



ASTC Bulletin

Date: 28 March 2006

Key topics

1. Tolhurst Noall Ltd

Reading List

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 ASTC Participants
 Office Managers
 Share Registries

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PARTICIPANT BULLETIN

Disciplinary Matters

Following the conclusion of an appeal to the Appeal Tribunal from a determination of the ASTC Disciplinary Tribunal ("the Tribunal"), Tolhurst Noall Ltd ("Tolhurst") has been fined \$25,000.00 (plus GST) for contravening SCH Business Rule 11.2.1 between 28 February 2003 and 10 March 2004 and ASTC Settlement Rule 8.15.8 between 11 March 2004 and 2 June 2004.

The breach that arose on 28 February 2003 subsisted until 2 June 2004. In the intervening period, the SCH Business Rules were superseded by the ASTC Settlement Rules.

Circumstances of the matter

A client of Tolhurst died on 17 January 2003 ("the client"). Tolhurst was informed of the client's death by way of a letter dated 28 February 2003, which enclosed a copy of the Death Certificate and the client's Last Will and Testament. This should have resulted in Tolhurst requesting SCH to apply a Holder Record Lock to the client's holdings as required by SCH Rule 11.2.1 and ASTC Settlement Rule 8.15.8. This simple but important administrative step was not taken until 3 June 2004, approximately 15 months after receipt of the Notice of Death. In the meantime, both before and after the grant of probate (which occurred on 9 February 2004), Tolhurst received and executed orders from two of the client's three executors to sell parcels of shares belonging to the client's estate. The Tribunal noted that had the Holder Record Lock been applied to the client's Holdings, those Holdings could not have been used to satisfy the transactions undertaken by the executors until the Holder Record Lock was removed following, in this instance, the grant of probate.

The Tribunal determined on the evidence and material before it that Tolhurst contravened:

- (a) SCH Business Rule 11.2.1 between 28 February 2003 and 10 March 2004 in that upon receiving Notice of Death of the relevant Holder, Tolhurst failed to promptly transmit a Valid Originating Message requesting SCH to apply a Holder Record Lock to all Holdings under that Holder Record; and
- (b) ASTC Settlement Rule 8.15.8 between 11 March 2004 and 2 June 2004 in that upon receiving Notice of Death of the Relevant Holder, Tolhurst failed to transmit a Valid Originating Message within one Business Day requesting ASTC to apply a Holder Record Lock to all Holdings under that Holder Record.

The Tribunal imposed a fine of \$25,000 (plus GST) upon Tolhurst in respect of the above contraventions.

The Tribunal took into account a number of matters, including the following:

- (a) Tolhurst has updated and increased deceased estate procedures training and employed a settlements clerk to handle all deceased estate processing;
- (b) Tolhurst was the subject of a bi-monthly continuous reporting obligation to ASX Compliance Services in respect of its deceased estate procedures;
- (c) Tolhurst received Management Letters from ASX concerning its deceased estate procedures on two separate occasions;
- (d) the contravention of SCH Business Rule 11.2.1 and ASTC Settlement Rule 8.15.8 occurred over an extended period of time;
- (e) Tolhurst conducted transactions on the client's account after receipt of Notice of Death and prior to probate being granted; and
- (f) both SCH Business Rule 11.2.1 and ASTC Settlement Rule 8.15.8 are provisions that require strict and mandatory compliance and serve to protect the interests of Holders and ensure the security of the assets of a deceased estate.

Tolhurst did not contest the contraventions of SCH Business Rule 11.2.1 and ASTC Settlement Rule 8.15.8, but appealed against the level of penalty imposed by the Tribunal. The Appeal Tribunal determined that the imposition of a fine of \$25,000 (plus GST) was appropriate in the circumstances and affirmed the decision of the Tribunal concerning the level of penalty. The Appeal Tribunal made the following observations:

- (a) Tolhurst had been the subject of previous ASX investigations, which concluded that its deceased estate procedures were inadequate. Those previous investigations, together with the circumstances in which the contraventions in this matter occurred, indicate systemic compliance inadequacy in relation to Tolhurst's deceased estate procedures. Having previously been put on notice of procedural inadequacies in the area of deceased estates, Tolhurst's failure to comply with SCH Business Rule 11.2.1 and ASTC Settlement Rule 8.15.8 amounted to an aggravating circumstance;
- (b) SCH Business Rule 11.2.1 and ASTC Settlement Rule 8.15.8 are designed to protect the assets of a deceased estate until authorised access is permitted. If complied with, those rules operate to prevent unlawful dealings with the assets of a client's estate, which, in turn, prevents loss to innocent third parties, such as beneficiaries or creditors of a client's estate; and
- (c) given the seriousness of the contraventions, the potential adverse consequences and the simplicity with which steps could and should have been taken to avoid the contraventions, the level of penalty was appropriate in the circumstances.