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Bulletin No. 240

Legislation Hotline

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Consultation on Asia region funds passport and corporate collective investment vehicle draft legislation

25 August 2017 - The Australian Government is seeking public comment on the proposed core legislative frameworks to give effect to the Asia Region Funds Passport (Passport) and introduce the Corporate Collective Investment Vehicle (CCIV) regime.

This legislation continues the Government's work to implement arrangements set out in the Passport's Memorandum of Cooperation between signatories Australia, Japan, Korea, New Zealand and Thailand. The Passport is an international initiative that will expand opportunities to export Australia's funds management expertise and will also provide Australian consumers with greater investment choice.

The CCIV regime will support the implementation of the Passport. It establishes a new type of investment vehicle which will allow Australian fund managers to offer investments through a company structure. It is an internationally recognisable vehicle which can be readily marketed to foreign investors. One of the key features of the CCIV is the depositary, which is required to be independent and have oversight of the CCIV and custody of fund assets. This is an important investor protection for retail investors both in Australia and overseas.

Complementary consultation is also underway on the proposed regulatory guidance to be issued by the Australian Securities and Investments Commission and the other Passport economy regulators. Details are available on the Passport website.

The draft legislation and supporting materials are available on the Treasury website. Further consultation will follow once the core framework and any consequential amendments are settled.

1.2 Survey of ASX100 CEO pay

24 August 2017 - The latest Australian Council of Superannuation Investors' (ACSI) annual survey of CEO pay highlights that not only has average and median pay remained flat for most of the past decade but bonuses have not risen.

While remuneration levels have not risen significantly in the ASX100, the persistence of bonus payments remains a concern for investors. This year, ACSI found that:

- 86% of ASX100 CEOs received a bonus in FY16;
- where bonuses were paid, the median payout was 69% of maximum;
- only 18 CEOs in the ASX100 received less than half of their maximum potential; and
- the median realised pay (remuneration including equity awards and bonus outcomes) for ASX100 CEOs was $3.78mn in 2016 (compared to $3.88mn in FY15 and $3.96mn in FY14).

The study is available on the ACSI website.

1.3 APRA's crisis management powers

18 August 2017 - Stakeholder views are sought on the Exposure Draft: Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017 (the draft Bill), which strengthens the crisis management toolkit of the Australian Prudential Regulation Authority (APRA) in relation to banks and insurers.

The draft Bill includes amendments to the Banking Act 1959 No. 6 (Cth), Insurance Act 1973 No. 76 (Cth), Life Insurance Act 1995 No. 4 (Cth), Australian Prudential Regulation Authority Act 1998 No. 50 (Cth), Payment Systems and Netting Act 1998 No. 83 (Cth) and Financial Sector (Business Transfer and Group Restructure) Act 1999 No. 45 (Cth).

These amendments enhance APRA's crisis management powers by providing:

- clear powers that enable APRA to set requirements on resolution planning and ensure banks and insurers are better prepared for a crisis; and
- an expanded set of crisis resolution powers that equip APRA to act decisively to facilitate the orderly resolution of a distressed bank or insurer.

The draft Bill is available on the Treasury website.

1.4 APRA consults on changes to authorising new entrants to the banking industry

15 August 2017 - APRA has released a discussion paper on proposed revisions to the licensing framework for authorised deposit-taking institutions (ADIs). APRA is consulting on proposals to introduce a phased approach to authorisation, designed to make it easier for applicants to navigate the ADI licensing process.

The phased approach is intended to support increased competition in the banking sector by reducing barriers to new entrants to be authorised to conduct banking business, including those with innovative or otherwise non-traditional business models or those leveraging greater use of technology. In particular, the purpose of the new Restricted ADI licence is to allow applicants to obtain a licence to begin limited operations while still developing the full range of resources and capabilities necessary to meet the prudential framework.

Restricted ADIs will be limited in their activity and would not be expected to actively conduct any banking business during the restricted period.

The discussion paper is available on the APRA website.

1.5 FRC consults on non-financial reporting guidance

15 August 2017 - The UK Financial Reporting Council's (FRC) consultation on amendments to its *Guidance on the Strategic Report* encourages businesses to consider the interests of stakeholders.

These proposals reflect the FRC's desire to improve the effectiveness of s. 172 of the *Companies Act 2006 (UK)*. This section requires a director to have regard to a number of matters including the long term impact of any decisions, the interests of stakeholders; and non-financial matters in pursuing their duty to promote the long term success of the company. The FRC is therefore encouraging companies to provide better information on how companies have fulfilled this duty to improve accountability to shareholders and other stakeholders.

The proposals reflect the enhanced disclosures that certain large companies are required to make in respect of the environment, employees, social matters, respect for human rights and anti-corruption and anti-bribery matters. The guidance also encourages all companies to disclose information on how boards have considered broader stakeholders when taking decisions to promote the long term success of the company.

The draft amendments and the *Guidance on the Strategic Report* are available on the FRC website.

1.6 IOSCO consults on recommendations to improve transparency of corporate bond markets

14 August 2017 - Corporate bond markets are a significant part of the global capital markets and a critical source of financing for economic growth. Since 2004, various developments have impacted corporate bond markets. These include changes in regulation as well as the market structure; the entrance of new participants; a shift from the traditional dealer-based principal model to an agency based model; and the increasing use of technology. In response to these significant changes, the Board of the International Organization of Securities Commissions (IOSCO) agreed to examine the liquidity of secondary bond markets and published its findings in March 2017.

Building on this report, the IOSCO Board also examined issues related to regulatory reporting, transparency and the collection and comparison of corporate bond markets data across IOSCO member jurisdictions.

The consultation report *Regulatory Reporting and Public Transparency in the Secondary Corporate Bond Markets* sets out seven recommendations that update IOSCO's 2004 report on *Transparency of Corporate Bond Markets*. It recommends that regulatory authorities should have sufficient information to perform effectively their regulatory functions. It also recommends that the regulatory authorities should look at how they could enhance pre-trade transparency in corporate bond markets and implement regimes that require post-trade transparency, taking into account the potential impact pre- and-post trade transparency may have on market liquidity.

It is IOSCO's view that an increase in publicly available information on corporate bond trading supports the price discovery process and enables participants in the corporate bond markets to make more informed investment choices and better assess execution quality. These improvements have the potential to attract additional liquidity from both new and existing participants.

1.7 Modernising business registers

9 August 2017 - The Australian Government has commenced consultation on ways to modernise business registers.

Stakeholders are asked to provide their views on all aspects of the operation of business registries including the user experience, opportunities to deliver improved business services, open data, accessibility, technology, governance and legislation.

The discussion paper is available on the Treasury website.

1.8 US Federal Reserve Board invites public comment on two proposals: corporate governance and rating system for large financial institutions

3 August 2017 - The US Federal Reserve Board has requested public comment on a corporate governance proposal to enhance the effectiveness of boards of directors. The proposal would refocus the Federal Reserve's supervisory expectations for the largest firms' boards of directors on their core responsibilities, which will promote the safety and soundness of the firms.

Boards' core responsibilities include oversight of the types and levels of risk a firm may take and aligning the firm's business strategy with those risk decisions. Additionally, the proposal would reduce unnecessary burden for the boards of smaller institutions.

The corporate governance proposal is made up of three parts. First, it identifies the attributes of effective boards of directors, such as setting a clear and consistent strategic direction for the firm as a whole, supporting independent risk management, and holding the management of the firm accountable. For the largest institutions, Federal Reserve supervisors would use these attributes to inform their evaluation of a firm's governance and controls. Second, it clarifies that for all supervised firms, most supervisory findings should be communicated to the firm's senior management for corrective action, rather than to its board of directors. And third, the proposal identifies existing supervisory expectations for boards of directors that could be eliminated or revised.

The Board also requested public comment on a proposal to better align the Board's rating system for large financial institutions with the post-crisis supervisory program for these firms.

The current supervisory program for the largest firms was introduced in 2012 and sets higher standards to lower the probability of a firm's failure or material distress, and also reduce risks to US financial stability. The proposed changes to the rating system will incorporate the regulatory and supervisory changes made by the Federal Reserve since 2012, which focus on capital, liquidity, and the effectiveness of governance and controls, including firms' compliance with laws and regulations. Supervisors would assess and assign confidential ratings in each of these categories.

The proposed rating system would only apply to large financial institutions, such as domestic bank holding companies and savings and loan holding companies with US$50 billion or more in total consolidated assets, as well as the intermediate holding companies of foreign banking organisations operating in the US.

Consistent with existing practice, the new rating system would not apply to insurance companies supervised by the Board. Firms with less than US$50 billion in total consolidated assets, including community banks, would continue to use the current rating system, which reflects long-standing supervisory practices for those firms.

The two proposals are available on the Federal Reserve website.

1.9 Survey of FTSE100 CEO pay

3 August 2017 - An annual assessment of FTSE 100 CEO pay packages released shows that rewards at the top have dropped by almost a fifth, but still remain high.

The analysis, from the CIPD, the professional body for HR and people development, and the High Pay Centre, shows that the average FTSE 100 CEO now receives an annual pay package of £4.5 million. This represents a 17% drop from £5.4 million in 2015.

Key highlights from the CIPD and High Pay Centre's analysis include:

- in 2016, the pay ratio between FTSE 100 CEOs and the average pay package of their employees was 129:1 - so for every £1 the average employee is paid, their CEO receives £129. In 2015, the ratio was 148:1; and
- 60 of the FTSE 100 CEOs are paid more than 100 times the typical annual pay of a UK worker which currently stands at £28,000 per year (mean earnings).

The CIPD and High Pay Centre have recommended that all publicly listed companies should be required to:

- publish the ratio between the pay of their CEO and median pay in their organisation, within the context of their overall reward strategy;
- have employee representation on their remuneration committee; and
- establish a human capital development sub-committee with a wider remit to focus on all aspects of people, culture and organisation to provide better insight and guidance to the Board and beyond.

In addition, the CIPD and High Pay Centre are recommending that the Government should set voluntary human capital (workforce) reporting standards to encourage all publicly listed organisations to provide better information on how they invest in, lead and manage their workforce for the long-term.

The full report is available on the CIPD website.

1.10 Global M&A statistics

2 August 2017 - The International Institute for the Study of Cross-Border Investment and M&A has released statistics for the second quarter of 2017 showing:

- global M&A volume in Q2 was US$823 billion, 6% higher than Q1;
- European M&A continued its strong trend in Q2, accounting for 30% of deal volume, up substantially from prior years;

- aggregate inbound M&A volume into all BRIC countries reached nearly US$33 billion, marking the strongest Q2 in recent years;
- the real estate sector had the strongest Q2, with US$131 billion in total deal volume, posting its strongest quarter of the last four quarters, and jumping 90% relative to Q1; and
- the industrials sector accounted for the most cross-border M&A volume in Q2, at almost US$75 billion and accounting for nearly 25% of all cross-border deal activity in Q2.

The review is available here.

1.11 IOSCO publishes thematic review of client asset protection recommendations

27 July 2017 - IOSCO has published its Assessment Committee's *Thematic Review of the Adoption of the Principles set forth in IOSCO's Report: Recommendations Regarding the Protection of Client Assets* (the Principles).

The thematic review identifies the implementation progress of 38 IOSCO members from 36 jurisdictions in adopting legislation, regulation and other policies in relation to intermediaries holding client assets addressed by the "Principles for the protection of client assets".

The review reports on the status of adoption measures taken by participating jurisdictions and finds that a majority have generally adopted a client asset protection regime described by the Principles. Implementation progress varied by jurisdiction and across the eight Principles. By jurisdiction, progress was most advanced in the EU member jurisdictions and North America. In some other regions, including Latin America, implementation progress was less advanced. The most implemented Principles were 2, 7 and 8 on Statements of Accounts, Regulators' Oversight of Compliance, and Information on Foreign Jurisdictions, respectively. In contrast, Principle 3 on Arrangements to Safeguard Clients Assets was the least implemented.

The report includes a detailed discussion of implementation on a Principle-by-Principle basis and sets out overarching themes and describes differences in approaches and adoption measures taken by participating jurisdictions under each of the eight Principles.

1.12 US Federal class action securities fraud filings hit record pace in first half of 2017

25 July 2017 - US Federal class action securities fraud filings hit a record pace in the first half of 2017. Over the past six months, plaintiffs initiated 226 securities fraud class actions in federal court, more than in any equivalent period since enactment of the *Private Securities Litigation Reform Act of 1995* (the PSLRA).

According to *Securities Class Action Filings-2017 Midyear Assessment*, a new report by Cornerstone Research and the Stanford Law School Securities Class Action Clearinghouse, the 226 filings were 135% higher than the historical semi-annual average of 96 filings between 1997 and 2016. Some of the other findings include:

- filings against European firms were almost triple the historical semi-annual average;
- the number of filings against S&P 500 firms in the first half of 2017 occurred at an annualized pace of 11.2%, the highest rate since 2002; and

- pharmaceutical firms were the most common targets of filings-the number at 2017 midyear already exceeds the full-year 2016 total.

1.13 FSC launches internal governance and asset stewardship standard

19 July 2017 - The Financial Services Council (FSC) has launched a new Internal Governance and Asset Stewardship Standard for investment managers and asset owners. Until now, Australian asset managers have not been subject to a set of quality benchmarks.

Stewardship codes arose in response to the GFC with the first published in the UK in 2010. Since then many other markets have followed suit including the US, Japan, Hong Kong, the Netherlands, Switzerland, South Korea, Malaysia and Brazil.

The FSC's Asset Stewardship Standard is mandatory for all FSC asset manager members.

FSC Standard 23: *Internal Governance and Asset Stewardship* has been developed to:

- encourage higher standards of internal governance and stewardship practices;
- provide better information for clients and other stakeholders; and
- raise the quality and standing of Australia's financial services internationally.

The Standard requires a non-prescriptive disclosure, utilising a "comply or explain" rationale, where asset managers will, where relevant within their business practices, be required to either describe the policy underlying their practices or explain why they are not relevant to them.

The FSC Standard is available on the FSC website.

1.14 EU report on sustainable finance

13 July 2017 - The High-Level Expert Group on Sustainable Finance, established by the European Commission, has published its interim report setting out steps to create a financial system that supports sustainable investments.

The areas on which the interim report proposes action include a classification system for sustainable assets, a European standard and label for green bonds, fiduciary duty that encompasses sustainability, better disclosure from financial institutions and companies on how sustainability is factored into decision-making and a "sustainability test" for relevant EU financial legislation. The Commission will now start exploring these early recommendations.

The High-Level Expert Group will continue examining other policy areas, such as: integrating sustainability considerations in ratings, improved transparency requirements for listed companies, as well as increasing the level of sustainable investments through stable long-term policy frameworks and a strong pipeline of sustainable projects.

The interim report is available on the European Commission website.

2. Recent ASIC Developments

2.1 Major banks change loan contracts to eliminate unfair terms

24 August 2017 - Following a commitment to further review their small business loan contracts, the big four Australian banks have now agreed to specific changes with ASIC to eliminate unfair terms from their contracts.

The changes mean that:

- the loan documents will not contain "entire agreement clauses" that absolve the bank from responsibility for conduct, statements or representations they make to borrowers outside the written contract;
- the operation of the banks' indemnification clauses will be significantly limited. For example, the banks will now not be able to require their small business customers to cover losses, costs and expenses incurred due to the fraud, negligence or wilful misconduct of the bank, its employees or a receiver appointed by the bank;
- clauses which gave banks the power to call in a default for an unspecified negative change in the circumstances of the small business customer (known as "material adverse change event" clauses) have been removed - so that the banks will now not have the power to terminate the loan for an unspecified negative change in the circumstances of the customer; and
- banks have restricted their ability to vary contracts to specific circumstances, and where such a variation would cause a customer to want to exit the contract, the banks will provide a period of between 30 and 90 days for the consumer to do so.

All four banks have limited the use of financial indicator covenants in small business contracts to certain classes of loans (e.g. property development and specialised lending such as margin loans). The banks have agreed that financial indicator covenants will not be applied to property investment loans.

The banks have agreed that all customers who entered or renewed contracts from 12 November 2016 - when the protections for small businesses began - will have the benefit of the changes agreed with ASIC.

2.2 Consultation on reforms to add-on insurance sales

24 August 2017 - ASIC has released Consultation Paper 294, *The sale of add-on insurance and warranties through caryard intermediaries*, seeking feedback on proposals to reform the sale of add-on insurance and warranties through car dealerships.

The consultation paper proposes:

- **a deferred sales model:** This will provide consumers with additional time to consider whether they need to buy add-on insurance products or warranties. The proposal is that a period of between four to thirty days must elapse before car dealership intermediaries could sell an add-on insurance product to the consumer; and
- **enhanced supervision obligations on insurers over their car dealership sales people:** This will introduce specific requirements for insurers to supervise and monitor their authorised representatives selling add-on insurance products.

ASIC has also announced that it will be undertaking significant data collection from insurers involved in this sector to enable better ongoing assessment of consumer outcomes. For example, ASIC will collect data on claims ratios on add-on products (the amount paid in insurance premiums compared to the amount paid out in claims).

The proposals would apply to all add-on financial products sold in connection with the purchase of a new or used car, with the exception of comprehensive car insurance and compulsory third party insurance.

2.3 Remaking of "sunsetting" class order on disclosure relief for an offer to a director or secretary

24 August 2017 - ASIC has remade Class Order [CO 04/899] *Definition of 'senior manager'-modification* which was due to expire ("sunset") on 1 October 2017.

The new instrument, ASIC Corporations (Disclosure Relief-Offers to Associates) Instrument 2017/737, continues to provide disclosure relief for an offer of securities to a director or secretary.

The relief was remade following public consultation via Consultation Paper 285 Remaking ASIC class order on disclosure relief for an offer to a director or secretary: [CO 04/899] (CP 285) issued in June 2017.

CP 285 sought feedback on ASIC's proposal to continue the relief in [CO 04/899] without substantive changes.

2.4 Target of unlicensed binary option mobile apps

1 August 2017 - In March 2017, ASIC conducted a review of various mobile app stores focusing on apps associated with binary options trading.

The review highlighted over 330 apps which were offered to Australians by entities and individuals that appeared to be unlicensed. 63% were offered by binary option issuers and facilitated trading, 25% were from various signal providers and the rest were controlled by introducing brokers or were apps designed to influence people to trade binary options.

In addition to the apparent unlicensed activity undertaken by these apps, ASIC was also concerned about the following behaviour:

- many of the mobile app descriptions contained statements which appeared to be misleading about the profitability of trading and the amount of profit that could be made, for example "Earn up to 90% in less than an hour, in fact you can profit quickly as 60 seconds and profit as much as 620% via one trade," and "[our app] generates around 85% profitable signals from the top traders to guarantee the safe trading";
- the majority of these apps failed to outline the risks of trading binary options, with 80% having no risk warning at all;
- some apps from introducing brokers made it appear they were the issuer of the binary option and did not clearly inform investors if and how they would be compensated for referral business; and
- some binary option review/education sites were merely collecting personal information which could be used for high-pressure cold calling. For example, some developer websites associated with the apps promoted their ability to deliver traffic to casino, lottery, forex, and binary option service providers.

ASIC contacted Apple and Google about the apps that were the subject of this surveillance. ASIC was encouraged with the speed both entities removed the relevant apps identified by ASIC from their respective app stores. ASIC also notes that Apple recently changed its review guidelines to state that apps that facilitate binary options trading will not be permitted in its app store.

2.5 Banks to overhaul consumer credit insurance sales processes

1 August 2017 - ASIC has brought together representatives from the banking industry and consumer advocates to improve outcomes for consumer credit insurance, with the establishment of a Consumer Credit Insurance (CCI) Working Group.

The CCI Working Group will progress a range of reforms, including a deferred-sales model for CCI sold with credit cards over the phone and in branches.

CCI is a type of add-on insurance sold with credit cards, personal loans, home loans and car loans. It is promoted to borrowers to help them meet their repayments if they lose their job, become sick or injured, or die. However, CCI has long been associated with poor consumer outcomes in Australia and overseas, including consumers being unaware that they have purchased CCI and consumers being ineligible to make a claim on their CCI policy. Compared with other common insurance products (such as car and home insurance), consumers can receive very little back in claims compared to what they pay in CCI premiums.

Following discussions with ASIC, the banks have now committed to a range of measures to improve consumer outcomes in relation to CCI. Significantly, this includes a deferred-sales model for CCI sold with credit cards over the phone and in branches. This will mean that consumers cannot be sold a CCI policy for their credit card until at least four days after they have applied for their credit card over the phone or in a branch. This reduces the risk that a consumer will feel pressured to purchase the CCI product, or purchases a CCI product that does not meet their needs.

In addition, the CCI Working Group will identify improvements that will be made to banks' sales practices for CCI on credit cards sold online, and with other loan products in all sales channels. For example, the banks have committed to strengthening their processes for obtaining express consent from customers who purchase CCI and to provide improved disclosure about the cost and duration of the policy.

The Australian Bankers' Association (ABA) will incorporate these measures into the revised Code of Banking Practice and will accelerate their introduction so that they commence in the first half of 2018 and well before the new code is fully in place.

2.6 Consultation on revised licence regime for domestic and overseas market operators

20 July 2017 - ASIC is consulting on proposals to refine and update ASIC's regulatory guidance on the licensing regime for financial markets.

Consultation Paper 293 *Revising the market licence regime for domestic and overseas operators* (CP 293) proposes introducing a two-tiered market licence regime, based on a risk-based assessment. The second tier of licence will be able to facilitate a range of market venues, including specialised and emerging market venues. The consultation paper also:

- proposes updating and clarifying the guidance about how licensees may comply with specific licence obligations;
- proposes consolidating Regulatory Guide 177 (overseas market licensees) into the updated Regulatory Guide 172;
- sets out the relevance of the proposals for secondary trading in shares of eligible crowd sourced funding companies; and
- addresses implementation and transition matters.

The proposals follow the passage of the Corporations Amendment (Crowd-sourced Funding) Act 2017 No. 17 (CTH) (the Crowd Sourced Funding Act), which amended Chapter 7 of the Corporations Act 2001 No. 50 (CTH) relating to the market licence regime.

2.7 Consultation on proposed financial benchmark regulatory regime

17 July 2017 - ASIC is seeking feedback on proposed ASIC rules for the administration of licensed financial benchmarks and regulatory guidance on how ASIC would administer the proposed financial benchmark regulatory regime.

The Government is consulting on draft legislation to implement financial benchmark regulatory reform. ASIC's consultation is about the licensing regime for administrators of significant benchmarks and ASIC's rule-making powers in the event the amendments to the Corporations Act are passed by Parliament. This early consultation and preparation will help Australia's financial benchmark regulatory regime to be implemented more expediently.

Together, the draft legislation and ASIC's proposals will help to ensure the robustness and reliability of financial benchmarks in the Australian economy in line with the IOSCO *Principles for Financial Benchmarks*. The proposals are also designed to facilitate equivalence assessments under overseas regimes including the European Benchmarks Regulation.

ASIC's proposals are outlined in Consultation Paper 292 *Implementing the financial benchmark regulatory regime* (CP 292).

3. Recent ASX Developments

3.1 Notification of Austraclear regulations procedure amendment

Procedure 10.2 of the *Austraclear Regulations Procedures, Determinations and Practice Notes* (the Procedure) has been amended to include additional circumstances in which participants must withdraw securities from the Austraclear System if required by Austraclear.

Broadly, the additional circumstances are where the issuer or guarantor in relation to a security is a party to legal proceedings in connection with the obligations of the issuer or guarantor with respect to the security or the variation of any terms of the security.

The Notice is available here.

3.2 Changes to clearing participant minimum core capital requirements approach

On 25 July 2017 ASX released a consultation paper in relation to the minimum core capital requirements (MCCR) approach for ASX Clear Participants. ASX is proceeding with the proposed approach as outlined in the January 2017 response to consultation.

ASX is seeking feedback on the proposed rule amendments and other documents which will implement the new MCCR approach for Participants that are subject to the risk based capital requirements.

The Consultation Paper is available here.

3.3 Monthly activity report

On 3 August 2017 ASX released the ASX Monthly Activity Report for July 2017.

4. Recent Takeovers Panel Developments

4.1 Yancoal Australia Limited 02 & 03 - Panel declines to conduct proceedings

15 August 2017 - The Takeovers Panel has declined to conduct proceedings on the applications by Senrigan Capital Management Ltd and Mr Nicholas R Taylor dated 8 August 2017 (see TP17/40) and Mt Vincent Holdings Pty Ltd and Osendo Pty Ltd (indirect wholly-owned subsidiaries of Noble Group Limited) dated 9 August 2017 (see TP17/41) in relation to the affairs of Yancoal Australia Limited.

The applications concerned the 23.6 for 1 renounceable entitlement offer and placement announced by Yancoal on 1 August 2017. The Panel decided to hear the applications together. Among other things, the applicants submitted:

- the entitlement offer has been priced and structured in a manner that is unnecessarily highly dilutive, disproportionately affects the interest of existing minority shareholders and is highly unattractive to new investors;
- dispersion strategies put in place by Yancoal are of no practical value to existing minority shareholders;
- the entitlement offer and placement have the effect of transferring value and control of Yancoal to Yancoal's majority shareholder (Yanzhou Coal Mining Company Limited), the underwriters and the placement investors in a way "that is inconsistent with the Corporations Act" and is deliberately designed to circumvent the Panel's orders in Yancoal Australia Limited [2014] ATP 24; and
- certain pre-existing relationships exist between Yancoal, Yanzhou, the underwriters and the placement investors that give rise to a relationship of association, and therefore the voting power of Yanzhou and its associates will increase as a result of the entitlement offer and placement.

The Panel considered that it was not likely to find that the entitlement offer would give rise to unacceptable circumstances, in view of:

- the dispersion strategies put in place by Yancoal, which provide shareholders (including the applicants) with a guaranteed opportunity to maintain their existing percentage interest in Yancoal (Guaranteed Allocation) and the possibility to obtain additional shares;
- the lack of material to indicate that the entitlement offer would lead to a change of control in Yancoal or increase Yanzhou's voting power; and
- the lack of material to suggest that any of Yancoal, Yanzhou, the underwriters or the placement investors are associated.

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

The reasons for the decision are available on the Takeovers Panel website.

On 17 August 2017, Senrigan Capital Management Ltd and Mr Nicholas R. Taylor and Mt Vincent Holdings Pty Ltd and Osendo Pty Ltd, indirect wholly-owned subsidiaries of Noble Group Limited, sought a review of the Panel's decision in Yancoal Australia Limited 02 & 03.

On 22 August 2017, the Takeovers Panel announced that the review panel had declined to conduct proceedings in relation to the review application. The media release announcing this decision of the Panel is available on the Takeovers Panel website.

5. Recent Research Papers

5.1 The remaking of Wall Street

This article critically examines the transformation of the financial services industry during and since the Financial Crisis of 2007-2009. This transformation has been marked by the demise of the major investment banks and the related rise of a set of powerful players known as private equity firms. First, the article argues that private equity firms now mirror investment banks in their mix of activities; ethos of entrepreneurialism, innovation, and risk-taking; role as 'shadow banks'; and overall power and influence.

These similarities might suggest that private equity firms pose financial risks similar to those caused by their now-defunct predecessors. But the article suggests that private equity firms, as currently structured, are more financially stable and pose less systemic risk to the global economy. These firms are structured and funded in ways that may address the basic shortcoming that led to investment banks' downfall - specifically, the use of short-term debt to fund longer-duration assets. It thus argues that, in the face of onerous post-Crisis reforms, Wall Street has evolved to displace investment banks with more financially resilient institutions. Importantly, however, the article cautions that ongoing changes in private equity firms' broker-dealer activities raise systemic concerns that require active regulatory monitoring. The article also identifies systemic and financial stability concerns arising from the funds that these firms manage, particularly their hedge and credit funds, about which little detailed information is publicly available.

Finally, the article explores other implications of these developments, including for the effectiveness of post-Crisis regulation, the popular backlash against Wall Street, the incidence of misconduct, and the evolution of financial institutions.

The Remaking of Wall Street

5.2 Success drivers of equity crowdfunding: A study in the UK market

Crowdfunding is an innovative fundraising practice witnessing phenomenal development over the last decade. The UK is the biggest crowdfunding market in Europe in terms of market share, number of platforms and funders. However, this phenomenon in this market is still understudied, especially equity crowdfunding. Drawing on a relative big sample data in the UK market, the research makes two main contributions to the current limited literature on equity crowdfunding. First, the study finds that investment criteria traditionally used by venture capital and business angel investors can be success predictors of equity crowdfunding campaigns. Second, the research confirms findings in prior studies that pre-determined campaign characteristics such as funding target, campaign duration, the provision of financials and the use of social networks can be success drivers of equity crowdfunding campaigns. These findings have numerous implications for actors in equity crowdfunding, including practitioners, policy makers and regulators.

Success Drivers of Equity Crowdfunding: A Study in the UK Market

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5.3 The extraterritorial application of US financial services regulation

The U.S. Securities and Exchange Commission seeks to regulate non-U.S. domiciled financial firms when U.S. investors' interests are affected. In 2010, in *Morrison v. National Australia Bank,* the U.S. Supreme Court narrowed the circumstances when extraterritorial regulation is appropriate. Although most articles about the Morrison decision focus attention on when the SEC can sue non-U.S. firms for fraud, this article addresses an understudied area of financial regulation, namely when the SEC can regulate and require the registration of non-U.S. firms. The article argues that by reaffirming the presumption against extraterritorial application of U.S. statutes, and by disapproving the conduct and effects test for extraterritorial jurisdiction, the Supreme Court has limited the SEC's approaches to regulate extraterritorially. The article reviews the Morrison case, explains why statutory amendments in the *Dodd-Frank Act* do not resolve the difficulties Morrison poses, discusses recent SEC extraterritorial actions, and outlines Morrison's implications with respect to such actions.

The Extraterritorial Application of U.S. Financial Services Regulation

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5.4 An empirical and theoretical assessment of dual-class stock structures

A battle is brewing for control of America's most dynamic companies. Entrepreneurs are increasingly seeking protection from interference or dismissal by public investors through the adoption of dual-class stock structures in initial public offerings. Institutional investors are pushing back, demanding that such structures be abandoned or strictly limited through sunset provisions. The actual terms of dual-class stock structures, however, have been remarkably understudied, so the debate between proponents of prohibition and private ordering is often ill-informed. This paper presents the first empirical analysis of the initial, or sunrise and terminal, or sunset provisions found in the charters of dual-class companies, with a data set of 123 US public companies. Careful selection of such provisions can satisfy both the desire of entrepreneurs to pursue their idiosyncratic visions for value creation without fear of interference or dismissal and the need of investors for a voice to ensure management accountability. Private law firms representing entrepreneurs in initial public offerings play a critical role in the selection of charter provisions, so the onus is on such firms to ensure that private ordering produces a satisfactory resolution before momentum builds for a regulatory solution to investors' concerns.

Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures

5.5 The G20/OECD Principles of Corporate Governance 2015: A critical assessment of their operation and impact

The OECD promotes the 2015 version of the Principles of Corporate Governance as a means "to support investment as a powerful driver of growth". But how realistic is this ambition? This paper provides a critical assessment of the operation and impact of these Principles. It maps the governance model of the Principles and discusses their impact on state legislation and corporate governance at the firm level. It concludes that there are various problems with the operation of the Principles as far as they are regarded as a universal benchmark, while they can be a useful "common frame of reference" for the debate about corporate governance reform in academia and practice.

The G20/OECD Principles of Corporate Governance 2015: A Critical Assessment of Their Operation and Impact

6. Recent Corporate Law Decisions

6.1 Setting aside statutory demands - the importance of statutory compliance

(By Sam Rafter, MinterEllison)

PCM Nominees (WA) Pty Ltd v ACN 063 291 430 Pty Ltd [2017] FCA 8, Federal Court of Australia, McKerracher J, 28 July 2017

(a) Summary

This case concerned an application to set aside a statutory demand pursuant to s. 459G of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). However, the decision turned on the Defendant's interlocutory application to dismiss the Plaintiff's application for want of jurisdiction, on the grounds that the Plaintiff's application did not conform with the requirements in s. 459G of the Corporations Act. Although ultimately determined on the procedural point, the Court went on to consider the Plaintiff's substantive application in obiter.

(b) Facts

Mr Phillip McAlister was the sole director and sole shareholder of both PCM Nominees (WA) Pty Ltd (Plaintiff) and ACN 063 291 430 Pty Ltd (In Liquidation) (Defendant). On 31 July 2014, the Plaintiff, Defendant, Mr McAlister and PMCARCH Pty Ltd entered into a deed, which outlined that Mr McAlister was indebted to the Defendant, in relation to two outstanding loan accounts, for sums totalling $527,248 (Debt). Pursuant to the deed, the Plaintiff guaranteed repayment of the Debt and offered security over the property. On 13 January 2016, a caveat was registered over the property at the instance of the liquidator of the Defendant to secure the Debt.

On 11 February 2016, demand letters were sent to both Mr McAlister and the Plaintiff demanding payment of the Debt. On 9 September 2016, the Defendant served a statutory demand on the Plaintiff for the Debt pursuant to s. 459E of the Corporations Act.

On 29 September 2016, the Plaintiff purported to serve its application to set aside the statutory demand by emailing a copy of the application to the liquidator's solicitors. The copy of the application emailed to the liquidator's solicitors did not bear the seal of the Court, the Registrar's signature, any Court stamp, the Court proceeding number or the return date for the Plaintiff's application.

The sale of the property occurred and settlement took place on 12 October 2016. The caveat was withdrawn on the basis that the proceeds of the sale would be held in the Plaintiff's solicitor's trust account pending agreement of the parties or a court order.

The Plaintiff's applied to set aside the statutory demand pursuant to s. 459G of the Corporations Act on the following grounds:

- there was no evidence to support the existence of the Debt;
- there was a genuine dispute as to the Debt;
- the Debt had been secured to the Defendant's reasonable satisfaction;
- the statutory demand was issued for the improper purpose of applying pressure on the Plaintiff to pay the amount claimed; and
- the claim cannot meet the requirements of a claim on a guarantee.

At the same time, the Defendant sought interlocutory orders that the Plaintiff's application be dismissed for want of jurisdiction, being that the application did not conform with the requirements of s. 459G(3) of the Corporations Act.

(c) Decision

(i) Interlocutory dispute

Section 459G of the Corporations Act requires that an application to set aside a statutory demand may only be made within 21 days after the demand is so served; and within those 21 days, an affidavit supporting the application is filed with the Court, and a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.

Importantly, service under s. 459G of the Corporations Act requires the application and supporting affidavit to have the seal of the Court, the registrar's signature or some other authenticating mark and the return date for the application, that is, the date and time which the application will be heard by the Court. The application and supporting affidavit emailed to the liquidator's solicitors did not meet these requirements, having not been filed at the time they were emailed.

The Court considered Austin J's obiter observations in *Austar Finance Group Pty Ltd v Campbell [2007] NSWSC 1493*, which emphasised the practical question of whether notice was received and that email transmission may be sufficient for the purposes of s. 459G(3) of the Corporations Act, provided there is evidence that the document came to the notice of the person to be served and the document was in readable form.

Ultimately, however, given that the application was served on the liquidator's solicitors and not the Defendant personally, the Court relied on the analogous decision in *Rochester Communications Group Pty Ltd v Lader Pty Ltd (1997) 143 ALR 648,* finding that, although in some circumstances irregular service may be cured, this is not open to the Court when service is essential to invoke the jurisdiction. Further, the Court noted Beaumont J's comments in Rochester at 670 that "[i]f the Court were to have largely unregulated discretion to validate defective service, at any time after that period, this would run the risk, in my view, of undermining a central element of the new statutory scheme." Accordingly, McKerracher J found that service was defective, and consequently that the Plaintiff's application to have the statutory demand set aside was defective. However, his Honour found that indemnity costs were not appropriate.

(ii) Substantive application

Although not strictly necessary, given the Court dismissed the application to set aside the statutory demand, McKerracher J considered the Plaintiff's application.

First, the Court considered whether there was no evidence to support the existence of the Debt. The Plaintiff argued that there was nothing in the statutory demand or affidavit that does more than set out a conclusionary statement that the debt is due and payable. McKerracher J dismissed this argument quickly, highlighting that "all [that] is required by [s. 459E of the Corporations Act] is a formal affirmation on oath that a certain amount of money is due and payable." Further, there is no requirement that an affidavit in support of a statutory demand should adduce detailed evidence to establish that a debt is owing.

Second, the Court considered the Plaintiff's argument that there was a genuine dispute as to the Debt. McKerracher J dismissed this argument, finding that Mr McAlister's affidavit supporting the application to set aside the statutory demand merely asserted that a genuine dispute exists and that the deed did not set out the Debt. His Honour noted that the Debt is clear and unambiguous by virtue of the deed, pursuant to which the Plaintiff had guaranteed the repayment of the Debt.

Third, the Court considered whether the Debt had been secured to the Defendant's reasonable satisfaction. The Plaintiff's case is that in circumstances where the funds were secured in the solicitor's trust account, the appropriate means for the defendant to resolve the dispute as to the funds, absent an agreement between the parties, was to commence proceedings in a court of competent jurisdiction, rather than to issue a statutory demand. McKerracher J highlighted that the proper inference from the evidence was that the proceeds were paid into the trust account pending determination of the dispute about the statutory demand and there was no evidence that this was "secured" for the purposes of the Corporations Act. This was supported by the fact that the proceeds were paid into the trust account after the statutory demand had expired.

Further, his Honour noted that it is not open for the Plaintiff, on the one hand, to assert that a genuine dispute exists in respect of the Debt and, on the other, to assert that the Debt has been secured to the Defendant's reasonable satisfaction. Fourth, in relation to the improper purpose argument, McKerracher J found that the Defendant is entitled to issue a statutory demand to achieve prompt payment of a debt. Accordingly, the statutory demand was issued for a proper purpose. Finally, the Plaintiff argued that the Plaintiff could not be called upon under the guarantee until demand was made under the principal obligation. This argument was quickly dismissed by McKerracher J, noting that there was nothing in the deed to support it.

Accordingly, McKerracher J found in obiter that the Plaintiff's application, albeit defective, should also be dismissed.

6.2 Class action stayed as an abuse of process due to improper purpose

(By Ryan Fitzpatrick, King & Wood Mallesons)

[Melbourne City Investments Pty Ltd v Myer Holdings Ltd [2017] VSCA 187,]() Supreme Court of Victoria, Court of Appeal, Osborn, Whelan and Ferguson JJA, 20 July 2017

(a) Summary

Melbourne City Investments Pty Ltd (MCI) sought leave to appeal from orders to stay a class action proceeding brought by MCI against Myer Holdings Limited (Myer) claiming breaches by Myer of its continuous disclosure obligations under the the [Corporations Act 2001 No. 50 (Cth)](#) (the Corporations Act).

The Court of Appeal unanimously granted leave but dismissed the appeal. It was held that MCI brought the class action proceeding with the improper, predominant purpose of generating income as a collateral advantage from the proceeding rather than to seek compensation for Myer's alleged breach of its continuous disclosure obligations or to assist the other members of the class action by acting as lead plaintiff.

(b) Facts

MCI was created as a vehicle for bringing class actions against listed entities for breaches of continuous disclosure obligations under the Corporations Act. MCI purchased small parcels of shares in a number of listed companies that allowed it to commence the class actions as the lead plaintiff. The sole director and secretary of MCI was Mark Elliot and its sole shareholder was BSL Litigation Partners Limited.

In this case, MCI had purchased 400 shares in Myer for just over $700. It commenced a class action against Myer in the Supreme Court of Victoria alleging that Myer had breached its continuous disclosure obligations under the Corporations Act and engaged in misleading and deceptive conduct. If MCI was successful, its damages would have been limited to hundreds of dollars.

However, a favourable result would allow MCI to apply under ss. 33ZF and 33V of the Supreme Court Act 1986 No. 110 (Vic) (the SCA) for an amount to reimburse it for its time and effort in bringing the action as lead plaintiff and additional compensation to the extent it acted as the litigation funder.

Myer claimed the class action was an abuse of process and therefore sought an order that it be stayed.

The trial judge granted a permanent stay, holding that the class action was brought for the predominant purpose of generating income or revenue for Mr Elliot or his related interests, which was not a legitimate predominant purpose.

MCI sought leave to appeal the decision.

(c) Decision

The Court of Appeal unanimously granted leave to appeal the decision but dismissed the appeal.

(i) Joint judgment of Osborn and Ferguson JJA

In a joint judgement, Osborn and Ferguson JJA considered MCI's argument that it was not an abuse of process for a lead plaintiff to commence and maintain a genuine class action for the purpose of generating income or profit that could be properly earned from the action pursuant to a valid legal process.

In this context Osborn and Ferguson JJA considered that there were three "silos" from which MCI could generate this income or profit through the class action:

- the damages silo (Silo 1) - the amount which MCI might hope to gain by way of compensation and interest payable on it;
- the lead plaintiff silo (Silo 2) - the amount that MCI might receive by an order under s. 33V and/or s. 33ZF of the SCA as compensation for its time and effort acting as lead plaintiff; and

- the funding silo (Silo 3) - the amount that MCI might hope to be paid for funding the class action through orders made under s. 33V and/or s. 33ZF of the SCA.

MCI claimed that the class action was sanctioned, controlled and regulated by the SCA and any amount granted by the Court to MCI would only be awarded with the close scrutiny of the Court and on formal orders being made. Essentially, MCI argued that before it could earn income from the class action under Silos 2 and 3, there had to be a vindication of its rights through settlement or judgment in its favour. Income from Silos 2 and 3 were then also dependent upon an order of the Court and was a benefit which the law gave that could only be achieved through the class action.

Their Honours rejected this argument. They held that *Williams v Spautz* [1992] HCA 24 made it clear that it was essential to determine whether the plaintiff's predominant purpose in bringing the class action was to fulfil the proper purpose of the class action or to gain some other collateral advantage.

In the context of a class action, the proper purpose is not limited to the determination of the lead plaintiff's claim, but involves an assessment of the common questions in the proceeding for the benefit of all group members of the class action. The proper purpose of such an action is therefore looking at the enforcement of the substantive rights of the plaintiff and laying the groundwork for enforcing the substantive rights of the group members of the class action.

Osborn and Ferguson JJA held that a class action did not exist for the purpose of the lead plaintiff obtaining ancillary orders of the kind MCI pursued under ss. 33ZF and 33V of the SCA. MCI's business model was purely predicated on bringing these class actions to earn income under Silos 2 and 3 beyond compensation for its loss as a shareholder and it had no interest in recovering the minimal damages it alleged it had suffered under Silo 1. MCI's predominant purpose in commencing the class action was not to have the common questions in issue determined for the benefit of group members of the class action.

Consequently, MCI had no substantial legitimate purpose in bringing the class action and it was determined to be an abuse of process. Accordingly, the trial judge's decision was upheld and the proceeding was permanently stayed because MCI had commenced the class action with the predominant purpose of generating income from the proceeding as a collateral advantage and not to seek damages for the wrong committed or to assist the group members as lead plaintiff.

(ii) Whelan JA

Whelan JA agreed with the joint judgment of Osborn and Ferguson JJA but also noted that MCI had committed an abuse of process not just because it commenced the class action, but because of how the circumstances on which the claim relied had arisen. MCI bought small shareholdings in a large number of companies with the intention of suffering a loss (the reduction in share price as a result of the alleged breach). MCI then pursued the opportunity to gain a more valuable profit through orders under ss. 33V and 33ZF of the SCA.

His Honour considered that in this way MCI had manufactured or engineered a claim that it could use to bring a class action and gain a profit from the proceedings.

6.3 Court finds that loan repayment is enforceable despite past consideration for guarantee following application of the Graywinter and Malec principles

(By Alex Moores, DLA Piper)

[Re Bendigo Central Pharmacy Pty Ltd [2017] VSC 419](), Supreme Court of Victoria, Randall AsJ, 21 July 2017

(a) Summary

William Anderson Kwan (Defendant) sought to enforce repayment of a debt owed by Central Pharmacies Pty Ltd (Central) that had been beneficially assigned to him as the substitute lender and guaranteed by Bendigo Central Pharmacy Pty Ltd (Plaintiff). The Defendant served a demand on the Plaintiff for enforcement of the guarantee to repay the debt. The Plaintiff argued that the guarantee did not apply and filed an application under s. 459G of the Corporations Act 2001 No. 50 (Cth) (the Act) for a setting aside of that demand, such application requiring the filing and serving of a supporting affidavit within 21 days of service of the demand.

The Supreme Court of Victoria (Court) held that the loan amount was repayable as the arguments raised by the Plaintiff in respect of past consideration for the guarantee and offsetting were not raised in the affidavit in support of the s. 459G application, and neither argument negated the enforceability of the full guaranteed amount following appropriate application of the principles established in Graywinter and Malec.

(b) Facts

On 26 February 2016, Central entered into a loan agreement with Mr Xian Heng Qu for the sum of $500,000.00 (Agreement), which was advanced on 4 March 2016. In a supplementary agreement provided by Central dated 17 May 2016 (Supplementary Agreement), Mr Qu purportedly assigned the Agreement to the Defendant. The deponent, Mr Taylor, who filed an affidavit as a director of Central, denied knowledge of the Supplementary Agreement or the assignment, stating no document had been executed. In addition, Mr Taylor outlined that $250,000.00 had already been repaid to Mr Qu under the Agreement and the amount of $128,260.00 had been retained by Central for services rendered.

The Defendant argued that there had been a default on repayment under the Agreement and so the Defendant had bought out the loan amount and was substituted as the lender. Following expiry of the term in the original Agreement, the repayment terms under the supplementary agreement were 60 days from execution and the Plaintiff provided a guarantee for the loan amount. On 17 June 2016, Central made an interest payment to the Defendant of $6,250.00 and subsequently, on 15 July 2016, requested an extension of a further 90 days. On 15 August 2016, the Defendant demanded repayment pursuant to the Plaintiff's guarantee.

(c) Decision

(i) Defective provisions in the affidavit

Prior to resolving the matter of the debt amounts, the Court addressed the Defendant's claim that the affidavit filed in support of the application under s. 459G of the Act was defective or inadequate on the basis that:

- the deponent did not have standing or the authority of the Plaintiff;
- much of the affidavit was mere assertion and offended the best evidence rule;
- much of the affidavit was irrelevant or otherwise inadmissible; and
- even if accepted, the evidence was weak, unparticularised, implausible, and contradicted by other contemporaneous evidence.

The Court dismissed the question of standing or authority on the basis that, in cases of companies with multiple directors, courts do not require board resolutions authorising the deposing director if they swear that they are so authorised to make the affidavit. On the claims regarding the content of the affidavit, the

Court held that, in the absence of evidence the facts proffered could not have been made with the actual knowledge of the deponent and would only be dealt with if directly relevant to a point in contention.

Additionally, the critical analysis of the courts in relation to defective affidavits cannot apply generally, as the requirements for filing differ depending on the application. Supporting affidavits filed under s. 459G were judicially considered in *Imagebuild Group Pty Ltd v Fokust Pty Ltd [2017] VSCA 131* where the court criticised the use of a sworn affidavit by a non-director in a special leave application that provided reasons for delay and attached an unsworn affidavit by the director to be lodged at a later time. The court stated that the sworn component should, if only by instruction, contain the content that is relevant to the application and not merely include that content in the unsworn attachment.

The Court held that this criticism should not be extended to supporting affidavits, as distinct from special leave applications under s. 459G as the rigidity of the filing deadlines means that it is foreseeable that the relevant creditor or officer of the company may not be able to execute within time. As such, distinguished by circumstances, there was no defect found in the affidavit before the Court.

(ii) Applicability of the guarantee obligations

It was argued by the Plaintiff that as the Defendant did not advance any funds to Central under the Supplementary Agreement, the guarantee was not enforceable. The Court disagreed with this interpretation finding that:

the $500,000.00 had been transferred pursuant to the Agreement;

- Central failed to repay the advance within 45 days as per the Agreement;
- the Defendant paid out Mr Qu and took assignment of the loan; and
- despite preservation of the original terms in the Supplementary Agreement being sufficient, there was another agreement effectively created between the parties including with the Plaintiff as the guarantor.

The new arrangements in place between the parties were held to apply to the original funds advanced, and any further advance pursuant to the same relationship between the parties.

The Plaintiff argued that, following a concession by the Defendant in their deposition that the new arrangement and guarantee were provided subsequent to the meeting in which the Supplementary Agreement was reached, that there was no consideration and based on the execution date that there would only be past consideration in any event. This would render the guarantee unenforceable. The Court then had to consider whether the issue had in fact been raised as genuine dispute in the affidavits submitted as was argued by the Plaintiff.

(iii) Subsequent grounds and the Graywinter principle

The Court held that the issue had not been raised in the affidavits, with the issue of timing going only to transfer dates for the funds advanced, to which the Plaintiff responded that although new grounds may not be raised a party is not precluded from raising matters that are the subject of deposition. The relevant precedent examined was that in *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund [1996] FCA 822*, which generally precludes new material being raised out of time, and broadly states that the ground must be identified expressly or by necessary inference so as to be clearly considered a ground for challenging the statutory demand under s. 459G of the Act.

The principle is based upon an implication sourced from the s. 459G requirements that an application to set aside a statutory demand be accompanied by an "affidavit supporting the application" which must be filed and served within 21 days after service of the demand. The Court held that the implication is simply that the grounds of the application to set aside the demand must be raised by the supporting affidavit, however, the Court was not satisfied that merely raising an argument about the timing of execution which might, after investigation, lead to the conclusion that there has been past consideration and that the guarantee may not be enforceable, falls into the category of unconscionable or an abuse of process. Further, although the order in which documents were executed could be questioned by what is set out in the Defendant's material, the Court did not interpret any of the content of the affidavits filed on behalf of the Defendant, nor submissions made on behalf of the Defendant, to concede that the guarantee was not enforceable.

(iv) Offsetting and the Malec principle

The Plaintiff sought to offset the amount owing due to the repayment made and the service fee retained by Central. The Court agreed with the court in *Malec Holdings Pty Ltd v Scotts Agency Pty Ltd (In Liq)* [2015] VSCA 330, where it was established that the dispute or offsetting claim should have a "sufficient objective existence and prima facie plausibility to distinguish it from a merely spurious claim, bluster or assertion". The Court held that the deposed claims were nothing more than bluster.

6.4 Court considers expiry of instalment warrant and whether contract contained contrary term

(By Deandra McDonald, Clayton Utz)

In the matter of Citigroup Global Markets Australia Pty Limited [2017] NSWSC 969, Supreme Court of New South Wales, Brereton J, 20 July 2017

(a) Summary

In this case, the Supreme Court of New South Wales considered the characteristics of an instalment warrant, and whether information regarding an instalment warrant displayed on a broker's online website, could be classified as a term or characteristic of the instalment warrant, in circumstances where that information was contrary to the terms contained in the documents which created the instalment warrant.

The Court made a fundamental distinction between the underlying terms contained in the documents creating an instalment warrant, which is a chose in action, and the terms of an offer or contract for the sale and purchase of that chose in action.

The Court specifically considered whether a statutory contract had been formed under s. 793B of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and Rule 4040 of the *ASX Operating Rules* (the Operating Rules). In obiter, the Court also addressed the possibility of whether there may have been a collateral contract which contained a contrary term or whether a contrary representation had been made in respect of the instalment warrant.

(b) Facts

On 16 May 2013, the plaintiff, Mr Allan Ong, purchased 100,000 instalment warrants designated "NCMIOM" issued by the defendant, Citigroup, in respect of underlying shares in Newcrest Mining Limited (ASX:NCM). The warrants were "reset" or "rolling" instalment warrants and were traded on the ASX.

The instalment warrants were purchased by Mr Ong through his online broker, Westpac Securities Limited (WSL), via the broker's live trading website. WSL, in turn, acquired the instalment warrants through Ausiex.

Relevantly, at the time of purchase, the following information was displayed on WSL's website in respect of the instalment warrant:

NCMIOM $0.062

CITIWARRANTS (CGMA) CTWMY14RW (CTW 18.50 NCM ROLLING INSTALMENT WARRANT 09-MAY-14)

Under the Product Disclosure Statement (PDS) issued by Citigroup for the instalment warrant, the next reset date for the warrant was 24 May 2013.

On or after 24 May 2013, Mr Ong was informed that his warrants had expired as he did not take the requisite action or make the required payments by the reset date of 24 May 2013 in order to implement a "reset" of the warrant. However, based on the information displayed at the time of purchase, Mr Ong was of the belief that the instalment warrant expired on 9 May 2014.

Mr Ong commenced proceedings in the Supreme Court of New South Wales claiming damages for breach of a contract said to be pursuant to ss. 793B, 793C and 1101B of the Corporations Act and Rule 4040 of the Operating Rules. The present case concerned an interlocutory application by Citigroup for summary dismissal or striking out of the proceedings commenced by Mr Ong.

(c) Decision

In its findings, the Court made a fundamental distinction between the underlying terms or characteristics of an instalment or share warrant and the terms of a contract for the sale and purchase of that warrant.

Specifically, the Court considered the following issues:

- whether it is arguable that Mr Ong acquired NCMIOM warrants with a 9 May 2014 reset date; and
- whether it is arguable that Mr Ong contracted to acquire NCMIOM warrants with a 9 May 2014 reset date.

Each of these matters are addressed in turn.

(i) Did the NCMIOM warrants have a 9 May 2014 reset date?

In Brereton J's view, the answer to this question was a resounding no. His Honour's rationale rested on the fact that, fundamentally, a warrant is a chose in action, and its characteristics are defined by the terms of the documents which create it.

Nowhere in the documentation creating or evidencing the terms of the NCMIOM warrants is there anything that would support the contention that Citigroup had issued NCMIOM warrants with a reset date of 9 May 2014. Such warrants did not exist, and Mr Ong could not have acquired them.

Brereton J noted that the reference on the website to 9 May 2014 could not alter the properties of the NCMIOM warrant as a chose in action, regardless of whether or not such terms or representations were associated with any contract related to the sale and purchase of the warrant.

(ii) Was there a statutory contract to acquire NCMIOM warrants with a 9 May 2014 reset date?

In making his application, Mr Ong relied upon a contract said to be formed under s. 793B of the Corporations Act and Rule 4040 of the Operating Rules.

Section 793B of the Corporations Act relevantly provides that the Operating Rules have effect as a contract under seal between (a) ASX and each market participant and (b) a participant and each other market participant, under which each of those persons agrees to observe the operating rules to the extent that they apply to that person and to engage in conduct that the person is required by the operating rules to engage in.

Rule 4040 of the Operating Rules relevantly provides that upon matching in a Trading Platform (meaning a platform made available by ASX to Trading Participants) of Trading Messages (meaning messages submitted into a Trading Platform relating to trading functions such as Orders) in accordance with the Operating Rules, a contract is formed between the Trading Participants (meaning a Market Participant which has Trading Permission in respect of one or more Products - relevantly a Cash Market Product) whose Trading Messages are matched:

- in the case of Cash Market Transactions, for the sale and acquisition of Cash Market Products (relevantly a Warrant admitted to Trading Status in accordance with Rule 2120) at the price and volume matched and subject to the Operating Rules; or
- in the case of Derivatives Market Transactions, on the terms of the relevant Contract Series at the price and volume matched and subject to the Operating Rules.

The Court considered whether or not any contract entered under Rule 4040 of the Operating Rules could have contained a term that the NCMIOM warrants to which it related had a reset date of 9 May 2014.

Ultimately, the Court concluded that any contract formed under Rule 4040 was for the sale and acquisition of NCMIOM warrants in accordance with their terms (relevantly a 24 May 2013 reset date), at the nominated price and in the nominated volume, and did not contain any term to the effect that the warrants would have a next reset date of 9 May 2014. Brereton J reasoned that the Rule 4040 contract is in effect an electronic pro-forma contract, which has a confined set of parameters: namely product designation, price and volume, and no other terms. The characteristics of the product depend on and are ascertainable from the documents which create it, and the PDS.

Despite the Court's conclusion on this point, Brereton J went on to consider whether or not Mr Ong could be a party to a Rule 4040 contract and have standing to sue on any such contract. In this regard, his Honour accepted Citigroup's submission that Mr Ong was not a party to the contract nor did he have standing to sue on the contract on the basis that he was not a "market participant" (for the purposes of s. 793B of the Corporations Act) or a "Trading Participant" (for the purposes of Rule 4040 of the Operating Rules). His Honour noted that Ausiex was the relevant market participant on the purchaser's side and in those circumstances, only Ausiex had standing to sue on the contract.

In obiter, Brereton J considered that it may be arguable for Mr Ong to have standing as a "person aggrieved" under ss. 793C or 1101B(1)(d) of the Corporations Act if he could establish that Citigroup failed to comply with the Operating Rules. However, on the evidence before the Court, Brereton J did not consider that Mr Ong was able to successfully argue any such failure. In any event, his Honour's view was that it was unlikely the Court would be authorised pursuant to these sections of the Corporations Act to make a compensatory order in the nature of damages of which Mr Ong was seeking.

(iii) Availability of other causes of action

Despite the Court's findings, Brereton J noted that this did not mean that Mr Ong had no viable cause of action against Citigroup. Brereton J considered the availability of an argument to the effect that Citigroup warranted or represented that the NCMIOM warrants had or would have a 9 May 2014 reset date and that Mr Ong relied on that warranty or representation in purchasing the NCMIOM warrants via WSL's online website, so as to establish a collateral contract (in respect of which he might have standing) or a claim for damages for misrepresentation. The merits of any such argument were not considered for the purposes of the current proceedings due to the fact that an argument to this effect was not properly formulated by Mr Ong as part of his application. In this respect, the Court ordered that Mr Ong reformulate and re-plead his case and the proceedings continue on their pleadings.

6.5 Supreme Court of Canada imposes personal liability on director for oppressive conduct

(By Bradley Montag, King & Wood Mallesons)

Wilson v Alharayeri, 2017 SCC 39, Supreme Court of Canada, McLachlin CJ and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ, 13 July 2017

(a) Summary

Mr Wilson sought to overturn the decisions of the Quebec Superior Court and Quebec Court of Appeal which found him personally liable for oppressive conduct. The Supreme Court of Canada upheld that it was "fit" for the courts to make Mr Wilson personally liable for oppressive conduct against Mr Alharayeri pursuant to s. 241 of the *Canada Business Corporations Act 1985* (CBCA).

Section 241 CBCA provides that a complainant may apply for an order of the court if the act of a corporation or its affiliates was oppressive. If established, the court may make any orders it thinks "fit" pursuant to s. 241(3) CBCA, including compensation.

In determining whether personal liability was appropriate in this case, their Honours applied the two-step test from *Budd v Gentra Inc (1998) 43 BLR (2d)* (Budd). Firstly, the court must consider whether the individual was implicated in the oppressive conduct and, secondly, whether the order was "fit in all of the circumstances".

Their Honours clarified that bad faith and personal benefit are not required to satisfy the test for the imposition of personal liability.

The Court ordered that Mr Wilson and another director, Dr Black, compensate Mr Alharayeri for loss resulting from their oppressive conduct in the amount of C$648,310.

(b) Facts

Mr Alharayeri was President, Chief Executive Officer, director and a significant minority shareholder in Wi2Wi Corporation (Wi2Wi). Mr Alharayeri was the owner of common shares and the only owner of Class A and B Convertible Preferred Shares in Wi2Wi, issued to him as performance-linked incentives. The shares were convertible to common shares if certain financial tests were met during a particular financial year. Mr Wilson held Class C Convertible Preferred Shares, which were also convertible on the basis of certain financial tests being met.

In 2007, Wi2Wi entered merger negotiations with Mitec Telecom Inc (Mitect). While negotiating the merger, Mr Alharayeri entered private negotiations with Mitec to sell his own shares without the Board's consent. The merger did not proceed and Mr Alharayeri did not sell his shares. Mr Alharayeri was subsequently censured and resigned from Wi2Wi. Mr Wilson took over as President and Chief Executive Officer. Mr Wilson and Dr Black were directors of Wi2Wi and the sole members of the audit committee.

Later in 2007 the Wi2Wi Board decided to issue a private placement of convertible secured notes (Private Placement) to existing common shareholders. In order to obtain the full benefit of the Private Placement, Mr Alharayeri and Mr Wilson would have needed to convert their convertible preferred shares to common shares. The Board decided to expedite the conversion of Mr Wilson's shares, despite doubts as to whether the conversion met the relevant financial tests. However, the Board never consented to converting Mr Alharayeri's shares, despite meeting the relevant financial tests. Mr Wilson and Dr Black actively advocated against the conversion of Mr Alharayeri's shares because of his conduct and involvement in the proposed sale of his shares to Mitec. As a result, Mr Alharayeri did not participate in the Private Placement to the full extent possible and the value of his shares and proportion of his existing common shares were substantially reduced.

(c) Decision

The key issue on appeal was whether it was "fit" for the courts to impose personal liability on Mr Wilson and Dr Black for oppressive conduct. Whether the conduct constituted oppression was not in issue.

(i) When may personal liability be imposed?

Section 241(3) CBCA grants the court wide remedial discretion, including compensating a complainant for oppressive conduct. However, the wording of s. 241(3) CBCA does not prescribe whether such liability for compensation should be imposed on a corporation or an individual. In order to determine whether personal liability was an appropriate remedy in the circumstances and in accordance with s. 241 CBCA, the Court upheld the two-step Budd test (above).

In applying the second limb of the Budd test, the Court highlighted four general principles to assist in whether it is "fit" to impose personal liability. The principles are that the remedy must:

- be a fair method of addressing the oppression;
- go no further than necessary to rectify the oppression;
- only serve to vindicate the reasonable expectations of the security holders, creditors, directors or officers in their capacity as corporate stakeholders; and
- take into consideration the context of general corporate law.

The Court found that in relation to Mr Wilson and Dr Black it was appropriate to impose personal liability.

In making its decision, the Court considered indicia which pointed to personal liability as being a "fair method' of addressing the oppression. As the sole members of the audit committee, Mr Wilson and Dr Black were instrumentally involved in the decision of whether to convert the Class A, B and C Convertible Preferred Shares to common shares. Further, the oppressive conduct allowed Mr Wilson to obtain a personal benefit by way of increased control in Wi2Wi and the ability to participate in the Private Placement. While the Court noted that personal benefit and bad faith were not required to establish personal liability, their presence is the "hallmark" of attracting personal liability for oppressive conduct.

The Court found that the other principles were also adequately addressed on the facts. The quantum of damages went no further than necessary and merely reflected the amount that Mr Alharayeri's shares would have been worth had the oppressive conduct not occurred. The remedy vindicated Mr Alharayeri's reasonable expectations that his shares would be converted and the remedy was in line with the general context of corporate law.

(ii) The plaintiff's proposed criteria

Mr Wilson argued that personal liability should only be imposed where the director has control of the corporation, acts in bad faith and obtains a personal advantage. The Court rejected the plaintiff's arguments and noted that while the proposed criteria may be relevant indicia, none of the requirements put forward were necessary in determining personal liability.

6.6 Extending the scope of public examinations: examinable affairs include the affairs of a trust

(By David Greenberg and Rachel Baker, Ashurst)

Pleash, in the matter of Equititrust Limited (In Liquidation) (Receivers and Managers Appointed) (No 2) [2017] FCA 758, Federal Court of Australia, Reeves J, 11 July 2017

(a) Summary

With the increasing use of family trusts, commercial trading trusts and managed investment schemes as a vehicle to conduct business, there has been a corresponding increase in the number of corporate trustees who are becoming insolvent and subject to all forms of external administration. Absent an appointment as receiver and manager of the property of a trust, liquidators appointed over corporate trustees often face difficulties exercising their powers over the property and undertaking investigations into the affairs of a trust when they are only appointed as liquidators of the corporate trustee. Public examinations are one of the most significant tools available to liquidators which can assist them to investigate and uncover conduct which may lead to recoveries for creditors of the insolvent estate. In the case of a corporate trustee this may extend to decisions which were made by directors and officers of the corporate trustee that has caused loss or otherwise prejudiced the interest of unitholders or beneficiaries of the trust.

This case is helpful because it has clarified that a liquidator can use their power to undertake public examinations to investigate causes of action related to the conduct of the trust which may give beneficiaries of the trust a claim against the directors and officers of the corporate trustee.

(b) Facts

Equititrust was a money lender operating on the Gold Coast. It raised funds through managed investment schemes and the Equititrust Premium Fund (EPF). Equititrust was the trustee of EPF.

Equititrust had significant borrowings from Bank of Scotland International Limited (BOSI) which were secured by a number of security interests granted over the assets of the EPF.

David Tucker was a director of Equititrust. Prior to the liquidators' appointment, he arranged for a company he controlled with another associate to purchase BOSI's debt at a significant discount and for its securities to be assigned to his corporate nominee. This would enable Mr Tucker to make a significant profit on this transaction should there be sufficient secured property to pay out the new secured creditor above what it paid to purchase BOSI's debt.

Upon their appointment the liquidators wished to investigate this transaction to see whether they, Equititrust, or any unitholders of the EPF could have a cause of action against Mr Tucker relating to this transaction. The liquidators wished to further these investigations by conducting public examinations in the Federal Court of Australia. As part of those examinations, a Summons was served upon Mr Tucker under s. 596A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

Mr Tucker subsequently applied to set aside the summons as an abuse of process on numerous grounds. Relevantly, this included an argument that the examinations were being conducted to investigate the affairs of EFP and claims that the unitholders of EFP may have against Mr Tucker. Mr Tucker claimed that this went beyond the examinable affairs of Equititrust and constituted an abuse of process.

(c) Decision

Reeves J held that the affairs of a trust (where the company acted as trustee) are within the examinable affairs of the company, and that benefitting unit holders in the trust is within the legitimate purpose of an examination.

In reaching this decision Reeves J applied the judgment of Lander J in *Evans v Wainter Pty Ltd* (2005) 145 FCR 176. He started by outlining what he considered to be the legitimate purposes for conducting an examination.

Briefly, these are:

- to enable an eligible applicant to gather information to assist that applicant in the administration of the corporation;
- to assist the corporation's administrators identify the corporation's assets and liabilities;
- to protect the interests of the corporation's creditors;
- to enable evidence and information to be obtained to support the bringing of proceedings against examinable officers and others in connection with the examinable affairs of the corporation;
- to assist in the regulation of corporations by providing a public forum for the examination of examinable officers of corporations.

Reeves J went on to refer approvingly to the judgment in *Evans v Wainter*, in which Lander J said that the definition of "examinable affairs" in the Corporations Act is broad enough to include "the business affairs of a connected entity insofar as they are relevant to the corporation's examinable affairs", which, in the case of a company acting as a trustee, extends to the "business affairs of the trust".

Reeves J explained that it is appropriate for a company's examinable affairs to be read so broadly given:

- the general ambit of an examination under Part 5.9 of the Corporations Act 2001 is extremely wide;
- proper purposes of an examination include any purpose that will benefit the company, its creditors, its members or the public generally;
- to constitute an abuse of process, the impugned purpose must be the predominant purpose; and
- it will not be an abuse of process to conduct an examination that will, at the same time, benefit both the company and someone who is not a creditor or contributory of the company.

In applying these principles, Reeves J held that if it emerged that Mr Tucker's conduct, or that of any other person involved in the transaction, caused Equititrust to breach its duty as trustee, then it is in the interests of Equititrust that Mr Tucker, and/or those other persons, be required to account to Equititrust for their conduct. If unit holders in EPF coincidentally benefit from any proceeding taken by Equititrust, that does not mean Liquidators are conducting the examination for an improper purpose.

This case reinforces again that it is generally difficult for directors and officers to successfully apply to have examination summons set aside as an abuse of process.

6.7 The Brickworks-Soul Pattinson cross-shareholding - oppression decision handed down following a Perpetual battle

(By Paul Branston and Jarred Lockhart, Herbert Smith Freehills)

RBC Investor Services Australia Nominees Pty Ltd v Brickworks Ltd [2017] FCA 756, Federal Court of Australia, Jagot J, 10 July 2017

(a) Summary

In this highly publicised Federal Court case, institutional investor Perpetual Investment claimed that the maintenance of the cross shareholding by two of its publicly traded investee companies, Brickworks Limited and Washington H Soul Pattinson and Company Limited, was oppressive to minority shareholders.

Perpetual was a long term shareholder in both Brickworks and Soul Pattinson and was of the view that the cross-shareholding of c.40% between the companies had the effect of depressing the Brickworks and Soul Pattinson share prices and that value could be unlocked for shareholders by unwinding the cross-shareholding.

Perpetual had presented a number of proposals to the Brickworks and Soul Pattinson boards that were designed to unwind the cross-shareholding. Perpetual was dissatisfied with the boards not progressing the proposals and contended that the maintenance of the cross-shareholding was oppressive because it disenfranchised minority shareholders and entrenched the incumbent boards. Perpetual sought orders that the cross-shareholding be unwound.

After undertaking an in-depth analysis of the history of the cross-shareholding and the interactions surrounding Perpetual's proposals, Jagot J held that the maintenance of the cross-shareholding was not oppressive or unfair in all of the circumstances and dismissed Perpetual's claim with costs.

Key to Jagot J's decision was the Brickworks and Soul Pattinson boards' active consideration of the Perpetual proposals, which demonstrated the directors' seeking to act in the interests of all shareholders and their continuing awareness of their duty to do so.

(b) Facts

(i) General background

Brickworks (a supplier of building products) holds 42.7% of the shares in Soul Pattinson (a diversified investment house with its roots in owning and operating pharmacies) and Soul Pattinson, owns 44.23% of Brickworks. The cross shareholding was created in 1969 via a share swap as part of a long term strategy of both boards to achieve diversification of earnings and a degree of takeover protection at a time when takeovers were becoming more common in the Australian market.

The current Corporations Act would prevent the cross-shareholding now being created. Section 259D of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) provides that if a company obtains or increases its control of an entity that holds shares in the company, then, within 12 months after this occurring, the entity must cease to hold the shares or the company must cease to control the entity. However, the maintenance of the Brickworks and Soul Pattinson cross-shareholding is not unlawful given it was in existence prior to the relevant amendments to the Corporations Act.

At the time the cross-shareholding was established James Millner was the Chairman of Soul Pattinson. He was also appointed Chairman of Brickworks upon creation of the cross-shareholding. The nephew of James Millner, Robert Millner, is currently the Chairman of both Soul Pattinson and Brickworks. Certain relations of Robert Millner are also directors of the companies - Robert Millner's cousin Michael Millner is on the Brickworks board, and Robert's son Thomas Millner and brother in law David Wills are on the Soul Pattinson board. The Millner families and their associated entities hold in aggregate a small percentage (

(ii) Facts specific to the case

Perpetual acquired an interest in both companies in the 1980s, after the cross-shareholding was established, and owned around 8.95% in Brickworks and 6.49% in Soul Pattinson at the time of commencing the action. By the time of the judgment Perpetual had sold down and owned approximately 3.06% and 1.46% of Brickworks and Soul Pattinson respectively.

From 2011 onwards, Perpetual presented five different proposals to the boards of Brickworks and Soul Pattinson that were primarily designed to unwind the cross-shareholding in order to unlock the contended unrealised value:

- that Robert Fraser be appointed to the board of Soul Pattinson as an independent director following Soul Pattinson appointing Thomas Millner (the son of Robert Millner). Mr Fraser's appointment was not approved at the 2011 AGM of Soul Pattinson;
- an in-specie distribution of Brickworks' shares in Soul Pattinson such that only Soul Pattinson would be left holding shares in Brickworks. This did not proceed due to adverse tax implications;
- a nil premium merger between the companies. This did not proceed as Brickworks considered that a nil premium merger would result in a transfer of value from Brickworks to Soul Pattinson as its shares were trading at a low point due to conditions in the building industry;
- a multifaceted restructure (proposed by Perpetual together with another shareholder, Mark Carnegie) that involved the cancellation of all shares in Soul Pattinson held by Brickworks and the appointment of Elizabeth Crouch as a director of Brickworks. This proposal was never put to shareholders because of an unfavourable ruling from the ATO; and
- Perpetual then continued to press for the unwinding of the cross shareholding through variants of the nil premium merger.

Perpetual contended that the maintenance of, and failure to take steps to unwind, the cross-shareholding entrenched control with the incumbent boards (and therefore the Millner family), thereby disenfranchising shareholders other than the companies and the Millner related entities and that failure to dismantle the cross-shareholding was not in the interests of shareholders as a whole and was therefore unfair and oppressive.

Perpetual sought to rely on a range of matters in attempting to establish that the maintenance of the cross-shareholding in the face of repeated attempts to have it unwound was unfair and oppressive, contending:

- the cross shareholding was established as an anti-takeover mechanism and could not be created now and it continues to exist to protect the incumbent boards;
- the cross-shareholding depressed the companies' share prices; and
- the Millner family perceived the companies as their "family business" and the cross-shareholding now exists to vest control in the incumbent boards of the companies, which are controlled or unduly influenced by the Millner family and that influence is used to protect the cross-shareholding and thereby the incumbent boards.

Perpetual sought orders from the Court under ss. 232 and 233 of the Corporations Act that the cross-shareholding be unwound within 12 months by a method to be determined by the companies or otherwise the shares sold to reduce the cross-shareholdings to no more than 10% within a further 6 months. Perpetual also sought an order that its director candidates, Mr Fraser and Ms Crouch, be appointed to the boards of Soul Pattinson and Brickworks respectively.

In summary, s. 232 of the Corporations Act provides that a Court may make an order it considers appropriate in relation to a company under s. 233 if the conduct of the company's affairs, an actual or proposed act or omission by or on behalf of a company, or a resolution or proposed resolution of members, is either contrary to the interests of members as a whole or oppressive to a member or members.

(c) Decision

(i) Justice Jagot's findings

Jagot J addressed Perpetual's submissions regarding the cross-shareholding in detail and in doing so systematically and forensically examined the history of the cross-shareholding and the long history of meetings and written communications between Perpetual and the boards regarding the cross-shareholding, each of Perpetual's proposals and the boards' responses to the proposals.

Her Honour found that whilst the cross-shareholding was established in part to make it more difficult for a takeover of the companies to succeed, it was also established as the companies considered the cross-shareholding to be a good investment including for reasons of diversification, and that the companies shared a view of long term value creation. Neither company had indicated the cross-shareholding should be maintained irrespective of circumstances.

Her Honour acknowledged that the Millner family did have a history of involvement in the leadership of the companies (and a history of success in that role) but held that it had not been established that there was any undue influence by the Millner family, nor agreement, arrangement or understanding between members of the Millner family or the other directors to exercise their votes a certain way. There was no suggestion that the directors had subordinated their duties as directors to the maintenance of the cross-shareholding in order to entrench control by them and the Millner family.

Jagot J held that whilst the cross-shareholding structure could not now be created, that did not establish that any risks it posed had eventuated or unfairness had occurred. The possibility for conflict as a result of the cross-shareholding was recognised, with the key in this regard being that the boards of the companies must remain vigilant about the issues that such a structure might give rise to. In this case neither board could be accused of a lack of vigilance or prudence regarding the effects of the cross-shareholding.

Her Honour considered that Perpetual had not established that the cross-shareholding depressed the companies' share prices or, that if it did, the dismantling would have the effect of increasing the share prices. The cross-shareholding had a range of advantages and disadvantages for the companies and the effect on the companies' share prices could not be predicted with certainty.

Importantly, it was not established that the cross-shareholding had caused any decision adverse to the performance of the companies. There was no evidence of a poor decision affected by conflict of interest or any improvident transactions. The companies' share prices had in fact increased substantially in recent years despite the maintenance of the cross-shareholding and there was no suggestion that the directors and management of the company were not competent or that the cross-shareholding had resulted in the retention of poorly performing management.

Both companies' boards were found to have spent considerable resources actively considering the proposals and the financial and governance implications of the cross-shareholding, including receiving expert advice on the advantages and disadvantages of the potential unwinding of the cross-shareholding. Their decisions to maintain the cross-shareholding were not "kneejerk" reactions - each board had carefully considered the cross-shareholding, the restructuring options and the professional advice based on the circumstances at the time and had reached the view that no option to restructure the cross-shareholding had been identified which presented demonstrable benefits for shareholders compared to the existing structure which had been in existence for 40 years. In addition, the boards were found to be well aware of their obligation to continually consider the companies' structure, and the cross-shareholding, in order to discharge their duties as directors.

Ultimately, Jagot J held that reasonable directors or commercial bystanders would not consider the maintenance of the cross-shareholding oppressive or unfair in all of the circumstances and dismissed Perpetual's claim with costs.

(ii) Implications of the decision

At a time when shareholder activism in Australia is on the rise (see for example Elliott Management's recent campaign in relation to BHP) Jagot J's decision illustrates the limits of the oppression doctrine in the context of publicly traded, well managed and strongly performing companies. It suggests that in similar circumstances a Court would effectively need to be satisfied that there was conduct equivalent to a breach of directors' duties in order for it to consider entertaining oppression arguments. This indication of the relatively high bar for oppression in a case that involved a cross-shareholding structure unique to Australian markets should serve to steel the resolve of Australian boards in responding to proposals by activist investors in more typical factual scenarios.

6.8 Recovery of payments by third parties as unfair preferences

(By Katrina Sleiman, Corrs Chambers Westgarth)

In the matter of Evolvebuilt Pty Ltd [2017] NSWSC 901, Supreme Court of New South Wales, Brereton J, 6 July 2017

(a) Summary

The Supreme Court of New South Wales dismissed unfair preference claims brought by liquidators against certain secondary subcontractors pursuant to s. 588FA of the Corporations Act 2001 No. 50 (Cth) (the Act).

The Court considered that the words "from the company" in s. 588FA of the Act require that the insolvent company must have directed that the payments occur, and the creditor must have had some form of entitlement to an asset of the company.

(b) Facts

Evolvebuilt Pty Ltd (Company), as contractor, had entered into a construction contract with Built NSW Pty Ltd (Built), as head contractor. The contract provided clauses to the effect that if the Company had not paid its secondary subcontractors, Built could deduct monies due to the Company and pay the secondary subcontractor direct.

On 12 March 2013, the Company's secondary subcontractors ceased work by reason of non-payment of their invoices and the Company requested that Built make payment directly to its secondary subcontractors. Although the request was made, Built did not act pursuant to that request, but acted pursuant to the agreement it made with CFMEU, to which the Company was not a party. Rather than acting pursuant to its contract with the Company, Built terminated the contract and indicated that the secondary subcontractors would be engaged through a new subcontractor. From about 15 March 2013 to early April 2013 Built made payments to the Company's secondary subcontractors direct.

On 19 September 2013, voluntary administrators were appointed to the Company, and subsequently, liquidators. The liquidators sought to void the payments made by Built to the secondary subcontractors as unfair preferences.

(c) Decision

Under s. 588FE(2) of the Act, a transaction of a company is voidable if, relevantly, it is an insolvent transaction of the company and it was entered into, or an act was done for the purpose of giving effect to it, during the six months ending on the relation back day. Under s. 588FC of the Act, an insolvent transaction is, relevantly, an unfair preference given by the company at a time when the company is insolvent, or the company becomes insolvent as a result.

(i) Insolvency

The liquidators needed to establish that the Company was insolvent when the impugned payments were made, or became insolvent as a result. It was accepted that the Company was insolvent as at 14 March 2013.

(ii) Unfair preferences

An unfair preference under s. 588FA(1) of the Act involves: (1) a transaction to which the company and the creditor are both parties (s. 588FA(1)(a)); whereby (2) the creditor receives from the company more than it would receive if the transaction were set aside and the creditor proved for the debt in the winding up (s. 588FA(1)(b)).

As it appeared the likely return to unsecured creditors in the liquidation of the Company was nil, it followed that each of the secondary subcontractors received more than they would receive if the payments to them were set aside and they instead proved in the liquidation. However, the critical question was whether they received the impugned payments from the Company.

The liquidators submitted that, although the payments were actually made by Built, via its solicitors, to the secondary subcontractors, the Company was also a party to the transaction, and the payments were made on behalf of the Company such that the payments were (for the purposes of s. 588FA(1)(b)) received from, and (for the purposes of s. 588FF(1)(a)) made by, the Company. They submitted that Built made the relevant payments on behalf of the Company, and that that is all that is required.

Justice Brereton undertook a detailed consideration of the phrase "from the company" in s. 588FA of the Act, and various authorities involving the payment of debts by third parties.

His Honour noted that the consideration between the debtor company and the third party for making the payment to the creditor is important to determining whether the payment can be said to have been "made by the company". That is because, if the third party's undertaking to make the payment is part of the consideration, then the company may have a legal right to require the payment to be made, and the payment is the conferral on the creditor of the benefit of an asset of the company, namely the consideration received by the debtor company under its contract with the third party.

His Honour found that although the payments by Built had the effect of discharging the Company's indebtedness - either because the Company assented to them, or because the liquidators subsequently did so - it did not follow that they were made by or received from the Company. Rather, the payments were made out of Built's assets, and not out of any asset the benefit of which the Company was otherwise entitled. Therefore, they were made by, and received by the secondary subcontractors from Built and not the Company. This was so, even if making the payment gave Built some right to restitution against the Company. His Honour noted that if it were otherwise, then the satisfaction of a creditor's debt by the debtor's guarantor would constitute a payment on behalf of the debtor and be liable to be avoided as a preference.

To set aside the impugned payments and order their "repayment" to the Company which had never been entitled to them would confer on the Company and the general body of unsecured creditors a windfall which they would not have received had Built not chosen - unconstrained by any legal obligation to do so - to make them. It followed that the impugned payments did not fall within s. 588FA(1) of the Act.

6.9 Ponzi scheme in the Pilbarra - Property development scheme companies wound up on just and equitable grounds

(By Rohit Sud and Samuel J Hickey, Judges' Associates, Federal Court of Australia)

Australian Securities and Investments Commission v AGKM Green Pty Ltd [2017] FCA 846, Federal Court of Australia, Barker J, 16 June 2017

(a) Summary

In this case, Barker J ordered the winding up of 18 defendant companies on the basis that they had breached various provisions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) (the ASIC Act). The defendants had operated a Ponzi scheme, and in doing so, failed to keep adequate records, produce books and records and maintain registered offices in Australia.

ASIC brought proceedings against 19 defendant companies controlled by Ms Desiree Veronica Macpherson. ASIC sought the winding up of the companies under s. 461(1)(k) of the Corporations Act on the basis that it was just and equitable to do so, as well as the appointment of liquidators under s. 472(1). ASIC alleged that the defendants were part of a group of companies that operated a Ponzi scheme under which over $110 million had been borrowed from private overseas investors. The decision provides a useful reiteration of the principles that apply in relation to the winding up of companies on just and equitable grounds, as well as an example as to how the public interest can be an influential consideration in cases of this kind.

(b) Facts

The proceeding was the result of an investigation commenced by ASIC into the activities of Ms Macpherson and associated companies in relation to property development projects, including a project called the "Newman Estate" project, in the Pilbarra region of Western Australia.

Ms Macpherson had caused approximately 251 companies, including the defendants, to be incorporated in Australia. Under Ms Macpherson's control, a number of those companies ran a real estate and property development business under the "Macro" brand (Macro Group). One such company, 511 GTN Pty Ltd) ("511 GTN") acquired land at lot 511, Great Northern Highway, Newman (the Newman Estate). From late 2011, another company under Ms Macpherson's control, Macro Realty Developments Pty Ltd (Macro Developments), together with 511 GTN and other companies under Ms Macpherson's control raised funds from senior lenders and private investors for the purposes of acquiring and developing all or part of the Newman Estate. The funds borrowed by 511 GTN for the purposes of developing the Newman Estate included $35,420,000 borrowed from a Hong Kong hedge fund known as Pacific Alliance Group at an interest rate of 27.5% per annum (PAG facility). The PAG facility was secured by a first ranking security over all of the assets of 511 GTN and a first ranking mortgage over the Newman Estate. 511 GTN subsequently procured the subdivision of the Newman Estate into 244 subdivided lots.

In addition to raising funds for the purpose of the development of the Newman Estate, numerous other companies within the Macro group (and controlled by Ms Macpherson) borrowed funds to purchase lots in the Newman Estate from 511 GTN and their subsequent development, as well as the purchase of other property in Western Australia including lots in another subdivision project, the "Kurra Estate" project. Between 30 July 2014 and 29 March 2016, approximately 170,921 investors lent $109,818,103 to companies within the Macro Group at interest rates varying from 11% to 36% per annum.

This money was transferred, by way of intercompany loan, to an Australian bank account in the name of Macro Developments, which operated like a central "bank" or "treasury" for the Macro Group. The funds were subsequently used to pay all of the expenses of the Macro Group, except those of 511 GTN. These expenses included substantial payments of interest and repayments of principal from the private lenders, and were made irrespective of the particular entity within the Macro Group to which the original loan was made.

The result was that almost all of the expenses of the Macro Group, including interest payments to the initial private investors, were paid using income derived from later private investors, rather than from profits generated by any property development scheme or other business being operated by any of the companies within the Macro Group.In about March 2016, the inflow of income from new loans from private investors was no longer sufficient to meet the group's obligations to existing lenders, and the Macro Group ceased making payments in respect of these loans and to most of the trade creditors of the group. 511 GTN also defaulted on its obligations under the PAG facility.

(c) Decision

Barker J's reasoning was premised on the following findings of fact:

- each of the first to sixth defendants were special purpose vehicle (SPV) companies within the Macro Group, and were the registered proprietor of one or more lots in the Kurra or Newman Estates. The lots were acquired by them using money borrowed from Macro Developments in the case of five of the six companies, and private investors in the case of the last company. His Honour inferred that the money borrowed from Macro Developments was, in whole or in part, originally lent to companies within the Macro Group by private investors;
- each of the seventh to twelfth defendants were SPV companies that did not own any land, but had nevertheless borrowed money directly from private investors that had not been repaid. To the extent that the companies had assets that were intercompany loans to Macro Developments, Barker J found that the assets probably had no value as the liquidator of Macro Developments had deposed that it was unlikely that there would be any meaningful return to unsecured creditors in the winding up of Macro Developments;
- each of the sixteenth to nineteenth defendants owned various parcels of land in Port Hedland, WA but had made net losses in the 2015/2016 financial year and had a deficit of assets against liabilities; and
- the remaining defendants were also SPV companies, but did not own land and had not borrowed money from private investors, but had nevertheless breached various record keeping obligations under the Corporations Act and the ASIC Act.

In relation to record keeping obligations, Barker J found that:

- each of the defendants had breached s. 286(1)(a) of the Corporations Act by failing to keep records to record and explain their transactions and financial position and performance;
- each of the defendants had breached s. 286(1)(b) of the Corporations Act by failing to keep records that would enable true and fair financial statements to be prepared and audited;
- each of the defendants had breached the requirement to produce books and records made under s. 30 of the ASIC Act, contrary to s. 63 of the ASIC Act; and
- 11 of the 19 defendants had breached the obligation to have a registered office in Australia, contrary to s. 142(1) of the Corporations Act.

Ultimately, Barker J found that the evidence strongly suggested that the defendants formed part of a group of companies that had operated a Ponzi scheme. His Honour was guided by the three principles formulated by Warren J in *Australian Securities and Investments Commission v ABC Fund Managers (2001) 39 ACSR 443* that dictate when a company is to be wound up on equitable grounds. Those principles are as follows: first, there needs to be a lack of confidence in the conduct and management of the affairs of the company. Second, it needs to be demonstrated that there is a risk to the public interest that warrants protection. Third, there is a general reluctance on the part of the courts to wind up a solvent company. Barker J found that the Court could have no confidence in the proper conduct and management of each of the defendants, and that the defendants' involvement in the Ponzi scheme gave rise to a need to ensure investor protection as well as a real risk to the public interest that warranted protection. His Honour was satisfied that the principle that the Court should be reluctant to wind up a solvent company had no application, as the defendants were either insolvent or had not maintained sufficient financial records to allow their solvency status to be assessed.

His Honour supported his findings by reiterating Finn J's comment in *Australian Securities Commission v AS Nominees Limited (1995) 62 FCR 504*; that, in making its decision, the Court can have regard to the public interest considerations that have caused the regulator to seek a winding up order.

Accordingly, Barker J ordered that the defendants be wound up on the ground that it was just and equitable to do so and appointed liquidators to each of those defendants. It should be noted that one of the defendants had already been wound up by order of the Supreme Court of Western Australia, and so the proceedings were discontinued as against that defendant.

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.