SAI Global Corporate Law Bulletin No. 237>

Index

info.regulatory@saiglobal.com

Bulletin No. 237

Legislation Hotline

Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

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.

Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Harold Ford Memorial Lecture 2017

The 2017 Harold Ford Memorial Lecture will be delivered by The Hon Geoffrey Nettle, Justice of the High Court of Australia.

Date: Monday 26 June 2017, Melbourne Law School

Topic: The Changing Position and Duties of Company Directors

The development of directors' duties spans the length of the 20th century, from the precepts of fiduciary obligation and the courts of Chancery to the Corporations Act 2001 No. 50 (Cth). This lecture will examine the obligations placed upon, and the roles expected of, company directors. The position of present-day company directors in Australia will be considered in light of the schemes regulating the conduct of other office-holders, including union and public officials, and the approaches taken in other jurisdictions.

For more information, visit the Melbourne Law School website.

1.2 Seminar: Potential introduction of corporate whistleblowing bounties

Melbourne Law School, the Centre for Corporate Law and Securities Regulation and Flinders Law School are co-hosting a free public seminar - *Potential Introduction of Corporate Whistleblowing Bounties: What are the Implications?*

Whistleblowing regulation in Australia is currently under intense scrutiny. Late 2016 saw the launch of a Federal Parliamentary Joint Committee Inquiry into Whistleblower Protections, as well as a Treasury Review of Tax and Corporate Whistleblower Protections in Australia. One of the most contentious potential developments under review is the introduction of financial compensation or rewards for whistleblowers. Consideration of this reform has been stimulated by the apparent dramatic success of the United States SEC's whistleblowing bounties system introduced in 2010 under the Dodd-Frank whistleblower reforms. Payments under this scheme so far total in the order of US$150 million. More recently, the Ontario Securities Commission also introduced a paid whistleblower program, offering further evidence of regulatory interest in the capacity of whistleblowing rewards to increase the volume and quality of disclosures.

This half-day seminar offers an unparalleled opportunity to hear the views of senior regulators, eminent practitioners, local and international academics and enforcement authorities on the implications of corporate whistleblowing bounty reforms in Australia.

Date: Friday 23 June 2017, Melbourne Law School

Speakers:

- Opening address by The Hon Kelly O'Dwyer, MP, Revenue and Financial Services Minister;
- Associate Prof Dr Janet Austin (University of New Brunswick, Canada);
- Heidi Franken (Chief of the Office of the Whistleblower, Ontario Securities Commission);
- John Price (Commissioner, ASIC);
- Greg Golding (Partner, King & Wood Mallesons);
- Sarah McNaughton SC (Commonwealth Director of Public Prosecutions); and
- Norman O'Bryan AM SC (Barrister).

For more information, visit Melbourne Law School website.

1.3 Report: Rapid growth in FinTech credit carries opportunities and risks

22 May 2017 - FinTech platforms account for an increasing share of credit provision and policymakers have to consider the opportunities and risks such activity brings, a new report by the Committee on the Global Financial System (CGFS) and the Financial Stability Board (FSB) finds.

The report analyses the nature of FinTech credit and finds wide variation in the business models of the electronic platforms involved. Platforms facilitate various forms of credit, including consumer and business lending, lending against real estate and business invoice financing. The profile of investors, which platforms match to borrowers, also differs across countries.

FinTech credit refers to credit activity facilitated by electronic platforms. This usually involves borrowers being matched directly with investors, although some platforms use their own balance sheet to lend. FinTech platforms facilitate various forms of credit, including consumer and business lending, lending against real estate, and business invoice financing. There is also variation in the creditor base of FinTech credit platforms: some source funding mostly from retail investors, while others use significant funding from institutional investors, banks and securitisation markets.

The report considers the implications for financial stability should FinTech credit grow to account for a significant share of overall credit. Potential benefits include access to alternative funding sources for borrowers, a lower concentration of credit in the traditional banking system and pressure on incumbent banks to be more efficient in their credit provision. At the same time, systemic risk concerns may arise, such as weaker lending standards and more procyclical credit provision in the economy. FinTech credit also poses challenges to the regulatory perimeter and authorities' monitoring of credit activity.

This report complements a number of other recently released studies by official bodies on other aspects of FinTech. The FSB will also publish a report, before the G20 Leaders' Summit in Hamburg in July 2017, on the financial stability implications of FinTech in general. More details about the FSB's work on FinTech is available on its website.

1.4 Global shadow banking monitoring report

10 May 2017 - The FSB has published the Global Shadow Banking Monitoring Report 2016. The report presents the results of the FSB's sixth annual monitoring exercise to assess global trends and risks in the shadow banking system, reflecting data up to the end of 2015. It covers 28 jurisdictions, including Belgium and the Cayman Islands for the first time. These jurisdictions together account for about 80% of global GDP.

The main findings are as follows:

- the activity-based, narrow measure of shadow banking was US$34 trillion in 2015, increasing by 3.2% compared to the prior year, and equivalent to 13% of total financial system assets and 70% of GDP of these jurisdictions;
- credit intermediation associated with collective investment vehicles (CIVs) comprised 65% of the narrow measure of shadow banking and has grown by around 10% on average over the past four years. The considerable growth of CIVs in recent years has been accompanied by liquidity and maturity transformation, and in the case of jurisdictions that reported hedge funds, relatively high level of leverage; and
- non-bank financial entities engaging in loan provision that are dependent on short-term funding or secured funding of client assets, such as finance companies, represent 8% of the narrow measure, and grew by 2.5% in 2015. In at least some jurisdictions, finance companies tended to have relatively high leverage and maturity transformation, which makes them relatively more susceptible to rollover risk during periods of market stress.

In 2015, the wider aggregate comprising "Other Financial Intermediaries" (OFIs) in 21 jurisdictions and the euro area grew to US$92 trillion, from US$89 trillion in 2014. OFIs grew quicker than GDP in most jurisdictions, particularly in emerging market economies.

1.5 New guidance urges FTSE companies to demonstrate how they act long-term

9 May 2017 - The UK Investment Association (IA) has published new long-term reporting guidance aimed at driving change in FTSE listed companies, which will help to boost investor confidence and address falling UK productivity levels.

The guidelines outline concerns of the UK's £5.7 trillion asset management industry on what is expected of companies that choose to list in the UK. The publication follows the IA's call in October 2016 to abolish quarterly reporting in favour of meaningful long-term reporting, and sets out a detailed set of recommendations to help listed companies report more transparently and effectively on the long-term drivers of productivity, capital allocation, human capital, and company culture.

1.6 Australian financial system reforms

9 May 2017 - The Australian Government has announced the following financial system reforms.

Banking Executive Accountability Regime

The Government will legislate a new Banking Executive Accountability Regime with three key components:

- registration: prior to appointing senior executives and directors, authorised deposit-taking institutions (ADIs) will need to advise the Australian Prudential Regulation Authority (APRA). Upon appointment, these people must be registered with APRA and a map of the role and responsibilities of the ADI's senior executives provided to the regulator;
- new powers and penalties: additional expectations will be established for how banks and their executives conduct their business consistent with good prudential outcomes, with a new civil penalty enforced by APRA for ADIs that fail to meet those expectations; stronger powers will also be given to APRA to remove and disqualify senior executives and directors from all APRA-regulated institutions; and
    - the civil penalty will be a maximum of $200 million for larger ADIs and $50 million for smaller ADIs; and
    - APRA will also be able to impose penalties if ADIs do not appropriately monitor the suitability of their executives to hold senior positions.
- remuneration: a requirement for a minimum of 40% of an ADI executive's variable remuneration - and 60% for certain executives such as the CEO - to be deferred for a minimum period of four years to ensure executives are more accountable; and stronger powers for APRA to require ADIs to review and adjust their remuneration policies when APRA believes such policies are producing inappropriate outcomes.

APRA will be provided with $4.2 million over four years to implement the measures and $1 million per annum for a fund to enforce breaches of the new civil penalty provisions where banks fail to meet expected standards.

The Banking Executive Accountability Regime complements the work of the Australian Securities and Investments Commission (ASIC) Enforcement Review Taskforce established by the Government in October 2016. That taskforce is examining the breach reporting regime and the adequacy of ASIC's regulatory tools and powers. The Taskforce will report in September 2017.

Dispute resolution

The Government is radically overhauling how financial disputes are dealt with in Australia and has accepted all 11 recommendations of the Review of the financial system external dispute resolution framework chaired by Professor Ian Ramsay (see the Government's response). The Government will create a new dispute resolution framework with a one-stop shop - the Australian Financial Complaints Authority (AFCA) - to ensure that consumers and small business have access to free, fast and binding dispute resolution.

AFCA will deal with all financial disputes, including superannuation disputes, reducing consumer confusion and the unnecessary duplication of costs that are a feature of the current multi-scheme framework.

All financial firms, including superannuation funds, that deal with consumers will be required by law to be members of AFCA. AFCA will be governed by an independent board, with an independent chair and equal numbers of directors with industry and consumer backgrounds, and be funded by industry.

AFCA will be able to hear disputes of a higher value so that more consumers and small businesses can access external dispute resolution and can access fair compensation, if they have wrongfully suffered a loss.

ASIC will be provided with stronger powers to oversee this new one-stop shop and to require financial firms, including superannuation funds, to report on their internal dispute resolution activity. To support this, the Government will provide $4.3 million to ASIC over four years from 2017-18, including capital of $0.9 million in 2017-18.

The Review will report on the merits and potential design of a compensation scheme of last resort and the issues involved in providing access to redress for past disputes in the second half of this year.

Competition

The Government will introduce an open banking regime that will increase access to banking product and consumer data by consumers and third parties, if the consumer consents. This will empower consumers to seek out banking products better suited to their needs and create further opportunities for innovative business models in banking that enhance competition.

The Government will commission an independent review to recommend the best approach to implement the open banking regime in Australia to report by the end of 2017.

The Government will act to reduce regulatory barriers to entry for new and innovative entrants to the banking system. For those entrants the Government will relax the legislative 15% ownership cap, whether through the existing ministerial discretion or legislative change. The prohibition on the term 'bank' by ADIs with less than $50 million in capital will also be lifted by legislation to allow them and other ADIs to benefit from the reputational advantages of the term.

The Government is also supportive of a phased approach to licensing banks and welcomes APRA's review of prudential licensing arrangements and consideration of such approaches.

The Government has tasked the Productivity Commission (PC) to commence a review on 1 July 2017 of the state of competition in the financial system. The PC will consider the level of contestability and concentration in key segments of the financial system, including the degree of vertical and horizontal integration. It will also examine competition in the provision of personal deposit accounts and mortgages and services and finance to small and medium businesses. The Inquiry will is due to report to the Government by 1 July 2018.

To complement the review by the PC, the ACCC will receive $13.2 million over four years to establish a dedicated unit to undertake regular in-depth inquiries into specific financial system competition issues.

FinTech

The Government will legislate to establish an enhanced regulatory sandbox to facilitate more innovation, promote greater competition and increase choice for Australian consumers. This regulatory sandbox will allow businesses to test for a period of 24 months a wide range of new financial products and services, allowing businesses to evaluate the commercial viability of new concepts without a licence but subject to meeting minimum consumer protection obligations.

The Government has released draft legislation to extend the crowd-sourced equity funding (CSEF) framework to proprietary companies. This will open up new funding for business ideas that may struggle to attract funding from traditional sources. Shareholders will be protected by the higher governance and reporting obligations that CSEF proprietary companies will need to meet. Draft legislation for public consultation is available on the Treasury website.

The Government is removing the double taxation of digital currency. From 1 July 2017 purchases of digital currency (such as Bitcoin) will no longer be subject to the GST, just like money. This delivers on the Government's commitment to remove obstacles to the growth of the FinTech industry.

Consistent with the PC's report on Data Availability and Use, the Government will legislate a mandatory comprehensive credit reporting regime if credit providers are not reporting at least 40% of their data by the end of 2017. Credit markets will operate more efficiently and effectively if credit providers have access to sufficient and reliable data about borrowers to inform decisions about who to lend to and on what terms. The Government tabled the PC's report this week to coincide with the *2017-18 Budget*.

Major bank levy

From 1 July 2017, the Government will impose a major bank levy on Australia's largest banks. The levy will raise around $6.2 billion over four years, net of interactions with other taxes.

The levy will apply to all ADIs with licensed entity liabilities of at least $100 billion. To ensure that only banks that are large relative to the economy continue to be liable to pay the levy, the $100 billion threshold will be indexed to grow in line with nominal Gross Domestic Product.

The levy will be calculated quarterly as 0.015% of an ADI's licensed entity liabilities, excluding Additional Tier 1 capital and deposits of individuals, businesses and other entities protected by the Financial Claims Scheme. Liabilities subject to the levy will, for example, include: corporate bonds; commercial paper; certificates of deposit; and Tier 2 capital instruments.

Credit card reforms

To protect consumers from poor practices in the credit card market, the Government will:

- require that affordability assessments be based on a consumer's ability to repay the credit limit within a reasonable period;
- prohibit unsolicited offers of credit limit increases;
- simplify how interest is calculated; and
- require online options to cancel cards or to reduce credit limits.

Additional measures

The Government will provide APRA with $28.6 million over four years from 2017-18 to respond to significant developments in the financial system and increasing community expectations for improvements in risk culture and corporate governance. The funding will also provide the means for APRA to update its infrastructure and tools to reflect changing technology and business trends.

The Government will also provide APRA with $2.6 million over four years from 2017-18 to allow APRA to exercise new powers over the provision of credit by lenders that are outside the traditional banking sector. The Government will also make it clear that APRA has the ability to use geographically-based restrictions on the provision of credit where APRA considers it appropriate. This will ensure that APRA can respond flexibly to financial and housing market developments that pose a risk to financial stability.

To improve the financial capability of Australians, the Government will provide ASIC with $16 million over four years to expand its financial literacy program and develop a new National Financial Literacy Strategy.

In line with the Government's commitment that the cost of regulation is borne by those entities that create the need for it, the funding of the measures in this package for APRA, ASIC and the ACCC will be offset by increases in supervisory levies.

1.7 Engagement between listed companies and proxy advisers

8 May 2017 - The Australasian Investor Relations Association (AIRA) has issued a Background paper and draft Code on increasing effective engagement between listed companies and proxy advisers. The Code is intended to be a voluntary framework to pre-empt the need for any regulatory or legislative intervention. It outlines the way in which proxy firms should engage with listed companies.

View background paper and draft code (registration required)

View media release

1.8 Regulations to support the ASIC industry funding model released for consultation

4 May 2017 - The Australian Government has released draft regulations on the operation of the industry funding model for ASIC.

This is the next step in meeting the Government's commitment to an industry funding model in place from 1 July 2017.

The exposure draft regulations and explanatory statements are available on the Treasury website.

1.9 OECD report on investment governance and the integration of ESG factors

2 May 2017 - The Organisation for Economic Cooperation and Development (OECD) has published a report on investment governance and the integration of environmental, social and governance (ESG) factors. The report presents the findings of an international stock-taking of the regulatory frameworks that apply to institutional investment in different jurisdictions and how these frameworks are interpreted by institutional investors in terms of their ability or responsibility to integrate ESG factors in their governance processes.

1.10 Global M&A statistics

28 April 2017 - The International Institute for the Study of Cross-Border Investment and M&A (XBMA) has published its XBMA Quarterly Review for First Quarter 2017.

- global M&A volume in Q1 totalled approximately US$778 billion, approximately 10% higher than Q1 2016, marking the second highest Q1 since 2011;
- cross-border M&A activity accounted for 43% of global deal volume in Q1, above 2016 levels, and led by activity in the Materials and Healthcare sectors. Five of the ten largest deals in Q1 were cross-border transactions;
- European M&A activity accounted for almost 29% of deal volume in Q1, up substantially from recent levels, whereas Chinese and US M&A accounted for smaller percentages of global deal volume than in recent years; and

- the Energy & Power sector accounted for over US$665 billion in global deal volume over the past 12 months.

However, the Materials sector accounted for the largest share of cross-border M&A activity over the past 12 months, exceeding US$230 billion, with cross-border deals accounting for 59% of global deal volume in this sector. Cross-border deals also drove deal activity in the Consumer Staples sector, representing 71% of total M&A activity.

1.11 FSB publishes thematic peer review on corporate governance

28 April 2017 - The FSB has published a peer review on corporate governance. The peer review takes stock of how FSB member jurisdictions have implemented the G20/OECD Principles of Corporate Governance for publicly listed, regulated financial institutions. In so doing, it identifies effective practices and areas where good progress has been made while noting gaps and areas of possible weakness.

The peer review found that, while all FSB member jurisdictions have a comprehensive corporate governance framework, its effectiveness can be impacted if the division of responsibility among financial sector authorities is unclear or if the various requirements overlap, leave unwarranted gaps, or are otherwise not well aligned with each other. The peer review also found that although FSB member jurisdictions' corporate governance frameworks generally provide some degree of proportionality - typically requiring financial institutions to have risk management systems that are commensurate with their size, complexity and risk profile - other factors such as ownership and control structure, geographical presence and stage of development could also be considered.

The peer review offers 12 recommendations to FSB member jurisdictions, standard-setting bodies (i.e. OECD, Basel Committee on Banking Supervision, International Association of Insurance Supervisors and International Organization of Securities Commissions) and financial institutions focusing, among others, on the following areas:

- ensuring the basis for an effective corporate governance framework - identify and address gaps or inconsistencies in cases where corporate governance frameworks are found in multiple sources; and augment enforcement powers available to supervisory authorities to address weaknesses in corporate governance regimes or non-compliance with corporate governance;
- disclosure and transparency - consider improving disclosures related to governance structures, voting arrangements, shareholder agreements and significant cross-shareholdings and cross-guarantees; and identify remuneration information that could be usefully provided to shareholders;
- the responsibilities of the board - consider adoption, implementation and disclosure of codes of ethics or conduct; and encourage boards to undertake regular assessments of their effectiveness;
- Rights and equitable treatment of shareholders and key ownership functions - consider requiring that shareholders be given the opportunity to vote on financial institution remuneration policies and the total value of compensation for the board and senior management;
- the role of stakeholders in corporate governance - consider enhancing the effectiveness of whistle-blower programs; and
- other - consider reviewing practices with respect to the effectiveness of rules regarding the duties, responsibilities and composition of boards within group structures; the framework for related party transactions; and the role and responsibilities of independent directors on the board and board committees.

1.12 Progress report on adoption of Basel III standards

25 April 2017 - The Basel Committee on Banking Supervision has issued the Twelfth progress report on adoption of the Basel regulatory framework.

This report sets out the adoption status of Basel III standards for each BCBS member jurisdiction as of end-March 2017. It updates the Committee's previous progress reports which have been published on a semi-annual basis since October 2011 under the Committee's Regulatory Consistency Assessment Programme (RCAP).

The report shows that:

- all 27 member jurisdictions have final risk-based capital rules, LCR regulations and capital conservation buffers in force;
- 26 member jurisdictions have issued final rules for the countercyclical capital buffers;
- 25 have issued final or draft rules for domestic systemically important banks (D-SIBs) frameworks and, with regards to the global systemically important banks (G-SIBs) framework, all members that are home jurisdictions to G-SIBs have final rules in force; and
- 20 have issued final or draft rules for margin requirements for non-centrally cleared derivatives.

1.13 SEC enforcement activity

20 April 2017 - US Securities and Exchange Commission (SEC) enforcement activity remained elevated through the first half of fiscal year 2017, according to research from Cornerstone Research. The data show an increase in actions involving broker-dealers, issuer reporting and disclosure, and securities offerings.

According to SEC Enforcement Activity-First Half FY 2017 Update, the SEC filed 334 enforcement actions during the first half of FY 2017, down from 372 filings during the same period in FY 2016. Most of the decline can be attributed to a decrease in actions against delinquent filers. Excluding those actions, there were 299 actions in the first half of FY 2017-virtually unchanged from the same period last fiscal year.

The number of cases involving broker-dealers, issuer reporting and disclosure, and securities offerings increased during the first half of FY 2017:

- actions against broker-dealers increased 20%;
- actions related to issuer reporting and disclosure increased 34%; and
- actions involving securities offerings increased 34%.

These increases were accompanied by a 50% decline in actions against delinquent filers - only 35 were filed during the first half of FY 2017, compared to 70 in the first half of the previous fiscal year. Actions involving allegations of insider trading and Foreign Corrupt Practices Act (FCPA) violations also decreased.

1.14 World Federation of Exchanges publishes derivatives report

20 April 2017 - The World Federation of Exchanges (WFE), which represents more than 200 market infrastructure providers including exchanges and CCPs, has published its annual report into the global derivatives market.

Highlights of the report are as follows:

- derivatives volumes continued to grow in 2016 - increasing by 2.2% on 2015 - reaching a total number of 24.9 billion derivatives contracts;
- this was made up of 9.4 billion options (38%) and 15.5 billion futures (62%) traded;
- growth was driven by volumes traded in the Americas (up 6.7%, and accounting for 41% of total volumes traded), with increases across stock index futures, interest rate, currency and commodity derivatives;
- in a reversal of the trend observed in 2015, the Asia-Pacific region (36% of the total volume), saw a decline of 5.5% in volumes traded vs 2015. This was mainly due to the decrease in volumes of single stock derivatives and stock index derivatives, whilst volumes of commodity derivatives grew by 27%;
- there were volume increases in all product lines, except equity derivatives and 'other derivatives' such as REIT derivatives and CFDs, (declines of 11% and 1.1% respectively vs 2015);
- commodity derivatives volumes - the most actively traded contract type in both 2016 and 2015 - grew by 27.5%; and
- currency derivatives also continued strong volume growth, up 10.4% on 2015.

Interest rate derivatives were up 5.5% in 2016, a reversal of the declines seen in 2014 and 2015.

---

2. Recent ASIC Developments

2.1 Regtech report

26 May 2017 - ASIC will establish a new regtech industry liaison network, conduct a number of new technology trials using regtech applications and establish a 'hackathon' later this year to help identify roadblocks to the successful and rapid take-up of the sector.

The initiatives are among a range of proposals covered in Report 523 ASIC's Innovation Hub and our approach to regulatory technology, covering ASIC's approach to regtech and inviting feedback from the sector and wider industry.

In addition to covering current initiatives the regulator has underway and proposed next steps, the report also gives an update on the work of ASIC's Innovation Hub, launched in March 2015, to help innovative fintech businesses navigate the regulatory framework.

2.2 Report on promoting better conduct in the wholesale spot foreign exchange market

26 May 2017 - ASIC has released [Report 525 Promoting better behaviour: Spot FX](). This report sets out ASIC's observations on key behavioural drivers of conduct arising from recent ASIC investigations into the wholesale spot foreign exchange (FX) businesses of the major Australian financial institutions.

The spot FX market is a key global market and is of systemic importance to the Australian economy, with a daily average turnover of US$31.4 billion in Australia. The effective functioning of the spot FX market relies on all participants acting with integrity and fairness.

ASIC's report illustrates the behavioural drivers of conduct that, in ASIC's view, are likely to lead to poor conduct if not adequately managed. The report also describes a number of good practice principles for managing these drivers to more effectively prevent, detect and respond to inappropriate practices.

The release of ASIC's report coincides with the release of Phase Two of the FX Global Code of Conduct (FX Global Code). The FX Global Code provides a global set of practice guidelines designed to promote the integrity and effective functioning of the wholesale FX market. Where relevant, Report 525 makes reference to related principles of the FX Global Code and encourages market participants to adhere to high standards of market practice.

ASIC will use this report as a reference point for its surveillance of the FX markets and, where appropriate, the broader wholesale over-the-counter markets.

2.3 Consultation on remaking class order on credit union member shares

25 May 2017 - ASIC has released a consultation paper proposing to remake a class order that is due to expire (sunset) in 2018.

The instrument ASIC proposes to remake without significant changes is *Class Order [CO 02/1176] Credit union member shares*.

ASIC considers this instrument is operating effectively and efficiently and continues to form a necessary and useful part of the legislative framework. The fundamental policy principles that underpin the class order have not changed. No substantive changes are proposed.

Consultation Paper [283] Remaking ASIC class order on credit union member shares: [CO 02/1176] (CP 283) outlines the class order proposed to be remade as a new instrument and ASIC's rationale for remaking it.

The existing class order gives relief from:

- AFS licensing and disclosure requirements in relation to the provision of financial product advice and dealing in 'member shares'; and
- the requirement to give information to members confirming the issue or redemption of these kinds of shares.

The only proposed material change to the substance of the relief in [CO 02/1176] is the removal of relief in relation to dealing in member shares. ASIC does not consider that this relief is necessary because credit unions may already be able to rely on the exemption in paragraph 766C(4) of the Corporations Act 2001 No. 50 (Cth).

2.4 Consultation on 'sunsetting' class orders about licensing relief for financial counselling agencies and rural financial counselling service providers

17 May 2017 - ASIC has released a consultation paper proposing to remake three ASIC instruments relating to financial counsellors, which are due to expire between 1 October 2017 and April 2026.

ASIC proposes to:

- remake, without significant changes, *Class Order [CO 03/1063] Licensing relief for financial counselling agencies*; and
- remake as a single new instrument, without significant changes, *Class Order [CO 11/926] Credit licensing exemptions for NGOs (non-government organisations) providing credit assistance to consumers* and *ASIC Credit (Financial Counselling Agencies) Instrument 2015/992*.

ASIC considers that these instruments are operating effectively and efficiently and continue to form a necessary and useful part of the legislative framework. The fundamental policy principles that underpin the class orders have not changed.

Consultation Paper 282 Remaking ASIC class orders on financial counselling licensing relief (CP 282) outlines the minor changes ASIC is proposing to make to ensure the relief applies in the intended way. In particular, clarifying the restrictions on the persons that may not receive payments. ASIC has published two draft ASIC instruments with CP 282.

2.5 Remake of 'sunsetting' class order on reporting requirements for Australian financial services licensees who are natural persons

26 April 2017 - ASIC has remade *Class Order [CO 03/748] Reporting requirements under s 989B* (Class Order) in ASIC Corporations (Financial Reporting: Natural Person Licensees) Instrument 2017/307 [CO 03/748], which was due to expire ('sunset') on 1 October 2017.

The new instrument continues relief for Australian financial services licensees who are natural persons from the requirement to include, in a profit and loss statement, any revenues and expenses that do not relate to the financial services business carried on by the licensee.

The relief contained in [CO 03/748] was remade without substantive changes following public consultation via *Consultation Paper 278 Remaking ASIC class order on reporting requirements for AFS licensees who are natural persons* (CP 278), issued in February 2017. ASIC did not receive any submissions in response to CP 278.

3. Recent ASX Developments

3.1 Launch of ASX 100 Cyber Health Check Report

The ASX 100 Cyber Health Check Report was launched on 20 April 2017 by the Minister Assisting the Prime Minister for Cyber Security, The Hon Dan Tehan MP, at a ceremony in Sydney hosted by ASX Chairman Rick Holliday-Smith and also featuring ASIC Commissioner Cathie Armour.

The ASX 100 Cyber Health Check is the first attempt to gauge how the boards of Australia's largest listed companies view and manage their exposure to cyber risk. It is an industry-led initiative that forms part of the Australian Government's Cyber Security Strategy.

The Notice is available here.

3.2 Robert Priestley appointed to the ASX Board

On 17 May 2017, the Board of ASX Limited (ASX) announced the appointment of Rob Priestley as a non-executive director. Mr Priestley was formerly the Chief Executive Officer of J.P. Morgan Australia & New Zealand, and a member of the bank's Asia Pacific Management Committee. Mr Priestley will stand for election at ASX's Annual General Meeting on 26 September 2017.

The Notice is available here.

3.3 Reports

On 3 May 2017, ASX released the ASX Monthly Activity Report for April 2017.

4. Recent Takeovers Panel Developments

4.1 Spotless Group Holdings Limited 02 - Panel accepts undertakings

23 May 2017 - The Panel has declined to make a declaration of unacceptable circumstances in response to an application dated 3 May 2017 from Downer EDI Services Pty Ltd (Downer Services) in relation to the affairs of Spotless Group Holdings Limited (Spotless) (see TP17/22). The Panel did so following the acceptance of undertakings from Spotless in which Spotless undertook to provide corrective disclosure in the form of a supplementary target's statement to be lodged with ASIC and sent to ASX, Downer Services and each holder of ordinary shares of Spotless. The supplementary target's statement addresses the Panel's concerns in relation to certain matters arising out of Downer Services' application by:

- removing any implication that if Spotless's FY18 guidance included in the Target's Statement was reflected in broker forecasts any valuation by those brokers would be equal to or above the offer price of Downer Services' bid;
- correcting the heading of s. 1.9 of the Target's Statement - which referred to the present intention of Coltrane Asset Management (Coltrane) to reject the offer at the current offer price - noting that Coltrane would need to request and be delivered the shares the subject of the swaps and the qualification that Coltrane has not made any final decision and reserves the right to take any action it considers appropriate in response to the offer; and

- reflecting accurately the current relevant interest of Coltrane and the assumptions on which that relevant interest is based following the updated substantial holder notices lodged by Morgan Stanley and Coltrane on 10 May and 11 May 2017 respectively, and making clear that, in order to reject the offer, Coltrane would need to request and be delivered the shares the subject of the swaps.

The Panel considers that the undertakings sufficiently address its concerns and that it is not against the public interest to accept the undertakings and decline to make a declaration of unacceptable circumstances.

On the basis of the above, the Panel decided not to make a declaration of unacceptable circumstances.

4.2 Globe Metals & Mining Limited - Panel declines to conduct proceedings

4 May 2017 - The Panel has declined to conduct proceedings on an application received on 26 April 2017 from Ao-Zhong International Mineral Resources Pty Ltd in relation to the affairs of Globe Metals & Mining Limited.

The application concerned circumstances surrounding the passing of certain resolutions at the annual general meeting of Globe held on 18 November 2013 (see TP17/21).

The Panel had some concerns about Globe's item 7 approval at the 2013 annual general meeting being passed on a show of hands. However, given the lateness of the application, the Panel considered that it would be difficult to investigate the allegations and provide suitable remedies if unacceptable circumstances were found.

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

4.3 Indiana Resources Limited - Declaration of unacceptable circumstances

4 May 2017 - The Panel has made a declaration of unacceptable circumstances in relation to an application made on 5 April 2017 by Indiana Resources Limited in relation to its affairs (see TP17/12). The Panel has accepted an undertaking from BPM Capital Limited (Annexure B) (BPM) in lieu of making orders.

Background

In late 2016 and early 2017 Indiana had discussions concerning a proposed transaction in which Mr Brett Montgomery and Ms Heidi Brown would be appointed as directors of Indiana at completion. However, in mid-February 2017, Indiana advised Mr Joseph El-Raghy, a representative of the other party, that Indiana did not wish to proceed with the transaction.

On 22 February 2017, BPM requisitioned a meeting of Indiana to remove two directors and elect Mr Brett Montgomery and Ms Heidi Brown as Indiana directors.

Between mid-February and early April 2017:

- BPM acquired shares increasing the voting power of Mr Joseph El-Raghy by more than 4%, and Mr Brett Montgomery acquired a substantial holding in Indiana; and
- Numerous emails were exchanged between two or more of Mr Brett Montgomery, Mr Joseph El-Raghy and Ms Heidi Brown on matters including: drafts of a letter by BPM to Indiana shareholders explaining the reasons for its requisition, conversations with other Indiana shareholders, acquisition of Indiana shares and voting at the requisitioned meeting.

Declaration

The Panel considered that:

- Mr Brett Montgomery, BPM and Ms Heidi Brown (the associated parties) had an understanding and were acting or proposing to act in concert in relation to the requisitioned meeting; and
- this resulted in contraventions of the 20% threshold and the substantial holding disclosure requirements.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s. 657A(3) of the Corporations Act 2001 No. 50 (Cth).

Undertaking

After the application was made:

- a placement of shares by Indiana diluted the combined holding of the associated parties below 20%; and
- BPM withdrew its requisition and Ms Brown and Mr Montgomery withdrew their respective consents to act as a director of Indiana.

In addition, after the Panel indicated it was minded to make a declaration, BPM offered an undertaking that it disclose the above circumstances and, if BPM and Mr Montgomery are of the view that they are no longer associated with one another in relation to Indiana, provide a clear statement to that effect and when and how their association concluded.

Given these further developments and BPM's undertaking, the Panel considered it was not necessary to make orders. The Panel makes no comment regarding any continued association between Mr Montgomery, BPM and Ms Brown.

5. Recent Research Papers

5.1 Impact of corporate governance on sustainability reporting

This empirical study evaluates the impact of corporate governance on sustainability reporting by investigating companies operating in Australia's resources industry. Specifically, this study investigates the relationships between the total disclosures and, separately, the three aspects of sustainability disclosures - economic, environmental and social - and various attributes of board composition, including independent directors, multiple directorship, and women directors. Significant positive correlations were found between sustainability disclosures and the proportion of independent directors, multiple directorships and women directors on the board. Companies without CEO duality and those with a sustainability committee disclosed more sustainability information.

Impact of Corporate Governance on Sustainability Reporting: Empirical Study in the Australian Resources Industry

---

5.2 Corporate scandals and regulation

Are regulatory interventions delayed reactions to market failures or can regulators proactively pre-empt corporate misbehaviour? From a public interest view, we would expect "effective" regulation to ex ante mitigate agency conflicts between corporate insiders and outsiders, and prevent corporate misbehaviour from occurring or quickly rectify transgressions. However, regulators are also self-interested and may be captured, uninformed, or ideological, and become less effective as a result. The authors develop a historical time series of corporate (accounting) scandals and (accounting) regulations for a panel of 26 countries from 1800 to 2015.

An analysis of the lead-lag relations at both the global and individual country level yields the following insights:

- corporate scandals are an antecedent to regulation over long stretches of time, suggesting that regulators are typically less flexible and informed than firms;
- regulation is positively related to the incidence of future scandals, suggesting that regulators are not fully effective, that explicit rules are required to identify scandalous corporate actions, or that new regulations have unintended consequences; and
- there exist systematic differences in these lead-lag relations across countries and over time suggesting that the effectiveness of regulation is shaped by fundamental country characteristics like market development and legal tradition.

Corporate Scandals and Regulation

5.3 How post-crisis regulation has affected bank CEO compensation

This paper assesses whether compensation practices for bank CEOs changed after the FSB issued post-crisis guidelines on sound compensation. Banks in jurisdictions which implemented the FSB's Principles and Standards of Sound Compensation in national legislation changed their compensation policies more than other banks. Compensation in those jurisdictions is less linked to short-term profits and more linked to risks, with CEOs at riskier banks receiving less, by way of variable compensation, than those at less-risky peers. This was particularly true of investment banks and of banks which previously had weaker risk management, for example those that previously lacked a Chief Risk Officer.

How Post-Crisis Regulation Has Affected Bank CEO Compensation

6. Recent Corporate Law Decisions

6.1 Recovery of unfair preference payments: Liquidator unable to establish insolvency at the date payment was made

(By Anna Trevor, Clayton Utz)

Shaw (as liquidator of ACN 166 338 138 Pty Ltd (in liq) (formerly Structural Projects Pty Ltd) v KPR Recruitment Australia Pty Ltd [2017] NSWSC 539, Supreme Court of New South Wales, Gleeson JA, 5 May 2017

(a) Summary

The Supreme Court of New South Wales declined to make an order for the repayment of an alleged unfair preference payment by the defendant, on the basis that the plaintiff (as liquidator of the company having made the payment) had failed to satisfy the Court that the company was insolvent as at the payment date.

In particular, the fact that two applications for the winding up of the company were filed in the months following the payment did not indicate anything other than a temporary lack of liquidity as at the date of payment. Evidence as to the company's cash at bank and its creditors as at the date of winding up (some eight months later) was also insufficient to establish insolvency, as what is required is evidence of the company's financial position at a time contemporaneous to the payment.

(b) Facts

The plaintiff in the proceeding, Shaw, is the liquidator of ACN 166 331 183 (described as "Projects"). The liquidator commenced an interlocutory application against the defendant, seeking an order pursuant to s. 588FF of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), that the defendant make payment of $61,420.89 to Projects, on the basis that the amount had been paid by Projects to the defendant as an unfair preference.

The relevant provisions of the Corporations Act are as follows:

- s. 588FE provides that certain transactions made by a company that is being wound up are voidable, including, relevantly, insolvent transactions entered into during the six months before the relation-back day;
- an insolvent transaction includes an unfair preference given by a company, if the company was insolvent at the time that it entered into the transaction pursuant to which the preference was paid or that an act was done for the purpose of giving effect to the transaction, or became insolvent by reason of entering the transaction or making the payment (s. 588FC);
- a payment is an unfair preference if it results in the creditor receiving from the company, in respect of an unsecured debt, more than it would receive if the transaction were set aside and the creditor proved for the debt in winding up (s. 588FA); and
- pursuant to s. 588FF, the Court is empowered to make an order directing the creditor to pay to the company an amount equal to the amount of the preference payment.

The payment by Projects to the defendant had been made within six months of the relation-back day, and gave the result that the defendant received a higher return than it would if it proved in the winding up.

However, in order to establish a right to the relief sought, the liquidator also had to show that Projects was insolvent at the time of the alleged preference payment, within the meaning of s. 95A of the Corporations Act.

(c) Decision

The evidence relied upon by the liquidator did not include an independent report on solvency. Primarily the liquidator relied on three facts to support insolvency on the date payment was made to the defendant:

- debts of two other creditors became due and payable shortly after the payment, and remained unpaid as at the date of the liquidation;
- two later applications to wind up Projects were filed in the months following the payment; and
- as at the date of liquidation, Projects had no cash in its bank accounts and had substantial creditors.

The Court found that it was not possible to conclude that Projects' failure to pay the other two creditors indicated anything more than a temporary lack of liquidity at that time. Further, the state of Projects' bank accounts at the date of the liquidation said nothing about its cash resources as at the date of the alleged preference payment, over eight months earlier.

The Court identified matters that would be significant to the assessment of Projects' insolvency as at the payment date, including:

- an analysis of outstanding creditors, including the "aged payables" at the payment date and whether those debts remained unpaid thereafter;
- an analysis of Projects' cash and other resources at or shortly after the payment debt; and
- an assessment of the value of Projects' work in progress, and any impediment to the likely realisation of the work in progress arising.

However, no evidence was adduced by the liquidator concerning these matters.

The Court was not satisfied that the liquidator had established that Projects was insolvent as at the payment date, and as such, his claim for relief under s. 588FF must fail. However, having regard to the fact that the defendant had not appeared on the application and would appear to suffer no prejudice if the liquidator sought to re-open his case, the liquidator was given liberty to apply for leave to re-open the application to adduce further evidence on the issue of insolvency.

6.2 Grasping for power: disgruntled minority shareholder tries to wind up a company

(By Rebecca Roach and Ivan Biros, Ashurst Australia)

Citi Project Marketing (Qld) Pty Ltd v VG Projects Pty Ltd [2017] QSC 65, Supreme Court of Queensland, Martin J, 28 April 2017

(a) Summary

This case involved the breakdown of the relationship between the shareholders of a company and the struggle for control over the company that followed. Two key questions were asked:

- whether the company should be wound up on just and equitable grounds under s. 461(1)(k) of the Corporations Act 2001 No. 50 (Cth) (the Act); and
- whether s. 1322 of the Act can overcome a procedural irregularity caused by a deliberate act of noncompliance in an attempt to avoid resolutions being passed at a meeting.

In response to those questions, Martin J of the Supreme Court of Queensland decided that:

- a winding up order will not be made simply on the demand of a disgruntled shareholder; and
- a party that deliberately causes a procedural irregularity to occur cannot rely on that procedural irregularity to avoid resolutions being passed at a meeting.

(b) Facts

VG Projects Pty Ltd (VG Projects) wholly owns Pointcorp Holdings Pty Ltd (Pointcorp). Mr Vitale and Mr Gedoun are directors of both VG Projects and Pointcorp. Pointcorp is a residential property developer.

In January 2013, VG Projects contracted with Samsara One Pty Ltd (Samsara) to market and sell Pointcorp's development projects on a commission only basis. Mr Patterson is the sole shareholder and director of Samsara.

Between November 2013 and October 2014, VG Projects and Samsara discussed a restructure of their relationship. As a result of those discussions Citi Project Marketing (Qld) Pty Ltd (Citi) was incorporated in November 2014 to market residential unit developments undertaken by Pointcorp and other developers.

Pointcorp owned two-thirds of Citi's shares and provided all of Citi's funding. Samsara owned the other third of Citi's shares and Mr Patterson was paid on commission for his role as sales manager of Citi. Mr Patterson was the sole director of Citi until he was removed on 24 December 2016.

The relationship between Pointcorp and Samsara soured almost immediately after Citi was incorporated. A timeline of the key issues follows:

- November 2014 to September 2015 - Pointcorp was concerned by how Mr Patterson was carrying out his duties as both sales manager and director of Citi. The concern arose after Mr Patterson informed Pointcorp on multiple occasions that Samsara had no money and could not meet its debt obligations. To address this issue the parties agreed to pay Mr Patterson a salary instead of commission;
- late 2016 - a dispute arose about the profit share to be paid to Samsara and Pointcorp on the sale of units in a particular development. A dispute about Citi's bank accounts also arose and Mr Patterson alleged that Pointcorp was not managing Citi's financial accounts in Citi's best interests;
- 25 November 2016 - Mr Patterson revoked Pointcorp's access to Citi's bank accounts so that only he could access the accounts;
- 28 November 2016 - Pointcorp issued a notice calling for an extraordinary general meeting (EGM) of Citi to remove Mr Patterson as director and to appoint Mr Vitale and Mr Gedoun instead;
- 2 December 2016 - Citi called for the EGM to be held on 24 December 2016;
- 24 December 2016 - the EGM was held and the resolutions were passed, but neither Mr Patterson nor Samsara attended;
- 27 December 2016 - Samsara advised Pointcorp that a quorum was not present at the EGM because it did not attend and that the EGM had been adjourned to 31 December 2016 under Citi's constitution (Adjourned EGM);
- 30 December 2016 - Pointcorp was informed by its accountants that Mr Patterson had withdrawn approximately $1.4 million from Citi's accounts since revoking Pointcorp's access;
- 31 December 2016 - neither Mr Patterson nor Samsara attended the Adjourned EGM; and
- 3 January 2017 - Pointcorp obtained a freezing order and injunction against Mr Patterson ordering him to return the funds he had withdrawn from Citi's accounts.

(c) Decision

(i) Winding up application

Samsara applied to have Citi wound up on just and equitable grounds under s. 461(1)(k) of the Act and argued that:

- Citi was a "quasi-partnership", the operation of which depended on trust and faith between Samsara and Pointcorp;
- Citi's purpose had failed because Pointcorp's actions meant that Citi was no longer marketing property developments;
- there was a deadlock between Samsara and Pointcorp and their relationship had broken down;
- Pointcorp was intent on excluding Samsara from information about Citi and from the benefits of its business; and
- Pointcorp had not properly maintained Citi's accounts.

Based on the evidence Martin J concluded that:

- although the breakdown of a "quasi-partnership" is one of the circumstances where a Court may find it just and equitable to order a company to be wound up, Citi was never a "quasi-partnership". Mr Patterson was only ever engaged by Pointcorp (either personally or via Samsara) as a marketing agent. Pointcorp and Samsara only had an ordinary business relationship based in contract, not a personal relationship involving mutual confidence;
- it was not decisive that Citi had been inactive for some time. Pointcorp's intention to continue using Citi was enough to show that there had not been a final and conclusive abandonment of the business;
- the breakdown of Samsara and Pointcorp's relationship did not prevent Citi from being liquid, profitable and paying its creditors; and
- the freezing order obtained on 3 January 2017 already addressed the provision of information to Samsara and the management of Citi's accounts so a winding up order was not necessary.

For these reasons, Martin J dismissed the winding up application as a winding up order is an extreme step which requires a strong case and will not be made simply on the demand of a disgruntled shareholder.

(ii) EGM

In response to Samsara's application, Pointcorp sought a declaration that the EGM and the resolutions passed at it were valid.

Mr Patterson (in his capacity as the director of Citi) called the EGM for 24 December 2016 and then deliberately failed to attend (in his capacity as the sole director and shareholder of Samsara) so that a quorum was not present.

Section 1322 of the Act grants the Court power to deal with irregularities. Under s. 1322(2) of the Act, the key question was whether the absence of a quorum at the EGM (a procedural irregularity under s. 1322(1)(b)(i)) caused a substantial injustice that could not be remedied by the Court.

Martin J reviewed a number of authorities dealing with procedural irregularities and concluded that a procedural irregularity can include deliberate acts of noncompliance. Martin J noted that it must be the procedural irregularity which causes the substantial injustice (the lack of a quorum at the EGM) not the proceeding (the EGM and the resolutions to remove Mr Patterson as director, which were always available to Pointcorp as the majority shareholder of Citi).

As the absence of a quorum was due to Mr Patterson's deliberate actions he was not the subject of injustice and so Martin J declared that the EGM and the resolutions passed at it were valid.

6.3 Court refuses to extend time for registration of security interest under PPSA

(By Grant Mason, Corrs Chambers Westgarth)

Kaizen Global Investments Limited v Australia New Agribusiness & Chemical Group Limited (in liq) [2017] FCA 431, Federal Court of Australia, Moshinsky J, 28 April 2017.

(a) Summary

An overseas investment company that had loaned money to an Australian company applied to the Court to extend the time within which it could perfect a security interest obtained in connection with that loan in circumstances where it had inadvertently failed to register its interest under the PPSA. The Court declined to exercise its discretion to grant that relief primarily on the basis that the company had not acted promptly enough in rectifying its mistake and also having regard to the impact on unsecured creditors now that the borrower company had been placed into liquidation.

(b) Facts

The plaintiff, Kaizen Global Investments Limited (Kaizen), was an investment company based in the United Arab Emirates. In December 2015, the defendant, Australia New Agribusiness & Chemical Group Limited (ANB), approached Kaizen for the purpose of obtaining a loan of $5 million. Kaizen agreed to provide that loan and as security for that loan obtained from ANB a share mortgage over ANB's 49% shareholding in another company, Australia Venus Resources Pty Ltd (Venus). By 11 December 2015, Kaizen had provided the loan to ANB and the parties had executed the share mortgage. The transaction documents were prepared by ANB's Australian solicitors and while Kaizen had lawyers review the documents it did not obtain any specific advice from Australian lawyers in relation to the effect of the documents, or critically, the effect of the Personal Property Securities Act 2009 No. 130 (Cth) (PPSA).

On 10 March 2016, Kaizen became aware of the requirement to register the share mortgage as a security interest under the PPSA and a short time later also became aware of the effect of failing to register that security interest, namely that in the event of administrators being appointed to ANB (and certain other insolvency events) the share mortgage would vest in ANB. On 12 April 2016, the Share mortgage was registered under the PPSA. Ordinarily, it should have been registered by 12 January 2016, being 20 business days after the creation of the security interest.

On 20 April 2016, administrators were appointed to ANB and on 23 August 2016, ANB was placed in liquidation.

Kaizen applied to the Court for an order extending the time within which the share mortgage could be perfected by registration under the PPSA to 12 April 2016, being the date that Kaizen did register that security interest. The Liquidators of ANB, Messrs McCann, Killer and Jonsson, who were respectively named as the second to fourth defendants, opposed the application.

(c) Decision

Section 588FL of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) provides, relevantly, that if an administrator has been appointed to a company and that company has granted a security interest that is perfected by registration but where "the registration time for the collateral [was] after the latest of.(i) six months before the [date of the appointment of the administrator to the company]; (ii) the time that is 20 business days after. the security interest came into force. or. (iv) a later time ordered by the Court under s. 588FM" then that security interest will vest in the company.

Section 588FM provides that a person may apply to the Court for an order fixing a later time for the registration of a security interest that would otherwise be affected by s. 588FL and that on such an application the Court may make an order extending the time for registration if it is satisfied that the failure to register within the time prescribed was accidental or inadvertent, "is not of such a nature as to prejudice the position of creditors or shareholders" or on such other grounds as the Court considers "just and equitable".

The Court noted that the approach required of it was a two-stage process. First, it had to consider whether the power to extend time under s. 588FM was enlivened and second, assuming the power was enlivened, it had to consider whether to exercise its discretion to make the order sought. As the security interest had been registered before the appointment of administrators, the Court had power to make the order.

As to the exercise of its discretion, the Court observed that the length of the delay before registration was effected was a relevant consideration as was the intervention of the commencement of the winding up of the company before the application to extend time was made because the liquidation was an event which caused certain statutory and quasi-proprietorial rights to crystallise under the Corporations Act. Moshinsky J reasoned that the effect of the legislation was that in the present situation the security interest that had not been registered within the time required was void and that it would therefore only be in exceptional circumstances that the Court would intervene to extend the time for registration where the company was already being wound up.

His Honour also considered the reasoning of Brereton J in *Re Appleyard Capital Pty Ltd ((2014) 101 ACSR 629)* where it was said that the rights of the unsecured creditors should be considered on an application to extend time, as is required under s. 588FM of the Corporations Act. However, that consideration could not be said to be a dominant one. Rather, what was required was a balancing between the interests of the secured creditor who was seeking the extension because of, for example inadvertently missing a deadline, and the rights of the unsecured creditors. Weighing that consideration required the Court to look at any prejudice to the unsecured creditors by reason of the delay in registering the security interest, as opposed to simply considering any prejudice that might be caused by the Court exercising its discretion, which would be expected.

In applying these principles, the Court was satisfied that Kaizen's failure to register was as a result of an inadvertence because as an overseas company its officers were not aware of the requirements of the PPSA. Significantly though, Kaizen continued to delay after it became aware that it had failed to register its interest. That is, not only had it allowed approximately three months to pass beyond the date by which it was required to register the security interest under the PPSA (in order to obtain the advantages of having a perfected as opposed to an unperfected security interest) but it had allowed a further period of 33 days to pass from the time that it had become aware of the need to register. In order to be successful on such an application, it would be incumbent on an applicant to have acted promptly upon becoming aware of the fact that it had inadvertently failed to register its interest. Kaizen had also failed to avail itself of advice as to Australian legal requirements even when its overseas advisors had suggested that it should. Taken together, Kaizen had failed to effectively protect its interests in a way that persuaded the Court to exercise a discretion in its favour.

The evidence of the liquidators was that if the Court granted the extension sought the likely impact on unsecured creditors was a reduction in return by between zero (ie no impact) and 21 cents in the dollar. For the reasons noted above this was also a relevant consideration but was not considered determinative of itself.

Ultimately, Moshinsky J declined to grant the extension sought by Kaizen and dismissed the application.

6.4 Scope of penalty privilege tested

(By Katrina Sleiman, Corrs Chambers Westgarth)

Australian Securities and Investments Commission v Whitebox Trading Pty Ltd (No 3) [2017] FCA 429, Federal Court of Australia, Foster J, 27 April 2017

(a) Summary

The Federal Court of Australia considered whether, by reason of the second defendant being a natural person and being entitled to claim penalty privilege in a proceeding brought by ASIC against him and also against the first defendant, a corporation, for pecuniary penalties, the Court is prohibited from ordering both defendants to notify their objections to ASIC's witnesses' evidence and to its documentary tenders before the commencement of the liability hearing.

After considering the relevant authorities, the Court was not convinced that there was any real risk that the notification of objections prior to the commencement of the liability hearing had any real prospect of infringing the privilege. Accordingly, the Court ordered the defendants to notify their objections to ASIC's evidence six weeks prior to the commencement of the liability hearing.

(b) Facts

In the proceeding, ASIC claimed that the first defendant, Whitebox Trading Pty Ltd (Whitebox) and the second defendant, Mr Boshoff, who was the sole director and principal of Whitebox and who was primarily responsible for its trading strategies and activities, caused National Australia Bank Limited (NAB) on five successive serial expiry trading days between 19 April 2012 and 18 October 2012 to trade index arbitrage positions in the period leading up to the conclusion of the opening single price auction on the ASX by placing, or causing to be placed, and then cancelling or amending, orders for securities listed on the ASX and orders on ASX 24 for quarterly ASX SPI 200 Index Futures next to expire. ASIC claimed that Whitebox and Mr Boshoff contravened ss. 1041A and 1041B of the Corporations Act 2001 No. 50 (Cth) (Cth) (the Act) by causing NAB to undertake this index arbitrage trading. In addition, ASIC claimed that Mr Boshoff contravened s. 180(1) of the Act in that, as a director of Whitebox, he failed to discharge his duties to Whitebox with the requisite degree of care and diligence, by reason of the above mentioned conduct.

ASIC sought declarations pursuant to s. 1317E of the Act against both defendants in respect of each contravention, orders for pecuniary penalties pursuant to s. 1317G of the Act against both defendants in respect of each contravention, injunctive relief pursuant to s. 1101B of the Act and banning orders against both defendants.

In the lead up to the liability hearing, questions arose as to the scope of the privilege which has become known as "penalty privilege". Foster J declined to make any order or direction against either defendant requiring them, or either of them, to file and serve evidence, prior to ASIC closing its case. The question then arose whether his Honour should make an order or direction requiring both defendants to notify ASIC of their objections to ASIC's evidence and, if so, by what time. The defendants opposed such an order on the ground that it would destroy or impermissibly trespass upon the penalty privilege which Mr Boshoff is entitled to claim.

The defendants contended that many (or, at least, some) objections that would be notified by them in the event that they were compelled to notify their objections before witnesses are called, will have the potential to assist ASIC to prove its case because, by reason of such notification, ASIC will be alerted to gaps in its proof and to weaknesses in its evidentiary case, which ASIC would then seek to repair and which it may successfully remedy if it has sufficient time. In this way, it was submitted that Mr Boshoff's entitlement to the privilege would be infringed and lost.

ASIC submitted that, when the remarks of the Full Court in *Australian Competition and Consumer Commission v FFE Building Services Ltd (2003) 130 FCR 37 (FFE) at [12]-[14]* regarding the justification for and scope of the privilege are considered in the context in which they were made, the Full Court had in mind circumstances where the provision of information by a defendant could be used either directly against him or her or could form the basis of investigations that could disclose evidence against that defendant. The danger identified by the Full Court was that a defendant might be placed at risk of providing proof against himself or herself. ASIC contended that the provision of evidentiary objections do not create any such danger where those objections have no evidentiary status and could not rationally be characterised as placing the defendants in a position in which they were required to provide proof against themselves.

ASIC also argued that the Full Court in FFE did not refer to assistance in a general and undefined way. Rather, the assistance must logically be referable to "proving the plaintiff's case" (at [13]). That is, the defendant must be compelled to provide information that can be used as evidence or that creates a train of inquiry for the discovery of such evidence that is to be adduced against the defendant.

The only case found by the parties where a superior Court has considered whether it should make an order or direction requiring an individual defendant to notify his or her objections to the plaintiff's evidence prior to the commencement of the hearing of a case in which a pecuniary penalty is sought is *Australian Securities and Investments Commission v Vines (2003) 176 FLR 106* (Vines), a decision of Austin J. In that case, his Honour confirmed such a direction which had previously been made. He held that doing so did not infringe the defendants' penalty privilege. The defendants in the present case argued that Vines is wrong, that Austin J's reasoning is flawed and that, in any case, it is distinguishable from the present case.

ASIC strongly defended the reasoning of Austin J in Vines, submitting his Honour had carefully analysed the relevant authorities and rejected the argument which the defendants now seek to make that Mr Boshoff's entitlement to claim penalty privilege absolves both of them from providing any assistance whatsoever in relation to the conduct of the proceedings against either of them. Justice Austin concluded that such a proposition divorced the rule from its rationale and was too wide.

(c) Decision

Foster J considered that Vines, if it is not distinguishable, provides a complete answer to the defendants' arguments in the present case. His Honour did not think Vines is distinguishable from the present case, because his Honour did not accept the order sought by ASIC in the present case is at all likely to produce the consequences feared by the defendants. Nor did Foster J think the decision and the reasoning in Vines is wrong. Accordingly, his Honour saw no reason not to follow Vines.

Foster J reasoned that the provision by the defendants of their objections to ASIC's evidence in the present case could not impinge upon Mr Boshoff's entitlement to claim penalty privilege. By providing those objections, the defendants would be required only to identify those aspects of ASIC's evidence that they contend should be ruled inadmissible in accordance with the rules of evidence. His Honour considered that as a matter of law and practicality, notifying material to which objection is taken says nothing about the evidence which the defendants might wish to adduce in the proceeding nor does it provide a chain of inquiry that might lead to ASIC discovering evidence which it does not already have available to it implicating the defendants in the contraventions with which they are charged.

Similarly, his Honour considered that if the defendants object to the whole or part of an expert's report upon the basis that critical underlying facts are not otherwise proven, the notification of such an objection does not provide evidence inculpating the defendants or, specifically, Mr Boshoff, nor would it provide a chain of inquiry that might lead to such inculpation. It is true that the notification of such an objection would alert ASIC to any problems of admissibility that may exist with the relevant experts' report and, in a very general sense, allow ASIC to shore up its evidentiary case by adducing admissible evidence to prove the necessary underlying facts. However, his Honour considered it difficult to conceive of a likely circumstance where, in the course of and as a result of seeking to solve a problem of admissibility of evidence, ASIC would be permitted to lead probative and admissible evidence of a character different in substance from that which it already has brought forward with the consequence that the privilege would be infringed.

In conclusion, his Honour was simply not convinced that there was any real risk that the notification of objections prior to the commencement of the liability hearing had any real prospect of infringing the privilege. Accordingly, orders were made requiring the defendants to notify their objections to ASIC's evidence six weeks prior to the commencement of the liability hearing.

6.5 Court allows the appointment a special purpose liquidator to investigate specific business activity where unfunded liquidator is incapable of further recoveries

(By Alex Moores, DLA Piper)

In the matter of 77738930144 Pty Limited (in liq) (formerly Commercial Indemnity Pty Ltd) [2017] NSWSC 452, Supreme Court of New South Wales, Gleeson JA, 21 April 2017

(a) Summary

Mr Geoffrey Newling sought to appoint a special purpose liquidator to investigate certain business practices of Mr John Gardner while he was the sole director and shareholder of Commercial Indemnity Pty Ltd, which changed its name to 7773890144 Pty Limited in June 2015 (Company). The Company retained profits from insurance commissions and also passed on profit from those commissions to Mr Newling via his wife's company. Prior to liquidation, Mr Gardner transferred various amounts of the Company's money to other entities, and Mr Newling argued this warranted a special purpose liquidator to represent his interests in recovering those funds.

The Supreme Court of New South Wales (Court) examined the standing of Mr Newling as a contributory of the Company to make the application and whether the circumstances required an additional liquidator with a mandate to investigate specific activity when there was already a liquidation conducted. Ultimately the Court found that, where a creditor has identified specific dealings that give rise to the potential for additional recoveries, and neither the company nor its general creditors will be disadvantaged by the appointment, then a special purpose liquidator may be appointed.

(b) Facts

The Company was operated as an insurance underwriting agency by Mr Gardner as the sole director and shareholder. The Company earned income by way of commissions from insurers, which issued bonds on behalf of the Company's clients. The Company ordinary retained 30% of the premium and passed on 70% of the premium to the insurer. The commissions retained by the Company were divided equally between the Company itself and G&L Newling (G&L). G&L claimed to be a contributory of the Company, and was operated by wife of the plaintiff, Mr Newling, as the sole director and sole shareholder.

In 2008, Mr Gardner agreed to transfer half the shares on issue in the Company to Mr Newling. The consideration was paid but the share transfer never occurred. In 2015, Mr Newling commenced proceedings in the Court for a declaration of ownership in relation to the shares, or alternatively that the Company be wound up for oppression or on equitable grounds. The following month, the Company transferred $129,500 to Corporate Indemnity Pty Ltd (CIPL), another company run by Mr Gardner. The Company then sold its business to CIPL for $21,000 and the assumption of various liabilities. Immediately after the sale, the Company initiated a voluntary winding up and appointed Mr Andrew Cummins as liquidator.

Almost a year later, the equity proceedings commenced by Mr Newling resulted in an order from Brereton J that Mr Newling did in fact own half the Company's shares and gave explicit consideration to s. 493A of the Corporations Act 2001 No. 50 (Cth) (Act) holding that it did not apply. Section 493A of the Act voids the legal transfer of shares if the resolution to approve the transfer is made subsequent to a winding up, except if the transfer is held to be in the best interests of the creditors as assessed first by the liquidator and then by the courts if the liquidator refuses to consent.

As a contributory of the Company, Mr Newling sought to use the powers granted by s. 477(2B), s. 506(1A) and (the now repealed) s. 511 of the Act to appoint a special purpose liquidator to investigate various transactions and dealings between Mr Gardner, CIPL and the Company. It was the granting of the shares in the Company that provided Mr Newling with standing as a contributory of the Company under the Act, which is required for an application under s. 511 of the Act, and this was not present when the application was first submitted.

(c) Decision

(i) Standing to appoint liquidator (s. 511)

Mr Newling's standing to seek the appointment of a special purpose liquidator was confirmed without the need for extensive analysis. Once the equity proceeding found in favour of Mr Newling, and the question of standing was raised, the liquidator provided unconditional written consent to the share transfer determining it was in the best interests of the Company as a whole, and registered the transfer with the Company and ASIC. Accordingly, s. 511 of the Act was applicable.

(ii) The need for an additional liquidator

At the time of the proceedings, Mr Cummins as the original liquidator was unfunded, with $20,000 cash at bank and an unpaid remuneration of approximately $50,000. In his report to creditors on 9 September 2016 he indicated that there will be no distribution to unsecured creditors. In evidence to the Court, he stated that determining the date of insolvency would be difficult due to the related party transactions and the context of a cessation of trading due to the Company's underwriting agreement being cancelled and not replaced, and that there may be the requirement to examine these areas further with reference to whether unrelated third parties had been prejudiced.

Mr Cummins also did not oppose the appointment of an additional liquidator, with the proviso that such appointment not prejudice the general body of creditors of the liquidator, and further Mr Cummins acknowledged the general body of creditors may benefit from additional recovery if the additional liquidator's enquiries resulted in the repayment of the funding advances and the funders' premium.

Mr Newling identified five specific matters that should be separately investigated, and would necessitate an additional liquidator:

- the payment of $150,000 from the Company to Mr Gardner's wife, described in the Company records as "director fees" despite her having never been a director of the Company;
- payments made from the Company to CIPL characterised as either siphoning of the premiums received from the Company's clients or single payments with no justification;
- the circumstances of the Company's entry into the asset sale agreement with CIPL for an alleged grossly undervalued sale price, especially with reference to the consideration for CIPL when it was subsequently sold;
- the acquisition of a property for one of Mr Gardner's other businesses using funds partially sourced from the Company and described in the Company's records as an unsecured loan; and
- the various payments made by the Company immediately prior to Mr Gardner placing the Company into voluntary administration.

For the reasons that the original liquidator was unfunded and had no intention of pursuing these avenues of enquiry, that the costs of the special purpose liquidator would be governed by the funding agreement and not draw from the Company's funds, and that the only chance of recovery for creditors was through an additional liquidator achieving additional recoveries, the Court held that it was just and beneficial to appoint a special purpose liquidator.

(iii) Funding agreement considerations

When the originating motion was first heard by the Court, the question was raised as to whether Mr Newling had standing to seek approval of the funding deed and costs agreement under s. 477(2B) of the Act, and specifically that the proposed special purpose liquidator had not been appointed at the time of the proceedings. The Court noted that the presence of the deed was also a matter for the courts to approve under s. 477(2B) of the Act as the liquidator was entering into an agreement on behalf of the Company.

The Court also considered the importance of the arrangement for ensuring the special purpose liquidator was funded adequately without disadvantaging the general creditors or the Company. The funding deed entered into between Mr Newling and the special purpose liquidator, while the terms were confidential, ensured that the liquidator would be sufficiently funded for all actions on their part and indemnified against any costs found against them. The Court ultimately held that all the considerations regarding the protection of the general body of creditors justified the funding agreement in this case.

6.6 Court imposes civil penalties on sole trader for unconscionable conduct and providing credit without a licence

(By Bradley Montag and Victoria Ngomba, King & Wood Mallesons)

Australian Securities and Investments Commission v Kobelt [2017] FCA 387, Federal Court of Australia, White J, 13 April 2017

(a) Summary

In *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327, ASIC brought a successful action in the Federal Court of Australia against Mr Lindsay Kobelt. The Court found in the principal judgment that Mr Kobelt had contravened:

- s. 12CB(1) of the Australia Securities and Investments Commission Act 2001 No. 51 (Cth) (the ASIC Act) on at least 117 occasions by engaging in a system of conduct or pattern of behaviour which was unconscionable; and
- s. 29(1) of the National Consumer Credit Protection Act 2009 No. 134 (Cth) (the NCCP Act) on 92 occasions by engaging in credit activity without a licence.

In this case, the Court considered the penalties to be imposed on Mr Kobelt pursuant to:

- s. 12GBA of the ASIC Act, for contraventions of s. 12CB(1) of the ASIC Act; and
- s. 167 of the NCCP Act, for contraventions of s. 29(1) of the NCCP Act.

Having regard to the totality principle, the Court imposed a total penalty of $167,500. The Court, among other things, found that:

- ASIC had pursued a "systems" case, therefore it had not be necessary for the Court at trial to make any findings that Mr Kobelt's conduct was unconscionable in relation to any identified individual. It was therefore more appropriate for the Court to impose a single penalty for a system of conduct constituting a contravention of s. 12CB(1) of the ASIC Act rather than multiple penalties relating to individual cases of unconscionable conduct; and
- it did not have the power to impose a single penalty for Mr Kobelt's contraventions of s. 29(1) of the NCCP Act as there was no explicit authority under the Act to do so and therefore it was more appropriate to impose a penalty for each contravention.

(b) Facts

Mr Kobelt operated a general store in a remote South Australian town. As part of this business Mr Kobelt sold used cars and provided credit for the cars by using a book-up system. Mr Kobelt did not hold a licence permitting him to offer this credit service. When providing credit, Mr Kobelt retained, as "security", each customer's debit card and pin number and transferred funds from the debit cards to his own account as repayment. Mr Kobelt also made some of the funds he had transferred into his account available to customers for further credit, at a fee. In most cases, the additional credit could only be used to purchase goods in his general store. Mr Kobelt's clients were predominantly indigenous and financially vulnerable.

(c) Decision

(i) Penalties for contravention of the ASIC Act

When fixing a penalty under s. 12GBA of the ASIC Act, the Court has to have regard to all relevant matters, including:

- the nature and extent of the act or omission and any loss or damage suffered as a result of the act or omission;
- the circumstances in which the act or omission took place; and
- whether the person has previously been found by the Court in proceedings under Subdiv G of Pt 2 of the ASIC Act to have engaged in similar conduct.

While ASIC acknowledged that the Court had made only one finding of a system of conduct that was unconscionable, ASIC argued that in considering the maximum penalty available, it was appropriate if the Court proceeded on the basis that there had been multiple separate acts which constitute contraventions, with ASIC nominating 59 out of the 117 customers for this purpose.

The Court rejected this approach on the basis that s. 12CB(4) of the ASIC Act (which ASIC relied upon) allowed the Court to find a system of conduct as being unconscionable whether or not a particular individual had been identified as having been disadvantaged by Mr Kobelt's act. Further in pursuing its "systems" case, ASIC did not seek to prove the circumstances of any individual in the initial case. Without sufficient information on the circumstances of each individual, the Court held it would not be appropriate to impose individual penalties.

The Court imposed a penalty of $150,000. In doing so, the Court had regard to the following:

- Mr Kobelt's personal circumstances and the extent of the profits he derived in relation to his book-up service;
- that general deterrence was an important factor in this case, with the Court noting that the penalty to be imposed needed to be such that it could not be seen as a mere cost of doing business;
- while it was not easy to quantify the loss to the customers caused by Mr Kobelt's conduct, the Court found that it may have been possible for customers to obtain cheaper credit elsewhere if they had not been tied to Mr Kobelt's business;

- while Mr Kobelt had still not acknowledged the wrongfulness of his conduct, following the Court's delivery of its principal judgment, there was mitigatory conduct on Mr Kobelt's part. He had, among other things, ceased to provide the book-up service, reduced the number of customer key cards he held and he had subsequently ceased to use customer key cards without the customer being present;
- though erroneous, Mr Kobelt held a subjective belief that his conduct was acceptable. However Mr Kobelt continued to engage in the conduct after he had knowledge of ASIC's view and did not subsequently seek to modify his practices; and
- the economic losses asserted by Mr Kobelt were not mitigatory in any significant way, however, the Court took into account the drop-in patronage at his general store as a result of Mr Kobelt ceasing the book-up service when considering his circumstances generally.

(ii) Penalties for contravention of the NCCP Act

ASIC and Mr Kobelt both submitted that a single penalty should be imposed in respect of Mr Kobelt's 92 contraventions of s. 29(1) of the NCCP Act. However, the Court held that the NCCP Act does not expressly allow the imposition of a single penalty where there are multiple contraventions of s. 29(1). Under ss. 166 and 167 of the NCCP Act, the Court may, respectively, make a declaration that a person or company has contravened the NCCP Act and impose penalties for a contravention up to a specified maximum. White J concluded that the reference to a maximum penalty in s. 167(3) of the NCCP Act was referable to each penalty, rather than a total for all penalties. As such, the Court did not have jurisdiction to impose a single penalty. The Court also rejected ASIC's alternative submission that a single global penalty in respect of multiple contraventions of s. 29(1) could be imposed by reference to a single "course of conduct". In doing so, the Court considered case authorities on the imposition of sentences for multiple criminal offences. These authorities effectively provide that absent statutory authority to do so, the fact that multiple offences occurred in a single course of conduct did not authorise the imposition of a global sentence. However, the Court also noted that a "course of conduct" was still important when considering the imposition of each individual penalty.

The Court also had regard to the following in determining the amount of penalties:

- Mr Kobelt's indifference to ASIC's advice in 2011 outlining the requirement that he hold an Australian credit licence for his book-up service;
- Mr Kobelt's continued provision of credit despite ASIC's advice; and
- that multiple penalties could be viewed as 'cumulative or concurrent'. In the context of the pecuniary penalty regime, this outcome could be achieved by imposing a reduced penalty, or no penalty at all, in respect of some contraventions. In fixing a civil penalty which was appropriate for at least some of the contraventions, there would still be some deterrent effect if reduced penalties were imposed for subsequent contraventions.

On this basis the Court imposed a total penalty of $80,000 for 55 out of Mr Kobelt's 92 contraventions the NCCP Act.

(iii) Final penalty and the totality principle

The Court acknowledged that the totality principle was applicable in the imposition of civil penalties and may lead to moderation of penalties imposed for some or all of the contraventions. However, its application in the circumstances of a given case involved discretionary judgment and reflected two considerations, namely that the:

- penalties reflect proper proportionality; and
- overall penalties should not have a crushing effect.

The Court also noted that the totality principle did not authorise the imposition of a single penalty but rather its application made it appropriate for the Court to moderate penalties which otherwise would have been imposed. ASIC submitted that the necessity to impose a penalty on Mr Kobelt commensurate to his acts should outweigh any concern for the financial hardship he may subsequently experience. However, White J concluded that, having regard to the second aspect of the totality principle, it was important that the penalties did not "crush" Mr Kobelt and as such, in light of Mr Kobelt's personal circumstances, it was appropriate to reduce the total penalty from $230,000 to $167,500.

6.7 State environmental laws prevail over the Corporations Act's insolvency provisions

(By Stephanie Swan, King & Wood Mallesons)

Linc Energy Ltd (in Liq) v Chief Executive Dept of Environment & Heritage Protection [2017] QSC 53, Supreme Court of Queensland, Jackson J, 13 April 2017

(a) Summary

The Supreme Court of Queensland recently delivered a judgment which is likely to have significant ramifications for both liquidators and unsecured creditors of insolvent companies. The Court held that an insolvent company's environmental obligations under state law will not be affected when a liquidator disclaims the property to which those environmental obligations relate. The decision alters the previously understood positions regarding a liquidator's powers and the order of priority in a winding-up.

(b) Facts

Linc Energy Ltd (Linc) operated an underground coal gasification facility at Chinchilla in Queensland. Linc held mineral development and petroleum facility licences (Licences), and environmental authorities (Authorities) issued under the Environmental Protection Act 1994 No. 62 (Qld) (EPA) for the purpose of conducting the facility.

The applicants were appointed as liquidators of Linc on 15 April 2016. On 13 May 2016, the respondent issued an environmental protection order (EPO) under s. 358 of the EPA to Linc (in administration), requiring Linc to undertake ongoing contamination monitoring and testing at the Chinchilla site. On 23 May 2016, Linc's creditors resolved that the company be wound-up, and on 30 June 2016, the applicants gave notice disclaiming the Chinchilla land, Licences, Authorities and other site infrastructure items pursuant to s. 568(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). Section 568D(1) of the Corporations Act states that a disclaimer has the effect of terminating the company's rights, interests and liabilities in respect of the disclaimed property.

The applicants applied to the Court for directions under s. 511 of the Corporations Act as to whether they are required to cause Linc to comply with the EPO (and any future EPOs) issued by the respondent, despite the disclaimer.

The respondent argued that, notwithstanding the disclaimer:

- Linc is obliged to comply with the EPO pursuant to s. 361 of the EPA, which provides that non-compliance with an EPO is an offence; and
- the applicants are obliged under s. 493 of the EPA, which creates executive officer liability, to ensure that Linc complies with the EPO where there are funds available in the winding-up to do so.

The Attorney-General for the State of Queensland intervened in the proceedings and made submissions in support of the respondent's contention.

Conversely, the applicants argued that if the relevant provisions of the EPA are inconsistent with those of the Corporations Act, the EPA provisions are invalid to the extent of the inconsistency by reason of s. 109 of the Constitution.

(c) Decision

(i) Does the disclaimer discharge Linc from compliance with the EPO?

The Court held that:

- the relevant sections of the EPA (the State Provisions) were inconsistent with the Corporations Act provisions because the State Provisions would "alter, impair or detract from the operation of a law of the Commonwealth Parliament";
- the disclaimer powers granted to liquidators under the Corporations Act do not prevail over the State Provisions to the extent they are inconsistent; and
- Linc is not discharged from its obligation to comply with the EPO as a result of the applicants disclaiming the Chinchilla land, Licences, Authorities and other site infrastructure items.

In making his decision, Jackson J referred to s. 5G of the Corporations Act, which deals with direct inconsistency between the Corporations Act and State laws. That section provides that a provision of the Corporations Act will not operate in a State to the extent necessary to ensure that there is no inconsistency with the provisions of a State law. It applies where:

- the relevant State law operated immediately before the Corporations Act commenced; and
- there was nothing in the corporations law of the relevant state before the Corporations Act commenced which would impact on the status of the relevant State law.

Whether there was any provision in the corporations law of Queensland that applied before the Corporations Act commenced (Qld Corporations Law) which would impact on the relevant State Provisions was a matter of statutory interpretation. Relying on s. 9(1)(b) of the Corporations (Ancillary Provisions) Act 2001 No. 45 (Qld), Jackson J held that the Qld Corporations Law did not contain any such provision and that, as a result of the operation of s. 5G of the Corporations Act, the operation of the State Provisions is protected from the application of direct inconsistency under s. 109 of the Constitution (which states that when a State law is inconsistent with a Commonwealth law, the latter will prevail, and the former will be invalid to the extent of the inconsistency).

(ii) Do the liquidators fall within the definition of "executive officer"?

Given the Court found that Linc is required to comply with the EPO, it was relevant to consider whether the liquidators are "executive officers" for the purposes of s. 493 of the EPA. An "executive officer" of a corporation relevantly means a person who is "concerned with, or takes part in, the corporation's management". Jackson J held that the "concept that a liquidator manages the affairs of a company in winding up is too well established to question generally." Therefore, the liquidators are executive officers of Linc and personally liable to cause Linc to comply with the EPO.

6.8 Liquidator's remuneration - Proportionality and reasonableness of work performed trumps determination on an 'ad valorem' basis

(By Manisha Pannu, MinterEllison)

In the matter of Australian Company Number 074 962 628 Pty Limited (in liq) (formerly Colonial Staff Super Pty Limited) [2017] NSWSC 370, Supreme Court of New South Wales, Gleeson JA, 10 April 2017

(a) Summary

This case reaffirms the principles governing the determination of liquidators' remuneration enunciated in the unanimous decision of the five member Full Court of the New South Wales Court of Appeal in *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr* [2017] NSWCA 38.

(b) Facts

ACN 074 962 628 Pty Limited (in Liq) (formerly, Colonial Staff Super Pty Ltd) (Company) was the trustee of the Colonial Group Staff Superannuation Fund (First Colonial Fund). The First Colonial Fund was a superannuation fund for certain employees of The Colonial Mutual Life Assurance Society Ltd (Colonial Mutual).

Colonial Mutual demutualised in about 1996 or 1997 and became Colonial Limited (Colonial). The assets held by the Company as trustee of the First Colonial Fund were transferred to a new fund, Colonial Group Staff Superannuation Scheme (Second Colonial Fund). The Company was then wound up voluntarily by a resolution of its members and deregistered in 2000.

In 2003, Commonwealth Bank of Australia (CBA) acquired Colonial and the assets of the Second Colonial Fund were transferred to Commonwealth Bank Officers Superannuation Corporation Pty Ltd (CBA Company) as trustee of the Commonwealth Bank Officers Superannuation Fund (Third Colonial Fund).

In 2011, Peter Beck who was, at various times, a former employee of Colonial and CBA and a member of the First Colonial Fund, Second Colonial Fund and Third Colonial Fund commenced proceedings against CBA Company and CBA (Proceedings).

Peter Beck also successfully applied for the reinstatement of the Company so it could join the Proceedings. The Company although reinstated, remained in liquidation.

At first instance, Peter Beck succeeded against CBA Company and CBA but that decision was overturned on appeal by the Court of Appeal (*Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* [2016] NSWCA 218). The High Court dismissed his application for special leave on 10 March 2017.

The liquidator applied to the New South Wales Supreme Court for a determination of his remuneration (in the amount of $19,404), costs (to be fixed in the sum of $4,378) and a distribution of the Company's assets (which comprised funds of $33,798.55) in the following order.

- payment of the liquidator's costs of this proceedings in the amount of $4,378;
- payment of the liquidator's expenses of administration incurred during the period from 7 March 2012 to 14 December 2016 in the amount of $14,586; and
- to the extent available, payment of the liquidator's remuneration in the amount of up to $19,404.

(c) Decision

(i) Liquidators' remuneration

The primary question for determination was whether the amount of the liquidator's remuneration, being $19,404, was appropriate.

Gleeson JA referred to s. 504(2) of the Corporations Act 2001 No. 50 (Cth) (the Act), that sets our various factors for consideration by a court in deciding this question. His Honour then referred to the case of In Sanderson, as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr [2017] NSWCA 38 (which concerned the determination of the remuneration of a court-appointed liquidator) from which his Honour derived three propositions:

- the Liquidator bears the onus of establishing that the remuneration is reasonable. It is, however, the role of the Court to determine the remuneration by "considering the material provided and bringing an independent mind to bear on the relevant issues";
- various factors set out in s. 504 of the Act have proportionality as their 'unifying theme'. "The work done must be proportionate to the difficulty and importance of the task in the context in which it needs to be performed"; and
- the mere fact that the work does not result in funds for distribution does not mean that a liquidator is barred from receiving remuneration for that work. There is no reason a liquidator should not be entitled to remuneration for work performed provided it was reasonable to perform the work and the amount charged was reasonable.

The Court considered the liquidator's affidavit of 1 March 2017 that detailed the work performed by him and his team and noted that:

'The evidence establishes that the work was carried out by persons with the appropriate level of seniority, whose charge-out rate was proportional to the level of the complexity of the work that was performed. This was established by the time ledgers, which show the bulk of the preliminary and administrative work was carried out by junior staff, the more detailed substantive work was carried out by more senior staff and that the work carried out by the liquidator himself, who had the highest charge-out rate, was limited to supervision and reviewing and signing statutory forms. The liquidator expressed the opinion that the hourly rates charged by the liquidator and his staff members are reasonable and commercially competitive. Having reviewed those charge-out rates, I accept that evidence.'

His Honour also noted that the amount claimed was modest (given the winding up of the company proceeded for over 4.5 years), the proceedings were substantial and complex, and most importantly, the liquidator accepted that he must first deduct from the funds the costs of this application and his legal expenses before the balance can be applied towards payment of his remuneration.

For the reasons set out above, his Honour concluded that the remuneration should be determined on a time-charge basis (and not an ad-valorem basis) and accepted the liquidator's claim for remuneration in the amount of $19,404.

(ii) Costs of proceedings

His Honour noted that the sum claimed was reasonable and modest, especially given that the legal costs that were sought were limited to counsels' fees and the filing fee.

(iii) Order of distribution of funds

His Honour approved the proposed order of distribution of funds noting that the Company has no other creditors apart from those already covered by the payment of the funds towards this application and towards the Proceedings.

6.9 Breach of directors' duties: deterrence key to the imposition of penalties

(By Sam Hall, Herbert Smith Freehills)

ASIC v Flugge (No 2) [2017] VSC 117, Supreme Court of Victoria, Robson J, 10 April 2017

(a) Summary

This decision concerned the imposition of penalties for a breach directors' duties under s. 180(1) of the Corporations Act 2001 No. 50 (Cth) (the Act). The Supreme Court of Victoria served a timely reminder to directors of the level of care and diligence expected of company officers under s. 180(1) of the Act. Robson J highlighted that the civil penalty regime is focused on deterrence, and whilst protection of the public is a consideration under the regime, personal and public deterrence is at the forefront of the court's considerations.

(b) Facts

ASIC instituted proceedings against Mr Trevor Flugge, the former Chairman of AWB Limited (AWB), for alleged breaches of duties under ss. 180 and 181 of the Act. The allegations relate to AWB's wheat sales to Iraq pursuant to the United Nations (UN) Oil-for-Food Program. ASIC argued first, that Mr Flugge knew of the impropriety and fraudulent nature of AWB payments made to Iraq. Alternatively, that if he did not have knowledge, he had the means of gaining knowledge, and breached his duties by failing to make enquiries.

ASIC did not succeed in its primary case, but did make out its alternative case. Robson J found that Mr Flugge failed as chairman/director to make any enquiries into the appropriateness of AWB's payment of inland transportation fees to the Iraqi Grain Board. This was in the context where he had the means, and duty, to make such enquiries. Such duty arose when Mr Flugge was informed that a complaint was raised by the UN over the appropriateness of payments made by AWB. With knowledge of the UN's concerns of the impropriety of the payments, Robson J found that a reasonable director in Mr Flugge's position would have made enquiries. Mr Flugge's actions were not found to be motivated by personal gain, and no findings were made on his state of mind. Mr Flugge, as did AWB's board, believed the payments were approved by the UN. The UN had in fact signed off on contracts involving AWB and Iraq, though the UN was not made fully aware of the implications, and payments to be made in Iraq. Despite this, the failure to make enquiries constituted a breach of Mr Flugge's duty of care and diligence under s. 180(1) of the Act (see liability judgment: *ASIC v Flugge & Geary* [2016] VSC 779).

(i) This proceeding

ASIC sought a declaration of contravention for the breach of s. 180(1) of the Act, the maximum penalty of $200,000, disqualification for ten years, and costs. Mr Flugge applied for relief from liability, failing which he resisted the pecuniary penalty sought and disqualification. Mr Flugge also sought costs orders.

(ii) Exoneration - Application for relief

Mr Flugge sought relief from liability pursuant to ss. 1317S or 1318 of the Act. As identified in *ASIC v Healey (No 2) (2011) 196 FCR 430*, relief under ss. 1317S and 1318 of the Act is a three stage enquiry. A court must first be satisfied that the applicant acted honestly. Then it must decide in all of the circumstances whether the applicant ought fairly be excused, and if so, to what extent. The onus rested with Mr Flugge to satisfy the Court in relation to this evaluative judgment.

Honesty refers to a person acting without moral turpitude. Robson J was satisfied that Mr Flugge acted honestly. The second two considerations require a "value judgment rather than an exercise in discretion." All of the circumstances of the case should be considered. In these circumstances, the payments in question were unusual, and the UN complaint went to their propriety. Mr Flugge's inaction, whilst not dishonest, was a significant departure from the conduct required of a diligent director. The breach was serious and did not warrant relief. Accordingly, Robson J found that Mr Flugge should receive a civil penalty.

(iii) Penalty in context

Mr Flugge had been on the board of AWB since 1984, and was the chairman from 1995 to 2002. Significant evidence was presented of his high regard in the business and wider communities. Despite this high standing, ASIC sought to argue that a lack of contrition should stand against Mr Flugge. Robson J noted that under the civil penalty regime, ASIC can, and often does, appeal misconduct-related issues. The risk of an appeal can create a tension over attributing significant weight to a lack of contrition. For this reason, Robson J did not place great weight on Mr Flugge's lack of contrition.

An interesting part of this judgment is Robson J's consideration of prior sanctions imposed over AWB's conduct in Iraq. Robson J identified that when determining the penalty to be imposed, the circumstances of the contravention must be considered, as well as penalties in similar cases. Robson J analysed criminal sentencing principles as his Honour asserted that they are relevant to determining the appropriate civil penalty to be imposed. In particular, his Honour canvassed the parity principle, which dictates that there should be no marked differences between the penalties imposed on co-offenders, all things being equal. Two penalties had been handed down to the former CEO and CFO of AWB. Whilst not being completely relevant here, as the AWB officers were not involved in a joint enterprise, the penalties themselves were relevant to the extent of comity and common sentencing.

Mr Lindberg, the former CEO, and Mr Ingleby, the former CFO, were found to have committed serious breaches of s. 180(1) of the Act. They had significant responsibilities within AWB, and were core facilitators of the AWB dealings in Iraq. They both had knowledge of the UN sanctions and information available to them that put them on notice over the appropriateness of the inland payments. They failed to make due enquiries over these payments. Robson J found that the ultimate responsibility for AWB's operations in Iraq rested with Mr Lindberg. They both agreed to a statement of facts, contravention and penalties with ASIC. Mr Lindberg received a pecuniary penalty of $100,000 and a two year disqualification. Mr Ingleby agreed to a $40,000 pecuniary penalty, and a 15 month term of disqualification. On appeal, the Court of Appeal even suggested that this pecuniary penalty may not fully reflect Mr Ingleby's culpability.

Robson J found that he was required to make a declaration of contravention. Pursuant to s. 1317E(1) of the Act, his Honour declared that Mr Flugge contravened s. 180(1) by failing to discharge his duties with the requisite care and diligence.

(iv) Disqualification

Robson J highlighted that disqualification focuses not only on protecting the public, but also on deterrence and mitigation. Disqualification is a key element of imposing penalties upon an officer for breaches of their duties under s. 180(1) of the Act. Robson J considered the 15 propositions relating to disqualification, outlined by Santow J in Re HIH Insurance Ltd; *ASIC v Adler* [2002] NSWSC 483. In particular, he considered proposition (xiv) that discussed 7-12 year disqualifications, and factors justifying that period of disqualification. These included evidence of deliberate impropriety and knowingly breaching the law. His Honour also considered three years disqualification period factors such as no longer intending to hold a position in a corporation, and intending to repay any debts.

His Honour identified that a key theme in case law resulting in longer terms of disqualification is dishonesty. Despite not offering any explanation for his failures, Robson J found that Mr Flugge did not act dishonestly. Robson J accepted that Mr Flugge did not intend to hold a position of office again. Despite this, his Honour noted that imposing a disqualification period is an important element in general deterrence for penalties under s. 180(1) of the Act. Robson J was satisfied that disqualification was warranted, as a matter of general deterrence, and imposed a disqualification of five years, pursuant to s. 206C of the Act.

(v) Pecuniary penalty

Robson J regarded the principles of comity when considering the penalties already imposed on Mr Lindberg ($100,000) and Mr Ingleby ($40,000). These were imposed over four agreed breaches of s. 180(1) of the Act. With the purpose of deterrence in mind, Robson J found that Mr Flugge's conduct was serious, though not egregious, and warranted a $50,000 pecuniary penalty.

(vi) Costs

Robson J highlighted that costs normally follow the event, but that costs are at the court/judge's discretion. Costs awards can be pragmatic and take account of the success, or lack thereof, on an issue-by-issue basis. ASIC lost on many arguments, and spent a significant amount of time on matters wholly unconnected to Mr Flugge. On the other hand, ASIC was ultimately successful. In the circumstances, Robson J found it inappropriate to make any orders for costs.

(c) Decision

Robson J decided:

- Mr Flugge is not entitled to relief under ss. 1317S or 1318 of the Act;
- to make a declaration for Mr Flugge's breach of s. 180(1) of the Act;
- Mr Flugge pay a pecuniary penalty of $50,00 for his breach of duties; and

Mr Flugge be disqualified from participating in the management of a corporation for five years.

6.10 Special purpose liquidators appointed to investigate potential phoenix operation

(By Samuel J Hickey, University of Queensland, LLB (Hons I))

Deputy Commissioner of Taxation, in the matter of ACN 154 520 199 Pty Ltd (in liq) [2017] FCA 444, Federal Court of Australia, Gleeson J, 6 April 2017

(a) Summary

Following a series of suspicion rousing restructuring transactions that were allegedly done to avoid liability for hundreds of millions of dollars in falsified tax input credit claims, Gleeson J of the Federal Court of Australia appointed two special purpose liquidators to investigate for impropriety. The decision serves as useful indication of the factors that will compel a court to appoint special purpose liquidators.

(b) Facts

The first defendant, EBS, was engaged in the business of acquiring and refining gold, silver and other precious metals. Under ss. 38-385 of A New Tax System (Goods and Services Tax) Act 1999 No. 55 (Cth) (the GST Act), the supply of precious metals was GST-free. EBS claimed tax input credits of $117,875,426 for the periods from February 2012 to June 2014 on the basis that its dealings were for creditable purposes.

In July 2014, the ATO notified EBS of an audit into its tax affairs.

Between late 2014 and late 2015, the controlling directors and shareholders of EBS oversaw a series of restructuring steps that included the incorporation of several entities: Pallion Group Pty Ltd, Pallion Equipment Pty Ltd, Pallion HR Pty Ltd and Australian Refinery (Australia) Pty Ltd. The directors and controlling shareholders of the new entities had all been involved in the business of EBS. Furthermore a series of transactions took place between July and September 2015, including various loans, lease agreements, lease assignments, general security agreements and "directions to pay" involving, inter alia, EBS, Pallion Group, Pallion Equipment and Australian Bullion Company (NSW) Pty Ltd.

Counsel for the applicant, the Deputy Commissioner of Taxation (DCT), submitted that these restructuring steps reflected a phoenix operation whereby the directors of EBS and the other newly incorporated entities were attempting to unlawfully divest themselves of EBS's liabilities and take up their business operations under a new vehicle.

In April 2016, following an audit by the ATO into the tax affairs of EBS, an Assistant Commissioner of Taxation made declarations under the GST Act for the purpose of negating $72,852,994 worth of GST benefits. A Deputy Commissioner also issued notices of assessment and amended assessment of GST net amounts totalling $122,112,065 and assessments of administrative penalties totalling $58,059,829. Robinson Legal, EBS's legal representative who had advised on the restructuring transactions, informed the ATO that EBS had ceased trading in September 2015. EBS applied for a review of the ATO's decision, but the ATO disallowed EBS's objection.

In September 2016, EBS entered administration following a creditors' voluntary winding up. The appointed liquidator released a circular to the creditors which revealed that the only secured creditors of EBS were Pallion Group Pty Ltd and Robinson Legal; owed $393,800 and $200,000 respectively. Meanwhile, the ATO, as an unsecured creditor, was owed $208,097,466. The ATO offered to fund the appointed liquidator to investigate the restructuring transactions, but later withdrew this offer, stating that it would be inappropriate because the liquidator was being funded by the parties who were involved in the restructuring transactions. The liquidator thereafter commenced action against the ATO in the Administrative Appeals Tribunal (AAT) for review of the ATO's decision to disallow EBS's objection to the ATO's decision. Robinson Legal was to represent the liquidator in this matter.

The DCT subsequently applied to the Court for the appointment of a special purpose liquidator under s. 511 of the Corporations Act 2001 No. 50 (Cth). Section 511(1)(b) empowers the Court to appoint a special purpose liquidator if it would be "just and beneficial" to do so.

(c) Decision

Gleeson J considered a range of cases concerning the appointment of special purpose liquidators, and approved the statement of *Martin CJ in Mentha v Hughes* [2014] WASC 478 at [30] that it would be appropriate to appoint a special purpose liquidator where it could be "credibly established that there were matters that required immediate investigation and in respect of which the failure to conduct such an investigation might prejudice the interests of creditors or the public interest". Her Honour also approved the statements of *Silfris J in Victoria v CTM Training Solutions Pty Ltd (in liq)* [2017] VSC 47 at [43] that, even where adverse findings had not been made against an incumbent liquidator, it might still be necessary to appoint a special purpose liquidator in order to maintain the confidence, integrity, and perceived impartiality of the administration process.

In opposition to the appointment of the special purpose liquidators, the incumbent liquidator submitted the following:

- he had 30 years' experience as a registered liquidator and thus had the capacity to carry out all necessary investigations thoroughly;

- while his investigations were being funded by those who had been involved in the business of EBS, they were being funded on an up-front basis, and so he was not under any pressure to produce findings in their favour;
- there was no evidence to suggest that the restructuring transactions would not be investigated (even though no arrangements had been made for their funding); and
- no conflicts of interests existed which might impede him in discharging his duties.

Furthermore, each of the creditors, both those related and unrelated to the restructuring transactions, gave evidence to the effect that there was no need to appoint a special purpose liquidator.

Gleeson J ultimately decided to grant the DCT's request and appointed two special purpose liquidators. In doing so, her Honour gave weight to the following factors:

- the allegation that the restructuring transactions had occurred as part of a phoenix operation was a very serious one;
- it would be beneficial to the administration and winding up and in the interests of the creditors for an investigation into the restructuring transactions to occur;
- unless a special purpose liquidator was appointed, it would be unlikely that the restructuring transactions would be investigated;
- the liquidator's choice of Robin Legal for the AAT appeal meant that the liquidator would have an ongoing relationship with the lawyers who advised EBS in connection with its restructuring transactions, the proprietary of which were in question;
- it would be unrealistic to expect the ATO to fund the liquidator to investigate the propriety of the directors involved in the restructuring transactions while the liquidator would be simultaneously asserting the propriety of those directors in the tax appeal before the AAT; and
- it was also unrealistic to expect the liquidator to conduct both the AAT appeal and the investigation into the restructuring transactions without compromising confidence in the administration process.

Her Honour ultimately concluded that it would be just and beneficial to appoint special purpose liquidators and ordered their appointment for them to conduct investigations into the restructuring transactions. Her Honour also ordered that the special purpose liquidators had leave to apply to the Court for extending the scope of their functions.

7. Contributions

If you would like to contribute an article or news item to the Bulletin, please email it to: law-cclsr@unimelb.edu.au.