12 December 2018 > Regulatory Newsfeed

SAI Global Corporate Law Bulletin No. 256>

Index

info.regulatory@saiglobal.com

Bulletin No. 256

Legislation Hotline

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

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

1. Recent Corporate Law and Corporate Governance Developments
2. Recent ASIC Developments
3. Recent ASX Developments
4. Recent Takeovers Panel Development
5. Recent Research Papers
6. Recent Corporate Law Decisions
7. Contributions
8. Previous editions of the Corporate Law Bulletin

COPYRIGHT WARNING
Use of this product must be in accordance with our licence agreement and the relevant licence fee paid by your organisation. We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 131 242.

Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Cyber-resilience: range of practices report issued by the Basel Committee
1.2 FSB reports to G20 Leaders on progress in financial regulatory reforms
1.3 FSB publishes recommendations on compensation data reporting to address potential misconduct risk
1.4 Investor engagement in the UK: study
1.5 Commencement of the review of unfair contract terms for small businesses
1.6 Proposed amendment of restrictions on ownership of banks and insurers
1.7 FSB publishes reports on implementation of OTC derivatives reforms and removal of legal barriers
1.8 IFAC recommendations to the G20 focus on rebuilding public trust
1.9 IOSCO members found mostly compliant with principles for the regulation and supervision of commodity derivatives markets
1.10 Report on effects of reforms on incentives to centrally clear over-the-counter derivatives
1.11 FSB publishes 2018 G-SIB list
1.12 SEC enforcement division issues report on FY 2018 results
1.13 Centre for Corporate Law LinkedIn page

2. Recent ASIC Developments

2.1 Report highlights need for improved consumer complaints experience
2.2 Report on relief decisions
2.3 Major financial reporting changes and other focuses
2.4 Report on buy now pay later industry

3. Recent ASX Developments

3.1 Public consultation - Amendments to the ASX Listing Rules
3.2 mFund Settlement Service - CHESS 10 release
3.3 ASX Clear (Futures) - Initial margin parameters variation
3.4 ASX Clear and ASX Settlement Operating Rules - Minor amendments
3.5 Report

4. Recent Takeovers Panel Development

4.1 Benjamin Hornigold Limited and Henry Morgan Limited - Panel decision

5. Recent Research Papers

5.1 Putting technology to good use for society: The role of corporate, competition and tax law
5.2 Group company liability
5.3 Index funds and the future of corporate governance: Theory, evidence, and policy
5.4 Beyond climate risk: Integrating sustainability into the duties of the corporate board
5.5 Scaling up: The implementation of corporate governance in pre-IPO companies
5.6 Directors: Older and wiser, or too old to govern?

6. Recent Corporate Law Decisions

6.1 GetSwift Appeal: Carriage motions endorsed by Full Federal Court but no magic bullet for competing class actions
6.2 Estoppel cannot extend the time within which an application to set aside a statutory

demand must be made
6.3 Failure of proposed declaration of contravention to identify contravening conduct
6.4 Orders for reinstatement and ancillary orders to replace sole director and company secretary following deregistration
6.5 Administrators lose application for directions: directors' derivative action application adjourned until after second meeting of creditors
6.6 Westpac penalised $3.3 million for bank bill swap rate manipulation
6.7 Failure to establish the existence of an undocumented loan agreement
6.8 Proceeds from right of exoneration to be distributed by trustee company in liquidation according to Corporations Act priorities
6.9 Relationship between Part 5.3A of the Corporations Act and State laws

1. Recent Corporate Law and Corporate Governance Developments

1.1 Cyber-resilience: range of practices report issued by the Basel Committee

4 December 2018 - The Basel Committee on Banking Supervision (the BCBS) has published the report Cyber-resilience: range of practices. It identifies, describes and compares the range of observed bank, regulatory and supervisory cyber-resilience practices across jurisdictions.

The BCBS classifies the expectations and practices into four broad dimensions of cyber-resilience:

- governance and culture;
- risk measurement and assessment of preparedness (both in preventing and recovering/learning);
- communication and information-sharing; and
- interconnections with third parties.

The current challenges and initiatives to enhance cyber-resilience are summarised in 10 key findings and illustrated by case studies which focus on concrete developments in the jurisdictions covered.

1.2 FSB reports G20 Leaders on progress in financial regulatory reforms

28 November 2018 - The Financial Stability Board (the FSB) has published its fourth annual report Implementation and Effects of the G20 Financial Regulatory Reforms. Ten years after the crisis, the report highlights the progress made in the reform agenda. Looking ahead, the report highlights some challenges in promoting a financial system that supports the G20's objective of strong, sustainable and balanced growth, while preserving open and integrated markets and adapting to rapid technological change.

The report:

- documents the substantial progress that has been made in implementing key post-crisis financial reforms;
- discusses how the reforms have contributed to the core of the financial system becoming more resilient to economic and financial shocks;
- describes the FSB's work to evaluate whether reforms are working as intended;
- lays out why preserving financial stability, and supporting sustainable growth, requires the continued monitoring of developments in the global financial system; and
- documents the benefits of cooperation between jurisdictions in the aftermath of the crisis.

The report calls for the support of G20 Leaders in implementing the agreed reforms, and reinforcing global regulatory cooperation.

Specifically, the report highlights:

- regulatory and supervisory bodies should lead by example in promoting the timely, full and consistent implementation of remaining reforms to Basel III, resolution regimes, over-the-counter (OTC) derivatives and non-bank financial intermediation to support a level playing field and avoid regulatory arbitrage;
- frameworks for cross-border cooperation between authorities should be enhanced in order to build trust, allow for the sharing of information, and to preserve an open and integrated global financial system;
- authorities should evaluate whether the reforms are achieving their intended outcomes, identify any material unintended consequences, and address these without compromising on the objectives of the reforms; and
- financial stability authorities should continue to contribute to the FSB's monitoring of emerging risks and stand ready to act if such risks materialise.

1.3 FSB publishes recommendations on compensation data reporting to address potential misconduct risk

23 November 2018 - The FSB has published Recommendations for national supervisors: Reporting on the use of compensation tools to address potential misconduct risk. The Recommendations complement the FSB's Supplementary Guidance to the FSB Principles and Standards on Sound Compensation Practices by setting out the types of data that can support improved monitoring by supervisory authorities on the use of compensation tools to address misconduct risk in significant financial institutions.

The Recommendations are directed to the relevant national supervisory authorities for firms in all financial sectors. They build on national supervisory work and existing international efforts including Basel Committee Pillar III disclosures on compensation.

The Recommendations will help supervisors understand whether governance and risk management processes at financial institutions:

- appropriately include conduct considerations in the design of their compensation and incentive systems, including the setting of individual goals, *ex ante* performance measurement mechanisms and *ex post* compensation adjustments;
- support the effective use of compensation tools in combination with other performance management tools to help promote good conduct or to remediate misconduct;
- promote wider risk management goals, including for conduct issues, consistent with the firm's strategy and risk tolerance; and
- support the effective identification of emerging misconduct risks and appropriate review of incentive systems and compensation decisions in response to conduct incidents to ensure alignment of incentives, risk and reward.

The Recommendations form part of the FSB's action plan to address misconduct risk, which also includes a toolkit for firms and supervisors for strengthening governance frameworks to mitigate misconduct risk.

The FSB has also published an overview of responses to its public consultation on the Recommendations launched in May. The overview summarises the issues raised in the public consultation and sets out the main changes that have been made to the Recommendations to address these comments.

1.4 Investor engagement in the UK: study

22 November 2018 - The latest Stewardship Survey from the United Kingdom (UK) Investment Association shows that asset managers are regularly engaging with companies across a broad range of issues, such as executive pay, company strategy and financial performance.

The survey also examines how gender diversity is affecting voting decisions, and shows that investors are placing a strong focus on gender diversity at the top of companies and voting on the basis of how diverse companies are.

In a sign that investors are pushing for more women to be in UK boardrooms, the survey finds that 42% of asset managers made a voting decision based on the gender diversity of a company in 2018, while 56% actively engaged with UK companies on the issue of gender diversity.

The findings are based on a survey of 59 members of the Investment Association, who manage more that £5.6 trillion of assets in the UK.

The survey also finds that:

- engagement leads to better investor decisions;
- 80% of asset managers reported that engagement led to better investment decisions;
- asset managers are well-equipped to support their fund managers to engage with companies - the average firm has 33 staff participating in engagement and stewardship activity (with a mix of portfolio managers, analysts and stewardship specialists conducting this work);
- asset managers are engaging regularly with companies they invest in;
- there were more than 7,000 individual engagements with UK companies, with each individual asset manager averaging 158 engagements; and
- the stewardship process is significantly integrated into the investment process - nine out of ten asset managers used in-house resources to engage with companies.

1.5 Commencement of the review of unfair contract terms for small business

22 November 2018 - The government is undertaking a review of the current legislative protections provided to small businesses regarding unfair contract terms (UCTs).

Feedback received will asist the government to determine whether the legislative protections are performing as intended and whether enhancements are required to the UCT regime to ensure appropriate protections are afforded to small businesses.

A discussion paper published on the Treasury website invites submissions from small businesses and other stakeholders to share their experiences with the small business UCT protection framework.

The paper seeks views on:

- the thresholds to which the protections apply;
- the coverage of standard form contracts in the legislation;
- whether exemptions from the protections remain appropriate; and
- the overall effect of the UCT regime.

1.6 Proposed amendment of restrictions on ownership of banks and insurers

19 November 2018 - The government has introduced legislation relaxing the restriction on ownership of banks and insurers as well as introducing a new streamlined approval path under the Financial Sector (Shareholdings) Act 1998 No. 55 (Cth) (the FSS Act). These changes are aimed at strengthening competition in the financial system.

The new framework provides for:

- an increase in the general FSS Act ownership cap from 15% to 20%, in line with the requirements of the Foreign Acquisitions and Takeovers Act 1975 No. 92 (Cth); and
- owners of domestically incorporated companies to hold more than 20% of an institution's shares as long as they meet certain requirements.

These requirements include:

- that the owners are "fit and proper"; and
- if applying to become an authorised deposit-taking institution (ADI: broadly, banks; credit unions; and building societies) or a life insurer, or licensed as such for fewer than five years, the entity has assets of less than $200 million; or
- if applying to become a general insurance company, or licensed as such for fewer than five years, the entity has assets of less than $50 million.

1.7 FSB publishes reports on implementation of OTC derivatives reforms and removal of legal barriers

19 November 2018 - The FSB has published the following two reports:

- setting out progress on reforms to OTC derivatives markets; and
- reporting on FSB member jurisdictions' actions to remove legal barriers relating to OTC derivatives trade reporting.

OTC Derivatives Market Reforms: Progress Report on Implementation

Overall, good progress continues to be made across the G20's OTC derivatives reform agenda in the period from end-June 2017, including work to assess whether the implemented reforms meet the intended objectives.

The report draws various conclusions in multiple areas.

Trade reporting:

- 21 out of 24 FSB member jurisdictions have comprehensive trade reporting requirements in force, up by two since end-June 2017;
- authorities are using trade repository data for a wide range of tasks, and incorporating it in their published work; and
- work continues internationally, including on data harmonisation.

Central clearing:

- 18 member jurisdictions now have in force comprehensive standards/criteria for determining when standardised OTC derivatives should be centrally cleared, and two more jurisdictions adopted mandatory clearing requirements during the reporting period.

Margin requirements for non-centrally cleared derivative (NCCDs):

- 16 jurisdictions have implemented comprehensive margin requirements for NCCDs, an increase of two; and
- estimated collateralisation rates have risen since end-2016.

Higher capital requirements for NCCDs:

- interim higher capital requirements for non-centrally cleared derivatives are in force in 23 of the 24 member jurisdictions, unchanged over the reporting period;
- the number of jurisdictions that have implemented the final standardised approach for counterparty credit risk and capital requirements for bank exposures to central counterparties is much lower; and
- having regard to the 1 January 2017 recommended implementation date, jurisdictions are urged to implement those requirements without further delay.

Platform trading:

- 13 jurisdictions have in force comprehensive assessment standards or criteria for determining when products should be platform traded;
- new determinations entered into force for specific derivatives products to be executed on organised trading platforms in six jurisdictions; and
- transparency of information about OTC derivatives transactions has increased since end-2016.

Cross-border coordination and issues:

- jurisdictions reported continuing progress, both in establishing broad legal powers to exercise deference with regard to foreign jurisdictions' regimes, but more particularly with regard to exercising those powers in particular cases; and
- notably, the European Union (EU) and United States (US) (the Commodity Futures Trading Commission (the CFTC)) recognised each other's regulatory regime for trading venues, while Australia, Japan and the CFTC recognised one or more jurisdictions for the purposes of their margin requirements.

Trade reporting legal barriers: Follow-up of 2015 peer review recommendations

Trade reporting data provides important information for authorities as they seek to assess risks in OTC derivatives markets. However, where barriers to the full reporting of trade data and to authorities' access to this information exist, this reduces the usefulness of this data. This document reports on actions FSB member jurisdictions have taken to address legal barriers to reporting and accessing trade data identified in a 2015 peer review. Four of these recommendations included implementation dates in 2018, while the other two did not have specific implementation dates.

The progress report finds:

- barriers to full trade reporting - all but three of the FSB's member jurisdictions have removed or addressed barriers to full trade reporting;
- masking - five FSB member jurisdictions allow masking of counterparty identifiers for some transactions (as reported by jurisdictions, the percentage of masked trades is relatively low, typically 5% or under, with several under 1%); and

- regulators' access to trade repository data - in twelve jurisdictions, changes have been made or are underway to address or remove barriers to access to trade repository data by foreign authorities and/or non-primary domestic authorities, including legal barriers which have only very recently been removed.

A number of supplementary recommendations have been made by the FSB. The FSB will continue to monitor implementation.

1.8 IFAC recommendations to the G20 focus on rebuilding public trust

19 November 2018 - The International Federation of Accountants (IFAC) has called upon G20 countries to pursue smart regulation, heightened transparency, and inclusive growth to rebuild trust in institutions and advance global economic progress.

IFAC issued 10 actionable recommendations for G20 countries to support the global economy, including in relation to regulation, transparency and growth.

Develop smarter regulation

Regulation must effectively support the public interest through well-targeted conception, effective design and committed implementation.

To achieve smarter regulation, G20 countries must:

- develop and adopt consistent, comprehensive, and high-quality regulation;
- create a coherent, transparent global regulatory environment that limits divergence; and
- implement internationally-accepted standards to enhance confidence and stability in the global financial system.

Increase transparency

Robust transparency in the public and private sectors is key to earn public trust, fight corruption, encourage good governance and promote ethical business practices.

To increase transparency in the global economy, G20 countries must:

- strengthen governance in the public and private sectors;
- embrace integrated reporting;
- enhance public sector financial management; and
- collaborate to tackle corruption.

Enable inclusive growth

The fruits of a growing global economy must be shared inclusively to inspire confidence in the future.

To enable inclusive growth, G20 countries must:

- foster an environment that supports small- and medium-sized entity growth;
- create a secure and digital-ready investment environment; and
- collaborate for a coherent international tax system.

1.9 IOSCO members found mostly compliant with principles for the regulation and supervision of commodity derivatives markets

19 November 2018 - The Board of the International Organization of Securities Commissions (IOSCO) has published the findings of an updated survey that show respondent IOSCO members to be broadly compliant with the *IOSCO Principles for the Regulation and Supervision of Commodity Derivatives Markets* (the Principles).

In 2010, the G20 Leaders identified the regulation and supervision of the commodity derivatives markets to be a G20 priority and requested that IOSCO develop the Principles. IOSCO published the Principles in 2011 which help to ensure that commodity derivatives markets are able to facilitate price discovery and hedging activity while avoiding manipulation and abusive trading.

In 2013, the G20 Leaders requested that IOSCO monitor the implementation of the Principles on a regular basis. The report represents the third review conducted by IOSCO of the implementation of the Principles, following previous reviews conducted in 2012 and 2014.

The report shows that IOSCO members have made substantial progress towards achieving full compliance and, in many cases, have strengthened their implementation of the Principles. The report provides a summary of the updated survey results and sets out the specific areas in which IOSCO members have achieved compliance through the implementation of regulatory reforms.

IOSCO believes this third review satisfies the original request by the G20 Leaders, and, unless the G20 requests a further review, this report constitutes the final implementation review.

1.10 Report on effects of reforms on incentives to centrally clear over-the-counter derivatives

19 November 2018 - The FSB, the BCBS, the Committee on Payments and Market Infrastructures (the CPMI) and IOSCO have published their final report on Incentives to centrally clear over-the-counter (OTC) derivatives.

The central clearing of standardised OTC derivatives is a pillar of the G20 Leaders' commitment to reform OTC derivatives markets in response to the global financial crisis. A number of post-crisis reforms are, directly or indirectly, relevant to incentives to centrally clear. The report by the Derivatives Assessment Team (the DAT) evaluates how these reforms interact and how they could affect incentives.

The report, one of the first two evaluations under the FSB framework for the post-implementation evaluation of the effects of G20 financial regulatory reforms, confirms the findings of the consultative document that:

- the changes observed in OTC derivatives markets are consistent with the G20 Leaders' objective of promoting central clearing as part of mitigating systemic risk and making derivatives markets safer;
- the relevant post-crisis reforms, in particular the capital, margin and clearing reforms, taken together, appear to create an overall incentive, at least for dealers and larger and more active clients, to centrally clear OTC derivatives;
- non-regulatory factors, such as market liquidity, counterparty credit risk management and netting efficiencies, are also important and can interact with regulatory factors to affect incentives to centrally clear;

- some categories of clients have less strong incentives to use central clearing, and may have a lower degree of access to central clearing;
- the provision of client clearing services is concentrated in a relatively small number of bank-affiliated clearing firms and this concentration may have implications for financial stability; and
- some aspects of regulatory reform may not incentivise provision of client clearing services.

The analysis suggests that, overall, the reforms are achieving their goals of promoting central clearing, especially for the most systemic market participants. This is consistent with the goal of reducing complexity and improving transparency and standardisation in the OTC derivatives markets. Beyond the systemic core of the derivatives network of central counterparties (CCPs), dealers/clearing service providers and larger, more active clients, the incentives are less strong.

The DAT's work suggests that the treatment of initial margin in the leverage ratio can be a disincentive for banks to offer or expand client clearing services. Bearing in mind the original objectives of the reform, additional analysis would be useful to further assess these effects.

In this regard, the BCBS issued on 18 October a public consultation setting out options for adjusting, or not, the leverage ratio treatment of client cleared derivatives.

The report also discusses:

- the effects of clearing mandates and margin requirements for non-centrally cleared derivatives (particularly initial margin) in supporting incentives to centrally clear; and
- the treatment of client cleared trades in the framework for global systemically important banks.

The final responsibility for deciding whether and how to amend a particular standard or policy remains with the body that is responsible for issuing that standard or policy.

The BCBS, CPMI, FSB and IOSCO also published an overview of responses to the consultation on this evaluation, which summarises the issues raised in the public consultation launched in August and sets out the main changes that have been made in the report to address them. The individual responses to the public consultation are also available.

1.11 FSB publishes 2018 G-SIB list

16 November 2018 - The FSB has published the 2018 list of global systemically important banks (G-SIBs) using end-2017 data and an assessment methodology designed by the BCBS.

One bank (Groupe BPCE) has been added to the list and two banks (Nordea and Royal Bank of Scotland) have been removed from the list and therefore the overall number of G-SIBs decreases from 30 to 29.

FSB member authorities apply certain requirements to G-SIBs.

Higher capital buffer:

- the G-SIBs are allocated to buckets corresponding to higher capital buffers that national authorities require banks to hold in accordance with international standards; and
- compared with the 2017 list of G-SIBs, two banks have moved to a lower bucket, Bank of America has moved from bucket 3 to bucket 2 and China Construction Bank has moved from bucket 2 to bucket 1.

Total Loss-Absorbing Capacity (TLAC):

- G-SIBs are required by national authorities to meet the TLAC standard, alongside regulatory capital requirements set out in the Basel III framework; and
- the TLAC standard will be phased in from 1 January 2019 for G-SIBs identified in the 2015 list (provided that they continue to be designated as G-SIBs thereafter).

Resolvability:

- these include group-wide resolution planning and regular resolvability assessments; and
- the resolvability of each G-SIB is also reviewed in a high-level FSB Resolvability Assessment Process by senior regulators within the firms' Crisis Management Groups.

Higher supervisory expectations:

- these include heightened supervisory expectations for risk management functions, risk data aggregation capabilities, risk governance and internal controls.

The BCBS has published updated denominators used to calculate banks' scores and the values of the underlying twelve indicators for each bank in the assessment sample. The BCBS also published the thresholds used to allocate the G-SIBs to buckets, as well as updated links to public disclosures of all banks in the sample.

A new list of G-SIBs will next be published in November 2019.

1.12 SEC enforcement division issues report on FY 2018 results

2 November 2018 - The Enforcement Division of the US Securities and Exchange Commission (the SEC) has issued the annual report of its ongoing efforts to protect investors and market integrity. The report also highlights several significant actions and initiatives that took place in FY 2018. The report presents the activities of the Division from both a qualitative and quantitative perspective.

Quantitatively, the SEC brought a diverse mix of 821 enforcement actions, including 490 standalone actions, and returned US$794 million to harmed investors. A significant number of the SEC's standalone cases concerned investment advisory issues, securities offerings, and issuer reporting/accounting and auditing, collectively comprising approximately 63% of the overall number of standalone actions. The SEC also continued to bring actions relating to market manipulation, insider trading, and broker-dealer misconduct, with each comprising approximately 10% of the overall number of standalone actions, as well as other areas. It obtained judgments and orders totalling more than US$3.945 billion in disgorgement and penalties.

1.13 Centre for Corporate Law LinkedIn page

Melbourne Law School's Centre for Corporate Law and Securities Regulation (the CCLSR) LinkedIn company page features research on topics such as:

- corporate governance;
- director's duties;
- FinTech;

- corporate social responsibility;
- shareholder activism;
- shareholder rights;
- financial hardship;
- financial literacy;
- insolvency; and
- fraudulent phoenix activity.

The page also highlights events hosted by the CCLSR and activities of its members.

View CCLSR LinkedIn page

2. Recent ASIC Developments

2.1 Report highlights need for improved consumer complaints experience

10 December 2018 - The Australian Securities and Investments Commission (ASIC) has released research exploring the consumer experience of internal dispute resolution (IDR) procedures across the financial services sector.

The research sought to better understand the experience of people thinking about or making a complaint to a financial services firm. The research revealed the incidence of complaints across the financial services sector, as well as the barriers and difficulties people face in approaching and navigating the complaints process.

Key findings of the research were:

- 17% of Australians aged 18 and over considered making a complaint to a financial firm in the preceding 12 months (the considerers);
- 8% went on to make a complaint (the complainants);
- almost half of those who did not make a complaint reported that they did not think it would make a difference or it was not worth their time; and
- 18% of complainants dropped out or withdrew their complaint before it was concluded.

Common obstacles that were encountered by complainants that directly affected their satisfaction and/or confidence in the complaints process include:

- structural obstacles, one in seven complainants found it difficult to find the firm's contact details to make a complaint;
- transparency obstacles, almost a quarter of complainants did not have the IDR process explained well at first contact and 27% of complainants were unsure of how long they would need to wait for a decision; and
- customer service obstacles, 28% of complainants reported feeling that they had not been listened to or heard and 22% felt they had been passed around to too many people or strung along.

Only 45% of complainants who received an unfavourable outcome received an explanation of the decision made against them by the firm and only 21% of complainants whose complaints were not resolved in the timeframe set by ASIC guidance had the external dispute resolution (EDR) process explained to them.

ASIC was particularly concerned about this finding since each of these steps is essential to assist consumers to effectively escalate their complaint to an independent and external forum. Since 1 November 2018, this forum has been the Australian Financial Complaints Authority (AFCA).

Next steps: improving IDR outcomes and transparency

The release of this research is the first step in a coordinated body of work that ASIC is undertaking to raise financial services IDR standards and transparency.

Industry action:

- all financial firms should closely review the research findings and consider whether their complaints procedures need to be reformed to improve the experience for consumers and to ensure that identified problems are remedied effectively and promptly; and
- firms should also prepare to engage with ASIC about its review of the complaints handling standards and requirements.

IDR onsite visits:

- a specialist ASIC team has been set up under ASIC's Close and Continuous Monitoring Program to conduct onsite monitoring of the IDR functions at NAB, CBA, Westpac and ANZ, as well as AMP;
- the ASIC team will review and assess target firms' IDR arrangements (including processes, practices, resourcing, communications, governance and reporting) and will map and evaluate their systems capabilities; and
- the first onsite review commenced in November 2018.

Review of ASIC standards and guidance:

- all financial firms that deal with retail clients and all superannuation trustees must have IDR procedures that meet ASIC's standards and requirements; and
- from February 2019, ASIC will be consulting publicly on a review of existing IDR guidance set out in *Regulatory Guide 165: Licensing - Internal and external dispute resolution*.

This review will consider, amongst other matters:

- the definition of "complaint" i.e. what triggers the IDR process;
- requirements for complaints that are resolved immediately or within five business days;
- maximum IDR timeframes across all complaints including superannuation related complaints; and
- written reasons for decisions made by superannuation trustees about complaints.

IDR data reporting:

- the legislation establishing AFCA introduced specific IDR-related reforms, including the requirement for financial firms to report IDR performance data to ASIC on an ongoing basis; and
- ASIC also has new powers to publish the IDR data on a firm-by-firm basis.

ASIC will be consulting on the proposed data collection and reporting framework as part of the broader policy consultation mentioned above.

Both the broad IDR policy reforms and the proposed data collection framework will be informed by insights from the consumer research and findings of the IDR onsite program.

View

Report 603: The consumer journey through the Internal Dispute Resolution process of financial service providers

2.2 Report on relief decisions

6 December 2018 - ASIC has released its latest report outlining decisions on relief applications.

Report 602: Overview of decisions on relief applications (April 2018 to September 2018) (REP 602) notes that between 1 April 2018 and 30 September 2018, ASIC granted relief from provisions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and the National Consumer Credit Protection Act 2009 No. 134 (Cth) (the National Credit Act) in relation to 827 applications.

REP 602 lists publications released by ASIC during the period that may be relevant to prospective applicants for relief.

The report also provides examples where ASIC has exercised, or refused to exercise, its exemption and modification powers under the Corporations Act and the licensing and responsible lending provisions of the National Credit Act.

2.3 Major financial reporting changes and other focuses

3 December 2018 - Announcing its focus areas for 31 December 2018 financial reports of listed entities and other entities of public interest with many stakeholders, ASIC has called on companies to focus on new requirements that can materially affect reported assets, liabilities and profits.

New accounting standards

Major new accounting standards will have the greatest impact on financial reporting for many companies since the adoption of International Financial Reporting Standards in 2005.

Both full-year and half-year reports at 31 December 2018 must comply with new accounting standards on revenue recognition and financial instrument values (including hedge accounting and loan loss provisioning).

The reports must also disclose the future impact of new lease accounting requirements.

There are also new standards covering:

- accounting by insurers; and
- the definition and recognition criteria for assets, liabilities, income and expenses.

It is important that directors and management ensure that companies are prepared for these new standards and inform investors and other financial report users of the impact on reported results.

ASIC will be reviewing more than 85 full year financial reports at 31 December 2018 and selected half-year reports.

Other considerations

Directors are primarily responsible for the quality of the financial report. This includes ensuring that management produces quality financial information on a timely basis. Companies must have appropriate processes, records and analysis to support information in the financial report.

Companies should apply appropriate experience and expertise, particularly in more difficult and complex areas such as accounting estimates (including impairment of non-financial assets), accounting policies (such as revenue recognition) and taxation.

Further information can be found in ASIC Information Sheet 183: Directors and financial reporting and ASIC Information Sheet 203: Impairment of non-financial assets - Materials for directors.

2.4 Report on buy now pay later industry

28 November 2018 - ASIC has released its first review of the rapidly growing buy now pay later industry. The review of this diverse and evolving market has found that buy now pay later arrangements are influencing the spending habits of consumers, especially younger consumers.

A buy now pay later arrangement allows consumers to purchase and obtain goods and services immediately but pay for that purchase over time. While some buy now pay later providers offer fixed term contracts up to 56 days for amounts up to $2,000, other providers offer a line of credit for amounts up to $30,000.

ASIC found that the number of consumers who have used buy now pay later has increased five-fold from 400,000 to 2 million over the financial years 2015-2016 to 2017-2018. The number of transactions has increased from about 50,000 during the month of April 2016 to 1.9 million in June 2018. At 30 June 2018, there was $903m in outstanding buy now pay later balances.

One in six users had either become overdrawn, delayed bill payments or borrowed additional money because of a buy now pay later arrangement. Most consumers believe that these arrangements allow them to buy more expensive items than they would otherwise and spend more than they normally would. Providers also use behavioural techniques which can influence consumers to make a purchase without careful consideration of the costs.

Given the potential risks to consumers, ASIC supports extending the proposed product intervention powers to all credit facilities regulated under the Australian Securities and Investments Commission Act 2001 No. 51 (Cth). Product intervention powers will provide ASIC with a flexible tool kit to address emerging products and services such as buy now pay later arrangements. This will ensure ASIC can take appropriate action where significant consumer detriment is identified.

View

Report 600 Review of buy now pay later arrangements and Infographic - ASIC puts the spotlight on buy now pay later

3. Recent ASX Developments

3.1 Public consultation - Amendments to the ASX Listing Rules

On 28 November 2018 the Australian Securities Exchange (the ASX) released a consultation paper seeking feedback on a major package of proposed listing rule amendments designed to simplify, clarify and enhance the integrity and efficiency of the ASX Listing Rules.

The proposed changes can be grouped into the following categories:

- improving market disclosures and other market integrity measures;
- making the rules simpler and easier to follow;
- making aspects of the listing process and ongoing compliance with the listing rules more efficient for issuers and for the ASX;
- updating the timetables for corporate actions;
- enhancing the ASX's powers to operate the market and to monitor and enforce compliance with the listing rules;
- correcting gaps or errors in the listing rules;
- general drafting improvements, including removing redundant rules; and
- increasing better quality guidance.

The paper provides a mark-up of proposed changes to the listing rules, with drafting notes explaining the reasons for the changes.

In addition, the paper includes:

- a mark-up of the changes proposed to Guidance Notes 1, 12 and 33;
- the proposed new Guidance Notes 11, 13, 21, 24 and 25;
- the proposed new Appendices 1A, 1B and 1C; and
- early proto-types of the proposed new Appendices 2A, 3B and 4A.

The ASX is seeking feedback on these proposals by 1 March 2019. More information about the consultation paper is available on the ASX website.

3.2 mFund Settlement Service - CHESS 10 release

On 12 November 2018 the CHESS 10 technology release went live, introducing a number of regulatory and administrative enhancements for users of the ASX Managed Fund Settlement Service. This release was accompanied by various amendments to the *ASX Operating Rules Procedures* and the *ASX Settlement Operating Rules Procedures*.

More information about the release of CHESS 10 is available on the ASX website.

3.3 ASX Clear (Futures) - Initial margin parameters variation

On 20 November 2018 The ASX announced amendments to Schedule 5 of the *ASX Clear (Futures) Operating Rules*. These amendments, which took effect on 30 November 2018, revised initial margin parameters for all ASX 24 derivative products, and introduced a new Liquidity margin add-on margin requirement for Participant portfolios which are greater than pre-defined levels. The changes are designed to ensure that initial margin levels adequately protect both the ASX Clear (Futures) clearing house and the market in the event of a Participant default.

More information about the amendments is available on the ASX website.

3.4 ASX Clear and ASX Settlement Operating Rules - Minor amendments

On 3 December 2018 The ASX announced minor amendments to the ASX Clear and ASX Settlement rulebooks. The *ASX Clear Operating Rules* have been amended to expressly address when an Options Market Contract arising from an OTC Options Market Transaction will be novated. In addition, the submission to jurisdiction requirements under both the Rules have been amended so that parties submit to the exclusive jurisdiction of the courts of New South Wales and appeal courts from them.

More information about the amendments is available on the ASX website.

3.5 Report

On 5 December 2018 The ASX released the ASX Monthly Activity Report for November 2018.

4. Recent Takeovers Panel Development

4.1 Benjamin Hornigold Limited and Henry Morgan Limited - Panel decision

26 November 2018 - The Takeovers Panel (the Panel) has affirmed the decisions of ASIC to refuse relief under s. 655A(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to Benjamin Hornigold and Henry Morgan to:

- extend time for the dispatch of their target's statements; and
- permit them to lodge incomplete target's statements.

Both applications related to similar facts. Benjamin Hornigold and Henry Morgan are subject to separate off market takeover bids by John Bridgeman Limited. Benjamin Hornigold and Henry Morgan were required to lodge their target's statements by 26 November 2018. They separately applied to ASIC for a modification of the provisions of Chapter 6 of the Corporations Act to extend the time to lodge their target's statements to 10 December 2018. They later separately applied to ASIC for a modification of the provisions of Chapter 6 to allow them to lodge incomplete target's statements. ASIC refused to exercise its powers in relation to these requests.

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

5. Recent Research Papers

5.1 Putting technology to good use for society: The role of corporate, competition and tax law

Innovation and its main output, technology, are changing the way we work, socialise, vote, and live. New technologies have improved our lives and made firms more productive, overall raising living standards across the world.

Thanks to progress in information technology, the rate of change is accelerating. Disruption and disequilibrium are the new normal. In this essay, prepared as a chapter for the first phase of the British Academy The Future of the Corporation initiative, the authors reflect upon the role that corporate, competition and tax law can play both to facilitate innovation and simultaneously assuage emergent societal risks arising from new technologies.

The authors consider means of enhancing investment in research and development and optimising corporate organisation. But the authors also reflect on the risks associated with innovation, such as the use of technology to exploit consumers, manipulate markets or distort, unwittingly or not, the political process.

Finally, the authors consider the way in which the environment for business law reform is subject to new political risks following the challenge to the liberal order from populism and the rising power of dominant technology companies.

Putting Technology to Good Use for Society: The Role of Corporate, Competition and Tax Law

5.2 Group company liability

According to a universal bedrock principle of corporate law, corporations have separate legal personality and limited liability. These principles apply equally to corporate groups. Accordingly, a parent company is normally not liable for legal infractions and unpaid debts of its subsidiaries. In relation to torts and other misconduct committed by corporations, however, the bedrock principles of corporate law are increasingly subject to criticism, in particular where such claims cannot be brought by tort victims due to undercapitalization of subsidiaries, among other problems.

While the doctrine of veil piercing may allow for relief in certain scenarios, this practice has fallen out of favour with many courts and the legal requirements for doing so have become increasingly strict. Thus, courts have developed new approaches to holding parent companies liable such as holding the parent directly liable.

In view of these significant shifts, this article examines the law and policy considerations governing parent company and-more broadly-group liability. It argues that reform is necessary, which may be found in a model that involves combinations of voting equity ownership-based enterprise liability concepts with modified vicarious liability for corporations.

Group Company Liability

5.3 Index funds and the future of corporate governance: Theory, evidence , and policy

Index funds own an increasingly large proportion of American public companies, currently more than one fifth and steadily growing. The stewardship decisions of index fund managers-how they monitor, vote, and engage with their portfolio companies can be expected to have a profound impact on the governance and performance of public companies and the economy. Understanding index fund stewardship, and how policy making can improve it, is critical for corporate law scholarship. This article contributes to such understanding by providing a comprehensive theoretical, empirical, and policy analysis of index fund stewardship.

The authors begin by putting forward an agency-costs theory of index fund incentives. Stewardship decisions by index funds depend not just on the interests of index fund investors but also the incentives of index fund managers. Their agency-costs analysis shows that index funds have strong incentives to under-invest in stewardship, and defer excessively to the preferences and positions of corporate managers.

The authors then provide the first comprehensive and detailed evidence of the full range of stewardship activities that index funds do and do not undertake. This body of evidence, they show, is inconsistent with a no-agency-costs view but can be explained by their agency-cost analysis.

The authors next put forward a set of policy reforms that should be considered in order to encourage index funds to invest in stewardship, to reduce their incentives to be deferential to corporate managers, and to address the concentration of power in the hands of the largest index fund managers. Finally, the authors discuss how our analysis should reorient important ongoing debates regarding common ownership and hedge fund activism.

The policy measures the authors put forward, and the beneficial role of hedge fund activism, can partly but not fully address the incentive problems that the authors analyse and document. These problems are expected to remain a significant aspect of the corporate governance landscape, and should be the subject of close attention by policymakers, market participants, and scholars.

Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy

5.4 Beyond climate risk: Integrating sustainability into the duties of the corporate board

While the heat records and wildfires of 2018 brought climate change firmly into the spotlight, what we face is a convergence of environmental, social and economic crises. The grand challenge of our time is how to achieve social progress for all without destroying the very basis of our existence, with climate change being one of several such existential threats. Finding out how business can be a part of the shift to sustainability has never been more crucial.

This article starts out with presenting the results of a multi-jurisdictional comparative analysis of corporate law seeking to investigate the barriers to and possibilities for sustainable business in the dominant form for doing business, the corporation. The social norm of shareholder primacy is identified as a main barrier. Shareholder primacy has taken over the space that corporate law leaves open for the discretion of the individual corporate board. Increasing warning signs concerning the financial consequences of climate change and of pressure on other planetary boundaries, as well as of social inequality across and within countries, may signal a change in the mainstream perception of the role of the corporation. The financial risks of ignoring the impacts of unsustainability have the potential for bringing sustainability full circle into the core of profit-seeking purpose of the corporation. Nevertheless, boards will need guidance on how to integrate sustainability into their decision-making.

The article concludes with a brief presentation of a work-in-progress Sustainable Governance Model, which can be a starting point for businesses wishing to transition towards sustainability. It can also form the basis for a corporate law reform proposal, which is arguably a necessary step to shift business away from the unsustainable 'business as usual' and onto a sustainable path.

Beyond Climate Risk: Integrating Sustainability into the Duties of the Corporate Board

5.5 Scaling Up: The implementation of corporate governance in pre-IPO companies

Companies are required to have a reliable system of corporate governance in place at the time of an initial public offering (IPO) in order to protect the interests of public company investors and stakeholders. Yet, relatively little is known about the process by which they implement one. This article, based on detailed data from a sample of pre-IPO companies, examines the process by which companies go from essentially having no governance in place at the time of their founding to the fully established systems of governance required of public companies by the US Securities and Exchange Commission. The authors examine the vastly different choices that companies make in deciding when and how to implement these standards.

The authors ask:

- what factors do chief executive officers and founders take into account in determining how to implement governance systems?;
- should regulators allow companies greater flexibility to tailor their governance systems to their specific needs?;
- which elements of governance add to business performance and which are done only for regulatory purposes?;
- how much value does good governance add to a company's overall valuation?; and
- when should small or medium sized companies that intend to remain private implement a governance system?.

Scaling Up: The Implementation of Corporate Governance in Pre-IPO Companies

5.6 Directors: Older and wiser, too old to govern?

An unintended consequence of recent board governance reforms is that US firms are increasingly tapping into pools of older independent directors (OIDs), causing their boards to become substantially older. The authors document that OIDs display monitoring deficiencies and weaken board oversight. Firms with more OIDs exhibit worse performance, which is not driven by poorly performing firms subsequently appointing more OIDs. Investors appear to recognize this and react negatively to OID appointments and to raising directors' mandatory retirement ages. The negative performance effect can sometimes be mitigated or reversed when firms have stronger advisory needs or OIDs provide particularly valuable experience.

Directors: Older and Wiser, or Too Old to Govern?

6. Recent Corporate Law Decisions

6.1 GetSwift Appeal: Carriage motions endorsed by Full Federal Court but no magic bullet for competing class actions

(By John Pavlakis, Andrew Westcott and Stephanie Stacey, Ashurst)

Perera v GetSwift Limited [2018] FCAFC 202 (20 November 2018) Federal Court of Australia, Full Court, Middleton, Murphy and Beach JJ

(a) Summary

The Full Federal Court (the Full Court) has endorsed a selection process analogous to a carriage motion to decide which of several competing class actions should proceed. The Full Court concluded that the Federal Court of Australia (the Court) had power to grant a stay of two out of the three competing class actions and found no error with the first instance decision of Lee J in exercising that power.

However the Full Court indicated that there was no one right answer when dealing with competing class actions. Consolidation of proceedings, the "wait and see" approach and class closure are also valid case management tools.

(b) Facts

The Full Federal Court dismissed an appeal against the decision of Lee J to allow one of three competing class actions to proceed and permanently stay two other proceedings advancing substantially the same claims.

Lee J dealt with the competing class actions by a process akin to a tender for the carriage. This involved orders that the parties file affidavits and submissions addressing matters such as the terms of any common fund order sought, a cost estimate and proposals regarding security for costs.

(c) Decision

(i) Case management options

The Full Court held that the Court has power to order a stay of competing class actions, whether that be in the exercise of its inherent power, or express and implied powers of case management, or in its equitable jurisdiction. Further, a selection process analogous to the Canadian carriage motion will be appropriate in some cases to select which of several competing class actions should proceed. That process involves the evaluation of the nature and scope of the cause of action, the theories advanced by counsel as being supportive of the claims, the state of preparation, the number, size and extent of involvement of the representative applicant, the priority of commencement, the resources, experience and competence of counsel and any conflict of interests.

However, the Court did not accept that a competing class action would amount to an abuse of process. Accordingly, a permanent stay is just one option for the Court to consider. There is no one right answer to the case management problem presented by competing class actions.

Other case management options for dealing with competing class actions were recognised by the Full Court as legitimate. These were the consolidation of class actions (where the parties agree), a "wait and see" approach (effectively postponing the decision) and an order closing the classes in all but one proceeding.

However the Full Court rejected the suggestion that a declassing order could be made in response to competing class actions.

The Full Court considered that a selection process is less helpful where a substantial number of group members have entered into agreements with a lawyer and litigation funder. In such cases it may be more appropriate to close all but one of the classes. For example, in GetSwift agreements had been signed by

200 group members in one of the proceedings which was stayed and 100 in the other. In contrast, in the case of *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 over 1,500 group members had signed agreements in one of the proceedings and over 1,000 members in the other.

(ii) The selection process

While accepting that Lee J had the power to use the carriage motion style selection process and that it was appropriate in this case, the Full Court pointed out the following problems with that approach:

- there is a risk of a "rush to the bottom" by funders and solicitors trying to win the tender, because lower legal costs and funding charges can be a key consideration;
- the Court may be required to choose between legal firms to select the team most likely to achieve the largest settlement or judgment;
- the Court must strongly discourage a rush to the Court in large and complex cases. It may be time for the Court to order a standstill in securities class actions for 90 days to allow other solicitors or funders to undertake proper due diligence;
- as a selection process such as that used in the present case requires the parties to reveal the approximate size of their "war chest", the Court needs to be careful to avoid damaging the interests of group members by exposing them to trial by attrition; and
- a selection process such as that used in the present case is expensive, costing the three competing proponents here in the order of $300,000 to $500,000 each.

(iii) Implications for competing class actions

The decision confirms that the Court has the power to carry out a process analogous to a carriage motion in order to select one of several competing class actions to proceed while permanently staying others.

However the Full Court did not endorse this as the default or preferred case management tool to deal with competing class actions.

The decision will no doubt be studied carefully by the Australian Law Reform Commission, which recently proposed in its Discussion Paper that only open class actions should be permitted and as a default position only one should be allowed, unless efficiency or the interests of justice require more.

In the current securities class action climate, the problem of competing class actions will continue to cause increased legal costs for both sides, wastage of court resources, delay, and unfairness to respondents. Accordingly, further adjustments to the class action regime aimed at choosing one competing class action to proceed are likely to be welcomed by listed Australian companies.

(iv) Communications between solicitors for unsuccessful applicant and group member clients

Apart from the decision to stay two competing class actions, the GetSwift decision also involved the ancillary issue of an injunction restraining the solicitors for an unsuccessful applicant from communicating with group members, including their clients.

The Full Court considered that Lee J had properly exercised his discretion to restrain the solicitors for the unsuccessful applicant in communicating with group members in relation to whether they should exercise their right to opt out of the proceeding.

However, in respect of the group members who were clients of the solicitors for the unsuccessful applicant, the Full Court held that the *possibility* of conflict was not a sufficient basis for the restraint, and interference with the lawyer/client relationship was not justified in this instance. The Full Court set aside the order imposing restrictions on communications between the solicitors for the unsuccessful applicant and the group members which were their clients.

6.2 Estoppel cannot extend the time within which an application to set aside a statutory demand must be made

(By Sama Rahman, Herbert Smith Freehills)

Chief Commissioner of State Revenue v Boss Constructions (NSW) Pty Ltd [2018] NSWCA 270 (16 November 2018) Supreme Court of New South Wales, Court of Appeal, Bathurst CJ, Leeing JA and Sackville AJA

(a) Summary

The Supreme Court of New South Wales Court of Appeal (the Court) considered whether an estoppel could operate to extend the time limit within which an application for an order to set aside a statutory demand must be made.

The Court held that an estoppel could not operate in this manner because:

- doing so would be beyond the Court's jurisdiction;
- the text of the relevant legislative provisions supports this conclusion; and
- there are persuasive policy reasons for not permitting variations to the time limits specified in Part 5.4 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

The Court was unanimous in its decision and Bathurst CJ delivered the leading judgment (Leeming JA and Sackville AJA concurred).

(b) Facts

Boss Constructions (NSW) Pty Ltd (Boss Constructions) owed the Chief Commissioner of State Revenue of New South Wales (the Chief Commissioner) $489,069 in unpaid payroll tax and interest.

In June 2017, the Chief Commissioner served a statutory demand on Boss Constructions requiring Boss Constructions to make payment of the amount owing. The demand was made under s. 459E(1) which empowers a person to serve a statutory demand on a company for one or more debts owed to that person if:

- that debt is due and payable; and
- the amount is at least the statutory minimum of $2,000.

On 20 July 2017, Boss Constructions sought an order from the Supreme Court of New South Wales that the statutory demand be set aside under s. 459G(1). That section allows a company to apply for an order setting aside a statutory demand served on that company.

The application must be made within 21 days after the demand is served (s. 459G(2)) and an application is only valid if within the 21 day period:

- an affidavit supporting the application is filed with the court; and
- copies of the application and supporting affidavit are served on the person who served the statutory demand on the company (s. 459G(3)).

These provisions are found within Part 5.4 of the Corporations Act and that part also contains other important provisions which were considered by Bathurst CJ in this decision.

Those provisions broadly concern:

- the Court's power to wind up an insolvent company (ss. 459A and 459P) and the process where the winding up is due to a failure by the company to comply with a statutory demand (ss. 459Q to 459S);
- circumstances where the court is bound to presume a company is insolvent (s. 459C), including where a company has "failed (as defined by s. 459F) to comply" with a statutory demand;
- how a company may apply to set aside a statutory demand (s. 459G, discussed above); and
- how a statutory demand may be set aside where there is a dispute as to the existence or amount of a debt (s. 459H).

The Chief Commissioner contended that the statutory demand was served on 27 June 2017 (in which case the application to set it aside would fall outside of the prescribed 21 day period) whereas Boss Constructions contended that the statutory demand was served on 29 June 2017 (in which case the application to set it aside would fall within the prescribed 21 day period).

The primary judge found that although the statutory demand was served on 27 June 2017 (as contended by the Chief Commissioner), the Chief Commissioner was estopped from denying that the statutory demand was served on 29 June 2017. The Chief Commissioner appealed to the Court and the key issue for determination was whether estoppel could operate to extend the time limit within which an application for an order to set aside a statutory demand must be made.

(c) Decision

Bathurst CJ disagreed with the primary judge and held that estoppel could not operate in this context because there could be no variation to the 21 day time limit. Three primary reasons were advanced by his Honour to support this conclusion.

(i) Estoppel is beyond the Court's jurisdiction

Bathurst CJ held that the time limit in s. 459G sets the boundary of the court's jurisdiction to hear a matter arising from s. 459G and as a result, a variation of the time limit is ineffectual because the court will cease to have jurisdiction once the time limit has elapsed. His Honour relied on the reasoning of Gummow J in *David Grant & Co Pty Ltd v Westpac Banking Corporation* [1995] HCA 43 (*David Grant*) to support this conclusion. In that case, Gummow J explained that the requirements (including time limits) in s. 459G operate as "a limitation or condition upon the authority of the court to set aside the demand". Gummow J also explained that the requirement as to time delineates "the jurisdiction of the court" (*David Grant,* 277) by imposing the requirement as "an essential condition of the new right [to seek an order to set aside a statutory demand] conferred by s. 459G".

(ii) The text of the relevant provisions

Bathurst CJ also drew attention to the phrase "may only" in s. 459G(2). His Honour suggested that this phrase excludes any possible variation in the time limit (by virtue of an estoppel or otherwise) because it exhaustively sets out when a court can set aside a statutory demand.

(iii) Policy of Part 5.4

Bathurst CJ also cited the policy behind Part 5.4 of the Corporations Act as supporting his conclusion that the time limit cannot be varied. His Honour stated at [17] that "the practical effect of these provisions is that, where a statutory demand has been served, a company which has not availed itself of the procedure in s. 459G to set aside the statutory demand is not entitled to oppose the winding up application on a ground which could have been raised to set aside the demand, such as by disputing the existence of the debt, unless a court grants leave to do so". His Honour also cited Gummow J in *David Grant* where Gummow J explained that Part 5.4 of the Corporations Act is "a legislative scheme for quick resolution of the issue of solvency and the determination of whether the company should be wound up without the interposition of disputes about debts unless they are raised promptly". According to Bathurst CJ, this policy would be undermined if there was any flexibility or uncertainty surrounding the time periods and the winding up process more broadly.

6.3 Failure of proposed declaration of contravention to identify contravening conduct

(By Diana Reid, Corrs Chambers Westgarth)

ASIC v Westpac Banking Corporation [2018] FCA 1733 (13 November 2018) Federal Court of Australia, Perram J

(a) Summary

The Applicant and Respondent jointly applied for orders by consent to dispose of the proceeding in its entirety. The proposed orders were a declaration of contravention, and the imposition of a civil penalty of $35 million. In the parties' statement of agreed facts, the Respondent accepted that the manner in which it assessed the suitability of home loans for customers from 12 December 2011 to March 2015 had contravened s. 128 of the National Consumer Credit Protection Act 2009 No. 134 (Cth) (the NCCP Act). The Federal Court of Australia (the Court) dismissed the application with no order as to costs, because the parties' proposed declaration did not specify the contravening conduct, and the statement of agreed facts did not provide sufficient information for the Court to assess the suitability of the proposed $35 million pecuniary penalty.

(b) Facts

From 12 December 2011 to March 2015, the Respondent assessed the suitability of home loans for its customers by use of what the parties referred to as the Automated Decision System. The Automated Decision System was a computerised system comprised of just over 200 rules.

There were three possible outcomes from an application made using this system:

- the application could be declined;
- the application could be referred for manual assessment; or
- the application could be conditionally accepted.

If an application was conditionally accepted, a Westpac staff member could still exercise a discretion to manually refer or decline it.

The proceedings concerned two types of home loans, which the parties called respectively "Automatically Assessed" and "Owner Occupier IO". The assessment process for each of these loans used the Serviceability Calculation Rule: one of approximately 200 rules in the Automated Decision System.

The Serviceability Calculation Rule calculated net monthly surplus income, using the following calculation:

> Final Net Monthly Surplus/Shortfall = Net Monthly Income - (Assessed Monthly Repayments + Outgoings) - (HEM Benchmark + "buffer").

The HEM Benchmark is a figure for monthly living expenses developed by the Melbourne Institute of Applied Economic and Social Research. The HEM Benchmark reflects the living expenses of persons in the customer's locale, with the same number of dependants, and the same marital status. It is not scaled for income.

Under the Serviceability Calculation Rule, the Respondent used the HEM Benchmark instead of customers' declared expenses to calculate monthly surplus income. The only circumstances where declared living expenses were taken into account were if the declared expenses exceeded 70% of verified monthly income, in which case the system would automatically recommend a refer outcome.

In the parties' statement of agreed facts, the Respondent accepted that it should not have used the HEM Benchmark instead of the customers' declared expenses in every case. Instead, it should have used whichever was the higher of the two.

The Respondent also accepted that this failure to use the customers' declared expenses, where it was higher than the HEM Benchmark, was in breach of s. 128 of the NCCP Act, which prohibits entering into a credit contract with a customer unless the licensee has within 90 days before the loan is advanced made an assessment that complies with s. 129. Under s. 129, credit providers must assess whether a credit contract will be unsuitable if entered into.

The Respondent accepted that it failed to meet the requirements of s. 129, and was therefore in breach of s. 128, wherever the use of the HEM benchmark resulted in loans being conditionally approved, which would not have been approved had the customer's declared income been used instead. There were 5,041 Automatically Assessed, and 441 Owner Occupier IO Loans, which fit this description. Had the HEM Benchmark not been used, these loans would have been referred for manual assessment, rather than being approved. A civil penalty of $35 million for contravention of the NCCP Act was proposed by the parties.

(c) Decision

In order to make a declaration of convention, s. 166(3)(d) of the NCCP Act requires the Court to specify the conduct constituting contravention. The Court was not satisfied that the parties' proposed declaration of contravention identified the contravening conduct with sufficient specificity, nor was it satisfied that the parties had been able to identify the loss to which the proposed penalty related. Further, the Court held that the parties' statement of agreed facts did not provide sufficient information to determine the suitability of the proposed penalty of $35 million.

(i) Contravening conduct

The Court noted that s. 128 of the NCCP Act concerns entry into contracts, and therefore that specifying conduct in contravention of s. 128 requires identifying how many contracts were entered into in breach. The parties' reference to the use of the HEM Benchmark in the proposed declaration did not suffice, because it referred to a method of assessment, rather than specific contracts which were entered into as a result of that method being applied.

In addition to failing to state in the proposed declaration how many contracts were entered into in breach of s. 128, the Court also noted that the statement of agreed facts suggested that the parties had been unable to reach an agreement on that point. This failure was due to the parties' different interpretations of the requirements in ss. 129 and 130 of the NCCP Act.

Specifically, the parties differed in their interpretations of the requirement in s. 130(1)(b) that the licensee make reasonable inquiries about a customer's financial situation. The Applicant interpreted s. 130(1)(b) as requiring the Respondent to take into account declared living expenses in every case, whereas the Respondent interpreted it as a requirement to take into account declared living expenses *only* to the extent it rationally informs the opinion of the licensee as to whether the proposed contract is unsuitable. On the Applicant's interpretation, every application that was assessed using the Serviceability Calculation Rule was in breach, whereas on the Respondent's narrower view, the only applications in breach were the 5,041 Automatically Assessed Loans that would have been referred for manual assessment had the HEM Benchmark not been used.

(ii) Loss

The parties' statement of agreed facts did not identify whether the use of the HEM Benchmark had any adverse effect, even in the cases where the loan would have been referred for manual assessment, rather than automatically approved, had the HEM Benchmark not been used. In these cases, it was unclear what the manual assessment would have found. If the manual assessment would have found that the loans were suitable, then the outcome would have been the same, whereas if manual assessment would have resulted in the loans being declined, then harm may have been done. Given that this was not explained in the parties' statement of agreed facts, the Court was unable to determine what, if any, adverse effect the Respondent's assessment process had. Accordingly, the Court noted that it was unable to assess the reasonableness of the proposed penalty.

(iii) Severity of Respondent's conduct

The statement of agreed facts did not articulate why the HEM Benchmark was used in preference to declared living expenses, beyond stating that the Respondent was acting in good faith. Without this information, the Court held that it was unable to assess the severity of the Respondent's conduct, and the reasonableness of the proposed penalty.

6.4 Orders for reinstatement and ancillary orders to replace sole director and company secretary following deregistration

(By Michael Cook, MinterEllison)

In the matter of A.C.N. 063 346 708 (formerly known as South Passage Pty Ltd) [2018] NSWSC 1709 (9 November 2018) Supreme Court of New South Wales, Rees J

(a) Summary

In this case, Stuart Chase (the plaintiff) brought an application for orders that South Passage Pty Ltd (SPPL) be reinstated by ASIC following deregistration. The Supreme Court of New South Wales (the Court) made orders pursuant to s.601AH(2) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to reinstate the registration of SPPL following consideration of the application to deregister, which was shown to have failed in meeting statutory requirements. In light of orders made against Karen Chase (the defendant) in an earlier hearing and given her improper application to deregister the company since those proceedings, ancillary orders pursuant to s.601AH(3)(d) of the Corporations Act were made that the company name be changed to A.C.N. 063 346 707 and that ASIC record the plaintiff as the sole shareholder, sole director and secretary, effectively removing the defendant as sole company director and secretary who would have ordinarily been placed back in such a position.

(b) Facts

SPPL is the sole registered proprietor of certain property which forms the only known asset of SPPL. SPPL was originally incorporated in 1994 with a share capital of 100 ordinary shares (the defendant owned 75 shares, while Andrew Chase owned 25 shares). Following this, each signed declarations of trust with the shares held on trust for the plaintiff. The defendant and Andrew Chase later became company directors in 1998 (Andrew Chase ceased to be so in 2013), and the plaintiff became a director in 2007 before ceasing in 2014, thereby leaving the defendant as the sole director. In 2014, the plaintiff directed the defendant to transfer her shares in the company to him, to which she refused. Subsequent to this, the defendant executed a mortgage (registered on title) securing $100,000. In 2015, Andrew Chase transferred all of his shares to the plaintiff for $1, however the transfer was never effected by the sole office holder (defendant).

In June 2016, proceedings were commenced by the plaintiff (and his mother) seeking a declaration that the defendant held the entirety of her shareholding on trust for the plaintiff. Additionally, an order was sought that the defendant transfer the shares to the plaintiff. The defendant claimed she had not signed the initial declaration of trust thereby negating her need to abide by the transfer. Subsequently, the defendant (and sole office holder at the time) lodged an application for voluntary deregistration of SPPL and Ileaco Pty Ltd (IPL) (another family company) which resulted in both companies being deregistered. Following difficulties in effecting personal service on the defendant, orders were made for substituted service in addition to orders that the plaintiffs also sought to have IPL reinstated. By originating process, the plaintiff then began these proceedings seeking orders against the defendant and ASIC in addition to the reinstatement of SPPL.

(c) Decision

(i) Substituted service

Significant difficulties were encountered by the plaintiffs' solicitors during the previous proceedings in effecting service on the defendant. Specific examples were drawn to the Court's attention, particularly that the process server had been unable to locate the defendant at the listed residence despite attending on multiple occasions. Lindsay J (the trial judge at first instance) issued orders for substituted service. In this case, citing the above difficulties, Rees J ordered in two instances that service was taken to be effected via delivery of a copy of the originating process, affidavit, and interlocutory process.

(ii) Reinstatement of registration

In finding for the plaintiff and ordering reinstatement, Rees J considered the application of s.601AA(2) of the Corporations Act which provides the circumstances under which such an application can be made.

A person may apply only if:

- (a) all the members of the company agree to the deregistration; and
- (b) the company is not carrying on business; and
- (c) the company's assets are worth less than $1,000; and
- (d) the company has paid all fees and penalties payable under the Corporations Act; and
- (e) the company has no outstanding liabilities; and
- (f) the company is not a party any legal proceedings.

It was held that not only did all the members not agree to the deregistration (the defendant had made the application alone), the asset value held by the company exceeded an estimated $1.2 million and therefore was above the $1,000 threshold. Additionally, a $100,000 outstanding liability existed to a secured creditor (the partner of the defendant).

Sections 601AH(2) and (3) of the Corporations Act provide the Court with the power to reinstate the company.

Section 601AH(2) specifies that an application for reinstatement requires:

- (a)(i) a person aggrieved by the deregistration;. and
- (b) the Court is satisfied that it is just that the company's registration be reinstated.

In considering whether the plaintiff was a "person aggrieved", reference was had to *Re European Metal Recyclers Pty Ltd (in liquidation) (deregistered)* [2018] NSWSC 946 [17]-[18] which provided that the phrase be "construed liberally and include a person who has been damaged in the legal sense". When read in conjunction with *Melluish v Underwood Development Pty Ltd* [2004] NSWSC 429 [6], which clarified that in addition to being displaced as a director and shareholder, some particular prejudice was required to meet the threshold as a "person aggrieved", Rees J held that by virtue of his beneficial ownership of the $1.2-1.4 million property asset, the plaintiff was in fact a "person aggrieved".

In turning to whether the company's reinstatement would be just, the Court referred to *Australian Competition and Consumer Commission v Australian Securities and Investments Commission* [2000] NSWSC 316 [27], which listed the following as relevant factors:

- the circumstances in which the company was dissolved;
- whether, if an order were made, good use could be made of it; and
- whether any person is likely to be prejudiced by the reinstatement.

Rees J was satisfied that reinstatement would be just in the circumstances. Her Honour stated that it could be inferred that the defendant had applied to voluntarily deregister SPPL to frustrate the processes of the Court.

(iii) Appointment of plaintiff as sole shareholder, director and secretary

Having regard to s. 601AH(5) of the Corporations Act, specifically ".A person who was a director immediately before deregistration becomes a director again.", Rees J acknowledged the difficulty this would pose with regard to handling of the company's assets given the defendant's previous actions as sole director. Distinguishing the circumstances in this case from previous case law, Rees J noted that as the plaintiff had already been found to be the beneficial owner through previous proceedings to which the defendant was a party, the Court may be emboldened in making orders in this instance. Citing the power of the Court to make other orders it considers appropriate pursuant to s. 601AH(3)(d) of the Corporations Act, reference was made to *Bell Group Limited v ASIC* [2018] FCA 884 where McKerracher J noted at [129] that "[t]he power to make the orders is cast in very broad terms", and further at [137] that ancillary orders with significant consequences were acceptable. Rees J ordered that the name of the company be changed, that the plaintiff be recorded by ASIC as the sole shareholder, sole director and secretary of the company, that the registered office be changed, and that the existing constitution be repealed.

6.5 Administrators lose application for directions: directors' derivative action application adjourned until after second meeting of creditors

(By Luke Furness, Clayton Utz)

El-Saafin v Franek (No 2) [2018] VSC 683 (9 November 2018) Supreme Court of Victoria, Lyons J

(a) Summary

The case involved two applications relating to a company in administration (the Company).

The administrators applied under s. 90-15 of the Insolvency Practice Schedule (the Schedule) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) for directions that they may properly and justifiably enter into and give effect to deeds of assignment and release (the Deeds). The Deeds assigned to a company associated with the defendants (who were creditors of the Company) the Company's claims against the defendants and their related entities. The Deeds were signed by all parties and were subject to court approval.

The Supreme Court of Victoria (the Court) held that:

- it did not have jurisdiction to make the directions as the power is designed for future actions, not ratification of past actions, the performance of the Deeds was virtually complete and the deal was a *fait accompli* subject only to Court approval; and
- even if the Court had power, the Court would decline to exercise it as it was not satisfied that the assignments under the Deeds were proper, just and beneficial to the administration of the Company.

The plaintiffs (directors of the Company) applied for leave under Part 2F.1A of the Corporations Act, the Court's inherent jurisdiction, and s. 90-15 of the Schedule to bring proceedings on behalf of the company.

The Court held that:

- its power to order a derivative action under Part 2F.1A of the Corporations Act does not extend to companies in administration; and
- the application under the inherent jurisdiction should be adjourned until after the second meeting of creditors as the administrator had not taken independent legal advice on the merits of the proceedings and whether or not the administrator (or liquidator if appointed) should pursue them.

(b) Facts

The main proceedings were a challenge by the plaintiffs against the defendants regarding the existence and amounts of debts, extent of the security interests and alleged wrongful conduct by the defendants in the appointment of external administrators pursuant to s. 436C of the Corporations Act.

In particular, the defendants had appointed receivers to sell a substantial property asset of the Company to the defendants' associated company (Transfer). The defendants then appointed administrators to the Company. A company associated with the defendants offered to enter into (and did enter into) the Deeds with the Company. The defendants conceded that a purpose of the Deeds was to prevent claims against them or their related parties including claims to set aside the Transfer.

The administrators had not received proper, independent legal advice on either the merits of the proceedings or entry into the Deeds. However, the administrators had made it clear that they did not intend to pursue the proceedings.

(c) Decision

(i) The administrator's application for directions

In dismissing the application for directions, the Court noted that the power in s. 90-15 of the Schedule is broad and should be interpreted widely but is designed to provide protection to administrators in respect of actions they seek to take. The directions sought must be just and beneficial to the administration.

The Court confirmed that there are four principal categories in which directions are given:

- (1) guidance on matters of law;
- (2) guidance on legal procedure;
- (3) whether a liquidator should postpone a sale in order to achieve a better price; and
- (4) protection in selection from two competing offers for assets.

Directions are not generally given on matters of commercial or business judgment.

The Court held that the administrator's directions were of the kind in category (1) (and not (4)). However, it held that it did not have jurisdiction as the directions were not to seek protection from liability arising out of future actions but to ratify actions already taken. The Court considered that the Deeds were a *fait accompli* and everything required to be done had been done including payment (cf. *One.Tel* (2014) 99 ACSR 247).

The Court also considered that, even if it had jurisdiction, it would decline to exercise its discretion for reasons including the Company was insolvent, the administrators had not taken independent legal advice on the Deeds, the claims assigned by the Deeds (if successful) could produce significant value for the Company, the Deeds were not for fair value of the claims, and there were doubts on whether all steps in entering the Deeds were lawful.

The Court also noted that there were serious questions about whether the appointment of administrators was an abuse of process, but it was not required to decide the issue as the plaintiffs had not applied for an order to end the administration.

(ii) The plaintiffs' derivative action application

The Court held that it did not have the power under Part 2F.1A of the Corporations Act to order that the plaintiffs could bring the proceedings on behalf of the Company as this Part does not apply to companies in administration. The Court referred to cases which held that the Part is not available during administration or liquidation including *Re CGH Engineering* (2014) 104 ACSR 245 and *Chahwan v Euphoric Pty Ltd* (2008) 245 ALR 780.

The Court agreed with the reasoning in those cases that:

- (1) the mischief that Part 2F.1A was intended to remedy were the restrictions in the rule in *Foss v Harbottle* (1843) 2 Hare 461 which have no application when a company is in liquidation or administration; and
- (2) liquidators and administrators assume control of all aspects of the company including its litigation and that the purpose of administration is to allow the administrator to investigate the company's affairs without harassment by litigants.

In respect of the Court's inherent jurisdiction, both parties agreed that the Court had such jurisdiction and the Court held that it survived enactment of Part 2F.1A.

The Court considered that there are three factors relevant to the exercise of that jurisdiction:

- (1) whether the claims have some solid foundation and reasonable prospects of success;
- (2) the attitude of the liquidator; and
- (3) practical considerations, in particular, whether the litigant will give the liquidator and the company an indemnity and security.

The Court was satisfied the claims had solid foundations (1) and the plaintiffs had given a form of indemnity and security (3). However, on the attitude of the administrator (2), the Court found that the administrator had decided not to pursue proceedings without obtaining and considering independent legal advice on the issue. Given that the matter was heard only a few weeks before the second meeting of creditors, the Court declined to exercise its discretion until after that meeting. The Court considered that a liquidator (if appointed) may wish to obtain such independent legal advice following that meeting and adjourned the plaintiffs' application until after that meeting. The Court similarly adjourned the application insofar as it was made under s. 90-15 of the Schedule.

6.6 Westpac penalised $3.3 million for bank bill swap rate manipulation

(By Simon MacIsaac, King & Wood Mallesons)

Australian Securities and Investments Commission v Westpac Banking Corporation (No 3) [2018] FCA 1701 (9 November 2018) Federal Court of Australia, Beach J

(a) Summary

In the latest decision concerning the attempted manipulation of the Bank Bill Swap Reference Rate (the BBSW), the Federal Court of Australia (Beach J) ordered the Westpac Banking Corporation (Westpac) to pay the statutory maximum penalty of $3.3 million for engaging in manipulative trading in the Bank Bill Market in 2010.

Beach J observed that the maximum penalty prescribed by s. 12GBA of the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) (the ASIC Act) was "seriously inadequate" in the circumstances. Nonetheless, his Honour rejected ASIC's attempt to increase the maximum penalty by characterising each trade or transaction on the relevant trading days as a separate contravening act.

(b) Facts

(i) Background

The Bank Bill Swap Reference Rate BBSW is a key benchmark interest rate in Australian financial markets. The BBSW is published by the Australian Financial Markets Association Limited (AFMA) each Sydney business day. AFMA determines the BBSW with reference to bids and offers made in the Bank Bill Market by Prime Banks, including Westpac, during a specific time period each morning (BBSW Rate Set Window).

(ii) Litigation history

In the earlier decision of *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 357 ALR 240, Beach J found that on four days in 2010 (6 April, 20 May, 1 and 6 December) Westpac engaged in manipulative trading in the Bank Bill Market and thereby contravened s. 12CC of the ASIC Act (relating to unconscionable conduct) as in force at the time. Beach J also held that Westpac contravened its financial services licensee obligations under s. 192A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

The determination of an appropriate penalty was left to a later hearing. At the penalty hearing, the three relevant dates were 20 May, 1 and 6 December 2010 (the Contravention Dates). A pecuniary penalty could not be sought for 6 April 2010 because s. 12GBA of the ASIC Act did not come into force until 15 April 2010.

(iii) Relief sought

In the penalty hearing, ASIC sought the following relief:

- $58 million in pecuniary penalties under s. 12GBA(1) of the ASIC Act;
- declarations of contravention of s. 12CC of the ASIC Act and s. 912A of the Corporations Act; and
- orders requiring Westpac to implement a compliance program pursuant to s. 1101B of the Corporations Act and s. 12GLA of the ASIC Act.

Contrastingly, Westpac proposed:

- $3 million in pecuniary penalties;

- more succinctly framed declarations as to the contraventions of s. 12CC of the ASIC Act and s. 912A(1) of the Corporations Act; and
- a more narrowly framed compliance order under s. 12GLA of the ASIC Act and s. 1101B of the Corporations Act.

(c) Decision

Beach J held that the maximum total penalty permitted under s. 12GBA of the ASIC Act for Westpac's contraventions of s. 12CC was $3.3 million. The pecuniary penalty was set at this amount. His Honour also made declarations of contravention and a compliance order in the terms proposed by Westpac.

(i) Maximum penalty

The key issue was the quantum of the maximum pecuniary penalty for Westpac's conduct. Pursuant to s. 12GBA(3) of the ASIC Act, the maximum penalty for contravening s. 12CC is 10,000 penalty units ($1.1 million).

Westpac argued that its aggregate trading activity on each of the three Contravention Dates constituted contraventions of s. 12CC of the ASIC Act. Therefore, the maximum penalty was $3.3 million. ASIC's primary submission was that each individual trade or transaction entered into by Westpac on the Contravention Dates constituted a separate contravention. Since 58 trades and transactions were executed on the Contravention Dates, the maximum penalty was $63.8 million.

Beach J accepted Westpac's submission that there were only three contraventions of s. 12CC of the ASIC Act.

This conclusion was reached for three reasons:

- ASIC's submission was outside its own pleaded case;
    - at the liability stage, ASIC had pleaded that Westpac, by the aggregate volume of trades during the BBSW Rate Set Window, engaged in conduct which had the likely effect of influencing the BBSW and thereby disadvantaging Westpac's counterparties on BBSW-referenced products; and
    - it was never pleaded that each separate trade independently had the likely effect of disadvantaging counterparties;
- None of the evidence led at trial focused on the effect or likely effect of any particular trade on the BBSW;
    - rather, the evidence focused on the effect or likely effect of the total volume of trades within the BBSW Rate Set Window; and
- ASIC's submission was inconsistent with the form of expression of Beach J's reasons in the earlier decision on liability;
    - Beach J cited several passages from the earlier decision in which his Honour characterised the contraventions of s. 12CC of the ASIC Act as consisting of Westpac's aggregate conduct on each of the Contravention Dates.

(ii) Appropriate penalty

Beach J decided that it was appropriate, in endeavouring to achieve specific and general deterrence, to impose the maximum penalty of $3.3 million. His Honour held that a penalty must be imposed "at a meaningful level" in order to achieve the statutory object of ensuring that a contravention is not regarded as a mere cost of doing business.

Relevant factors included:

- Westpac's status as a large corporation which has the means to pay a substantial penalty;

- the deliberate nature of Westpac's unconscionable conduct;
- the significant period throughout which the contravening acts persisted; and
- the BBSW's systemic and institutional significance in Australian financial markets.

(iii) Declaratory relief

Beach J decided to make declarations in the succinct form proposed by Westpac, as opposed to the more extensive declarations proposed by ASIC. His Honour held that the power to make declarations - contained in s. 21 of the Federal Court of Australia Act 1976 No. 156 (Cth) - should not be used unnecessarily. Its function is to convey a limited and accurate message to those who have an interest in the subject matter (quoting *ACCC v Danoz Direct Pty Ltd* (2003) 60 IPR 296, 350 [260] (Dowsett J)). ASIC's proposed declarations were rejected as "overly elaborate" and an attempt to summarise his Honour's reasoning in the earlier decision on liability, which is not the proper function of the remedy of declaration.

(iv) Compliance programs

ASIC and Westpac each proposed compliance orders under both s. 12GLA of the ASIC Act and s. 1101B of the Corporations Act. These provisions grant the Court extensive discretionary power to make orders in response to contraventions of provisions of the respective Acts.

Westpac's proposed order required Westpac to ensure that appropriate systems, policies and procedures are in place in relation to Bank Bill Market trading and for the adequacy of those systems to be assessed by an independent expert. ASIC proposed a much more prescriptive and detailed compliance program. Beach J held that it was appropriate to make an order in the broader terms proposed by Westpac. ASIC's order was so prescriptive that it would likely cause significant difficulties and inefficiencies in its implementation. Moreover, ASIC's order did not take into account certain policies, procedures and monitoring introduced by Westpac since 2010 in relation to trading in the Bank Bill Market.

6.7 Failure to establish the existence of an undocumented loan agreement

(By Katrina Sleiman, Corrs Chambers Westgarth)

Michell v Onroad Offroad Pty Ltd [2018] VSC 648 (31 October 2018) Supreme Court of Victoria, Digby J

(a) Summary

The plaintiff sought to establish the existence of an undocumented loan agreement by reference to inferences which it said could be drawn from the books of a company and the conduct of the parties, along with the presumption as to the books and records of a company pursuant to s. 1305 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The Supreme Court of Victoria (the Court) held that the evidence was inconsistent with the existence of a loan agreement and that s. 1305 was not of assistance in those circumstances.

(b) Facts

The trustee (the Trustee) of the bankrupt estate of Cheryl Hill (Hill) sought recovery of a debt from Onroad Offroad Pty Ltd (the Defendant). Hill was the sole director of the Defendant from 1998 to 2014. In 2014, Bruce Townsend (Townsend) was appointed director of the Defendant. Hill and Townsend are married.

In about 1998, the Defendant and its accounts, including the "Loan to Director" account that was the subject of the proceeding, were structured and established by the Defendant's former accountant Anthony Darko (Darko). The Defendant's relevant financial arrangements were allegedly recorded in the books and accounts of the Defendant by Darko following discussions with Hill and Townsend.

The Trustee argued that between 2010 and 2015, the Defendant's financial statements and tax returns recorded a "Loan to Director" account with an outstanding balance of over one million dollars. In the Defendant's Books of Account, journal entries record a series of debits from the "Loan to Director" account to Hill which appear to reduce the outstanding balance. Relying on these documents, the Trustee submitted that the Court should find that the "Loan to Director" account was created when Hill agreed to loan funds to the Defendant in 1998. The Trustee alleged this gave rise to a "loan agreement" and that the establishment of these matters entitled the Trustee to judgment for the amount outstanding under this loan agreement.

The Trustee asked the Court to draw inferences that the books and records of the Defendant are prima facie evidence of any matter stated or recorded in the book pursuant to s. 1305 of the Corporations Act. The Trustee argued that when the books are read with the other available contemporaneous evidence, including Hill's personal tax returns which the Trustee submitted reflect receipts consistent with the existence of the loan agreement, there is no ambiguity or uncertainty to displace the presumption.

Both Hill and Townsend denied ever making a loan and said that they were never financially in a position to do so. Hill's evidence was that Darko established the Defendant's accounting systems and books of account at about the time the Defendant was incorporated in 1998. Townsend's evidence was that in doing so Darko created a book entry by shuffling figures as opposed to real money for tax purposes, and that no actual money was ever advanced to the Defendant by way of loan.

(c) Decision

The Trustee needed to prove on the balance of probabilities that the Defendant owed a debt to Hill and the amount of the debt was $1,292,005.88. To prove the existence of the debt, the Trustee needed to prove the existence of the asserted loan agreement.

The Court was not satisfied that the Trustee established the existence of the alleged loan agreement or that Hill advanced the alleged sum of money to the Defendant.

(i) Existence of the loan agreement

The Trustee could not adduce any direct or documentary evidence of the alleged loan agreement or the subject advance. Instead, the Trustee asked the Court to infer the existence of the loan agreement based on the matters referred to above.

The Court considered that it will only be in very clear cases that the Court will infer an agreement from conduct without evidence of the written or oral communications that evidence the exchange of promises. Here, the circumstantial evidence relied on by the Trustee must be evaluated against the direct, clear, unequivocal and, in the Court's view, credible evidence given by Hill. The Trustee's reliance on s. 1305(1) of the Corporations Act is to be considered in the same context.

The Court considered that Hill's direct and persuasive evidence, which was substantially unchallenged by the Trustee, that she did not advance money to the Defendant, and that she was at no relevant time in possession of funds approaching one million dollars that she could advance to the Defendant, defeated the Trustee's inferential evidentiary case and assertions that there was a loan agreement, and that Hill advanced the relevant money to the Defendant and received loan repayments.

(ii) Use of company books

The Trustee relied on s. 1305(1) of the Corporations Act and a number of authorities in relation to that section.

That section provides for the admissibility of books in evidence:

- (1) A book kept by a body corporate under a requirement of this Act is admissible in evidence in any proceeding and is *prima facie* evidence of any matter stated or recorded in the book.
- (2) A document purporting to be a book kept by a body corporate is, unless the contrary is proved, taken to be a book kept as mentioned in subsection (1).

The effect of s. 1305(1) of the Corporations Act was considered by Austin J in *ASIC v Rich* (2009) 236 FLR 1 at [397]-[398]:

> "Section 1305(1) does not make the company's books conclusive evidence of the matters they contain, in the sense of requiring the tribunal of fact to make a finding in terms of the content of the books in the absence of proof to the contrary by the opposing party.
>
> In my view it would be open to the tribunal of fact to find that the prima facie evidence constituted by the company's books is outweighed by other evidence. "

The Court considered that accounting entries relied on by the Trustee do not alone suffice as proof of the underlying loan or the advance alleged. Instead, whether there is a loan agreement as pleaded and asserted by the Trustee depends on the objective intention of the Defendant and Hill at the time the agreement is alleged to have been formed. Such evidence was wholly absent, whereas the direct evidence from Hill, largely corroborated by Townsend, was wholly antithetical.

The Court considered that in the context of the entire body of evidence, the success of the Trustee's claim required more than bare deemed proof of the existence of an account and proof of the debits and credits in the Defendant's books of account and related accounts. In this case, the Court considered that s. 1305(1) of the Corporations Act was of limited assistance.

(iii) Limitations defence

The Defendant claimed the Trustee's claims are statute barred pursuant to s. 5 of the Limitation of Actions Act 1958 No. 6295 (Vic) (the Limitation Act), which provides that no action shall be brought after the expiration of six years from the date on which the cause of action accrued in respect of actions founded on simple contract. The Defendant submitted that because there was no stipulation for a repayment date it must be taken that the alleged loan was repayable on demand and it followed that time began to run when the alleged loan was created on or about 17 June 1998.

In response, the Trustee relied on s. 24(3) of the Limitation Act which relates to the fresh accrual of an action on acknowledgement or part payment. The Trustee submitted there was direct evidence of Hill receiving funds within the year ending 30 June 2013. The funds were thus "part paid" within six years of the proceeding being commenced in 2017.

The Court noted that if there was a loan, the starting point is that the Defendant would have been liable to repay the loan from the moment the funds were advanced. In this case, the cause of action accrued on or around 17 June 1998 and under s. 5(1)(a) of the Limitation Act the cause of action in simple contract has been barred since around 17 June 2004. The Court did not consider that s. 24(3) of the Limitation Act assisted the Trustee, because to inadvertently make a payment to a creditor without acknowledging liability for the relevant debt does not attract s. 24(3)(b). The Limitation Act required the Trustee to demonstrate that the Defendant made a payment which was in respect of the alleged debt. Only then will such payment constitute an "admission" for the purpose of the Limitation Act.

6.8 Proceeds from right of exoneration to be distributed by trustee company in liquidation according to Corporations Act priorities

(By Taylor Fitzpatrick, DLA Piper)

Re Humphreys & Anor [2018] QSC 241 (16 October 2018) Supreme Court of Queensland, Crow J

(a) Summary

The proceeding was brought by the liquidator of Harts Transport (Qld) Pty Ltd (the Company) and the Company in its capacity as trustee of the JL & BA Hart Family Trust (the Trust).

The proceeding sought clarification of longstanding uncertainty about whether a trustee company's right of exoneration (i.e the entitlement to have recourse to the trust assets to discharge liabilities incurred as a trustee) should be considered as "property" of the trustee company for the purposes of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). If the right was considered to be property, it would follow that the Corporations Act priority regime would apply to the proceeds of the right and the trust assets would be distributed accordingly.

Crow J ultimately adopted the position of Allsop CJ in *Jones (Liquidator) v Matrix Partners* [2018] FCAFC 40 (*Jones*). In *Jones*, Allsop CJ had found that the right of exoneration does constitute property for the purposes of the Corporations Act and as such the priority regime does apply. Consequently, the Company was entitled to distribute the assets of the Trust: first, in order of Corporations Act priority; and then, in respect of the balance, proportionately among the admitted creditors of the Company.

(b) Facts

The Company traded solely as a trustee of the Trust. Notwithstanding its liquidation, the Company retained its trustee position and, with the liquidator, was involved in distribution of the Company's assets and the proceeds of an unfair preferences claim.

While trading, the Company incurred a series of liabilities to creditors. These liabilities were incurred solely in the Company's capacity as Trustee. However, the value of the Trust assets were insufficient to meet the amounts owed.

The liquidator and the Company brought the proceeding seeking clarification as to whether the trust assets and proceeds from an unfair preferences claim should be distributed in accordance with the priorities regime established by the Corporations Act.

This was an issue in relation to which there was significant doubt due to a number of conflicting authorities.

(c) Decision

In general, a trustee is entitled to be indemnified against debts and liabilities incurred in the proper execution of its duties. According to Allsop CJ in *Jones*, "[i]f a Trustee has not paid [such a] debt, it has a right of exoneration from the trust assets; that is a right to use the trust assets to exonerate itself from liability for the debt or liability. The right of indemnity is a beneficial interest in the trust property that will be preferred to any beneficial interest *cestuis que* trust in the trust assets". The proceeds of the right are only available to trust creditors.

The case law demonstrates a divergence of opinion on whether the priority regime established by the Corporations Act applies to the distribution of proceeds from the right of exoneration. The issue turned on whether the right of exoneration could be considered the property of a trustee company under the Corporations Act and therefore subject to the priority regime.

Three competing approaches had emerged:

- the view that the priority regime applies to the disbursement of trust assets;
- the view that the priority regime does not apply but that in the exercise of the Court's equitable jurisdiction distribution according to priorities should be authorised; and
- the view that the priority regime does not apply and that trust assets should be distributed among trust creditors proportionately.

The applicants' primary submission was that the priority regime established by the Corporations Act applies to the disbursement of trust assets. Whilst there was no Queensland decision dealing directly with this issue, this position was said to be consistent with several cases on this issue, including the Full Court of the Federal Court in *Jones*, a five-member bench of the Victorian Court of Appeal in *Commonwealth v Byrnes* (2018) 354 ALR 789 (in August 2018, the High Court granted special leave to hear an appeal from this decision) and *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99.

Jones was particularly relevant, as the company had only ever acted as a corporate trustee for one trust and carried on no other business. On the facts, it was held that the property of the company includes the right of exoneration and the funds obtained from its exercise and should be distributed in accordance with the priorities regime.

The issue of whether the intermediate appellate decisions were binding on the Court were discussed with reference to the High Court in *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89*.* That case held that intermediate appellate courts and trial judges in Australia should not depart from intermediate appellate decisions in another jurisdiction, unless they are convinced that the interpretation is plainly wrong.

Crow CJ, following this authority, adopted the approach of Allsop CJ in *Jones.* In *Jones*, Allsop CJ had stated that "[t]he analysis is easiest where the company has only ever acted as here as corporate trustee for one trust. In such circumstances, the property of the company includes the right of exoneration and the funds obtained from its exercise is to be distributed in accordance with the statutory command: ss. 501 and 556 [of the Corporations Act]".

On this basis, Crow J ordered that the liquidator and the Company were justified in distributing the unfair preference proceedings and the Trust assets:

- in payment of the debts and claims given priority by s. 556 of the Corporations Act; and
- in respect of the balance, proportionately among the admitted creditors of the Company.

6.9 Relationship betwen Part 5.3A of the Corporations Act and State laws

(By Casey Temple, King & Wood Mallesons)

Banerjee v Commissioner of Police [2018] NSWCA 283 (22 November 2018) Supreme Court of New South Wales, Court of Appeal, Bathurst CJ, Beazley P, Basten JA

(a) Summary

A recent New South Wales Court of Appeal judgment has further clarified the relationship between Part 5.3A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and state legislation which prescribes the way in which certain companies may operate their business.

The dispute concerned whether certain provisions of the Security Industry Act 1997 No. 157 (NSW) (the SI Act) and the Security Industry Regulation 2016 No. 557 (NSW) (the Regulation), by providing that a licence to operate must be revoked by the relevant state authority when a company enters voluntary administration, are inconsistent with provisions of Part 5.3A, and so fall foul of s. 109 of the Commonwealth of Australia Constitution Act (The Constitution) 1900 (Cth) (the Consititution), as they prevent an administrator from exercising their conferred business management powers under that part of the Corporations Act.

The Court held that no such constitutional inconsistency existed and the impugned state and federal legislation were entirely reconcilable. The case indicates that there is a fairly wide area in which state legislation licensing and otherwise regulating certain businesses may operate without being inconsistent with the Corporations Act's voluntary administration procedures and powers.

(b) Facts

The applicants, Shumit Banerjee and Jason Lloyd Porter, were the joint and several voluntary administrators of United Security Enterprises Pty Ltd (in administration) (the Company), a company which provided security services to government and other organisations. The Company required a master security licence under the SI Act to provide these services. The respondent, the Commissioner of Police (the Commissioner), was required to revoke this licence pursuant to the Security Industry Act and the Regulation when the Company entered voluntary administration.

This revocation prevented the Company from operating its primary security services business. The applicants subsequently commenced proceedings against the Commissioner in the Equity Division of the Supreme Court of New South Wales.

The applicants contended s. 109 of the Constitution invalidated the SI Act and the Regulation due to their inconsistency with Part 5.3A of the Corporations Act. If successful, this argument would operate to render the revocation of the licence inoperative. The specific question concerned whether s. 437A(1) and periphery Part 5.3A provisions in the Corporations Act left a scope for the state law to operate. Section 437A(1) outlines the role of administrators as managing the business, property and affairs of the relevant company. The applicants submitted that the licence revocation under ss. 15(4) and 26(1A) of the SI Act and cl. 13(3) of the Regulation was in conflict with s. 437A(1) as it prevented the administrators from exercising their conferred management powers.

To address this assertion, Sackar J of the Supreme Court of New South Wales referred the following question to the Court of Appeal for determination:

> "Whether clause 13(3) of the [the...Regulation], in its operation pursuant to sections 15(4) and 26(1A) of [the...Act], is inconsistent with the provisions of Part 5.3A of [the Corporations Act...] and therefore invalid or inoperative to the extent of any inconsistency by reason of s. 109 of the [...Constitution]."

(c) Decision

The Court answered Sackar J's question in the negative and held that no constitutional inconsistency existed between the relevant state and federal legislation. The matter was remitted to the Equity Division. In arriving at this decision, the Court examined the relevant statutory provisions, the nature of constitutional inconsistency and statutory construction of the relevant state and federal legislation. The Court's conclusions about these considerations are examined below.

(i) Nature of constitutional inconsistency

Section 109 of the Constitution operates to invalidate a state law to the extent that it is "inconsistent" with a federal law. The Court observed the numerous distillations and tests which seek to elucidate statutory "inconsistency".

The Court referenced Mark Leeming SC's approach to inconsistency in one of his books (published before his appointment to the Court of Appeal).

This view provides that there are no discrete categories of inconsistency, rather it arises where:

> "[E]ither expressly or by implication, the Commonwealth law provides for an immunity from a class of State laws, which immunity would be qualified, altered or impaired by, and is therefore inconsistent with, the operation of a state law within that class."

Analyses such as "direct inconsistency", "indirect inconsistency" and "covering the field" were also considered. The Court echoed Mason J in *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 (*Ansett*) and stated that more than one test may be applied in determining s. 109 inconsistency.

As such, the analysis to be adopted in determining whether particular laws are inconsistent will vary depending on the respective laws. As stated in *Bell Group NV (in liq) v State of Western Australia* (2016) 260 CLR 500, the mode of analysis will particularly pivot upon whether the Commonwealth legislation imposes a prohibition or obligation or creates a right or power.

Prior to the application of the above principles, the Court noted that it must first consider the intention of Parliament. The Court referenced *Ansett* and agreed that it is insufficient for the applicant to simply point to an inconsistency under a Commonwealth law, a further step is required to evince a legislative intention that the power is to be exercised to the exclusion of the state law.

(ii) Proper statutory construction

The Court relied upon the approach expounded by Gummow J in *Momcilovic v The Queen* (2011) 245 CLR 1. In following this methodology, the Court sought to examine the Commonwealth statute upon its true construction by having regard to its subject, scope and purpose. The Court considered whether the State law operated upon the same subject matter as the federal law, and if so, whether it sought to impair or detract from it.

The Court upheld the fundamental argument advanced by counsel for the Commissioner. In constitutional terms, the impugned Corporations Act provisions operated to provide a mechanism to address bankrupt and insolvent companies. Part 5.3A did not contemplate the manner in which specific companies are to carry on their businesses. Correspondingly, the Security Industry Act and the Regulation were not focused upon issues of bankruptcy or insolvency, rather they specifically sought to regulate the security industry.

From the Court's examination of the intention and purpose of the state and federal legislation, it concluded that both operate in very different spheres and are wholly harmonious and reconcilable.

Moreover, as a matter of statutory construction, the Commonwealth legislation does not exhibit an intention to provide a company in administration with any immunity from the State legislation. To the contrary, this federal legislation assumes such licences will cease to exist once having entered administration. Similarly, the state law did not seek to detract from or impede the operation of the Corporations Act.

Accordingly, the State legislation and the Corporations Act were held to be entirely consistent such that it was not possible for s. 109 constitutional invalidity to exist.

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.

DISCLAIMER
This email alert is not intended to be and is not a complete or definitive statement of the law on the relevant subject matter. No person should take any action or refrain from taking any action in reliance upon the contents of this alert without first obtaining advice from a qualified practitioner. SAI Global expressly disclaims liability for any loss or damage suffered howsoever caused whether due to negligence or otherwise arising from the use of this information. For further information or if you have received this notice in error or believe that the email has been forwarded to you in breach of our licence terms, please notify SAI Global immediately by telephone on 131 242 or email info.regulatory@saiglobal.com.

Copyright © 2018, Anstat Pty Ltd an SAI Global Company ACN 115 133 152. All rights reserved.