period, Crown could vary the premium, including variations that would have retrospective effect within a year.
12. On 4 September 2017, Mr Pattenden, Mr Law and Mr Wilson, agreed that Crown should double the premium it was charging ACBF 2. The doubling of premiums significantly affected ACBF 2’s financial position. Agreeing to or accepting the increase in Crown’s premium was not in good faith in the best interests of ACBF 2. A substantial reason for making that decision was to gain an advantage for Crown and in turn Mr Pattenden and Mr Law.
13. From 6 September 2017 until 5 December 2018, ACBF 2 paid Crown premiums in amounts that were double the amount of the premium that had previously been paid.
14. On 30 November 2018, Mr Pattenden and Mr Law resigned as directors of the ACBF Entities following execution of a share sale agreement by which by Mr Jones, Mr Clayton and their business associates acquired ownership interests in the ACBF Entities.

Knowledge of the Directors

15. At various times during the Relevant Period, the Directors of ACBF 2 knew or ought to have known that:
 - 15.1. where certain members of Fund 2 wished to cancel their membership and wrote to ACBF 2 giving notice of their cancellation, ACBF 2 was required to repay the member an amount equal to one third of the member's total membership payments from the 26th payment onwards;
 - 15.2. ACBF 2 maintained cash reserves to meet its potential liability to pay cancellation benefits to members. That liability was not insured under the policy with Crown;
 - 15.3. ACBF 2 did not have sufficient cash reserves to meet its ongoing liabilities to pay death benefits to members. ACBF 2 was not attempting to accumulate cash reserves for this purpose. Consequently, ACBF 2's ability to meet claims by members depended on the insurance with Crown;
 - 15.4. historically, the premium paid to Crown far exceeded the benefits paid to members;
 - 15.5. Crown was under no obligation to renew the policy and had the power to vary the premium payable under the policy in force, as it had done by doubling the premium in September 2017;
 - 15.6. ACBF 2 could not afford Crown's doubled premium without either depleting cash reserves and/or increasing member contributions and/or decreasing expenses;
 - 15.7. in accordance with the trust deed, ACBF 2 could not increase member contributions without obtaining the consent of 75% of the members;
 - 15.8. there was a substantial risk that ACBF 2 would be unable to obtain insurance from any other insurer;
 - 15.9. there was a substantial risk that if ACBF 2 continued to pay Crown's premium without making changes to increase available reserves, ACBF 2 would become insolvent;
 - 15.10. in the event ACBF 2 continued to pay Crown's premium and became insolvent, the trust would be wound up, ACBF 2's policy with Crown would be terminated and the remaining members of Fund 2 would not be able to recover all or part of any cancellation benefit they were owed. If after this a member still required funeral cover, they would have to apply to obtain cover from a different funeral fund or insurer with the risk that they may be unsuccessful due to age, health or other underwriting requirements;
 - 15.11. there was a substantial risk that the members of Fund 2 did not know or understand the matters referred to in paragraph 15.10 above and had no practical way of knowing those matters unless explained to them by information provided by ACBF 2;
 - 15.12. there was a reasonable chance that if the members of Fund 2 understood the matters referred to in paragraph 15.10 above, they would cancel their membership with Fund 2.

16. During the Relevant Period, the Directors of ACBF Plans and ACBF Community knew or ought to have known that the risks the Crown arrangement posed to ACBF 2 also applied to those entities. In particular, continuing to insure with Crown left ACBF Plans and ACBF Community vulnerable to unaffordable premium increases in circumstances where they had insufficient reserves to meet ongoing liabilities to pay death benefits to members.

B PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

17. During the Relevant Period, if the Directors of the ACBF Entities had exercised their powers and discharged their duties with a reasonable degree of care and diligence, they would have:
- 17.1. considered whether the Crown policies were in the interests of the ACBF Entities (including upon the doubling of the ACBF 2 premium); and
 - 17.2. pursued alternatives to the insurance arrangements with Crown, including: considering whether to:
 - 17.2.1. renegotiate the Crown insurance policy;
 - 17.2.2. cancel the Crown insurance policy and transition to self-insurance;
 - 17.2.3. find a cheaper external insurer;
 - 17.2.4. increase reserves from which to pay Crown;
 - 17.2.5. notify members of the risks to the funds inherent in the arrangements with Crown;
 - 17.2.6. for ACBF 2, wind up the trust; for ACBF Plans and ACBF Community, wind up the companies.
18. By failing to consider or pursue alternatives to the insurance arrangements with Crown and by maintaining those arrangements (including upon the doubling of the ACBF 2 premium), the Directors contravened ss 180, 181 and 182 of the Corporations Act.

C RELIEF SOUGHT FROM THE COURT

19. ASIC seeks the relief set out in the accompanying originating process, being:
- 19.1. declarations pursuant to s 1317E(1) of the Corporations Act, that the Directors contravened ss 180(1), 181(1) and 182(1) of the Corporations Act;
 - 19.2. pecuniary penalties under s 1317G(1) of the Corporations Act;
 - 19.3. disqualification orders under ss 206C(1)(a)(i) and/or 206E(1)(a)(ii) of the Corporations Act.

D THE ALLEGED HARM SUFFERED

20. As a result of the contravening conduct, the ACBF Entities paid substantial sums in insurance premiums to Crown in Vanuatu which was not in their interests, in circumstances where Mr Pattenden and Mr Law benefited financially from those arrangements. This impacted the viability of the ACBF Entities' and put at risk their ability to meet their commitments to members.

Date: 30 August 2023

This concise statement was prepared by David McLure SC, Joanne Little and Jacqueline Fumberger of counsel.

CERTIFICATE OF LAWYER

I Jody Maree Marshall certify to the Court that, in relation to the concise statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 30 August 2023


.....

Jody Maree Marshall
AGS lawyer
for and on behalf of the Australian Government Solicitor
Solicitor for the Plaintiff

Schedule of Parties

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL**

No. NSD of 2023

Second Defendant:	JONATHAN GLEN LAW
Third Defendant:	MICHAEL BRENDAN WILSON
Fourth Defendant	BRYN ELWYN JONES
Fifth Defendant	GEOFFREY PETER CLAYTON