SAI Global Corporate Law Bulletin No. 236>

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Bulletin No. 236

Legislation Hotline

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Published by SAI Global on behalf of Centre for Corporate Law and Securities Regulation, Faculty of Law, The University of Melbourne with the support of the Australian Securities and Investments Commission, the Australian Securities Exchange and the leading law firms: Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper, Herbert Smith Freehills, King & Wood Mallesons, Minter Ellison.

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1. Recent Corporate Law and Corporate Governance Developments

1.1 Further streamlining of regulatory approvals

12 April 2017 - The Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, has announced that the Government has legislated to give partial licence exemptions and additional powers to partially or fully exempt a particular market or class of financial markets from ASIC supervision and from compensation arrangements.

The new powers will create a more tailored regulatory regime to facilitate the operation of specialised and emerging financial markets and clearing and settlement facilities, including in relation to crowdsourced equity funding securities.

These new powers are being delegated to authorised officers of the Australian Securities and Investments Commission (ASIC) and will streamline market licensing approval. This delegation follows the successfully delegation of powers in 2016 relating to firm seeking regulatory approval for licensing, operating rules and compensation arrangements for financial markets and clearing and settlement facilities.

The delegation of these regulatory powers is accompanied by guidelines for ASIC to take into account when exercising these powers.

The guidelines can be accessed on the Treasury website.

1.2 ASIC enforcement review consults on breach reporting

11 April 2017 - The ASIC Enforcement Review Taskforce has published a consultation paper on 'Self-reporting of contraventions by financial services and credit licensees'.

ASIC's ability to deal appropriately with misconduct is greatly enhanced by timely reporting by licensees of significant breaches of the financial services laws. The Government included breach reporting in the Terms of Reference for the ASIC Enforcement Review, so that any necessary changes to the reporting regime, to ensure it operates as effectively as possible, could be considered. The proposed reforms will:

- reduce ambiguity around whether a breach is significant and must be reported to ASIC by introducing an objective "reasonableness" test, making it easier for businesses to make decisions about reporting and strengthening ASIC's position when it takes enforcement action for failure to report.

- enhance accountability for licensees, and their employees and representatives, by expanding the class of reports that must be made to expressly include misconduct by individual advisers and employees;
- introduce new and heightened penalties for non-reporting, giving ASIC greater flexibility to impose a range of penalties in response to a failure to report;
- require ASIC to publish data on breach reports for major licensees; and
- introduce an equivalent reporting regime for credit licensees (who are currently subject only to annual compliance reporting).

The ASIC Enforcement Review Taskforce was established by the Government in October 2016. The terms of reference allow for examination of the adequacy of ASIC's enforcement regime, including in relation to industry Codes of Conduct, to deter misconduct and foster consumer confidence in the financial system.

Membership of the Taskforce includes senior members of the Treasury, ASIC, the Attorney-General's Department and the office of the Commonwealth Director of Public Prosecutions, as well as representatives from industry bodies, consumer groups and academia.

The Taskforce will provide its recommendations to Government by the end of September 2017.

The position paper is available on the Treasury website.

1.3 US CEO pay: study

11 April 2017 - ISS Analytics, the data and analytics arm of Institutional Shareholder Services Inc (ISS), has announced findings from an analysis of US CEO pay figures for companies reporting their financials by 10 April 2017.

The median CEO pay raise, excluding pensions, at large-cap US companies was 6.7%, representing the largest annual increase in the last five years, according to ISS Analytics data. An examination of 270 S&P500 company filings year-to-date finds that median pay in 2016 stands at just under US$12.2 million compared with approximately US$10.9 million in fiscal 2015. Including pension allocations, the median CEO pay raise was 8.1%.

As in past years, equity grants were the primary fuel behind CEO pay increases, with equity compensation packages now representing more than 60% of S&P 500 CEO aggregate compensation. The median S&P 500 CEO received 4.5% more value in stock grants during fiscal 2016 than in 2015. Reversing a trend witnessed over the past several years, the use of stock options increased in aggregate by 19% in 2016, though much of this growth was focused on a small number of CEOs.

For S&P 500 CEOs, base salary increases were, as in previous years, relatively modest. The median base salary raise for CEOs based on filings to-date in 2017 was less than 1%, lower than the 2.2% evidenced in last year's filing. For these chief executives, base salary is usually a small portion of their total pay package - in aggregate, these S&P 500 CEOs receive less than 10% of their total pay through salary.

The findings are available on the ISS website.

1.4 FSB consults on framework for post-implementation evaluation of the effects of the G20 financial regulatory reforms

11 April 2017 - The Financial Stability Board (FSB) has published for consultation the main elements of a Proposed Framework for Post-Implementation Evaluation of the Effects of the G20 Financial Regulatory Reforms. The framework will guide analyses of whether the G20 core financial reforms are achieving their intended outcomes, and help to identify any material unintended consequences that may have to be addressed, without compromising on the objectives of the reforms.

The G20 launched a comprehensive post-crisis program of financial reforms to increase the resilience of the global financial system, while preserving its open and integrated structure. The reforms, by making the financial system more resilient and by reducing the likelihood and severity of crises, support the G20 objective of strong, sustainable and balanced growth. The FSB has coordinated the development of these reforms and is supporting their full, timely and consistent implementation.

The FSB places great importance on implementation monitoring and the evaluation of the effects of reforms. These processes represent good regulatory practice, form part of the FSB's accountability to the G20 and the public, and inform structured policy discussions among FSB members and standard-setting bodies. To date, the FSB and standard-setting bodies have been able to monitor whether there has been full, timely and consistent implementation in more detail than they have been able to evaluate the effects of the reforms.

1.5 ESG draft engagement guidelines published

10 April 2017 -The Australasian Investor Relations Association (AIRA) has issued a draft of its recommended practices for how listed companies can manage environmental, social and governance (ESG) issues.

The draft guidelines include 13 recommendations covering issues like engagement and coordination; systematic strategy and integrating planning; feedback and review; and board involvement.

One recommendation deals with the increasingly complex nature of those involved with ESG issues within the investment community. Companies now deal with a web of interested parties, such as asset owners and managers, ESG managers and analysts, proxy voting analysts, ESG research and ratings groups, and governance and proxy research. Companies need to identify and engage with relevant parties in this system.

The draft guidelines also offer advice about the timing and practicalities of how companies can best engage. For instance, they should integrate ESG matters into their existing investor engagement schedule. They also need to incorporate their ESG strategy into their overall investor relations strategy, and disclose their program as part of their investor relations outreach.

Draft guideline: ESG Engagement - Recommended Practices for Listed Entities

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1.6 Corporate governance reforms proposed for the UK

5 April 2017 - UK businesses must act on corporate governance, executive pay including long-term incentive plans, and boardroom diversity to maintain the country's strong international standing in corporate governance and address a worrying lack of trust of business among the public, says the UK Parliament's Business, Energy and Industrial Strategy Committee in its report.

While recognising the overall strength of the UK corporate governance system, the report notes the damage caused by high-profile failings and a dramatic ratcheting up of executive pay in recent years, at a time of stagnant wage growth for many workers. The Committee recommends a series of actions on executive pay, a new and stronger voluntary code of governance for private companies, better reporting by companies on how directors fulfil their duties and responsibilities and a major expansion of the role and powers of the Financial Reporting Council (FRC), with a new rating system for companies to be assessed for their corporate governance performance.

On executive pay, the Committee calls for businesses to simplify the structure of executive pay and put an end to long-term inventive plans (LTIPs), which lack transparency and which can distort decision-making. The Committee also suggests workers be represented on remuneration committees and for the chairs of remuneration committees to be expected to resign if shareholders fail to approve the company's pay policy. The report calls for companies to explain their pay policies better, including by publishing pay ratios annually.

On gender diversity, the Committee calls for the Government to set a target that from May 2020 at least half of all new appointments to senior and executive management level positions in the FTSE 350 and all listed companies should be women, and for companies to explain if they fail to achieve this ambition.

View:

- Report summary;
- Report conclusions and recommendations; and
- Full report: Corporate Governance.

1.7 OECD publishes Corporate Governance Factbook

4 April 2017 - The OECD has published the 2017 edition of the OECD Corporate Governance Factbook, an important complement to the G20/OECD Principles of Corporate Governance. The Factbook tracks how countries are actually implementing the Principles, which offer a comprehensive set of recommendations to policy makers to support sound corporate governance frameworks.

The OECD Corporate Governance Factbook supports the implementation of good corporate governance practices by providing an up-to-date factual underpinning for understanding countries' institutional, legal and regulatory frameworks. The Factbook is divided into four main areas that are important for understanding how corporate governance functions in different jurisdictions:

- the corporate landscape
- the corporate governance framework
- the rights of shareholders and key ownership functions
- the corporate board of directors.

The Factbook compiles information gathered from OECD and non-OECD country delegates to the OECD Corporate Governance Committee as part of a series of thematic reviews issued by the OECD. The thematic reviews cover major corporate governance challenges that came into focus following the 2008 crisis: board practices (including remuneration); institutional investors; related party transactions; board member nomination and election; supervision and enforcement; and risk management.

Countries covered: Covering 47 jurisdictions, including all 35 OECD countries as well as Argentina; Brazil; China, Colombia, Hong Kong, China; India; Indonesia; Lithuania; the Russian Federation; Saudi Arabia; Singapore and South Africa, the Factbook catalogues the legal and regulatory frameworks, institutions and practices in place.

1.8 IOSCO approves enhanced standard for cross-border enforcement cooperation

31 March 2017 - The members of the International Organization of Securities Commissions (IOSCO) have approved the Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (EMMoU), which offers securities regulators new enforcement powers for responding to the challenges arising from recent developments in global financial markets.

Both the MMOU and the EMMoU provide a mechanism for securities regulators to share essential investigative material, such as beneficial ownership information, and securities and derivatives transaction records, including banking and brokerage records. Both documents also set out specific requirements for the exchange of information, notably ensuring that no domestic banking secrecy laws or regulations prevent the sharing of enforcement information among securities regulators.

The EMMoU, however, provides for additional enforcement powers that IOSCO believes are necessary for continuing to safeguard the integrity and stability of markets, protect investors, and deter misconduct and fraud. The ACFIT powers, as they are known, will enable members to:

- obtain and share audit work papers, communications and other information relating to the audit or review of financial statements;
- compel physical attendance for testimony (by being able to apply a sanction in the event of non-compliance);
- freeze assets if possible or, if not, advise and provide information on how to freeze assets, at the request of another signatory;
- obtain and share existing Internet service provider records (not including the content of communications), including with the assistance of a prosecutor, court or other authority, and to obtain the content of such communications from authorised entities; and
- obtain and share existing telephone records (not including the content of communications), including with the assistance of a court, prosecutor, or other authority, and to obtain the content of such communications from authorised entities.

In addition, the EMMoU envisages the obtaining and sharing of existing communications records held by regulated firms.

Securities regulators currently are required to sign the MMoU to become a member of IOSCO. The MMoU will remain in effect as long as any signatories continue to wish to use it. However, the objective is for all MMoU signatories to migrate eventually to the EMMoU.

Of IOSCO's members that are securities regulators, 112 are signatories to the MMoU. In 2015, signatories made 3,203 requests for information, compared to only 56 requests in 2003.

1.9 Investor relations survey

30 March 2017 - Investor Relations (IR) roles are evolving as changes to the structure and focus of financial markets and communication mediums move with the times, according to the 2017 Biennial IR Benchmarking Survey published by the Australasian Investor Relations Association (AIRA).

The survey highlighted declining analyst coverage, increasing investor and analyst queries on Environmental, Social & Governance (ESG) and evolving social media marketing and monitoring are just some of the changes escalating the demand on IR professionals.

The survey revealed that 51% of respondents had experienced a reduction in the number of sell-side analysts covering their company. This decreasing sell-side analyst coverage has meant almost half the survey respondents have already implemented strategies to manage this change, and a further 10% will implement a new strategy within the next 12 months. Another highlight was the increased queries on ESG related topics, with companies experiencing direct queries from 95% of investors and 75% of analysts over the 12-month period.

Other significant findings from the survey include:

- Increase in USA institutional share ownership across 53% of respondents;
- Downtrend towards reviewing analyst earning models;
- Fewer companies disclosed names of brokers with coverage;
- Fewer published broker forecasts on their company website;
- Almost all companies derive and maintain their own consensus;
- Almost all companies undertook IRO-only roadshows - majority held domestically;
- Increased site visit and blackout policy implementation and responsibility;
- Increase in live and archived webcast availability;
- Social media use growing for investor relations use;
- Issuing hard copy communication has decreased; and
- Less than a fifth of companies were concerned with ASX replacement of CHESS

Visit the AIRA website to access the report (membership required)

1.10 Report on behavioural insights in financial policy-making and regulation

29 March 2017 - The Ontario Securities Commission (OSC) has published OSC Staff Notice 11-778 Behavioural Insights: Key Concepts, Applications and Regulatory Considerations, a report on how leading practitioners and regulators around the world are using behavioural insights to address issues in capital markets and improve outcomes for investors and market participants.

Behavioural insights use psychology, economic and other research to examine how consumers are often neither deliberate, nor rational in their decisions in the way that traditional models, strategies and policies assume.

The report found that the use of behavioural approaches in the public and non-profit sectors has increased significantly over the past decade, and other securities regulators have increasingly applied these approaches in their work and have successfully improved outcomes for investors and market participants.

1.11 Corporations Amendment (Crowd-sourced Funding) Act 2017

28 March 2017 - The Corporations Amendment (Crowd-sourced Funding) Act 2017 No. 17 (Cth) was assented to on 28 March 2017 and amends the legislation listed below. According to the explanatory memorandum, the Act amends the Corporations Act 2001 No. 50 (Cth) to establish a regulatory framework to facilitate crowd-sourced funding by small, unlisted public companies. Specifically, the Act:

- provides new public companies that are eligible to crowd fund with temporary relief from the reporting and corporate governance requirements that usually apply;
- provides greater flexibility in the Australian Market Licence and clearing and settlement facility licencing regimes; and
- allows the relevant Minister to provide that certain financial markets and clearing and settlement facility operators are exempt from certain requirements in Chapter 7 (Financial services and markets) of the Corporations Act.

The amending Act also amends the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) to include a crowd-funding service, as defined in the Corporations Act, in the range of financial services covered by the ASIC Act.

1.12 US securities class action settlements-2016 review and analysis

15 March 2017 - In 2016 US courts approved the highest number of securities class action settlements since 2010. Continuing the growth observed in the prior year, there were 85 approved settlements in 2016, five more than in 2015. Both years are a substantial increase over the annual numbers from 2011 through 2014.

As reported in Securities Class Action Settlements-2016 Review and Analysis, the US$6 billion of approved settlements was nearly double the total settlement value in 2015. This increase was fueled by 10 mega settlements (settlements of US$100 million or more), which accounted for 81% of all settlement dollars. The number of mega settlements in 2016 was the highest in 10 years and included two settlements over US$1 billion.

Report highlights

- total settlement dollars approved by US courts in 2016 was nearly double the total in 2015 and the second highest in the past decade.
- the median settlement amount in 2016 was US$8.6 million, about 40% higher than the 2015 median of US$6.1 million.
- in 2016, median settlements as a percentage of "estimated damages" increased 24% from the 2011-2015 median and was higher than any annual percentage in the last five years.
- the median Disclosure Dollar Loss (DDL) associated with 2016 settlements was more than 50% higher than the previous year.
- median total assets of issuer defendants increased more than 40% over 2015.
- public pension plan involvement as lead plaintiffs increased for the second straight year.

2. Recent ASIC Developments

2.1 Market integrity report

20 April 2017 - ASIC has released its latest report on market integrity for the period 1 July 2016 to 31 December 2016.

Report 524 Market integrity report: July to December 2016

Key outcomes during the six-month period include:

- 2 criminal actions;
- 6 civil outcomes, 2 enforceable undertakings;
- 6 infringement notices issued;
- $1.48 million value of infringement notices; and
- 2 people banned from providing financial services.

The report examines ASIC's reviews of market cleanliness, handling of confidential information and conflicts of interest, and the ASX equity market outage. It also looks at some of ASIC's key activities over the last six months in areas such as insider trading (Hochtief AG) and the management of wholesale spot foreign exchange businesses (CBA and NAB).

Ongoing priorities and areas of focus for ASIC's market integrity work in 2017 include:

- firm culture and conduct risk
- confidential information and conflicts of interest
- technology risk and cyber resilience, and
- market innovation.

2.2 Updated guidance for strata schemes and management rights schemes

12 April 2017 - ASIC has updated Regulatory Guide 140 Strata schemes and management rights schemes (RG 140). This update follows ASIC issuing two legislative instruments in September 2016 to replace several class orders that dealt with relief for property, strata and management rights schemes.

The legislative instruments are the ASIC Corporations (Serviced apartment and like schemes) Instrument 2016/869 and the ASIC Corporations (Property Rental Schemes) Instrument 2016/870 (the Legislative Instruments). The Legislative Instruments replaced the ASIC class orders listed below that were due to expire under the Legislation Act 2003:

- Class Order [CO 99/463] Serviced strata scheme valuations;
- Class Order [CO 02/185] Sale of strata units for $500,000 or more;
- Class Order [CO 02/245] Closed schemes;
- Class Order [CO 02/303] Management rights schemes-amendment;
- Class Orders [CO 02/304] Management rights schemes;
- Class Order [CO 02/305] Management rights schemes;
- Class Order [CO 07/189] Management rights schemes where the strata unit cannot be used as a residence;

- Class Order [CO 02/183] Small Property Syndicates; and
- Class Order [CO 02/182] Real Property Rental Schemes.

RG 140 explains the key terms of the relief under the Legislative Instruments. In broad terms, the Legislative Instruments provide relief to various arrangements involving real property from the managed investment provisions, the Australian financial services licensing provisions, the product disclosure provisions and hawking provisions of the Corporations Act 2001 (the Act).

In addition, RG 140 provides general explanations of how the provisions of the Act relating to managed investment schemes apply to arrangements involving real property, including under strata or community title and certain freehold titles or leasehold interests, referred to in RG 140 as strata schemes. RG 140 explains the concepts of strata schemes, serviced strata schemes and management rights schemes and whether these types of arrangements may fall within the definition of a managed investment scheme under the Act. RG 140 also explains the obligations of operators and promoters for the various types of arrangements.

2.3 Consultation on establishing a Financial Services Panel

11 April 2017 - ASIC has released a consultation paper on its proposal to develop and implement a Financial Services Panel (the Panel).

ASIC is proposing that the Panel would be responsible for determining whether ASIC should ban individuals from the financial services and credit industries for misconduct. ASIC would select matters and refer them to the Panel where they are significant, complex or novel. Over time, ASIC may expand the range of matters on which the Panel will make decisions.

The Panel would comprise financial services and credit industry participants and non-industry participants (e.g. lawyers or academics) with relevant expertise, and at least one ASIC staff member. The Panel would sit alongside ASIC's existing administrative structures and processes.

ASIC is consulting on:

- how the Panel would enhance the impact of ASIC's administrative decisions;
- the types of matters that would be referred to the Panel; and
- the optimal composition of the Panel.

See Consultation Paper 281 Financial Services Panel (CP 281).

2.4 Further report on emerging market issuers

6 April 2017 - ASIC published Report 521 Further review of emerging market issuers (REP 521), which discusses ASIC's views on emerging market issuer activity and highlights how ASIC has responded to the key challenges identified in Report 368.

Report 521 describes some of the regulatory initiatives that ASIC has undertaken to address topical issues in the markets, which have also had an impact on ASIC's oversight of emerging market issuers. Using its regulatory tool kit, ASIC has sought to provide greater transparency around the risks associated with emerging market issuers in a multi-faceted way, through engagement with industry and stakeholders, surveillance, enforcement action, guidance, education and policy advice.

2.5 Extension of relief provided for foreign collective investment schemes for two years

3 April 2017 - ASIC has extended *Class Order [CO 04/526] Foreign collective investment schemes* ([CO 04/526]) for two years. This class order was due to expire (sunset) on 1 April 2017.

[CO 04/526] provides relief for collective investment schemes from the requirement to register as a managed investment scheme or obtain an Australian financial services licence where the relevant overseas regulatory regime delivers regulatory outcomes sufficiently equivalent to ASIC's regulatory regime.

ASIC Corporations (Repeal and Transitional) Instrument 2017/271 extends the relief in [CO 04/526] in the same form for two years.

ASIC has extended this relief for two years so that ASIC can review and consult on the policy settings of the relief in light of other regulatory developments, such as the Government's announcement of the introduction of new collective investment vehicles, and implementation of the Asia Region Funds Passport regime.

ASIC will consult publicly on its relief for foreign collective investment schemes before 1 April 2019.

View ASIC Corporations (Repeal and Transitional) Instrument 2017/271

2.6 Further measures to promote responsible lending in the home loan sector

3 April 2017 - ASIC has announced a targeted industry surveillance to examine whether lenders and mortgage brokers are inappropriately recommending more expensive interest-only loans. With many lenders, including major lenders, charging higher interest rates for interest-only loans compared with principal-and-interest loans, lenders and brokers must ensure that consumers are not provided with unsuitable interest-only loans.?@

2.7 Repeal of "sunsetting" class order on FSG exemption for market-making services on a licensed market

30 March 2017 - ASIC has made a new legislative instrument, ASIC Corporations (Amendment and Repeal) Instrument 2017/65, which repeals *Class Order [CO 03/578] Financial Services Guide exemption for market-making services on a licensed market* and makes minor amendments to other ASIC instruments.

CO 03/578 was due to expire ('sunset') on 1 April 2017. ASIC has reconsidered the basis for the relief provided by CO 03/578 and whether the Corporations Act requires a market maker on a licensed market to be given an FSG in the absence of relief. ASIC has repealed CO 03/578 because ASIC has come to the view that the class order is no longer legally necessary.

The new legislative instrument also makes a minor amendment to ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813 to correctly reflect the policy intention of the Instrument and Regulatory Guide 87 Charitable scheme and school enrolment deposits. The definition of "retail client" in relation to debentures is now consistent with the position under the Corporations Act.

In addition, the new legislative instrument makes minor amendments to a number of other ASIC instruments, namely to correct drafting errors and ensure that the principal instruments operate as intended.

View:

- ASIC Corporations (Amendment and Repeal) Instrument 2017/65;
- CP 275 and non-confidential submission;
- ASIC Class Order [CO 09/425];
- ASIC Class Order [CO 11/272];
- ASIC Class Order [CO 13/656];
- ASIC Class Order [CO 13/760];
- ASIC Class Order [CO 13/1410];
- ASIC Class Order [CO 14/1252];
- ASIC Corporations (Compromises or Arrangements) Instrument 2015/358;
- ASIC Corporations (Securitisation Special Purpose Vehicles) Instrument 2016/272;
- ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813; and
- ASIC Corporations (Managed Investment Schemes: Interests Not For Money) Instrument 2016/1107.

2.8 Report on Sydney Stock Exchange's listing standards

30 March 2017 - ASIC has released its assessment report on the listing standards of the Sydney Stock Exchange Limited (SSX).

The report concludes that SSX should make a number of changes to improve compliance with its statutory obligations.

These changes include putting adequate arrangements in place to manage conflicts between its commercial interests and the need for it to operate a listing market that is fair, orderly and transparent. SSX's ownership and business model makes conflict management essential because it is a wholly owned subsidiary within a corporate group, where other businesses in the corporate group provide professional advisory services to entities seeking admission to its official list.

SSX also needs to improve how it monitors and enforces compliance with its listing rules, including whether an entity is appropriate for admission to its market.

Additional licence conditions have been imposed on SSX's Australian market licence to ensure that SSX has the appropriate arrangements in place to meet its statutory obligations, particularly those about managing its conflicts and having suitable arrangements to monitor and enforce its listing standards.

SSX was consulted on the imposition of the licence conditions, which are designed to bolster the independence of its board, admissions and market supervision committees so it can better manage the conflicts that arise from its exchange ownership structure. SSX has also introduced operational controls to support its compliance with its statutory obligations in the future.

View REP 518 Assessment of Sydney Stock Exchange Limited's listing standards

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2.9 Extension of relief provided for business introduction services for two years

29 March 2017 - ASIC has extended *Class Order [CO 02/273] Business introduction or matching services* (CO 02/273) for two years. The class order was due to expire (sunset) on 1 April 2017.

CO 02/273 gives conditional relief from the fundraising, financial product disclosure, hawking and advertising requirements in the Corporations Act (the Act) that would otherwise apply to a person making or calling attention to offers of securities or interests in a registered managed investment scheme through a business introduction service.

ASIC Corporations (Repeal and Transitional) Instrument 2017/186 extends the relief in CO 02/273 in the same form for two years so that ASIC can review and consult on the policy settings of relief.

The review is necessary because of recent amendments to the Act which introduce a new framework to facilitate crowd-sourced funding offers by small unlisted public companies. This new regime in the Corporations Amendment (Crowd-sourced Funding) Act 2017 No. 17 (Cth) commences later this year.

The extension of the class order relief for two years will provide certainty until the new regime commences. It will also allow ASIC to evaluate how the regime will interact with the relief in CO 02/273.

ASIC will consult publicly on its relief for business introduction services before 1 April 2019.

View ASIC Corporations (Repeal and Transitional) Instrument 2017/186

2.10 Remake of "sunsetting" class order providing relief to foreign financial services providers with a limited connection to Australia

29 March 2017 - Following public consultation, ASIC has temporarily remade *Class Order [CO 03/824] Licensing relief for foreign entities with limited connection to Australian wholesale clients* (CO 03/824) in the *ASIC Corporations (Foreign Financial Services Providers - Limited Connection) Instrument 2017/182* (2017/182). The new instrument continues to provide licensing relief for foreign financial service providers with limited connection to Australia providing financial services to wholesale clients, for a period of 18 months. CO 03/824 was due to expire ("sunset") on 1 April 2017.

The relief provided under 2017/182 is extended until the expiry of the suite of "passport" relief provided to foreign providers under ASIC Corporations (Repeal and Transitional) Instrument 2016/396 on 27 September 2018.

This extension of relief will allow ASIC to undertake a comprehensive review of the underlying policy settings applicable to all foreign providers relief. This review comes as a result of market and regulatory developments since the relief was first granted and a number of ongoing international and domestic reviews.

In particular, ASIC will seek detailed information from industry about the use of CO 03/824 and the impact of a repeal, including the types of products and services offered, the jurisdictions involved and the number of clients affected.

3. Recent ASX Developments

3.1 No more trading halts to facilitate sales of major shareholdings

The Australian Securities Exchange (ASX) has in the past agreed to requests by a listed entity for a trading halt to help facilitate a bookbuild process for a sale by an existing security holder of a major stake in the entity. ASX will no longer be agreeing to requests for a trading halt for these purposes.

This change in policy does not affect ASX's preparedness to grant trading halts to facilitate significant capital raisings by listed entities.

The change reflects the general principle outlined in ASX Listing Rules Guidance Note 16 Trading Halts and Voluntary Suspensions that interruptions to trading should be kept to a minimum and therefore a trading halt should only be permitted where there is a material risk that trading in a particular security might occur while the market as a whole is not reasonably informed or where it is needed to correct or prevent a false or disorderly market.

The Notice is available here.

3.2 Updates to guidance on applications for in-principle advice

ASX has published updates to a number of its Guidance Notes to the ASX Listing Rules to reflect the introduction of an application for in-principle advice.

This new form can be used by entities that are considering listing on ASX and that wish to seek in-principle advice, ahead of lodging their listing application, in relation to ASX's application of Listing Rule 1.1 condition 1 (structure and operations appropriate for listing) and Listing Rule 1.19 (admission discretion).

The Notice is available here.

3.3 Consultation paper: ASX OTC Interest Rates Derivatives Clearing

On 31 March 2017, ASX released a consultation paper, *ASX OTC Interest Rate Derivatives Clearing: Consultation on OTC Rule and Handbook amendments relating to the Client Clearing API and Multilateral*

Compression Service. ASX seeks feedback from OTC Participants in relation to ASX's proposal to introduce a best practice OTC client clearing workflow for trade submission (Client Clearing API) and a multilateral compression service in the second quarter of 2017.

The Consultation Paper is available here.

3.4 Consultation paper: ASX releases reverse takeovers rule amendments

On 12 April 2017 ASX released:

- its response to the November 2015 consultation on proposed listing rule amendments to introduce a requirement for bidder shareholder approval of a reverse takeover; and
- an exposure draft of the proposed listing rule amendments.

Those documents are available on the public consultation page of the ASX website.

The proposed amendments will require shareholder approval for a takeover bid or scheme of arrangement where the bidder issues securities of 100% or more of its current share capital as consideration, resulting in the target shareholders holding more than 50% of the bidder post-takeover. The amendments will also require the bidder to disclose specific information in relation to the reverse takeover in its notice of meeting seeking shareholder approval.

Voting exclusion requirements will apply to the resolution to approve the reverse takeover. Some more general amendments to the voting exclusion rules and to the definition of "associate" are also proposed.

3.5 Reports

ASX has released the ASX Monthly Activity Report (5 April 2017) for March 2017.

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4. Recent Takeovers Panel Developments

4.1 MEC Resources Limited - Panel declines to conduct proceedings

21 April 2017 - The Panel has announced that it has declined to conduct proceedings on an application dated 10 April 2017 from Grandbridge Limited, Trandcorp Pty Ltd and Mr David Breeze in relation to the affairs of MEC Resources Limited.

The application concerned (among other things) the potential effect on control (including a potential dilution of the applicants' voting power) resulting from MEC Resources' 1 for 2 non-renounceable rights issue (see TP17/14).

MEC Resources announced on Thursday, 20 April 2017 that it would allocate shortfall applications pro rata to its shareholders (excluding any related party of MEC Resources, including its directors and their associates) before it allocated any shortfall at its discretion.

In light of the announcement, the Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings.

The reasons for the decision are available on the Panel's website.

4.2 Spotless Group Holdings Limited - Panel declines to conduct proceedings

10 April 2017 - The Panel has announced that it has declined to conduct proceedings on an application dated 31 March 2017 from Spotless Group Holdings Limited in relation to its affairs (see TP15/21).

Spotless is currently the subject of an off-market takeover bid from Downer EDI Services Pty Ltd. Following discussions with the Panel and ASIC, Downer EDI has agreed to provide additional disclosure in a replacement bidder's statement, in particular in relation to clarifying the operation of withdrawal rights for accepting Spotless shareholders while the bid is conditional.

The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings.

The reasons for the decision are available on the Panel's website.

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5. Recent Research Papers

5.1 Do independent directors curb financial fraud? The evidence and proposals for further reform

In this article the authors argue that the US corporate governance rules put too much faith in the independent board members and insufficient emphasis on the shareholders themselves to control and monitor the top management. Given the agency problem between the board of directors and the shareholders, outside directors can be captured by management, thereby leading to inadequate checks on management. The evidence presented in this paper shows that outside board members do not exercise sufficient controls on the management even when the management has gone awry. To solve this agency problem, the authors propose increasing the power of the principals: make shareholder resolutions binding on management, require a one share, one vote rule to increase the voting rights of shareholders, as well as give the shareholders the ability to directly nominate and/or actively vote against board members.

Do Independent Directors Curb Financial Fraud? The Evidence and Proposals for Further Reform

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5.2 Directors' duties and legal safe harbours: A comparative analysis

Directors' duties are a core element of corporate governance, yet a range of legal safe harbours ultimately shape the contours and stringency of these duties in practice. Although the standards of conduct that constitute directors' duties (so-called "conduct rules") are often relatively strict, legal safe harbours can dilute those rules, resulting in the application of more lenient standards of judicial review ("decision rules"). The potential gap between conduct rules and decision rules, which has been labelled "acoustic separation", is particularly striking in the context of the duty of care and diligence ("duty of care"). Directors' duties and legal safe harbours can also involve complex interaction between equitable and common law ("general law") principles on the one hand, and statutory regimes on the other.

This paper explores, from a comparative law perspective, differences in the shape of directors' duties and the legal safe harbours that accompany those duties. The paper examines directors' duties in the United States (focusing on Delaware law), the United Kingdom and Australia. It considers the nature, operation and enforcement of directors' duties in these three jurisdictions, with particular attention to the duty of care and two related legal safe harbours - the business judgment rule and exculpatory clauses.

The paper explores how differences in relation to these various aspects of directors' duties can alter "acoustic separation", by expanding or reducing the gap between conduct rules and decision rules concerning directors' duties. This issue has a direct bearing on the effectiveness of directors' duties as a regulatory technique in the United States, the United Kingdom and Australia.

Directors' Duties and Legal Safe Harbours: A Comparative Analysis

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5.3 Director appointments - it is who you know

Corporate directors almost always run unopposed and are elected; yet shareholders have little if any say in their nomination or removal. Particularly controversial is the appointment of directors connected to the incumbent board. Connected directors could perpetuate cronyism, but could also reduce uncertainty and coordination costs of boardroom assimilation. Using 9,923 director appointments during 2003-2014, the authors document the dramatic impact of connections. Consistent with facilitating coordination, more complex firms and firms in more competitive environments are more likely to appoint connected directors. Such appointments receive better market reactions and higher shareholder votes.

Director Appointments - it is Who You Know

5.4 A legal theory of shareholder primacy

Shareholder primacy is the most fundamental concept in corporate law and corporate governance. It is widely embraced in the business, legal, and academic communities. Economic analysis and policy arguments advance a normative theory that corporate managers should maximise shareholder wealth. Academic literature invariably describes shareholder primacy as a "norm." But whether the concept is "law" is contested because, remarkably, we still do not have a coherent legal theory. Our understanding of a fundamental tenet of the field is flawed and incomplete. This article presents a positive legal theory of shareholder primacy. It answers the questions: Is shareholder primacy law? What form of law is it? How does it work? The core prescription to maximise profit is misunderstood as a social norm because it cannot be in the form of an enforceable rule, the framework of a board's fiduciary duty. Such form of law would be internally incoherent with the structure of corporate law. However, to influence behaviour the concept of law is not limited to a rule-sanction form. Pervasive judicial acceptance of a principle can legitimate a rule and thus impose a strong internal sense of obligation. This article conducts the first empirical study of US case law discussing profit maximisation for the period 1900 to 2016. It shows that shareholder primacy has become a Hartian obligation and a rule of law. The rule does not exist in a single locus duty, but instead is a filamentary principle that weaves through many other rules of corporate law and the architecture of the corporate and market systems. This article shows how the obligation, albeit unenforceable, is efficacious nonetheless.

A Legal Theory of Shareholder Primacy

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6. Recent Corporate Law Decisions

6.1 Service of, and defects in, statutory demands: Re International Materials wrong

(By Leah Grolman, Corrs Chambers Westgarth)

Slap Corporation Pty Ltd v Civil, Infrastructure & Logistics Pty Ltd [2017] VSC 168, Supreme Court of Victoria, Randall AsJ, 4 April 2017

(a) Summary

Slap Corporation Pty Ltd (the Company) sought to have a creditor's statutory demand given by Civil, Infrastructure & Logistics Pty Ltd (CILPL) set aside under s. 459G of the Corporations Act 2001 No. 50 (Cth) ('the Corporations Act') ('Application'). The Company also sought leave to amend its originating process to, in the alternative, seek a declaration that the statutory demand was null and void.

Having determined that the Application was not properly made because it was not made within the time limit prescribed by s. 459G of the Corporations Act and the Company had not complied with the Service and Execution of Process Act 1992 No. 172 (Cth) (the SEP Act), it fell for Randall AsJ to determine whether the statutory demand was "null and void" because CILPL had specified an interstate address where the prescribed form required an address in the State in which the demand was served.

After surveying conflicting authority, Randall AsJ determined that this defect did not render CILPL's statutory demand "null and void". In doing so, his Honour preferred the decision of Black J in *Re Urban Solutions Group Pty Ltd* [2015] NSWSC 1940 (Urban Solutions) to that of Brereton J in *Re International Materials & Technologies* [2013] NSWSC 787 (International Materials), which Randall AsJ thought inconsistent with the legislative purpose of the part of the Corporations Act containing s. 459G.

(b) Facts

On 21 December 2016, CILPL posted a statutory demand dated the same to the Company's registered address in Victoria. Section 459E(2)(e) of the Corporations Act requires a demand to be in the prescribed form. The Corporations Regulations 2001 No. 193 (Cth) prescribes Form 509H, which requires the creditor to insert "[t]he address of the creditor for service of copies of any application affidavit", being "the address for service of the documents in the State or Territory in which the demand is served on the company". Despite having served the demand in Victoria, CILPL inserted a Queensland address for service.

Section 459G provides that a company served with a statutory demand may apply to the Court for an order setting it aside, but such application can only be made "within 21 days after" the demand is served. Section 459G(3) states that an application to set a demand aside is only made in accordance with s. 459G where, within those 21 days, the application and a supporting affidavit is filed with the Court and served on the person who served the demand on the company.

The Company's Application was filed and sent by fax to CILPL's solicitors on 6 February 2017. The Company did not include with the Application a notice which was required by the SEP Act.

On the first return date for the Application, the Company conceded that its application must fail on the basis that it was not served in compliance with the SEP Act. The Company therefore sought leave to amend its pleading to seek a declaration that the statutory demand was "null and void". Randall AsJ granted leave to amend.

(c) Decision

Randall AsJ dismissed the Company's amended application. His Honour's reasons dealt with two main issues. It bears noting that his Honour also observed that, for obvious reasons, posting a demand right before the Christmas holiday period ought to be discouraged.

(i) Was the Company's application served 21 days from service of the demand?

Determining when the statutory demand was served was essential to determining whether the Company had filed its application to set it aside within the 21 days permitted by s. 459G. The Company argued it received the demand on 16 January 2017 because its registered office was closed from 21 December until that date. CILPL submitted that, based on information in Australia Post's 2016 annual report about standard delivery, it would have been delivered by 3 January.

His Honour referred to s. 109X(1) of the Act, which authorises service by post when serving a document on a company. His Honour also referred to s. 29 of the Acts Interpretation Act 1901 No. 2 (Cth) (AIA), which creates a presumption that service is effected "at the time at which the letter would be delivered in the ordinary course of post". Finally, his Honour referred to the presumption, expressed to be unaffected by s. 29 of the AIA, that an item sent by post is, in the absence of "evidence sufficient to raise doubt", received at the address specified on the "fourth working day after having been posted" (s. 160 of the Evidence Act 1995 No. 2 (Cth)).

Taking into account the three public holidays (25 and 26 December, and 2 January), it was deemed to have been received on 30 December 2016. Randall AsJ found that evidence the Company had not received the demand until 16 January because of its office closure was not sufficient to displace the presumption in s. 160. His Honour emphasised that the mere fact an item is not "received", does not affect the deeming of "delivery" under the AIA.

In light of CILPL's submission that the demand would have been delivered by 3 January in the ordinary course of post, Randall AsJ found that the demand was served by 3 January, although his Honour thought CILPL's calculations generous. The Application was, therefore, not made within the 21 days prescribed and the Court's jurisdiction under s. 459G was not enlivened.

His Honour accepted the Company's concession that its Application also failed because it failed to attach a notice required by the SEP Act, and that for that reason, too, the Court's s. 459G jurisdiction was not enlivened.

(ii) Was the statutory demand "null and void"?

Randall AsJ went on to consider whether the demand was "null and void" because it was served in Victoria but specified a Queensland address for service. International Materials involved a statutory demand served in New South Wales but specified a Victorian address for service for the creditor, contrary to the requirements of Form 509H. After finding that the plaintiff's application to have the demand set aside under s. 459G had not been effectively served such that the Court's s. 459G jurisdiction was not enlivened, Brereton J found:

"This statutory demand is null and void because, in not providing an address for service within a State in which the demand was served, it fails in a material and fundamental way to comply with the requirements of the prescribed form referred to in s. 459E(2)(e) of the Corporations Act."

Principles of judicial comity meant that Randall AsJ should follow International Materials unless he considered it to be plainly wrong. His Honour surveyed various conflicting authorities on the issue, concluding that he should not follow International Materials. His Honour observed that Brereton J had not considered the earlier decision of a single justice in the Supreme Court of Queensland, *Sustainable Organics (Wooshaway) Pty Ltd v Ranger Loaders Pty Ltd [2011] QSC 45* in which Phillipides J held that specifying an interstate address was not a defect so fundamental that the demand was incapable of meeting the definition of a statutory demand under the Act in the sense addressed by authorities emanating from *Topfelt Pty Ltd v State Bank of New South Wales Ltd (1993) 47 FCR 226.*

Randall AsJ also thought that Brereton J had not considered two decisions from intermediate appellate courts, one from the full court of the Supreme Court of South Australia and one from the Full Court of the Federal Court, which indirectly addressed the issue and which conflicted with Brereton J's decision.

His Honour preferred Black J's opinion in Urban Solutions that the conclusion of invalidity in International Materials was the exception, not the rule. Randall AsJ thought following Re International would be inconsistent with the legislative purpose of the Corporations Act as it would circumvent the 21-day time limit imposed by s. 459G for applying to have a demand set aside. Moreover, any injustice to the Company could be explored or overcome in an injunction application, or if and when the creditor seeks to rely on the demand in a winding-up application.

Randall AsJ found that the case before him was not one of exceptional circumstances as contemplated by Black J in Urban Solutions. The Application was late on any view, and that lateness was not due to any defect in the demand but, rather, due to the Company not having a system for monitoring mail at its registered office over the holiday period and failing to give instructions to its solicitors upon becoming aware of the demand, which had also been sent by email.

6.2 ASIC successfully prosecutes under the FOFA reforms

(By Anthony Di Gregorio, King & Wood Mallesons)

Australian Securities and Investments Commission, in the matter of *NSG Services Pty Ltd v NSG Services Pty Ltd* [2017] FCA 345, Federal Court of Australia, Moshinsky J, 30 March 2017

(a) Summary

ASIC brought a successful action in the Federal Court of Australia against NSG Services Pty Ltd (NSG) under the Future of Financial Advice reform provisions (FOFA reforms), introduced into the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) by the Corporations Amendment (Further Future Financial Advice Measures) Act 2012 No. 68 (Cth). The action sought to prosecute improper conduct involving the sale of insurance and the provision of financial services to retail clients.

The insurance products and financial advice provided by certain representatives of NSG breached the duty in:

- s. 961B of the Corporations Act to act in the best interests of retail clients (the "best interests duty"); and
- s. 961G of the Corporations Act to provide advice to these retail clients that was objectively appropriate (the "appropriate advice duty").

NSG's liability flowed directly and indirectly from its representatives and authorised representatives (respectively), as reflected in Moshinsky J's declarations for breaches under:

- s. 961K(2) of the Corporations Act, which automatically imputed liability on NSG for two employees' breaches of the best interests and appropriate advice duties. The two employees were considered "representatives" (but not "authorised representatives") for the purposes of the FOFA reforms; and
- s. 961L of the Corporations Act, which imposed a direct duty on NSG, as an Australian financial services licence ("AFSL") holder, to take reasonable steps to ensure all its representatives (authorised or otherwise) comply with those duties.

As the first successful prosecution of its kind under the FOFA reforms, the decision provides guidance on two important aspects of these statutory duties, namely:

- the practical standard that financial advisers must reach in discharging their duties to give advice in the best interests of, and appropriate to, retail clients under the Corporations Act; and
- the reasonable steps that an AFSL holder must take to satisfy its obligations under s. 961L that its representatives have complied with those duties.

(b) Facts

NSG is an AFSL holder, advising retail clients and dealing in life risk insurance and superannuation products. The Court heard that, between 1 July 2013 and 20 August 2015, two employees ('representatives') and three other contractors ('authorised representatives') of NSG sold insurance and/or gave incomplete or poor financial advice relating to rolling over superannuation accounts which had the effect of harming the financial position and/or insurance coverage of eight retail clients.

(c) Decision

Moshinsky J was satisfied based on the parties' agreed statement of facts and admissions (annexed to the judgment) that NSG had breached ss. 961K(2) and 961L of the Corporations Act. His Honour noted that the declarations made against NSG "serve to record the Court's disapproval of the contravening conduct, vindicate ASIC's claim that NSG contravened the [Corporations] Act, assist ASIC in carrying out its regulatory duties in the future, inform the public of the contravening conduct, and deter other corporations from contravening the [Corporations] Act" (at [13]).

(i) Direct liability for breach of the best interests duty

The Court heard different submissions from the parties on whether the practical protections (deemed the "safe harbour" provisions) described in s. 961B(2) would have to be satisfied in totality before they offered protection to an AFSL holder against an alleged breach of the best interests duty. The safe harbour provisions, among other things, require the AFSL holder to satisfy the Court that it has: made reasonable inquiries to identify and act appropriately to the individual financial needs of the retail client; declined to act where the relevant expertise needed was lacking; and taken all other steps reasonably regarded as in the best interests of the client and their financial circumstances.

NSG argued that an AFSL holder could still satisfy its best interests duty despite not falling entirely within the "safe harbour" conditions. Although this question was left unresolved by the Court, Moshinsky J gave a general indication that at least some of the key "safe harbour" provisions would have to be satisfied, particularly the need for thorough investigation into the needs of the client and a reasonable investigation of financial products available before recommending one or more's suitability for a client.

(ii) The distinction between liability arising from the actions of "representatives" and "authorised representatives"

Discussion around the direct and indirect limbs of NSG's liability showed that AFSL holders should be more aware of the extent of their responsibility under s. 961L, which imposes a duty to take reasonable steps to ensure that all its representatives, authorised or otherwise, comply with the best interests and appropriate advice duties. This sits in contrast with liability imposed by s. 961K(2), which automatically implicates an AFSL holder for breaches by its representatives only (and not its authorised representatives).

In these proceedings, while direct liability flowed to NSG from the breaches of ss. 961B and 961G by its two employees (acting as "representatives"), indirect liability for NSG's failure to take reasonable steps to prevent these breaches also emanated (with less certainty) from its remaining three authorised representatives, via s. 961L.

Again, ASIC and NSG differed in their analysis of when an AFSL holder would become liable under s. 961L. ASIC argued that NSG was liable in this instance as:

- certain of its representatives contravened ss. 961B and 961G;
- NSG had failed to take reasonable steps to prevent the contraventions; and
- there was a causal nexus between those two elements.

Conversely, NSG submitted that a contravention of s. 961L would depend only on the reasonableness of the conduct of the AFSL holder, and that it was not necessary or sufficient to show a contravention of a relevant provision such as s. 961B or 961G.

Ultimately, in the present case, it was deemed unnecessary to resolve the nuances which might trigger s. 961L given the admissions and evidence which showed blatant failures on NSG's part to take sufficiently reasonable steps. However, the resulting decision still serves as a warning to AFSL holders that, despite liability under s. 961K not applying to the actions of an authorised representative, an AFSL holder may be liable nonetheless for the behaviour of its authorised representatives through operation of s. 961L.

(iii) Reasonable steps to ensure compliance by all representatives

Importantly, this judgment considers what would (or rather, what would not) constitute reasonable steps of NSG, as an AFSL holder, to ensure its representatives had adequately discharged their best interests and appropriate advice duties.

Moshinsky J outlined practices and policies of NSG that fell short of these reasonable steps, including NSG's awareness that both the content and form of those policies were deficient and its response to rectify them was substantially inadequate. Despite warnings from multiple external advisers and audits, NSG failed to disseminate key information as to representatives' statutory duties and to implement major policy reforms to fulfil those duties. In addition, NSG was criticised by the Court as falling short of this duty, for the following reasons:

- written statements of advice for new retail clients were hastily prepared, incomplete and pro forma (after only brief phone calls and incomplete client instructions), without opportunity for review by clients before being implemented;

- training of NSG representatives was internal and focused on communication and sales effectiveness, rather than the personal responsibilities imposed on representatives by the FOFA reforms;
- NSG's systems for monitoring and supervision were limited, and internal audits or substantive performance reviews were not conducted on representatives;
- compliance policies alluding to the statutory duties of representatives were imprecise, and registers of breaches by, and complaints against, representatives were incomplete and poorly monitored; and
- entirely or substantially commission-based salary structures for representatives with weekly sales targets emphasised bottom-line imperatives over statutory duties owed to retail clients.

A hearing will be set for the second half of 2017 to determine the extent of the pecuniary penalties to be imposed and liability for ASIC's associated costs.

The case is a reminder to AFSL holders that they must take reasonable steps to discharge their responsibility for the actions of their representatives, authorised or otherwise, and that deficient institutional compliance practices and questionable financial advice may lead to liability under the Corporations Act.

6.3 Court dismisses cross-claim seeking re-apportionment of the liabilities as between co-sureties

(By Rachel Lapinskas, Ashurst)

AMP Bank Ltd v Brown and Kavanagh [2017] NSWSC 313, Supreme Court of New South Wales, Kunc J, 30 March 2017

(a) Summary

In 2014, Daniel Brown and Dustin Kavanagh personally guaranteed the obligations of their financial advisory business, Rethink Financial Group Pty Ltd (Rethink), in exchange for financial accommodation from AMP Bank Ltd (AMP). In March of 2016, AMP alleged that Rethink had defaulted under the terms of the loan and sought to recover the outstanding amounts from Brown and Kavanagh. It was uncontroversial that Brown and Kavanagh were liable for the debt, and the parties settled shortly after proceedings began.

This case disposed of a cross-claim that Brown brought against Kavanagh during the course of proceedings. Brown alleged that certain conduct Kavanagh had exhibited made Kavanagh more culpable for Rethink's default. As such, Brown argued that it would not be just and equitable for the parties to have equal liability for repayment of the loan. Brown asked the Court to readjust the parties' liabilities to 80/20% in order to reflect Kavanagh's greater culpability.

(b) Facts

The defendants, Brown and Kavanagh, were directors and shareholders of Rethink. Brown held 30% of Rethink's shares, while Kavanagh held 70%. On 5 March 2014, AMP agreed to provide financial accommodation to Rethink under an Advisory Practice Financial Loan Agreement (the Agreement). To secure the accommodation, the defendants personally guaranteed Rethink's performance of its obligations under the Agreement.

On 10 November 2015, Brown informed Kavanagh that he intended to start his own business, and that he would be leaving Rethink and taking part of its customer base with him. On 21 March 2016, AMP issued Rethink a default notice, alleging that the following matters constituted defaults under the agreement:

- that Brown and other employees had left Rethink;
- that Rethink only had two advisors left to service its customers;
- that Brown and others sought to take customers of Rethink to another entity, which represented a decline of $633,000 in Rethink's value and substantially lessened Rethink's ability to meet its obligations under the Agreement; and
- the threat of litigation by one of Rethink's former employees due to the alleged repudiation and termination of his employment.

On the same day, AMP issued notices to the defendants requiring them to pay all outstanding amounts within 30 days.

The defendants did not comply with those or further demands, and on 22 August 2016, AMP brought proceedings against Brown and Kavanagh for the amount owing under the Agreement, which was calculated at $2,705,912.83.

On 14 October 2016, Brown cross-claimed against Kavanagh, asking the Court to re-apportion the defendants' respective liabilities as co-sureties. According to Brown, Kavanagh should bear 80% of the liability because Kavanagh held 70% of Rethink's shares and, as Brown alleged, Kavanagh had exhibited certain conduct that made him more culpable for the debt. The conduct in question consisted of:

- locking Brown out of Rethink's business from around 20 November 2015;
- failing to consult Brown before making significant staff changes;
- transferring many of Rethink's assets to other entities without any consideration or involvement of Brown;
- withholding Brown's income, shareholder dividends and superannuation accrued from Rethink; and
- failing to agree to an arrangement with AMP that would have seen both defendants released from their guarantee obligations.

Although the defendants reached a settlement with AMP on 22 November 2016, Kunc J heard Brown's cross-claim against Kavanagh on 1 and 16 December 2016.

(c) Decision

Kunc J dismissed Brown's claim both at law and on the facts. His Honour held that an Australian court does not have discretion to adjust the right to contribution between co-sureties by reference to general considerations of justice and fairness. And even if such a discretion does exist, Brown's evidence did not provide a principled or logical basis for making the adjustment he sought.

(i) Principle of equal contribution between co-sureties

Kunc J held that the defendants' disproportionate shareholding in Rethink was not, in itself, a sufficient basis for the Court to adjust the defendants' liability. His Honour referred to the longstanding principle that if two co-sureties are equally liable to a creditor, there is between them a right to equal contribution. His Honour noted that there are only four recognised exceptions to this principle:

- where a contract (or something less than a contract) manifests the parties' common intention to modify or exclude rights to contribution;
- where one surety has obtained the whole benefit of the guarantee;
- where one surety is guilty of "fraud, illegality, wilful misconduct or gross negligence"; and

- where equitable defences such as clean hands apply.

Kunc J concluded that no exception applied in the present case. It was uncontroversial that no agreement existed between the defendants, in contract or otherwise, that manifested a common intention to modify the defendants' respective liabilities under the Agreement. As a shareholder of Rethink with the potential for dividends, Brown had received some benefit from Rethink's financial accommodation. Furthermore, there was no evidence that Kavanagh had acted fraudulently, illegally or negligently, or that any equitable defences should apply.

In reaching his conclusion, Kunc J dismissed the cases on which Brown sought to rely. In particular, His Honour noted that Official Trustee in *Bankruptcy v Citibank Savings Ltd (1995) 38 NSWLR 116* and the Canadian case of *Bater v Kare [1964] SCR 206* were distinguishable on the facts. Furthermore, these cases only reinforced the "whole benefit" exception to the principle of equal contribution. They did not demonstrate a court's willingness to adjust the liabilities as between co-sureties on more general grounds. His Honour also dismissed the New Zealand case of *Trotter v Franklin [1991] 2 NZLR 92*, noting that to the extent that Tipping J sought to erect a free-standing basis for displacing the prima facie rule of equal contribution, his Honour's conclusion was not a correct statement of the law in Australia.

(ii) No basis for adjustment on the facts

Kunc J further held that, even if his Honour's conclusions on the point of law were incorrect, Brown failed to demonstrate on the balance of probabilities that there was any connection between the conduct he complained of and the apportionment of the defendants' liability under the Agreement. His Honour indicated that absent fraud, illegality or negligence, there must be a clear causal connection between the surety's conduct and the borrower's default under the loan. Unfairness in a general sense will not warrant an adjustment of liability as between co-sureties.

6.4 Disqualification of directors under s. 206F: requirement of winding up of the company

(By George Durbridge, Herbert Smith Freehills)

Oreb v Australian Securities and Investments Commission (No 2) [2017] FCAFC 49, Federal Court of Australia, Full Court, Rares, Davies and Gleeson JJ, 24 March 2017.

(The decision at first instance is *Oreb v Australian Securities and Investments Commission* [2016] FCA 321, Federal Court of Australia, Markovic J.) It was originally published as *ASE16 v Australian Securities and Investments Commission*. Until the appeal was disposed of, the applicants' names were suppressed.)

(a) Summary

Two directors sought judicial review of ASIC's action in issuing them with notices to show cause why ASIC should not disqualify them from managing corporations under s. 206F of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). They argued that ASIC's power to issue the notices had not been enlivened, on the basis of a reading of subparagraph 206F(1)(a)(ii) on which it required the winding-up of the relevant companies to have been completed, and liquidators' reports in respect of them to have been lodged, within 12 months after the applicants had ceased to be directors of those companies.

Their application was rejected by Markovic J and their appeal from her Honour's decision was dismissed by the Full Court. At first instance and on appeal, the only issue was the construction of subparagraph 206F(1)(a)(ii), and the court found that that provision had the entirely orthodox meaning for which ASIC contended. Although it requires the winding up of each company to have commenced within 12 months of the directors' resigning and although ASIC can only issue a show cause notice within 7 years, it does not require the winding up to have been completed, or the liquidator to have reported by any particular date.

(b) Facts

There was no dispute as to the facts, which are set out at [23]-[26] of Markovic J's judgement. The applicants resigned as directors of four companies on 10 May 2012. On 11 April 2013, each of those companies was placed into liquidation. At various dates from July 2014, the liquidators reported to ASIC that each of the companies might be unable to pay its creditors more than 50 cents in the dollar. A delegate of ASIC issued a show cause notice to each applicant in August 2015.

(c) Decision

Subparagraph 206F(1)(a)(ii) is as follows:

"while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) ... about the corporation's inability to pay its debts".

The applicants contended that on a plain reading:

- "within 12 months" applied to each of the requirements imposed by the provision, namely that the company was wound up and that its liquidator had reported under subsection 533(1), and
- the winding-up must be complete within that time, because the phrase "was wound up" is in the past tense. Winding up is an extended process, and a company cannot be said to have been wound up until that process is complete.

There are a number of references in the Corporations Act to companies being wound up or having been wound up, but the phrase "was wound up" does not occur elsewhere in the Act. Paragraph 206D(2)(h) uses "is wound up", and a note explains that this phrase refers to the beginning of winding up, but the note is inconsistent with the section it seeks to explain.

Both Markovic J and the Full Court took into account that s. 206F replaced a rather differently worded provision of the Corporations Law, as part of the *Corporate Law Simplification* program. That provision laid down two distinct requirements: a liquidator of the company must have reported under s. 533(1) at some time in the 7 years before the Commission issued a show cause notice; and the person to whom the notice is issued must have been a director of the company at some time during the year ending on the day the winding-up began. The secondary materials relating to the Simplification program set out an intention to rewrite the section in plain English, but none to change its policy or operation.

It was common ground that the policy of s. 206F, and of the previous provisions, is to enable ASIC to protect the public from incompetent or dishonest directors by dealing in a quick and summary way with the plainest cases itself, but to allow ASIC to take the more complex and serious cases to the court (which can disqualify directors for much longer periods) under s. 206C, 206D or 206E.

On the applicants' reading, ASIC's power to disqualify directors under s. 206F is much narrower than the corresponding power under previous provisions: ASIC cannot issue a show cause notice until the liquidation is complete, and will be unable ever to issue a notice if the liquidation is unfinished one year after the director resigns. The applicants argued that this change was intended, and reflects an intelligible decision to confine the summary process available to ASIC to the simplest cases.

Markovic J discussed previous decisions on s. 206F in which the Full Court and the High Court had read s. 206F in the way for which ASIC contended, although they were not authority for that reading, as the applicants' reading had not been considered. She rejected the applicants' reading because it would drastically narrow ASIC's power, by reference to factors which did not reflect the legislative policy. It would be inconsistent with the objective which the courts have recognised in s. 206F, as in previous provisions, of enabling ASIC to deal quickly and informally with disqualification matters as they arise. It would also in effect impose an extraneous time limit on the liquidator's obligation to report under subsection 533(1), which would be inconsistent with both the investigative nature of a liquidation and the time limit set by s. 533 itself. Her Honour thought it more likely that the amendment of subparagraph 206F(1)(a)(ii) resulted from a plain English rewrite of the previous provision than that it was intended as a substantive amendment of it.

On appeal, the applicants advanced the same reading as they had at first instance, and argued that Markovic J had relied too heavily on the inferred policy of the section, and had allowed it to displace the natural meaning of the words actually used. Without expressly accepting this criticism, the Full Court rebutted it by showing that the applicants' preferred reading of the provision was neither free from difficulty nor the only natural or idiomatic reading. They reasoned that:

- The applicants' reading of the phrase "was wound up" in effect requires the word "fully" to be implied into that phrase. They preferred ASIC's submission that it is a common idiom to speak of a company being wound up, to convey that it is put into liquidation: even the superior courts do it, and the Act often refers to an order that a company be wound up, by which it refers to the commencement of a liquidation, not its completion.
- The past tense was not used in "was wound up" to require that the process of winding-up be complete before the notice can issue, but to acknowledge that the company must have been put into liquidation before a liquidator can report under subsection 533(1). Indeed, because the liquidator cannot make that report after completing the liquidation (when the liquidator is functus officio) the sequence of events which is contemplated by the provision is inconsistent with the applicants' reading of it.
- The provision does not unequivocally require the liquidator to have lodged a report under subsection 533(1) within a year after the person ceased to be a director. It is well open to read the provision as requiring that the company has been put into liquidation (within a year of the resignation) and that the liquidator has lodged a report (at any time before the notice is issued).

It followed that neither reading was clearly preferable to the other on purely textual grounds, and that the choice between them had to depend on the coherence of the provision with the statutory policy and the objects of the statutory regime, as gleaned from the context in the Act and the legislative history. On this issue, the Full Court agreed with Markovic J's reasons and added some similar reflections. In particular, they reasoned that the policy of the s. is more consistent with reckoning time from the fixed point of the commencement of a winding-up than from its completion: a winding up is only complete when the liquidator has completed his business so far as he can, which is a matter of fact, liable to be affected by contingencies which are irrelevant to the statutory policy, and is often uncertain. Similar contingencies affect the lodgement of a liquidator's report under s. 533 and may, on the applicants' reading, arbitrarily abridge or eliminate the time allowed to ASIC to issue a show cause notice.

They then disposed of the argument that when Parliament changes the language of a provision with a settled interpretation, it must be taken to have intended to change its effect, on the orthodox basis that this principle cannot be applied to redrafting which is intended to clarify the language of the provision, citing the secondary materials and s. 15AC of the Acts Interpretation Act 1901 No. 2 (Cth).

Although that was enough to deal with the appeal, the Full Court had more to say about the simplified drafting of the provisions:

"[53] The drafting of s 206F falls short of the claim in the Explanatory Memorandum that the change from an earlier, easy to comprehend, section was "a plain English rewrite" that "will make the law more user friendly and reduce compliance costs for corporations and market participants". The English is profoundly obscure and uses a concept "was wound up" that does not relate to well understood expressions that companies legislation had used for years. Since most users of provisions such as this are likely to be lawyers and regulators, user friendly drafting would have been better employed in expressing the legislative idea with words that had an accepted clear meaning.

[54] The refrain in explanatory memoranda that legislation in the form of the over 2,500 page long Corporations Act, replete with massive and over complex verbiage, is "user friendly" is patent nonsense. Professionals and judges must navigate tortuous, mind-numbingly detailed, cascading provisions to ascertain the meaning that the Parliament, supposedly, had in mind when enacting these telephone books, at huge cost to the community. Principles-based drafting would enable the elucidation of legislative intention much more effectively and also be likely to be user friendly and to reduce cost.

6.5 Appeal against Associate Justice's decision to set aside statutory demand

(By Samuel Gerber, Corrs Chambers Westgarth)

Bendigo and Adelaide Bank Ltd v Pekell Delaire Holdings Pty Ltd [2017] VSCA 51, Supreme Court of Victoria, Court of Appeal, Santamaria, Ferguson and McLeish JJA, 17 March 2017

(a) Summary

The Bendigo and Adelaide Bank Ltd ("Bank") served a statutory demand on Pekell Delaire Holdings Pty Ltd ("Pekell Delaire"). Pekell Delaire applied to have the demand set aside. An Associate Justice granted Pekell Delaire's application, on the basis that there was a genuine dispute as to the existence of the debt and/or an offsetting claim, within the meaning of s. 459H(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

The Bank appealed, arguing, as it had before the Associate Justice, that Pekell Delaire's claim was barred by a settlement deed in group proceedings, of which it said Pekell Delaire was a group member. The Victorian Court of Appeal agreed, rejecting Pekell Delaire's argument that a settlement in a group proceeding approved under Part 4A of the Supreme Court Act 1986 No. 110 (Vic) (the SC Act) could not bind group members beyond the common issues in the proceeding. The Court also found against Pekell Delaire on a separate contention that it had in fact opted out of the group proceeding, finding that the evidence relied on by Pekell Delaire was insufficient to show that there was a genuine dispute as to the existence of the debt.

(b) Facts

Pekell Delaire was a participant in two of the several failed agribusiness schemes operated by the Great Southern Group in the mid-to-late 2000s. In 2006 it executed applications for term finance with Great Southern Finance Pty Ltd (GSF). The Bank claimed that, as a result, Pekell Delaire become liable to GSF for loans totalling about $32,000, and later became liable to the Bank for those same loans following GSF's assignment of the debts.

In 2016 the Bank served Pekell Delaire with a statutory demand for the sum of $53,580.33. Pekell Delaire responded by applying to the Victorian Supreme Court under s. 459G(1) of the Corporations Act to have the demand set aside. The grounds Pekell Delaire relied on included that there was a genuine dispute about the existence of the debt, and that it had an offsetting claim (s. 459H(1)). At first instance Pekell Delaire succeeded in having the demand set aside.

The Bank appealed. On the appeal, it contended that Pekell Delaire's purported defence to the debt and offsetting claims were barred by the settlement deed that had concluded the Great Southern group proceedings in December 2014. The deed had been approved by the Victorian Supreme Court under s.

33V(1) of the SC Act and purported to bind all group members, of which the Bank said Pekell Delaire was one. The Bank accepted that if it was wrong in this contention, then there was at least a genuine dispute about the existence of Pekell Delaire's debt and any offsetting claims, and its appeal would fail.

(c) Decision

The settlement deed on which the Bank relied was approved by Croft J by order 1 of two orders made on 11 December 2014. By order 2, his Honour gave the plaintiffs in the group proceedings "the authority of the 'Group Members' ?c *nunc pro tunc*, to enter into and give effect to the deed of settlement and the transactions contemplated thereby for and on behalf of the Group Members". By various clauses of the deed the Group Members admitted the enforceability of certain loan deeds, released parties including the Bank from all "Claims" (a term which was broadly defined) and agreed that parties such as the Bank could plead the settlement deed "as a bar or defence to any claim or action" brought by them.

Pekell Delaire argued, however, that:

- the Court could only approve the settlement deed insofar as it concerned the common issues in the group proceedings, and that the orders of Croft J should be read down to the extent that they went beyond this;
- Pekell Delaire was not a "Group Member" within the meaning of the settlement deed and was therefore not bound by the settlement; (
- even if Pekell Delaire appeared to be a Group Member on the face of the deed, it was not in reality a Group Member because it had opted out of the proceeding; and
- the very fact that the application posed this question of law meant that there was a genuine dispute as to the existence of the debt, which meant Pekell Delaire must succeed.

The Court of Appeal, in a unanimous judgment, decided against Pekell Delaire on each issue and reversed the Associate Justice's decision.

(i) Could the order of Croft J settle claims beyond the common issues?

In support of this submission Pekell Delaire relied on two authorities: *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 339 ALR 11 ("Timbercorp") and *Byrne v Javelin Asset Management Pty Ltd* [2016] VSCA 214 ("Byrne").

Timbercorp was another group proceeding arising from a failed agribusiness scheme. In that case the proceeding went to trial and the trial judge made orders dismissing the claims. When Timbercorp Finance Pty Ltd ("TFPL") later tried to recover amounts it said were owed to it by group members in the proceeding, the group members sought to run defences that were personal to them and had not been argued at the trial of the group proceeding. TFPL argued that the group members were precluded from running these defences by Anshun estoppels - a form of estoppel that prevents a party asserting a claim or an issue of law that it, or its "privies in interest", should reasonably have made or raised for determination in an earlier proceeding (see *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589). The High Court dismissed TFPL's claim, holding that a judgment given under Part 4A of the SC Act only bound the group members by the determination of the claims giving rise to the common questions. No Anshun estoppel could operate, because the group members were not parties to the group proceeding and were not the "privies in interest" of the plaintiffs.

Byrne, on the other hand, was another case related to the Great Southern group proceeding. The applicant, Javelin Asset Management Pty Ltd ("Javelin") was a party to the settlement deed but had not been a party to all of the group proceedings that gave rise to it. It wished to take the benefit of the settlement deed in respect of a proceeding to which it had not been a party. The Victorian Court of Appeal held that it could. The Court held that Javelin's rights were contractual rights that derived from the settlement deed, to which it was a party, and not from the fact of membership of the group proceeding anterior to the deed. As Javelin was a party to some of the proceedings it was entitled to the benefit of the deed, whether or not other disputes to which it was not a party were also settled by it.

Pekell Delaire submitted that, just as a judgment and orders given in proceedings under Part 4A may only determine the common issues (relying on Timbercorp), so must the effect of a settlement approved under that Part be equally limited. It submitted that this was not inconsistent with Byrne, or, alternatively, that to the extent of any inconsistency Byrne was overruled by the decision in Timbercorp.

The Court of Appeal rejected this argument. It held that order 2 made by Croft J, which authorised the plaintiffs to enter into the settlement deed on behalf of the group members, supplied the privity that was absent in Timbercorp. The Court went on to observe that, even if the order was invalid or partially invalid, it would still have been effective until set aside (applying *New South Wales v Kable* (2013) 252 CLR 118).

(ii) Was Pekell Delaire a "Group Member" under the settlement deed?

The Court refused to allow Pekell Delaire to run this argument because it was not run below and, had it been run, the Bank might well have put on further evidence to resist it (applying *Water Board v Moustakas* (1988) 180 CLR 491 at 497).

(iii) Had Pekell Delaire opted out of the Great Southern group proceeding?

Pekell Delaire relied on evidence from one of its directors that he had completed opt out notices and provided them to his personal assistant to be posted to the Court, and evidence from the personal assistant that she had no reason not to believe that she would have posted any document given to her for posting by the director. The Bank, on the other hand, relied on the settlement agreement itself, which listed Pekell Delaire as a client of the plaintiff's law firm; and the Court's spreadsheet of persons who had opted out of the proceeding, which did not include Pekell Delaire.

The Court noted that Pekell Delaire was only required to establish "'a plausible contention requiring investigation' of the existence of a genuine dispute or claim". Nonetheless, the Court found that Pekell Delaire's evidence "raise[d] more questions than it answer[ed]", and failed to "provide a sufficient account of its dealings in relation to the group proceedings to raise a genuine dispute and take the matter beyond mere assertion". The Court therefore held that there was no genuine dispute as to whether Pekell Delaire had opted out of the group proceeding.

(iv) Did the legal questions alone raise a genuine dispute?

The Court observed that, while an application to set aside a statutory demand should not involve deciding disputed questions of fact, it might require determination of short points of law. It considered that the point of law raised by Pekell Delaire was such a short point, suitable for determination in the application.

6.6 Director incurring debts while company was insolvent held to owe compensatory payment to liquidators

(By Alex Moores, DLA Piper)

Hambleton v Finn [2017] QDC 61, District Court of Queensland, McGill SC DCJ, 17 March 2017

(a) Summary

The District Court of Queensland ('the Court') considered the matter of a director who incurred debts while the company was insolvent. The liquidators sought to recover the amount of the debts as a compensatory payment under s. 588M of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act'). The defendant argued that a percentage of the total debt was owed to the director and accordingly the compensation payment should not include this amount.

Ultimately, the Court agreed that while the compensation payment was enforceable, the total amount owing by a director should be offset by the amount owing to the director who was liable for the insolvent trading under s. 588G of the Corporations Act. The Court, therefore, found for the plaintiffs and ordered the defendant to pay the outstanding debt that the Court was able to confirm as owing, less the amount owing by the company to the director, and including interest on the final amount as calculated with reference to the court calculator practice direction.

(b) Facts

The defendant was the sole director of Mary Finn's Nursing Recruitment Pty Ltd (MFNR). MFNR was ordered to be wound up on 10 July 2015 by the Federal Court, and the plaintiffs were appointed liquidators. The plaintiffs alleged that the defendant is liable to MFNR for the amount of $368,487.83 as compensation for loss resulting from insolvent trading. The defendant sought to set off the amount - which she claimed was less than the amount argued by the plaintiffs - against a debt allegedly owed by MFNR to her for money she lent to the company. Notwithstanding, she also sought to be excused from any contravention established, by virtue of s. 1317S of the Corporations Act.

(i) The application of the Act

The Court considered the operation of ss. 588G and 588M of the Corporations Act in relation to the duties owed by directors not to incur debt while a company is or may become insolvent, and the ability of creditors to recover compensation payment if loss is suffered as a result of incurring that debt. The Act requires the plaintiffs to establish four elements; (1) that the company incurred debts (2) at a time it was in fact insolvent, and there were both (3) reasonable grounds to suspect it was insolvent and (4) the defendant did or should have suspected it was insolvent.

The plaintiffs cited three debts to satisfy the first limb, being $153,084.25 owed to the Australian Tax Office (ATO), $211,759.97 owed to the defendant, and $4,105.97 owed to a third party creditor. The defendant accepted the former two debts and refuted that the latter debt was still owing. In the circumstances the Court was willing to dismiss this amount as the other amounts satisfied the legislative requirement for a debt to have been incurred, however noting that reduction of the total has an effect on the overall s. 588M compensation liability.

(ii) Balance sheet tracing

The financial statements of the company showed continuously accruing obligations to the ATO, which began accruing from 1 July 2012 onwards. Business losses varied from year to year, with accumulated losses of $133,327.49 in 2012 decreasing to $78,275.90 in 2013. However, on inspection of the balance sheets, third party debts including those to trade creditors and the ATO would decrease when the defendant would increase capital through loans to the company. The amount owing to the ATO would fluctuate depending on the timing of the statement and whether a director loan had been advanced, but the liability that the company was unable to repay was present and continued from 2013.

(c) Decision

(i) Defining insolvency in a commercial context

The Court examined the ordinary test for insolvency under s. 95A of the Corporations Act, being that insolvency exists if the person is not able to pay all of the person's debts as and when they become due and payable. The mechanics of insolvency under the Corporations Act have the effect of introducing an element of commercial reality, insofar as it is not sufficient that a company simply has more assets than liabilities in terms of book value. If liquidity is not readily realisable, then the company is not solvent. The Court identified that a temporary lack of liquidity does not constitute insolvency, as that would be to deny that creditors can be and routinely are flexible with the dates for payment, but even this flexibility will not render a company as solvent in the case of insurmountable endemic illiquidity.

Relevant to the case before the Court was that the ability and willingness of directors to inject capital by way of loans to the company is not a stable or sustainable form of liquidity, unless it can be established that this is a reliable and continuing form of income. Accordingly, the way debt had been shifted in MFNR from the ATO and third party creditors to the defendant as director did not affect the solvency, especially with reference to the defendant's decision to stop advancing funds to support the business. It was an attempt to delay insolvency and allow time to "trade out of trouble" but did not improve the ability to repay the company's aggregate debt.

The defendant explained the financial position as a problem of delays in payments from the company's trade debtors, however the explanation did not accord with the accounting entries in the company's financial statements and the fact that the company was reporting annual trading losses was evidence that its debts could not be paid. While not conclusive, it was also identified that the fact that certain payments leading to the debt, such as PAYG and GST tax debts, are payable promptly is evidence of a company failing the cash flow insolvency test. The Court found that the second limb of s. 588G of the Corporations Act was satisfied and MFNR was in fact insolvent.

(ii) Setting off compensatory payments

The defendant submitted that the total amount of the compensation payment, if referable to the outstanding amount of the debts cited by the plaintiffs, must be reduced by the amount owing to her personally pursuant to s. 553C(1) of the Corporations Act. Section 553C(1) provides that, where mutual dealings have occurred between an insolvent company to be wound up and a creditor claiming against that company, the sum due from one party is to be set off against a sum due from the other and the balance is to be paid. This section is more usually applied to a person who is simultaneously a creditor and a debtor of a company that is being wound up.

The plaintiffs sought to rely on s. 553C(2) whereby a person cannot rely on a set off if the person had notice of the company's insolvency at the time credit was given to or received from the company. The Court held that, as evidenced by the way the defendant continued to supply financial support to MFNR, she was not able to draw the conclusion that the company was insolvent and (in accordance with other case law on the topic) neither constructive notice nor a general suspicion of possible insolvency is sufficient to make out s. 553C(2).

(iii) Interaction with a s. 1317S defence

Notwithstanding the Court's decision in relation to a s. 553C(1) set off, the defendant also raised the defence under s. 1317S pursuant to which a court can relieve a person from liability for a contravention of the Corporations Act if:

- the defendant acted honestly despite contravening a civil penalty provision;
- having regard to all the circumstances of the case, the defendant ought fairly to be excused for the contravention; and
- whether as a matter of discretion the court should exercise the power to relieve the defendant in whole or in part.

The Court examined the interaction with s. 588M finding that if a person could be both a creditor and a director for the purposes of that section, the section could operate in a way which would cause injustice to a person in the defendant's position and the defendant ought to be excused for the contravention to that extent. However, given the way the Court applied s. 588M, the defendant is not liable for the amount of her contribution anyway and so is not unfairly disadvantaged. In respect of the amount owed to the ATO, on balance the Court held that the defendant should not be excused from liability and as such the s. 1317S defence did not apply.

(iv) Calculation of the total compensation payment

The Court held that the amount of the compensation payment levied in accordance with s. 588M of the Corporations Act should be the total debts incurred that the Court can confirm as owing, less the total of the debts owing by the company to the director accused of the insolvent trading, plus interest on the ultimate assessed figure. In this case, of the three amounts proffered by the plaintiffs to satisfy the first limb of s. 588G of the Act only the $153,084.25 owing to ATO was found to be relevant to the final compensation payment. Interest on this amount was assessed at $13,463.55 and applied to the total owing by the defendant.

6.7 Employee, director or shadow director roles define related parties payments

(By Dan Howard and Dan Moore, Clayton Utz)

In the matter of ACN 092 745 330 [2017] NSWSC 241, Supreme Court of New South Wales, Barrett AJA, 17 March 2017

(a) Summary

The Plaintiffs, Mr Hillig as the liquidator of a company referred to by its ACN number, ACN 092 745 330 Pty Ltd (330Co), sued Mr V Battaglia, his wife Mrs K Battaglia and their family company Fellmane Pty Ltd. It was alleged that Mr Battaglia was a director, or shadow director, or an officer performing the role of a director and had caused payments to be made to Mrs Battaglia, and Battaglia related family companies to the extent of $1,108,277.54. It was further alleged that this caused 330Co to be deprived of those monies and Mr Battaglia therefore breached his statutory and fiduciary duties.

Mr Battaglia held the position of Project Manager in the employment of 330Co. However, he was a director of other companies in a "loosely affiliated group of companies" which operated within the construction industry. During the period of Mr Battaglia's employment, 330Co underwent several name changes. He later formally became a director of 330Co.

The defendants gave evidence of employment agreements; email correspondence requesting financial action be taken by the internal CFO with regards to remuneration; and a loan from Mrs Battaglia (via a family trust) to Mr Battaglia which was paid to 330Co as a form of "partnership" capital contribution of $1.3 million for a development at Neutral Bay. The defendants argued that monies paid under these arrangements were in the form of legitimate remuneration, loan and associated interest repayments. The Plaintiffs' claims were dismissed by the Court.

(b) Facts

At issue in this case was the formal and informal roles performed by Mr Battaglia in the management and decision making of 330Co and, in particular, whether the payments made to the various Battaglia entities had deprived 330Co and its creditors of legitimate liquidity. Evidence of Mr Battaglia's role with the relevant group companies included his LinkedIn profile (as at 24 July 2015) which described him as the founder and Director of SX Projects, which appeared to be 330Co. This was explained by the defendants as being produced by "marketing people"; and in any event was well out of the time period in question, and irrelevant to the proceedings.

Mr Battaglia was at various times an employee, director or Managing Director of 330Co, which underwent an evolution of name changes during his association:

- SX Interiors Pty Ltd ACN 092 745 330, registered 08/05/2000 until 03/05/2010;
- Southern Cross Constructions (ACT) Pty Ltd ACN 092 745 330 from 04/05/2010 until 30/06/2011;
- SX Projects Pty Ltd from 01/07/2011 until 17/09/2012; and
- SX projects (NSW) Pty Ltd 18/09/2012.

Mr Battaglia had originally been employed within the Southern Cross group of companies from 2001. On or about 4 October 2012 Mr Battaglia took ownership of SX Projects (NSW) Pty Ltd (330Co) and until about June 2013 traded and undertook construction work with existing and new contracts. From June 2013 he also conducted businesses through a new company known as SX Projects Pty Limited (ACN 160 440 111).

The Plaintiffs' claim centred around payments made to related entities of Mr Battaglia between August 2011 and September 2013. These are defined at [18] as:

- Schedule A: payments totalling $408,541.70 allegedly made by 330Co between 19 August 2011 and 13 February 2013 out of accounts maintained by 330Co with National Australia Bank and St George Bank to a bank account held by Mrs Battaglia with Westpac;
- Schedule B: payments totalling $143,500 allegedly made by 330Co between 14 November 2012 and 15 May 2013 out of accounts maintained by 330Co with NAB and Westpac to a bank account held by Mrs Battaglia with NAB and designated "Karen Battaglia ATF Stefano & Adriano Battaglia"; and
- Schedule C: payments totalling $307,500 allegedly made by 330Co between 12 August 2011 and 12 October 2012 out of accounts maintained by 330Co with NAB and St George to a bank account held by Fellmane with NAB (designated "Fellmane Pty Ltd ATF the Vince Battaglia No 2 Family Trust").

A fourth group of payments (the Monardo payments) involved sums paid out of one of 330Co's bank accounts into the trust account of a firm of solicitors, Monardo Legal, for the benefit of Mrs Battaglia and later paid by the solicitors to her. These are defined as:

- $50,000 paid into the trust account on 5 September 2012 and paid out to Mrs Battaglia on 20 September 2012;
- $50,000 paid into the trust account on 24 September 2012 and paid out to Mrs Battaglia on 4 October 2012; and
- $148,735.84 paid into the trust account on 15 October 2012 and paid out to Mrs Battaglia on 1 November 2012.

Mr Battaglia was said to have breached the statutory duties imposed by s. 181 and s. 182 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). That is, his duties to exercise his powers and discharge his duties in "good faith" and in the "best interests of the corporation" and for a "proper purpose" (s. 181) and "not to make improper use" of his position to gain an advantage for himself or someone else or to "cause detriment to the corporation" (s. 182). Mr Battaglia was subject to the s. 181 duty, at a particular time, if he was "a director or other officer" of 330Co at that time. He was subject to the s. 182 duty if he was, at a relevant time, a "director, secretary, other officer or employee" of 330Co. Because the duties are imposed by the Corporations Act the expressions "director" and "officer are defined in that Act.

The claims by the liquidator were brought under s. 588FF of the Corporations Act. These were framed by reference to the "unreasonable director-related transactions" in s. 588FDA of the Corporations Act. An issue raised by those provisions is whether each of Mrs Battaglia and Fellmane was, at relevant times, a "close associate" of a "director" of 330Co.

(c) Decision

The Court had first to determine if Mr Battaglia was a director, or an officer of 330Co and if he acted in that manner. The Court was not persuaded, from the evidence taken as a whole, that Mr Battaglia acted in the position of a director of 330Co at any time before his formal appointment on 28 February 2013, and before that time he had operated under the superior authority of the two appointed directors. Barrett AJA found that Mr Battaglia was not, in relation to 330Co, a person within para (b)(i) of the definition of "director" in s. 9 of the Corporations Act. This reasoning corresponded with that of Black J in *Re Swan Services Pty Ltd* [2016] NSWSC 1724.

Authoritative guidance on the "de facto director" concept embodied in para (b)(i) of the definition of 'director' in s 9 of the Corporations Act is provided by the judgment of the Full Federal Court (Finn, Stone and Perram JJ) in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6. The Full Federal Court noted (at [70]) that "to be a 'de facto director' a person must be shown to have assumed or performed functions which only a de jure director or board can properly perform or which are the 'sole responsibility' of a director or board", in the matter [110].

In that case two important observations were made by the Full Federal Court at [74] and [75]:

- that the existence of an active director or directors apart from the alleged de facto director or the fact that a properly constituted board is apparently functioning does not preclude a finding that the person in question was a director; and
- whether the company itself has held the person out as a director will itself be a relevant, but not decisive, consideration.

Barrett AJA at [147] found that:

- there was nothing in the evidence to suggest that Mr Battaglia played a part in the authorising of any of the payments or the processes by which the payments were effected; and
- as to the initial question whether Mr Battaglia "directed, authorised or otherwise caused" relevant payments "to be made by" 330Co, even allowing for payments which appeared to benefit Mrs Battaglia, Mr Battaglia did not so act in relation to any of the Schedule A, B and C payments or the fourth payments (Monardo payments).

The Plaintiffs claimed that Mr Battaglia breached s. 588FDA of the Corporations Act, and therefore sought orders of the Court relating to voidable transactions under s. 588FF of the Corporations Act. The Court found that:

- only payments that fell within the period that Mr Battaglia was a formal director of 330Co were relevant;
- Mrs Battaglia and Fellmane were "close associates of a director" within the description of s. 588FDA(1)(b)(ii)) and s 588FDA(1)(b)(iii) of Corporations Act at the time Mr Battaglia was a director;
- it was appropriate to apply a reasonableness test to s. 588FDA and that in the case of Mr Battaglia's remuneration arrangements "it may be expected that a reasonable person in 330Co's circumstances would have made the payment"; and
- accordingly, the claims under s. 588FDA failed and no orders were made under s. 588FF.

The Plaintiffs claims were dismissed and they were ordered to pay the defendants' costs of the proceedings.

6.8 Hold on to Holding Deeds of Company Agreement for the time being

(By Lauren Taylor, King & Wood Mallesons)

Mighty River International Ltd v Hughes & Bredenkamp [2017] WASC 69, Western Australia Supreme Court, Master Sanderson, 16 March 2017

(a) Summary

The Supreme Court of Western Australia recently considered two issues with significant practical importance to administrators and other parties involved in an administration process; first, the independence of administrators and second, the validity of a Holding Deed of Company Agreement (Holding DOCA) under Part 5.3A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

Relevantly, the Court held that:

- it is appropriate for the board of any company that is considering placing the company into administration to seek advice from potential administrators on the proper procedures to be followed and consequences of administration;
- the fact an administrator appointed by a company has had pre-appointment contact with the company and provided the company with advice on the administration process does not by itself impact the administrator's independence; and
- Holding DOCAs are consistent with the intentions of the Corporations Act and, given their widespread use, to rule them invalid "would have a profound effect on insolvency practice".

(b) Facts

Mesa Minerals Limited (Mesa) was a mining company. Mighty River Pty Ltd (Mighty River) was a minority shareholder and creditor of Mesa, while Mineral Resources Ltd (Mineral Resources) was a major shareholder and creditor of Mesa. Certain directors of Mineral Resources were also directors of Mesa. Mighty River was concerned that Mesa may have claims against its own directors and had instigated certain proceedings in respect of those allegations.

Voluntary administrators were appointed by Mesa's directors in July 2016. The administrators recommended Mesa enter into a Holding DOCA which gave the administrators time to sell Mesa's assets. Creditors approved the Holding DOCA on 20 October 2016 and signed it on 3 November 2016.

Under the Corporations Act, when an administrator is appointed by a company they are required to comply with certain time limits for convening meetings of creditors. Those meetings are used to decide the future of the company. Administrators are personally exposed to certain liabilities the company incurs while it is under administration and they control it. If the creditors of a company wish to accept a proposal put forward by the administrator to restructure the company, they do so by approving a DOCA at a creditor's meeting. This brings the administration and the administrator's personal liability to an end. In certain circumstances, the time limits in the Corporations Act do not provide the administrator with sufficient time to formulate a restructure plan that can be approved. If that is the case, administrators have two options, apply to the court to extend the period for convening the meeting or have the company's creditors approve a Holding DOCA. While Holding DOCAs are not expressly provided for in the Corporations Act, they operate to remove the company from administration and allow for the orderly restructure of the company.

In bringing the proceedings, Mighty River alleged that:

- the administrators' conduct gave rise to a perception of bias and on that basis they ought to be removed. In support of that allegation, Mighty River alleged that the administrators had not sufficiently investigated any potential claims against the directors of Mesa and that the administrators lacked independence as the Mesa directors had sought advice from the administrators before they had been appointed; and
- Holding DOCAs are invalid under the Act and therefore Mesa's Holding DOCA should be set aside. In support of this allegation, Mighty River argued that the Holding DOCA was inconsistent with s. 435A and Part 5.3A of the Corporations Act as it did not maximise the chances of Mesa continuing its existence nor did it result in a better return to creditors than would result in an immediate wind up. Instead, the Holding DOCA was used to preserve the status quo so that the administrator could carry out further investigations and formulate a future proposal which may or may not improve the company's surviving business or provide a better return to creditors. This, according to Mighty River, was subverting the role of the court and circumventing the legislature's intention.

(c) Decision

The Master held:

- there was no apprehended bias on the part of the administrators; and
- that Holding DOCAs are consistent with the intention of the Corporations Act and that, because of their widespread use, to rule them as impermissible would have a profound effect on insolvency practice.

(i) Whether there was apprehended bias

The Master did not find evidence of actual or apprehended bias on the part of the administrators and was not satisfied that there was any other basis on which to justify the removal of the administrators. In particular, the Master described the conduct of one of the administrators, Mr Hughes, as "exemplary" in maintaining his independence. The Master praised several aspects of the administrators' conduct, namely that he:

- arranged for a valuation of Mesa's assets, which is the first logical step to obtain an idea of Mesa's financial position;
- did not at any time advise individual board members of Mesa - their advice was always directed to Mesa; and
- did not advise Mineral Resources - whatever was passed on by the board of Mesa to Mineral Resources was entirely beyond the administrator's control.

The Master took the opportunity to discuss the pre-appointment contact between the board of Mesa and the administrators. The Master noted that the Court's role in relation to Part 5.3A of the Corporations Act is limited. It is left to the board to determine whether they should appoint administrators, and that decision is not approved by the Court nor are administrators appointed by the Court. As such, the onus is on the directors to appoint administrators, and in fulfilling that obligation, directors necessarily need to seek advice from potential administrators as to the correct procedures to be followed and the consequences of administration.

The Master noted that the potential for a conflict of interest would arise in almost every case where administrators are appointed by a company. This is due to the fact that once administrators are appointed they are obliged to investigate the conduct of the directors in their capacity as directors of the company and may decide the company has a claim against the directors. The Master argued that it is natural that the directors would look for "tame" administrators, but identified that it is the duty of an appointed administrator to bring his or her skill and resources to bear on the administration with a view to providing the best possible outcome for both creditors and shareholders. The fine line they tread is to advise the board as a whole (not the individual members) as to the consequences of administration yet also draw the board's attention to the requirements of the law and their obligation to investigate the conduct of the directors.

(ii) Validity of Holding DOCAs

The Master upheld the validity of Holding DOCAs. In doing so, the Master confirmed that there were two options to extend a convening period once administrators have been appointed. The first is to apply for a court approved extension, and the second is for the creditors to approve the use of a Holding DOCA. The Master acknowledged that the two options produce different results; if an administrator applies to the Court for an extension of the convening period, it is up to the administrator to lead evidence which will justify the extension being granted. Moreover, any opposing party, such as a minor creditor or shareholder with a legitimate basis for an application to the court has the right to be heard without carrying the onus of proof. In determining the application, the court will act to protect the creditors and shareholders. However, if a Holding DOCA is agreed, then the onus is on a disgruntled creditor or shareholder to apply to have the Holding DOCA set aside. This may be particularly disadvantageous to a small creditor or shareholder who may not have the capacity and finance to challenge the validity of a Holding DOCA but could seek to be heard on an administrator's application.

In considering whether Holding DOCAs are consistent with the purposes identified in s. 435A and Part 5.3A of the Corporations Act, the Master emphasised the importance of reading the Holding DOCA as a whole. Despite being an interim document that is not provided for in the Act, the Master concluded that the Holding DOCA under consideration satisfied the mandatory requirements for DOCAs in the Corporations Act. The widespread use of Holding DOCAs, as referred to in Mr Hughes' evidence, also provided significant weight to the Court's finding that the Holding DOCA was valid.

(iii) Implications of the decision

In arriving at his decision in relation to the validity of the Holding DOCA, the Master noted that the arguments were finely balanced and commented that it was not for a Court at first instance to create uncertainty across all Australian jurisdictions on the validity of Holding DOCAs. Moreover, given the Master's focus on the content of the Holding DOCA in question, alternative drafting of the Holding DOCA may have led to a different conclusion. As such, administrators and other insolvency practitioners should not rely on this case as an incontrovertible approval of Holding DOCAs.

6.9 Application of security for costs principles

(By Sam Rafter, MinterEllison)

Lex Fitness Pty Ltd ATF Lex Family Trust v Australian Fitness Management Pty Ltd [2017] NSWSC 157, Supreme Court of New South Wales, Slattery J, 13 March 2017

(a) Summary

Lex Fitness Pty Limited (LFPL) franchised and purchased a fitness business from Australian Fitness Pty Limited (AFPL) and J & N Fitness Pty Limited (JNFPL) respectively. LFPL alleged that AFPL and JNFPL had engaged in misleading and deceptive conduct in relation to misrepresentations about the City of Sydney Council's ('Council') future consent to operating the fitness business at the premises 24 hours a day. Ultimately, LFPL commenced proceedings against AFPL and JNFPL in relation to the misleading and deceptive conduct and, in ancillary proceedings, AFPL sought certain declaratory relief. The present issue for consideration was whether AFPL and JNFPL should be granted security for costs in relation to the proceedings.

(b) Facts

On 28 January 2014, AFPL granted a franchise of a fitness centre business, Plus Fitness 24/7 Darlinghurst, to LFPL located in Darlinghurst. JNFPL already conducted a fitness business at the premises and on 14 February 2014, LFPL took assignment of the lease of the premises and agreed to purchase the business from JNFPL for $407,617.

The premises is located in an area that is controlled by the Council. At the time LFPL was granted the franchise and purchased the business, the Council had given provisional consent to the business operating 24 hours a day, seven days a week, for a trial period. On 4 February 2016, after the expiry of a trial period of 24 hour operation, the Council determined that the premises could not be used between 10pm and 6am, as that was contrary to the Environmental Planning and Assessment Act 1979 No. 203 (NSW) and relevant local environmental plans. Accordingly, from the date of operation of the Council's decision, being 26 February 2016, LFPL was confined to operating the business at the premises only between 6am and 10pm.

Consequently, in June 2016, LFPL rescinded the franchise and purchase agreements and commenced proceedings against both AFPL and JNFPL ('Defendants'), alleging that the Defendants, and associated persons, misrepresented that the premises had been physically fitted out in such a way that after the expiry of the trial period, the Council would not refuse consent to the continued 24 hour operation. LFPL claimed the franchise and purchase agreements should be avoided and that LFPL is entitled to damages under the Australian Consumer Law. Subsequently, AFPL commenced another set of proceedings, seeking a declaration that LFPL wrongfully terminated the franchise agreement and other relief. In the latter proceedings, interlocutory orders were made restraining LFPL from dealing with the premises, any property located at the premises and any list of members of the fitness business. An agreement was ultimately reached between the parties that on the payment of $50,000 by AFPL to LFPL, LFPL would transfer title to the fit out and equipment at the premises to AFPL.

On 6 July 2016, AFPL filed a Notice of Motion seeking security for costs in relation to the proceedings. The case concerned the application for security for costs and whether it should be granted to the Defendants in the circumstances.

(c) Decision

(i) Applicable legal principles

The Court noted the several heads of power enable the Court to order security for costs on the basis that there is reason to believe that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so: r 42.21 of the *Uniform Civil Procure Rules 2005 (NSW)* (UCPR), s. 1335 of the Corporations Act 2001 No. 50 (Cth). For simplicity, and in conformity with the decision, this case note will only reference the UCPR .

Slattery J, referencing the decision in *KDL Building Pty Limited v Mount* [2006] NSWSC 474, highlighted that three issues generally arise on applications for security for costs: whether the grounds to make the application are established, whether as a matter of discretion an order should be made, and the quantum and terms of any order to be made.

(ii) Were the grounds for the application established?

First, before the jurisdiction is enlivened, there must be reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so: r 42.21(1)(d) of the UCPR. Slattery J found that

LFPL's financial position is such that there is reason to believe that it would be unable to pay the costs of the Defendants if ordered to do so. This decision was reached based on the following evidence:

- LFPL had paid up share capital of $12;
- LFPL no longer operates the fitness business and therefore has no goodwill, equipment, and does not derive any income from the business;
- LFPL's financial statements as at 30 June 2015 showed that it has $477,999.98 in total liabilities (with $453,250.65 in non-current liabilities), made an operating loss of $18,958.96 and had equity of $120, which was only achieved by balancing its liabilities with the assets of the business, assets which LFPL no longer had;
- LFPL had relatively modest cash reserves of $33,242.18; and
- the litigation is likely to incur substantial costs on both sides.

LFPL had little to say against these financial facts and conceded that it would not be able to meet a costs order if properly made.

(iii) Discretion

Slattery J confirmed there is no principle that a court should make an order for security merely because the grounds set out in r 42.21(1) of the UCPR are established, reiterating that the discretion is unfettered, the relevant factors to be considered will vary from case to case, and the relative weight of each factor depends upon its own intrinsic persuasiveness and its impact on other circumstances that have to be weighed.

The Court found that an order for security should be made for several reasons. First, the outcome of the proceedings is a very open question and his Honour highlighted this means it is not possible to draw clear inferences at this stage that the Defendants were the cause of the LFPL's impecuniosity. Second, in relation to the public interest in the litigation, his Honour found that LFPL's arguable case for misleading and deceptive conduct cannot be decisive at this stage, such that the public interest in pursuing the litigation should be weighed as a substantial factor in LFPL's favour in relation to not granting security for costs. Finally, the Court was unable to draw the inference that an order for security for costs will stultify the proceedings because the directors and shareholders of LFPL did not go into evidence as to whether or not they would be able to provide security were an order to be made.

(iv) Quantum and the terms of any order to be made

In relation to the assessment of quantum of security, Slattery J reiterated that the Court's power is to order security in such a manner, at such time, and on such terms as the Court may direct: r 42.21(2) of the UCPR.

The Defendants claimed security in the minimum amount of $100,000, forecasting costs for the preparation of the hearing and the hearing itself of approximately $165,000 to $265,000. The Court took into account that the Defendants had already paid LFPL $50,000 in respect of equipment and the fit-out contained in the gym and adopted the not uncommon approach of ordering security in tranches. Ultimately, the Court ordered that security be in "an acceptable" form, such as a bank guarantee or payment into court, and be $40,000 within 14 days and $40,000 21 days before hearing.

Although the possibility of the directors and shareholders of LFPL giving personal guarantees was raised by the Court, the Court received negative answers from both LFPL and the Defendants, and therefore this was not appropriate in the circumstances.

(v) Costs of the motion

The Court found that the costs of the motion be the Defendants' costs in the cause. This decision was reached because although the Defendants were successful on the motion, they claimed very substantial costs in relation to the motion, being in the range of approximately $24,000 to $33,000, and were not successful in obtaining an order for security in anything like the amount of costs they forecast for the preparation of the hearing and the hearing itself. In other words, the Defendants were not wholly successful and costs should reflect that accordingly.

7. Contributions

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