



ASIC

Australian Securities & Investments Commission

3 June 2004

MICHAEL GETHING

Regional Commissioner

66 St George's Terrace, Perth
GPO Box 9827 Perth WA 6001
DX 158 Perth

Telephone: (08) 9261 4199

Facsimile: (08) 9261 4156

Dear Sir/Madam

EMU BREWERY MEZZANINE LIMITED

Based upon the records of Emu Brewery Mezzanine Limited ("EBM"), the Australian Securities & Investments Commission ("ASIC") understands that you invested in the promissory notes issued by EBM pursuant to its information memorandum.

ASIC has commenced proceedings in the Supreme Court of Western Australia in matter COR 120 of 2004. In those proceedings, ASIC alleges that the conduct of EBM in offering investment under the information memorandum contravened the Corporations Act. ASIC also makes other claims. Details of ASIC's claims can be seen in the amended originating process, a copy of which is attached.

EBM denies ASIC's claims.

On 1 June 2004, the Supreme Court ordered that each investor wishing to become a party to or intervene in the action may do so by giving written notice of intention to do so to the Court, to the plaintiff and to the defendant. Such notice is to be given within 21 days of the date of this letter.

The Court's decision in the case may affect your rights as the holder of a promissory note. The action is back before the Supreme Court on 2 July at 9.15 am, at which time it is anticipated the Court will make further orders as to how the action is to proceed.

Whether you wish to become a party in or intervene in the litigation is, of course, a matter for your decision. You may wish to take your own legal advice in that respect.

If you have any queries in relation to this letter, please contact ASIC on (08) 9261 4108.

Yours faithfully

Michael Gething
Regional Commissioner WA

Att

**IN THE SUPREME COURT OF WESTERN AUSTRALIA
HELD AT PERTH**

COR 120 of 2004

**IN THE MATTER OF Sections 283HB, 1101B and 1324 of the Corporations Act
2001 (Cth) and sections 12DA and 12DB of the Australian Securities &
Investments Commission Act 2001 (Cth)**

**IN THE MATTER OF EMU BREWERY MEZZANINE LIMITED
ACN 104 639 410**

BETWEEN:

**AUSTRALIAN SECURITIES &
INVESTMENTS COMMISSION**

Plaintiff

and

**EMU BREWERY MEZZANINE LIMITED
(ACN 104 639 410)**

Defendant

**AMENDED ORIGINATING PROCESS
BY ORDER OF HON JUSTICE OWEN
MADE 1 JUNE 2004**

Date of Document: 21 May 2004

Filed on behalf of: The Plaintiff

Date of Filing: 1 June 2004

**Prepared by:
Matthew Benter
Solicitor for the Australian
Securities & Investments Commission
Level 3, 66 St Georges Terrace
PERTH WA 6000**

**Tel: 08 9261 4000
Fax: 08 9261 4057
Reference: ENF2003/14122
Michelle McDiarmid**

A. DETAILS OF APPLICATION

This application is made under *Corporations Act 2001* (Cth) sections 283HB, 1101B, 1324 and *Australian Securities & Investments Commission Act 2001* (Cth) sections 12DA, 12DB.

The application is for declarations, injunctions and orders in relation to the conduct of the defendant in raising funds in the circumstances set out in the information memorandum issued by the defendant, a copy of which appears as annexure "RWG-4" to the affidavit of Richard Warren Gomm filed in support of this application.

On the facts stated in the supporting affidavit, the plaintiff claims:

1. A declaration that the conduct of the defendant in offering to issue and issuing securities to investors in the circumstances set out in an information memorandum ("the information memorandum") issued by the defendant entitled "Emu Brewery Development Information Memorandum – Mezzanine Finance - \$35 Million Promissory Notes Issue" in order to raise \$35 million without:
 - (a) entering in to a trust deed in compliance with s283AB(1) of the *Corporations Act*;
 - (b) appointing a trustee in compliance with s283AC of the *Corporations Act*;
 - (c) preparing a disclosure statement in accordance with Part 6D.2 *Corporations Act*;
 - (d) lodging the disclosure document with the plaintiff in accordance with s718 of the *Corporations Act*; and

- (e) providing a copy of the disclosure document to investors in accordance with s721 of the *Corporations Act*;

contravened the *Corporations Act*.

2. Alternatively to 1, a declaration that the conduct of the defendant in inviting investors to subscribe for promissory notes to be issued by the defendant on the basis of statements made in the information memorandum to the effect that:

- (a) there was be an obligation or requirement for the defendant as a condition of issuing the promissory notes:
- (i) to be a single purpose vehicle that would receive money subscribed for the promissory notes and lend those monies to Emu Brewery Developments Pty Ltd as trustee of the Emu Brewery Trust;
 - (ii) to arrange for Westpoint Corporation Pty Ltd and associated entities to guarantee the repayment of the monies to be lent by the defendant to Emu Brewery Developments Pty Ltd;
 - (iii) to obtain a second ranking mortgage over a property to be developed by Emu Brewery Developments Pty Ltd as trustee of the Emu Brewery Trust and a second ranking mortgage over the assets of the Emu Brewery Trust; and
 - (iv) to ensure that the defendant had a board of directors that was independent of the Emu Brewery Developments Pty Ltd and the Emu Brewery Trust; and
- (b) the matters stated in paragraph 2(a) would provide a means by which the lending risk associated with the repayment of the promissory notes would be mitigated;

constituted misleading and deceptive conduct contrary to s12DA and s12DB(1)(g) having regard to the matters stated in s12BB of the

Australian Securities and Investments Commission Act 2001 (Cth) in that there was no obligation or requirement of the kind described in subparagraph (a).

- 2.A Alternatively to 1 and 2 above, a declaration that the conduct of the defendant in inviting investors to subscribe for promissory notes to be issued by the defendant on the basis of the information memorandum without registering a managed investment scheme under s601EB in accordance with s601ED contravened the *Corporations Act*.
- 2.B Alternatively to 1 and 2 above, a declaration that the conduct of the defendant in offering and issuing promissory notes on terms set out in the information memorandum without giving investors a product disclosure statement in accordance with s1012B(3) contravened the *Corporations Act*.
3. An order that within 30 days of the date of this order, the defendant enter into a trust deed, appoint a trustee and prepare and lodge with the plaintiff a disclosure document in accordance with the requirements of the *Corporations Act* in respect of securities issued by the defendant in the circumstances set out in the information memorandum.
4. An order that upon the plaintiff advising the defendant that it does not intend to issue a stop order under s739 of the *Corporations Act* in respect of the disclosure document, the defendant within seven days thereafter deliver to each of the investors to whom securities have been issued:
 - (a) a copy of the prospectus;
 - (b) a copy of these orders; and

- (d) a letter informing the investor that within 30 days of receipt of the letter the investor may, at the sole discretion of the investor, request the defendant to repay to the investor the principal sum and accrued interest in respect of the securities.
5. An order that the defendant, within 30 days of the date of the request, repay the principal sum and accrued interest to each investor who request repayment referred to in order 4(c).
6. An order that, if within 30 days of lodging of the disclosure document the plaintiff has not advised the defendant in accordance with order 4, then each of the parties shall have liberty to apply for orders granting an extension of time for advising the defendant, or such further order as the Court may consider appropriate.
7. An order that the defendant whether by itself, its officers, servants, agents or employees be restrained from issuing further securities in the circumstances set out in the information memorandum save to the extent permitted by this order.
8. Such other order that the court thinks fit.
9. An order that the defendant pay the plaintiff's costs to be taxed.

Date: 21 May 2004

Matthew Benter

Solicitor for the Australian Securities
& Investments Commission

This application will be heard by at
the Supreme Court of Western Australia, Stirling Gardens, Barrack Street, Perth
in the State of Western Australia atam/pm on
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B. NOTICE TO DEFENDANT

TO: Emu Brewery Mezzanine Limited (ACN 104 639 410)
C/- Westpoint Corporation Pty Ltd
Level 9, Paragon CBD
160 St. George's Terrace
PERTH WA 6000

If you or your legal practitioner do not appear before the Court at the time shown above, the application may be dealt with, and an order made, in your absence. As soon after that time as the business of the Court will allow, any of the following may happen:

- (a) the application may be heard and final relief given;
- (b) directions may be given for the future conduct of the proceeding;
- (c) any interlocutory application may be heard.

Before appearing before the Court, you must file a notice of appearance, in the prescribed form, in the Registry and serve a copy of it on the plaintiff.

**C. APPLICATION FOR WINDING-UP ON GROUND OF
INSOLVENCY**

Not applicable.

D. FILING

Date of filing: 12 MAY 2004

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K. F. Chapman
Principal Registrar

This originating process is filed by Matthew Benter, solicitor for the Plaintiff.

E. SERVICE

The Plaintiff's address for service is Level 3, 66 St George's Terrace, Perth.

It is intended to serve a copy of this originating process on each defendant and on any person listed below –

Emu Brewery Mezzanine Limited (ACN 104 639 410)
C/- Westpoint Corporation Pty Ltd
Level 9, Paragon CBD
160 St. George's Terrace
PERTH WA 6000