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Bulletin No. 279

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

Legislation Hotline

- > WHAT'S NEW
- > MODIFY MY NEWSFEEDS
- > SEARCH NEWSFEED ARCHIVE
- > RELEVANT STANDARDS
- > SEARCH LEGISLATION
- > ABOUT LEGISLATIVE ALERT
- > MORE SERVICES
- > ABOUT SAI GLOBAL

Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Legislation to implement further recommendations of the Banking, Superannuation and Financial Services Royal Commission introduced into Parliament
1.2 APRA releases revised remuneration standard for consultation
1.3 UK Financial Reporting Council review of climate-related considerations in corporate reporting and auditing
1.4 Report on the regulation of stored-value facilities in Australia
1.5 Treasury draft legislation and regulations consultation - consumer credit reforms
1.6 SEC division of enforcement publishes annual report for fiscal year 2020
1.7 SEC amends rules governing exempt securities offerings
1.8 IOSCO recommendations aim to assist develop emerging capital markets
1.9 Task force on climate-related financial disclosures - status report
1.10 SEC adopts modernised regulatory framework for derivatives use by registered funds and business development companies
1.11 Study of Australian boards of directors
1.12 Review of the Australian payments system
1.13 Financial Services Council recommendations for reform of financial advice
1.14 Treasury draft legislation consultation - virtual meetings and electronic communication
1.15 Effective practices for cyber incident response and recovery: Final report
1.16 Climate change disclosure in the ASX200
1.17 FSB publishes global transition roadmap for LIBOR
1.18 Cross-border mergers and acquisitions for third quarter 2020
1.19 UK FRC publishes future of corporate reporting discussion paper
1.20 Regulators and government agencies annual reports 2019-2020

2. Recent ASIC Developments

2.1 Latest data on buy now pay later industry
2.2 Licensing and professional registration activities: 2020 update
2.3 ASIC to further extend financial reporting deadlines for listed and unlisted entities and amends "no action" position for AGMs
2.4 ASIC seeks further feedback on the proposed intervention order for continuing credit contracts
2.5 Product intervention order strengthens CFD protections
2.6 Updated regulatory guidance for share transfers using s. 444GA of the Corporations Act
2.7 Updated information sheets on new protections under the unfair contract terms laws

3. Recent ASX Developments

3.1 Reports
3.2 New scope and go-live date for CHESS replacement
3.3 Public consultation - Proposed changes to capital requirements for ASX clear participants

4. Recent Takeovers Panel Developments

4.1 CFOAM Limited - Panel declines to conduct proceedings
4.2 Cardinal Resources Limited 02 - Panel declines to conduct proceedings
4.3 Webcentral Group Limited - Panel declines to conduct proceedings

5. Recent Research Papers

5.1 Green bonds: Legal and policy issues
5.2 Parent company direct liability for overseas human rights violations: Lessons from the UK Supreme Court
5.3 Board risk oversight and environmental and social responsibility

6. Recent Corporate Law Decisions

6.1 Section 1322 orders made to remedy a failure to lodge cleansing notices
6.2 Husband and wife directors liable to pay debts for insolvent trading
6.3 Does a court have jurisdiction to hear and determine a preliminary discovery order during a takeover bid?
6.4 Validating a deficient s. 249D requisition to call a meeting of members under s. 1322
6.5 Shareholder standing to seek, and permitted scope of, injunctive relief
6.6 Shareholder application to inspect books trumps company's claims of improper purpose
6.7 Court considers insufficient records and the s. 588H(2) Corporations Act insolvency defence
6.8 Leave granted for former director claiming improper distributions of funds following the sale of property

1. Recent Corporate Law and Corporate Governance Developments

1.1 Legislation to implement further recommendations of the Banking, Superannuation and Financial Services Royal Commission introduced into Parliament

12 November 2020 - The Government has introduced Legislation (the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020) that addresses 20 recommendations and one additional commitment from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. This legislation adds to earlier legislation implementing other recommendations of the Royal Commission.

The legislation:

- strengthens the unsolicited selling (anti-hawking) provisions, including for superannuation and insurance products, to prevent pressure selling to consumers;
- introduces a deferred sales model for add-on insurance products, to promote informed purchasing decisions and prevent inappropriate sales of add-on insurance;
- makes the handling and settlement of insurance claims a "financial service", which will require insurers to behave honestly, efficiently and fairly and comply with other licensing obligations, to improve claims handling practices;
- prohibits the trustee of a superannuation fund from having a duty to act in the interests of another person, other than those arising from their duties as trustee of a superannuation fund; and

- allows provisions in financial services industry codes to be enforceable, with breaches attracting civil penalties, ensuring better adherence by industry and certainty for consumers.

These changes will be complemented by providing further clarity regarding the role of the regulators and enhancing the requirements of financial institutions reporting breaches of the law which will ensure significant misconduct is reported and investigated sooner.

1.2 APRA releases revised remuneration standard for consultation

12 November 2020 - The Australian Prudential Regulation Authority (APRA) has released for consultation a revised remuneration prudential standard which is "designed to strengthen market practice, underpin sound remuneration practices and enhance accountability in the institutions it regulates".

The new draft standard responds to industry feedback from the initial consultation, sets minimum standards for APRA-regulated entities and addresses the relevant Royal Commission recommendations.

The draft standard has moved to a more principles-based approach that is designed to be risk-based and proportionate, with more comprehensive requirements for larger, more complex regulated entities (Significant Financial Institutions (SFIs)).

There are a number of revisions to draft Prudential Standard CPS 511 Remuneration (revised CPS 511).

The key revisions for SFIs include:

- replacing the 50% cap on financial measures for variable remuneration with a requirement that material weight be assigned to non-financial measures, combined with a risk and conduct modifier that can potentially reduce variable remuneration to zero; and
- a reduction in the minimum deferral periods for variable remuneration from seven to six years for chief executive officers (CEOs), from six to five years for senior managers and from six to four years for highly paid material risk takers.

The remuneration requirements for smaller (non-SFI) entities have been streamlined to minimise regulatory burden. Under the revised standard, non-SFIs will not be subject to a number of elements impacting variable remuneration including material weight for non-financial measures, a risk and conduct modifier, minimum deferral periods and clawback. To further ease compliance costs, non-SFIs will not have to conduct annual compliance checks or tri-annual effectiveness reviews of their remuneration frameworks.

Entities will be subject to greater public disclosure of their remuneration practices to demonstrate compliance with APRA requirements. The specific disclosure requirements will be defined through a future consultation process, expected to be conducted in late 2021.

According to APRA, "Taken together, the core measures will require SFI boards to strengthen incentives to manage non-financial risks, regularly assess for risk management failings and have deferral arrangements that allow boards to reduce remuneration for poor risk outcomes."

The consultation period for revised CPS 511 will close on 12 February 2021. It is scheduled to be finalised in mid-2021 and come into effect for SFIs that are authorised deposit-taking institutions (ADIs) on 1 January 2023, for insurance and superannuation SFIs on 1 July 2023, and for non-SFIs on 1 January 2024.

The response paper, revised standard and non-confidential submissions to the previous consultation are available on the APRA website at: Consultation on remuneration requirements for all APRA-regulated entities.

1.3 UK Financial Reporting Council review of climate-related considerations in corporate reporting and auditing

10 November 2020 - The United Kingdom (UK) Financial Reporting Council (FRC) has published a review titled Climate Thematic on climate-related considerations in corporate reporting and auditing. The FRC review concludes that corporate reporting needs to improve to meet the expectations of investors and other users on the urgent issue of climate change. The FRC supports the introduction of global standards on non-financial reporting, but, as an interim step, encourages public interest entities to report against the Task Force on Climate-related Financial Disclosures' (TCFD) recommended disclosures and the Sustainability Accounting Standards Board metrics for their sector.

The FRC's review sets out key findings, expectations and next steps. The review's key outcomes are as follows:

- evidence of climate considerations influencing business models and company strategy is limited;
- some companies have set strategic goals such as "net zero", but it is unclear from their reporting how progress towards these goals will be achieved, monitored or assured;
- an increasing number of companies provide narrative reporting on climate-related issues. While minimum legal reporting requirements are often met, users are calling for additional disclosure to inform their decision making;
- consideration and disclosure of climate change matters in the financial statements lags behind narrative reporting. The review identified areas of potential non-compliance with the requirements of International Financial Reporting Standards;
- the quality of support, training and review provided to audit practices on climate change varies considerably across firms;
- audits reviewed indicated that auditors need to improve their consideration of climate-related risks when planning and executing their audits;
- UK professional bodies and audit regulators are responding to climate change, but approaches differ in terms of substance and granularity; and
- investors support the TCFD framework, but also expect to see disclosures regarding the financial implications of climate change. Investors are themselves facing a changing regulatory environment.

The FRC has also published a suite of additional reports containing more detailed findings. These can be found at the following links:

- Governance;
- Corporate reporting;
- Audit;
- Professional Oversight; and

- Investor reporting and TCFD disclosure.

The FRC's views on non-financial reporting are contained in a statement available here.

1.4 Report on the regulation of stored-value facilities in Australia

6 November 2020 - The Council of Financial Regulators (CFR) has released a report on the regulation of stored-value facilities (SVFs) in Australia. The report was completed in October 2019 but only released by the CFR in November 2020. SVFs are payment services that enable customers to store funds in a facility for the purpose of making future payments. The 2014 Financial System Inquiry (FSI) identified the regulation of purchased payment facilities (PPFs) - a particular type of SVF defined in legislation - as having scope to be improved, and the Productivity Commission's 2018 Inquiry into Competition in the Australian Financial System recommended that CFR review regulatory arrangements for PPFs.

The report contains 11 recommendations aimed at modernising regulatory arrangements for SVFs, recognising the potential for such facilities to play a more prominent role in the payments system in the future as has occurred in some other jurisdictions.

The recommendations in the report are:

Recommendation 1: SVFs should be introduced as a new class of regulated product, replacing "purchased payment facilities" in the regulatory framework. Regulation of SVFs should be graduated and commensurate with risks to consumers.

Recommendation 2: Certain SVFs (and other payment products) that pose limited risk to consumers - such as small and/or limited-purpose facilities - should continue to be largely exempt from most regulatory requirements.

Recommendation 3: Issuers of payment products that hold client funds for only a short period of time for the purpose of facilitating a payment should be required to hold an Australian Financial Services (AFS) licence from the Australian Securities and Investments Commission (ASIC) and comply with the requirements of an updated ePayments code.

Recommendation 4: ASIC should be given the power to make compliance with the ePayments code mandatory, such as through a rule-making power.

Recommendation 5: The APRA and ASIC should be responsible for regulating and licensing SVF providers, consistent with their respective mandates for prudential supervision and consumer protection. The Reserve Bank of Australia (the RBA) should no longer be involved in regulating individual providers of SVFs, helping to streamline regulation in this segment of the market.

Recommendation 6: APRA should be responsible for prudential supervision of large SVFs that enable consumers to hold a significant amount of funds for long periods and to withdraw their funds on demand in Australian currency (e.g. by transferring funds to their bank account). These facilities are likely to offer similar functionality as a bank deposit and should be subject to the highest level of regulatory oversight within an updated regulatory framework for SVFs.

Recommendation 7: APRA should review its existing PPF prudential framework, with a view to introducing requirements for SVFs that are simpler, more targeted to the key risks posed by such entities and, where appropriate, better aligned with international approaches.

Recommendation 8: ASIC should be responsible for regulating SVFs that do not meet the criteria for APRA prudential supervision. In addition to holding an AFS licence, providers of these products should be subject to additional requirements administered by ASIC to ensure the safety of consumers' funds. In particular, the Corporations Act 2001 No. 50 (Cth) should be amended to ensure that protections on client money loaded in to SVFs operate effectively and client funds cannot be used as the provider's working capital.

Recommendation 9: AFS licensees that are subject to the amended client money protections should be required to report to ASIC on the amount of stored value that is held and transaction flows (e.g. aggregate amount in and out during a period).

Recommendation 10: A revised regulatory framework should incorporate a mechanism to "designate" certain facilities as being subject to APRA supervision in the public interest (e.g. on the basis of financial system risk considerations). CFR should develop principles to guide such decisions, which could be vested in the Minister or exercised jointly by APRA and ASIC.

Recommendation 11: CFR agencies should further consider additional measures to improve the clarity and transparency of SVF regulation for consumers and regulated entities. This could potentially include publishing a simple guide to payment regulation and providing guidance through ASIC's MoneySmart site for consumers using SVFs.

1.5 Treasury draft legislation and regulations consultation - consumer credit reforms

4 November 2020 - The Treasury is consulting on draft legislation and regulations to implement consumer credit reforms announced on 25 September 2020 (see Item 1.6 of the October 2020 Corporate Law Bulletin). The main elements of the reform include:

- removing the responsible lending obligations from the National Consumer Credit Protection Act 2009 No. 134 (Cth), with the exception of small amount credit contracts and consumer leases where heightened obligations will be introduced (it is stated in the Explanatory Materials accompanying the draft legislation that removing the responsible lending obligations is "aimed at improving the flow of credit by reducing the time it takes consumers and businesses to access credit");
- ensuring that ADIs will continue to comply with the APRA's lending standards requiring sound credit assessment and approval criteria;
- adopting key elements of APRA's ADI lending standards and applying them to non-ADIs (these standards will require licensees to implement adequate systems, policies and processes relating to non-ADI credit conduct rather than impose individual conduct level obligations. It is stated in the Explanatory Materials accompanying the draft legislation that this "enables credit assessment to move away from a prescriptive framework for lenders and borrowers and will support risk-based lending that is attuned to the needs and circumstances of the borrower and credit product"); and
- extending the best interests obligation imposed on mortgage brokers to all credit assistance providers (the extension of the best interests obligations to licensees and their credit representatives means that those licensees and their credit representatives must: (1) act in the best interests of consumers when providing credit assistance in relation to credit

contracts, and (2) where there is a conflict of interests, give priority to consumers in providing credit assistance in relation to credit contracts.

1.6 SEC division of enforcement publishes annual report for fiscal year 2020

2 November 2020 - The United States (US) Securities and Exchange Commission's (SEC) Division of Enforcement has published its annual report for fiscal year 2020. The report provides a review of the Division's accomplishments over the past year, discusses significant actions and key areas of strategic change, and details the Division's COVID-19-related enforcement efforts. The report also describes strategic changes the Division implemented to improve its operations in several key areas, including by implementing a number of efficiencies in the whistleblower program and increasing the pace of investigations.

In fiscal year 2020, the SEC brought a diverse mix of 715 enforcement actions, including 405 standalone actions. These actions addressed a broad range of significant issues, including the following: issuer disclosure and accounting violations; foreign bribery; investment advisory issues; securities offerings; market manipulation; insider trading; and broker-dealer misconduct. Through these actions, the SEC obtained judgments and orders totalling approximately US$4.68 billion in disgorgement and penalties - a record amount for the Commission - and returned more than US$600 million to harmed investors. Significantly, through the Division's efforts, the SEC awarded a record US$175 million to 39 whistleblowers in fiscal year 2020, both the highest dollar amount and the highest number of individuals awarded in any fiscal year.

1.7 SEC amends rules governing exempt securities offerings

2 November 2020 - The US SEC has voted to amend the rules regulating exempt securities offerings. The amendments generally:

- establish more clearly, in one broadly applicable rule, the ability of issuers to move from one exemption to another;
- increase the offering limits for Regulation A, Regulation Crowdfunding, and Rule 504 offerings, and revise certain individual investment limits;
- set clear and consistent rules governing certain offering communications, including permitting certain "test-the-waters" and "demo day" activities; and
- harmonise certain disclosure and eligibility requirements and "bad actor" disqualification provisions.

The amended rules are available on the SEC website.

1.8 IOSCO recommendations aim to assist develop emerging capital markets

30 October 2020 - The International Organization of Securities Commissions (IOSCO) Growth and Emerging Markets Committee (GEMC) has published a report examining the challenges and opportunities that Emerging Markets jurisdictions (EMs) face when developing their capital markets as key drivers of economic growth and financial resilience and inclusion. The report

makes five key recommendations that EMs should consider when seeking to strengthen their capital markets.

The report, Development of Emerging Capital Markets: Opportunities, Challenges and Solutions, draws on the GEMC's work on different aspects of market development, from corporate governance and regulatory frameworks to corporate bond markets and market liquidity. It also highlights the main challenges faced by EMs in implementing international standards and the role of capacity building. In addition to these areas, the report explores further opportunities offered by sustainable finance and Fintech for developing EMs.

The report also analyses the preliminary impact of COVID-19 on EMs focusing on the capital outflows and the operational resilience of these markets during the pandemic. Its analysis highlights the need for capital markets to function efficiently during the current crisis to support the real economy.

While recognising there is "no one size fits all" approach to capital markets development, the report includes five key recommendations to assist EMs in deepening their capital markets:

Recommendation 1: Policy makers and regulators should develop a holistic strategy for the development of capital markets.

Recommendation 2: Regulators should seek to ensure that capital markets are fair and efficient for capital raising. Increasing institutional investor participation, providing diversified investment choices and ensuring market confidence should be high priorities on their agenda.

Recommendation 3: Securities regulators should have adequate powers, proper resources and the capacity to perform their functions and exercise their powers.

Recommendation 4: Jurisdictions should establish strong national and international cooperation arrangements to develop capital markets with the key involvement of the securities regulator.

Recommendation 5: Regulators and market participants should develop and implement efficient roadmaps for investor education and guidance.

1.9 Task force on climate-related financial disclosures - status report

29 October 2020 - The TCFD has published its latest annual report on TCFD-aligned financial disclosures by companies.

The TCFD was established by the Financial Stability Board (FSB) in 2015 to develop a set of voluntary, consistent disclosure recommendations for use by companies in providing information to investors, lenders and insurance underwriters about their climate-related financial risks. The industry members of the TCFD, who are drawn from a wide range of industries and countries from around the globe, finalised the recommendations in 2017 after extensive public engagement and consultation. They set out the disclosures that a wide range of users and preparers of financial filings have said are essential to understanding a company's climate-related risks and opportunities.

Since then, more than 1,500 organisations have expressed their support for the TCFD recommendations, an increase of over 85% since the 2019 status report. Nearly 60% of the world's 100 largest public companies support the TCFD, report in line with the TCFD recommendations, or both. The latest status report finds that disclosure of climate-related financial information aligned with the TCFD recommendations has steadily increased since the recommendations were published in 2017. However, the report highlights the continuing need for progress in improving levels of TCFD-aligned disclosures given the urgent demand for consistency and comparability in reporting. The TCFD found that:

- on average across the TCFD recommendations, 42% of companies with a market capitalisation greater than US$10 billion disclosed at least some information in line with each individual TCFD recommendation in 2019;
- nearly 60% of the world's 100 largest public companies support the TCFD, report in line with the TCFD recommendations, or both;
- energy companies and materials and buildings companies are leading on disclosure, with an average level of TCFD-aligned disclosures of 40% for energy companies and 30% for materials and buildings companies in fiscal year 2019;
- expert users of disclosure identified the impact of climate change on a company's business and strategy as the "most useful" information for financial decision-making. Notably, this information has the lowest level of disclosure across the recommendations, with just one in 15 companies making this disclosure; and
- asset manager and asset owner reporting to their clients and beneficiaries is likely insufficient.

The report also provides a "roadmap" for preparers through highlighting insights from expert users on which information is most useful for decision making.

The TCFD also published guidance on climate-related scenario analysis for non-financial firms and on integrating climate-related risks into existing risk management processes. Additionally, the TCFD published a public consultation on forward-looking climate metrics for financial firms; responses to the consultation are due by 27 January 2021.

The FSB has asked the TCFD to publish a further status report in September 2021 and undertake further analysis on the extent to which companies describe the financial impact of climate-related risks and opportunities on their businesses and strategies. The TCFD also plans to gain better insight into reporting practices of asset managers and asset owners to their clients and beneficiaries.

1.10 SEC adopts modernised regulatory framework for derivatives use by registered funds and business development companies

28 October 2020 - The US SEC has voted to enhance the regulatory framework for derivatives use by registered investment companies, including mutual funds (other than money market funds), exchange-traded funds (ETFs) and closed-end funds, as well as business development companies. The new rule and rule amendments will provide a modernised, comprehensive approach to the regulation of these funds' derivatives use that addresses investor protection concerns and reflects developments over the past decades.

The Investment Company Act limits the ability of registered funds and business development companies to engage in transactions that involve potential future payment obligations, including obligations under derivatives such as forwards, futures, swaps and written options. The new rule permits funds to enter into these transactions if they comply with certain conditions designed to protect investors. These conditions include adopting a derivatives risk management program and complying with a limit on the amount of leverage-related risk that the fund may obtain based on value-at-risk, or "VaR."

A streamlined set of requirements will apply for funds that use derivatives in a limited way. The rule also permits a fund to enter into reverse repurchase agreements and similar financing transactions, as well as "unfunded commitments" to make certain loans or investments, subject to conditions tailored to these transactions. Funds, including money market funds, will now be permitted under the rule to invest in securities on a forward-settling basis. Funds also will be subject to reporting and recordkeeping requirements regarding their derivatives use.

Finally, the new rule requirements also apply to leveraged or inverse ETFs. The Commission has directed SEC staff to review the effectiveness of existing regulatory requirements in protecting investors, particularly those with self-directed accounts, who invest in complex investment products (including leveraged or inverse products). As part of this review, the staff will consider whether the Commission's promulgation of any additional requirements for these products may be appropriate.

The rule and related rule and form amendments will become effective 60 days after publication in the Federal Register. The Commission has provided for an eighteen month transition period for funds to comply with the rule and related reporting requirements.

View:

- Final Rule; and
- Fact Sheet.

1.11 Study of Australian boards of directors

25 October 2020 - Ownership Matters (OM) has published a report analysing ASX300 boards from 2005 - 2020. OM analysed the pool of 1777 executives and 4143 non-executives who have served on ASX 300 company boards from 2005 to 2020. OM utilised its proprietary database of directors which standardises director naming conventions across companies, assigns a gender to the director and records dates of appointment and departure together with share price returns during the period of director service.

This report examines a major change to the composition to the pool of non-executives (NEDs) who serve on the boards of ASX 300 companies over the period, namely the appointment of a greater proportion of women. OM examined the distribution of director tenure and observed the association between board turnover rates and company performance. OM's analysis also considers the changing propensity of Australian companies to appoint from within the existing pool of ASX 300 directors. Australian companies have moved to address gender discrimination at board level by appointing more women in recent times (now 33.1% of ASX 300 board seats and 29.3% of ASX 300 directors).

However, the analysis highlights other concerns:

- boards of the worst performing companies refresh themselves only marginally faster than companies that perform the best;
- the tenure of NEDs in the ASX 300 pool lengthens with each position attained: 74% of directors attain one board seat only and serve for an average of 71 months; 14% of directors attain two board seats and serve for an average of 116 months; each additional

seat extends a director's service by at least two years; and any director appointed as Chairperson extends their service by an average of four years; and

- there is a strong bias toward appointing existing ASX 300 directors to vacancies ("in pool" appointments): since 2005, 38.2% of all vacancies were filled from directors with an existing ASX 300 board seat; in pool appointments peaked at a high of 43.4% in 2006 and fell to a low 31.8% in 2016 (the current level is 36%); in the last three years, 40% of all serving women directors accepted an additional appointment compared to 17.5% of all men; and the average number of seats per director for women has risen to 1.45 (from 1.3 in 2009) while for men the ratio has decreased to 1.18 (from 1.23 in 2009).

According to OM, its analysis presents evidence that NED tenure is lengthy and that board turnover during the last 15 years is largely independent of company performance.

View full report

1.12 Review of the Australian payments system

21 October 2020 - The Government has announced that it will review the regulatory architecture of the Australian payments system. The purpose of the review is to ensure the payments system remains fit for purpose and is capable of supporting continued innovation for the benefit of both businesses and consumers. The review commenced in October 2020 and will report to the Treasurer by April 2021.

The terms of reference for the review state that it will assess the following:

- the current structure of the governance and regulation of the payments system to assess whether it is fit for purpose, including whether the regulatory framework adequately accommodates new and innovative systems and the effectiveness of the current structure in implementing government policy;
- how to create more productivity-enhancing innovation and competition in the payments system, including in relation to the pace and manner in which the New Payments Platform is being rolled out and enhanced by industry;
- ways to improve the understanding of businesses and consumers of alternative payment methods;
- whether government payment systems, including payments to citizens, are agile and can take advantage of new payments functionality, to enhance service delivery; and
- global trends and how Australia should respond to these trends to ensure that it continues to remain internationally competitive.

1.13 Financial Services Council recommendations for reform of financial advice

20 October 2020 - The Financial Services Council has published a report recommending wide-ranging reform of the current regulation of financial advice. The report states that although the provision of financial advice is important, the cost of providing simple financial advice is too high:

"The delivery of advice is not structured around the risks borne by consumers, so simple advice has the same complex and lengthy processes as high-risk advice. This drives up the cost to consumers to unsupportable levels. If advice is delivered in a cost-effective manner, this will improve trust in the sector. There are many people, including disadvantaged groups, who currently do not obtain Financial Advice because they cannot afford it. Any process that will lower the cost of advice will benefit these people. The government has attempted to improve standards by raising the education of financial advisers. However, the current approach has led to a reduction in the number of financial advisers both through large numbers leaving the industry and fewer new advisers joining. This leads to lower levels of advice being delivered to the community - and at a cost which is too high for most consumers."

The report makes the following recommendations:

1. New definitions of financial advice:

- General Information: will incorporate the existing definitions of Education, Information and General Advice; and
- Personal Advice: to be simplified (for delivery purposes) by separating it into Simple and Complex based on the extent of risk for the consumer.

2. Simple Personal Advice - This is advice that deals with well understood financial needs and Financial Products. Specifically, those that are nominated under Design and Distribution Obligations (DDO) as being for average family consumers.

3. Complex Personal Advice - This is advice that is not Simple Advice but should also specifically include products and strategic topics that are known to be complex and/or risky.

4. Best Interest Duty - The duty, and the obligations placed on an adviser to show they have met the duty, need to be adapted to suit the category of advice being provided in the first recommendation. It is expected that this will lead to a simplification of the duties. In delivering:

- Simple Personal Advice, it should be sufficient to review the case without needing a comprehensive analysis of the consumer's needs; and
- Complex Personal Advice, the Best Interest Duty should be reviewed as the existing process is complex and time-consuming.

5. Encouragement to take financial advice - it is recommended that Australians be able to deduct the cost of Financial Advice for tax purposes, up to (say) $500 a year for single people and $1,000 a year for couples.

The report, titled "Future of Advice", is available on the Financial Services Council website.

1.14 Treasury draft legislation consultation - virtual meetings and electronic communication

19 October 2020 - The Treasury has undertaken a short consultation on draft legislation to allow companies to execute documents, hold meetings, provide notices relating to meetings and keep minutes using electronic means or other alternative technologies. As reported in earlier issues of the Corporate Law Bulletin, in response to the COVID-19 pandemic, the government temporarily amended the Corporations Act 2001 No. 50 (Cth) to allow virtual meetings by companies and electronic communications by companies. These temporary changes were extended to 22 March 2021 by the Corporations (Coronavirus Economic Response) Determination (No 3) 2020. The draft legislation proposes to make these changes permanent.

In summary, the draft legislation allows electronic means or alternative technologies to be used to:

- execute company documents;
- hold meetings of directors of a company, meetings of shareholders of a company (including Annual General Meetings (AGMs)) and meetings of members of a registered scheme;
- execute documents relating to meetings;
- record, keep and provide minutes; and
- provide notice of a meeting and give other documents relating to meetings to the prospective attendees.

The proposal to make virtual shareholder meetings permanent has been controversial and in response to criticisms by shareholder groups and others, the Treasurer was quoted in the Australian Financial Review (1 November 2020) as saying that the government would now propose a hybrid meeting reform - which would involve a physical meeting along with online facilities for those who cannot be physically present.

1.15 Effective practices for cyber incident response and recovery: Final report

19 October 2020 - The FSB has released a final report on Effective Practices for Cyber Incident Response and Recovery. Cyber incidents pose a threat to the stability of the global financial system, and the remote working environments in light of the COVID-19 pandemic have heightened the need for attention. A significant cyber incident, if not properly contained, could seriously disrupt the financial system, including critical financial infrastructure, leading to broader financial stability implications. Efficient and effective response to and recovery from a cyber incident is essential to limiting any related financial stability risks. Such risks could arise, for example, from interconnected information technology systems between multiple financial institutions or between financial institutions and third-party service providers from loss of confidence in a major financial institution or group of financial institutions, or from impacts on capital arising from losses due to the incident. The cyber resilience of organisations is crucial for the smooth functioning of the financial system and in engendering financial stability.

Enhancing cyber incident response and recovery at organisations is an important focus for national authorities. National authorities are in a unique position to gain insights on effective cyber incident response and recovery activities in financial institutions from their supervisory work, and their observations across multiple organisations can help suggest areas for enhancement. Authorities also have an important role to play in responding to cyber incidents that present potential risks to financial stability. Authorities may also, as appropriate, support organisations in sharing information to protect against threats that could have a detrimental impact on financial stability.

As documented in the report, the FSB has developed a toolkit of effective practices that aims to assist organisations in their cyber incident response and recovery activities. The toolkit includes 49 practices for effective cyber incident response and recovery across seven components: (i) governance, (ii) planning and preparation, (iii) analysis, (iv) mitigation, (v) restoration and recovery, (vi) coordination and communication, and (vii) improvement.

1.16 Climate change disclosure in the ASX200

18 October 2020 - The Australian Council of Superannuation Investors (ACSI) has published the report Promises, Pathways and Performance: Climate Change Disclosure in the ASX200. The report shows that boards and management are, in the main, responding to investor demands for in-depth discussion of how they are measuring and managing climate risk and opportunities.

The analysis indicates that the TCFD framework, first published in 2017, has now become the most common benchmark for companies' reporting in high-risk sectors. ACSI found a five- times uplift on TCFD adoption by ASX200 companies, driven by those in high-risk sectors, as they strive to align their businesses to meeting Paris Agreement targets and avert the risk of stranded assets and operations.

Key findings:

- Eighteen ASX200 companies had set net-zero aspirations, and ACSI continues to see further adoptions this reporting season. However, more work is required to demonstrate pathways to net zero and ACSI has been engaging with companies this year on how their short and medium-term strategies are aligned to a pathway for achieving net-zero commitments;
- Science-based targets are gaining traction. In FY19 companies that had adopted science-based climate targets included Origin Energy, Dexus, SkyCity Entertainment, Fletcher Building, QBE Insurance, Insurance Australia Group and Suncorp. This trend is expected to continue in FY20 as demonstrated by BHP's recent announcement;
- Five-fold increase of TCFD adoption by the ASX200 - with 56% of higher-risk industries now reporting against the framework. In 2019, 60 ASX200 companies had adopted the framework up from only 11 companies in 2017. A further 14 companies have committed to disclose against the framework; and
- Proliferation of companies using scenario analysis to stress test their business. Of the 60 companies that reported against the TCFD, 32 undertook scenario analysis in 2019 (compared to 18 in 2018). A further 28 were reported as either having the analysis currently in progress or planned for in FY21. There are still a wide variety of scenarios being used but a growing number of companies are now using 1.5-degree pathways.

1.17 FSB publishes global transition roadmap for LIBOR

16 October 2020 - The FSB has published the Global Transition Roadmap for LIBOR. The roadmap sets out a timetable of actions for financial and non-financial sector firms to take in order to ensure a smooth LIBOR transition by end-2021.

In July, the FSB reaffirmed that financial and non-financial sector firms across all jurisdictions should continue their efforts to make wider use of risk-free rates in order to reduce reliance on IBORs where appropriate and in particular to remove remaining dependencies on LIBOR by the end of 2021.

The LIBOR benchmarks are not guaranteed to continue to be available after end-2021 and therefore preparations should be underway to reduce reliance on these rates well ahead of that point. Use of LIBOR in the five LIBOR currencies (USD, GBP, EUR, JPY and CHF) is widespread internationally. Transition away from LIBOR by end-2021 requires significant commitment and sustained effort from both financial and non-financial institutions across many LIBOR and non-LIBOR jurisdictions.

This Global Transition Roadmap for LIBOR is intended to inform those with exposure to LIBOR benchmarks of some of the steps they should be taking now and over the remaining period to end-2021 to successfully mitigate these risks. These are considered prudent steps to take to ensure an orderly transition by end-2021 and are intended to supplement existing timelines/milestones from industry working groups and regulators. Among the steps in the Roadmap are the following:

- firms should have already identified and assessed all existing LIBOR exposures and agreed on a project plan to transition in advance of end-2021;
- by the effective date of the ISDA Fallbacks Protocol, the FSB strongly encourages firms to have adhered to the Protocol;
- by the end of 2020, firms should be in a position to offer non-LIBOR linked loans to their customers;
- by mid-2021, firms should have established formalised plans to amend legacy contracts where this can be done and have implemented the necessary system and process changes to enable transition to robust alternative rates; and
- by end-2021, firms should be prepared for LIBOR to cease.

1.18 Cross-border mergers and acquisitions for third quarter 2020

16 October 2020 - The International Institute for the Study of Cross-Border Investment and M&A has published its quarterly review for the third quarter of 2020:

- Global M&A activity recovered in Q3 2020 as economies around the world began to reopen and dealmakers, focusing on existence-preserving activities in the first half of the year, returned their attention to M&A transactions;
- Global M&A volume was US$1.1 trillion in Q3 2020, 94% more than volume in the frozen pandemic trough of Q2 2020 (US$559 billion), and also 36% more than Q3 2019 (US$800 billion). For the first three quarters of 2020, global M&A volume was US$2.3 trillion, a decrease of 19% from the first three quarters of 2019 (US$2.9 trillion);
- The third quarter's global M&A volume was strong not only relative to the first half of 2020, but also historically: Q3 2020 global M&A volume was the highest volume for a third quarter since 2007 (US$1.1 trillion) and represented US$4.3 trillion on an annualised basis, which would be the second highest annual global M&A volume in the last 10 years, and the highest since 2015 (US$4.6 trillion). Global M&A volume in 2020 is now on pace to reach US$3.1 trillion, which represents a vastly improved outlook for annual M&A volume as compared to annualized data as of mid-year (US$2.5 trillion);
- U.S. M&A volume surged in Q3 2020, reaching US$430 billion in Q3 2020, an increase of 221% from Q2 2020 (US$134 billion) and 53% from Q3 2019 (US$281 billion);
- Large and mega deals accounted for US$336 billion and US$431 billion of global volume in Q3 2020, respectively, representing increases of 211% and 107% from Q2 2020 (US$108 billion for large deals and US$208 billion for mega deals in Q2 2020) and 39% and 98% from Q3 2019 (US$242 billion for large deals and US$218 billion for mega deals in Q3 2019), respectively;
- Cross-border M&A activity, which slowed materially as a result of the coronavirus pandemic in the first half of the year, increased significantly in Q3 2020, bringing cross-border M&A activity across the first three quarters of the year to near-2019 levels. In Q3 2020, cross-border M&A volume was US$347 billion, 38% above the volume in Q2 2020 (US$251 billion);

- M&A volumes increased all over the world, with North American M&A volume increasing 226%, Japanese M&A volume increasing 293% (mostly attributable to a single mega deal), Asia-Pacific (excluding Japan) M&A volume increasing 79% and European M&A volume increasing 23%, in each case from Q2 2020; and
- The largest deals in Q3 2020 were Nippon Telegraph and Telephone's US$40 billion related-party acquisition of NTT DOCOMO; NVIDIA's US$40 billion acquisition of UK-headquartered ARM; Gilead's US$21 billion acquisition of Immunomedics; and Seven & i Holdings' US$21 billion acquisition of Speedway.

The Review is available on the Institute website.

1.19 UK FRC publishes future of corporate reporting discussion paper

8 October 2020 - The UK FRC has published a discussion paper proposing a future for corporate reporting based on a principles-based framework.

It outlines a blueprint for a more agile approach to corporate reporting which challenges existing thinking about how companies can more effectively meet the information needs of investors and other stakeholders.

The paper considers a common criticism that annual reports are too long, with information difficult to access. With companies and society at large facing significant challenges, which have only been heightened by the Covid-19 pandemic, stakeholders are ever more interested in companies' wider actions and the reporting that supports these.

Proposals include:

- unbundling the existing purpose, content, and intended audiences of the current annual report by moving to a network of interconnected reports;
- a new common set of principles that applies to all types of corporate reporting;
- objective-driven reports that accommodate the interests of a wider group of stakeholders, rather than the perceived needs of a single set of users;
- embracing the opportunities available through technology to improve the accessibility of corporate reporting; and
- a model that enables reporting that is flexible and responsive to changing demands and circumstances.

1.20 Regulators and government agencies annual reports 2019-2020

November 2020 - Regulators and government agencies with responsibility for corporate law, financial regulation and corporate governance have recently released their annual reports for 2019-2020.

They include:

- Australian Accounting Standards Board (AASB) and Australian Auditing and Assurance Standards Board (AUASB) Annual Reports 2019-20;
- Australian Financial Complaints Authority Annual Report 2019-2020;
- Australian Financial Security Authority (AFSA) Annual Report 2019-20;

- Australian Office of Financial Management (AOFM) Annual Report 2019-20;
- APRA Annual Report 2019-20;
- ASIC Annual Report 2019-20;
- Commonwealth Director of Public Prosecutions (CDPP) Annual Report 2019-20;
- Companies Auditors Disciplinary Board (CADB) Annual Report for 2019-20;
- FRC Annual Report 2019-20; and
- Takeovers Panel Annual Report 2019-20.

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2. Recent ASIC Developments

2.1 Latest data on buy now pay later industry

16 November 2020 - ASIC has published a new report on the buy now pay later industry which has grown substantially since ASIC's initial review. Buy now pay later arrangements allow consumers to buy and receive goods and services immediately from a merchant, and repay a buy now pay later provider over time. These arrangements continue to be embraced by many consumers as a payment option for goods and services and as part of the further evolution of the retail payments and consumer credit markets.

The total amount of credit extended in the buy now pay later industry has almost doubled in 12 months. ASIC's latest report (Report 672 Buy now pay later: An industry update), an industry update, charts the growth and popularity of these arrangements. Notably, the number of buy now pay later transactions increased from 16.8 million in the 2017-18 financial year to 32.0 million in the financial year 2018-19, representing an increase of 90%. ASIC's research shows that one in five consumers are missing payments. In the 2018-19 financial year, missed payment fee revenue for all buy now pay later providers in the review totalled over $43 million, a growth of 38% compared to the previous financial year.

According to ASIC, buy now pay later arrangements are clearly popular as a payment method. However, while working for the majority of users, some consumers are suffering harm. There are regulatory changes coming that will impact the industry, with the design and distribution obligations coming into effect in October 2021. The industry is also developing a code of conduct. ASIC expects the industry to work collectively to develop a code that provides good consumer outcomes across the diverse range of business models operating in the industry. Together the regulatory changes and the code of conduct provide an opportunity for the industry to address consumer harm.

2.2 Licensing and professional registration activities: 2020 update

11 November 2020 - ASIC's Licensing and professional registration activities: 2020 update (Report 671) highlights new requirements for licensees, prospective applicants and service providers, and the impact of the COVID-19 pandemic.

Between July 2019 and June 2020, ASIC received 1,500 licensing and professional registration applications (a slight decrease from 1,504 the previous year). This includes 1,346 AFS and credit licence applications. ASIC approved 394 new AFS and credit licences and 580 variation applications by AFS and credit licensees.

In assessing the majority of the applications, ASIC achieved other regulatory outcomes including by imposing additional conditions on the licence to ensure applicants were only granted authorisations appropriate to their business activities and competence.

In addition, 361 AFS and credit licence applications were withdrawn or rejected for lodgement, four were refused, and 683 AFS and credit licences were cancelled and 40 suspended.

ASIC also approved the registration of 58 company auditors, 40 self-managed super fund (SMSF) auditors and registered 12 liquidators approved by the liquidator registration committee. In the same period, 41 professional registration applications were withdrawn and two were refused.

ASIC finalised a total of 2,062 applications during the relevant period.

2.3 ASIC to further extend financial reporting deadlines for listed and unlisted entities and amends "no action" position for AGMs

11 November 2020 - ASIC will extend the deadline for both listed and unlisted entities to lodge financial reports under Chapters 2M (Financial reports and audit) and 7 (Financial services and markets) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) by one month for certain balance dates up to and including 7 January 2021 balance dates.

The extended deadlines for lodgement of financial reports will assist those entities whose reporting processes take additional time due to current remote work arrangements, travel restrictions and other impacts of COVID-19.

Where possible, entities should continue to lodge within the normal statutory deadlines, having regard to the information needs of shareholders, creditors and other users of their financial reports, or to meet borrowing covenants or other obligations.

This additional relief builds on earlier relief announced for unlisted entities with 31 December 2019 to 7 July 2020 year ends (refer: 20-084MR ASIC to provide additional time for unlisted entity financial reports and 20-113MR ASIC to further extend financial reporting deadlines for listed and unlisted entities and amends "no action" position for AGMs) and will extend deadlines for lodging financial reports for all listed and unlisted entities for balance dates to 7 January 2021 where the reporting deadline has not already passed.

Unlisted entities will be able to take one additional month to lodge financial reports for year ends from 31 December 2019 to 7 January 2021. Listed entities will be able to take one additional month to report for full year and half-year financial reports for 21 February 2020 to 7 January 2021 balance dates. (The 7 January 2021 date accommodates entities that use a provision in the Corporations Act that allows their financial year to be changed by plus or minus 7 days each year.)

Listed entities will be required to inform the market when they rely on the extended period for lodgement. These entities may also find it desirable to explain the reasons for relying on the extended deadlines. Instruments extending the deadlines are to be registered on the Federal Register of Legislation.

"No action" position on holding of Annual General Meetings

ASIC has adopted a "no action" position where public companies do not hold their AGMs within five months after the end financial years that end from 31 December 2019 to 7 January 2021, but do so up to seven months after year end.

ASIC's no action position also allows additional time for distribution of financial reports to members prior to the AGM for those companies that have relied on the extension of time for lodgement of financial reports.

ASIC had previously adopted a "no action" position where public companies hold their AGMs for 31 December 2019 year ends by the end of July 2020 (refer: 20-068MR Guidelines for meeting upcoming AGM and financial reporting requirements and 20-113MR ASIC to further extend financial reporting deadlines for listed and unlisted entities and amends "no action" position for AGMs).

Reporting periods ending after 7 January 2021

ASIC will continue to monitor how market conditions and COVID-19 developments are affecting financial reporting and AGM obligations for balance dates after 7 January 2021. ASIC states that at present, there is no indication that further extensions of time will be necessary.

2.4 ASIC seeks further feedback on the proposed intervention order for continuing credit contracts

10 November 2020 - ASIC is seeking further feedback on its proposed use of its product intervention powers to address significant detriment in relation to continuing credit contracts. The announcement follows ASIC's earlier consultation through Consultation Paper 330 Using the product intervention power: Continuing credit contracts (CP 330) which was published on 9 July 2020.

CP 330 outlined ASIC's proposal to make an industry wide product intervention order to address concerns of ongoing significant detriment in relation to continuing credit contracts, which involve unreasonably high costs, in excess of the cost caps in the continuing credit exemption in s. 6(5) of the *National Credit Code*.

In response to submissions received to CP 330, ASIC has made changes to the proposed product intervention order. These changes involve providing certain exclusions for Buy Now Pay Later arrangements, and for fees charged by licensed providers of non-cash payment facilities that are associated with continuing credit providers.

These changes are set out in detail in the attached addendum to CP 330 and updated draft product intervention order.

View:

- Addendum to CP 330; and
- Updated draft ASIC Corporations (Product Intervention - Continuing Credit Contracts) Instrument 2020/XXX.

2.5 Product intervention order strengthens CFD protections

23 October 2020 - ASIC has made a product intervention order imposing conditions on the issue and distribution of contracts for difference (CFDs) to retail clients. ASIC's order strengthens consumer protections by reducing CFD leverage available to retail clients and by targeting CFD product features and sales practices that amplify retail clients' CFD losses. It also brings Australian practice into line with protections in force in comparable markets elsewhere.

From 29 March 2021, ASIC's product intervention order will:

- restrict CFD leverage offered to retail clients to a maximum ratio of:
    - 30:1 for CFDs referencing an exchange rate for a major currency pair;
    - 20:1 for CFDs referencing an exchange rate for a minor currency pair, gold or a major stock market index;
    - 10:1 for CFDs referencing a commodity (other than gold) or a minor stock market index;
    - 2:1 for CFDs referencing crypto-assets; and
    - 5:1 for CFDs referencing shares or other assets.
- standardise CFD issuers' margin close-out arrangements that act as a circuit breaker to close-out one or more a retail client's CFD positions before all or most of the client's investment is lost;
- protect against negative account balances by limiting a retail client's CFD losses to the funds in their CFD trading account; and
- prohibit giving or offering certain inducements to retail clients (for example, offering trading credits and rebates or "free" gifts like iPads).

ASIC also confirmed it will not require issuer-specific risk warnings or other disclosure-based conditions as originally proposed in Consultation Paper 322 Product intervention: OTC binary options and CFDs (CP 322).

The order strengthens protections for retail clients trading CFDs after ASIC found that CFDs have resulted in, and are likely to result in, significant detriment to retail clients. ASIC reviews in 2017, 2019 and 2020 found that most retail clients lose money trading CFDs.

During a volatile five-week period in March and April 2020, the retail clients of a sample of 13 CFD issuers made a net loss of more than $774 million. During this period:

- over 1.1 million CFD positions were terminated under margin close-out arrangements (compared with 9.3 million over the full year of 2018); and
- more than 15,000 retail client CFD trading accounts fell into negative balance owing a total of $10.9 million (compared with 41,000 accounts owing $33 million over the full year of 2018). Some debts were forgiven.

The order will remain in force for 18 months, after which it may be extended or made permanent. Civil and criminal penalties apply to contraventions of the product intervention order.

ASIC's consideration of feedback on its proposal in CP 322 to ban the issue and distribution of binary options to retail clients is ongoing.

2.6 Updated regulatory guidance for share transfers using s. 444GA of the Corporations Act

22 October 2020 - ASIC has released updated regulatory guidance to formalise its policy on when ASIC will give Chapter 6 (Takeovers) relief for share transfers under s. 444GA of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). This follows ASIC's review of submissions received in response to CP 326 Chapter 6 relief for share transfers using s. 444GA of the Corporations Act.

Section 444GA allows shares of a company in administration to be transferred by an administrator as part of a deed of company arrangement.

ASIC's updated guidance is set out in:

- Regulatory Guide 6 (RG 6) Takeovers: Exceptions to the general prohibition; and
- Regulatory Guide 111 (RG 111) Content of Expert Reports.

The guidance explains that before ASIC will give Chapter 6 relief for share transfers under s. 444GA, ASIC will generally require:

- explanatory materials to be provided to shareholders, including an Independent Expert Report (IER) prepared on a non-going concern basis in accordance with RG 111 Content of Expert Reports demonstrating that shareholders have no residual equity in the company; and
- the IER to be prepared by an independent expert (other than the administrator) in accordance with RG 112 Independence of experts.

2.7 Updated information sheets on new protections under the unfair contract terms laws

20 October 2020 - ASIC has updated its information sheets on unfair contract terms protections for consumers and small businesses. The protections will be extended to insurance contracts following the Government's enactment of the Financial Sector Reform (Hayne Royal Commission Response-Protecting Consumers (2019 Measures)) Act 2020 No. 2 (Cth). The changes will take effect from 5 April 2021.

Information sheet 210 (INFO 210) and information sheet 211 (INFO 211) now provide information about how the unfair contract terms will apply to insurance contracts from 5 April 2021.

In preparation for the unfair contract term protections applying to insurance contracts, ASIC is undertaking targeted supervisory work with industry. ASIC has been working with industry groups and insurers to gauge how insurers are tracking in the lead up to the new protections commencing, and to help inform industry about those new obligations. This includes discussions about potential contract terms which may raise concerns under the unfair contract terms protections.

The focus of ASIC's supervisory work is on:

- terms that allow an insurer to cash settle a claim based on the cost of repair to the insurer;
- terms that are an unnecessary barrier to a consumer lodging a claim;

- terms that reduce the cover offered where compliance with the preconditions is unfeasible; and
- terms that use an outdated, and therefore inaccurate or restrictive, medical definition.

ASIC will continue to engage with industry in the lead up to the commencement of the new laws.

View:

- Information sheet Unfair contract term protections for consumers (INFO 210); and
- Information sheet Unfair contract term protections for small businesses (INFO 211).

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3. Recent ASX Developments

3.1 Reports

On 5 November 2020, ASX released the ASX Monthly Activity Report for October 2020.

3.2 New scope and go-live date for CHESS replacement

On 28 October 2020, ASX announced the new go-live date for the CHESS replacement system as April 2023, with increased project scope and a 12-month extension to the proposed date consulted upon mid-year.

This follows careful consideration of the feedback from extensive industry consultation, engagement with regulatory agencies, detailed discussions with ASX's technology partners, and completion of a comprehensive project review. While most CHESS users indicated they could meet the proposed go-live date of April 2022, many asked for extra industry testing, more time to prepare, and additional functionality that reduces manual processes. The industry also requested substantially more post-trade processing capacity in response to the extreme increases in trading volumes on the ASX platform during the most volatile period of the pandemic in March 2020.

The media release is available on the ASX website.

ASX also released its response to consultation feedback received on the June 2020 CHESS Replacement: Revised Implementation Timetable Consultation Paper. This response provides a summary of the feedback received, the key factors driving the project extension and the confirmed implementation schedule for CHESS replacement.

ASX received feedback from 100 organisations. The response can be found on the ASX website.

3.3 Public consultation - Proposed changes to capital requirements for ASX clear participants

On 14 October 2020, ASX released a consultation paper which outlines a proposed consolidation of the two capital measures that non-bank ASX Clear participants are currently required to maintain as per Schedule 1 of the ASX Clear Operating Rules, into a single capital measure. ASX seeks feedback on the proposed single capital measure and draft miscellaneous rule amendments.

Written submissions are requested by Monday, 30 November 2020. The consultation paper is available on the ASX website.

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4. Recent Takeovers Panel Developments

4.1 CFOAM Limited - Panel declines to conduct proceedings

9 November 2020 - The Takeovers Panel has declined to conduct proceedings on an application dated 3 November 2020 from shareholders who collectively hold 37.5% of the issued shares in CFOAM Limited in relation to the affairs of that company.

On 8 October 2020, CFOAM announced that it had entered into an "agreement to invest A$1,550,000 to acquire a strategic 10.24% interest in Innovaero Technologies Pty Ltd (Innovaero), an Australian Aerospace and Defence Technology business", conditional (among other things) on CFOAM completing a new equity raising for a minimum of A$3,000,000 (Innovaero Investment). CFOAM also announced that it would undertake a 4 for 3 renounceable entitlement issue at an issue price of $0.015 per share to raise up to A$3,843,181 (Entitlement Issue) (see TP20/74).

The Panel considered (among other things) that:

- there was no evidence that the Entitlement Issue will have or is likely to have an effect on the control of CFOAM; and
- delaying the Entitlement Issue could impact on CFOAM's ability to raise funds.

The Panel noted the discretion given to the directors to allocate shares under the shortfall offer (Shortfall Shares) in accordance with the terms set out in cl. 2.7 of the *Entitlement Issue Prospectus*. The Panel considered that if the directors allocate the Shortfall Shares in a manner that will have or is likely to have an effect on control then this may be grounds for a further application.

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

The Panel will publish its reasons for the decision in due course on the Takeovers Panel website.

4.2 Cardinal Resources Limited 02 - Panel declines to conduct proceedings

30 October 2020 - The Takeovers Panel has declined to conduct proceedings on an application dated 26 October 2020 from Nord Gold S.E. (Nordgold) in relation to the affairs of Cardinal Resources Limited (Cardinal).

Cardinal is the subject of competing takeover bids from Nordgold and Shandong Gold Mining (HongKong) Co., Limited (Shandong). On 19 October 2020, Shandong lodged its Second Supplementary Bidder's Statement in respect of its off-market takeover bid for Cardinal which stated that its $1.00 per share offer price was best and final in the absence of a higher competing offer. On 21 October 2020, Nordgold increased the price under its unconditional on-market takeover bid for Cardinal from $0.90 to $1.00 per share.

On 23 October 2020 at approximately 3.59pm, Cardinal made an announcement that it had received shareholder intention statements from 28 of its shareholders (representing 19.38% of its shares) (Accepting Shareholders) to the effect that the Accepting Shareholders intend to accept the Shandong offer by 30 October 2020 (unless the Shandong offer was otherwise extended), subject to either Nordgold not increasing the offer price under its takeover offer above $1.00 per share or there being no superior proposal (see TP20/64).

Following the application to the Panel, at approximately 9.20am on 26 October 2020, Nordgold made an announcement which stated that its $1.00 per share offer price was best and final in the absence of a higher competing offer (Last and Final Statement).

At approximately 8.23pm on 26 October 2020, Shandong made an announcement that it was extending the offer period under its bid until 7.00pm (Sydney time) on 31 December 2020.

The Panel considered (among other things) that:

- there was not sufficient evidence that Cardinal's solicitation of shareholder intention statements from the Accepting Shareholders involved conduct that is unacceptable;
- if there was no superior proposal in excess of $1.00 per share prior to 5.30pm (AEDT) on Thursday, 29 October 2020 then Accepting Shareholders would have until 31 December 2020 to accept the offer by Shandong;
- it was not prima facie unreasonable for Cardinal to solicit statements from its shareholders at a time prior to Nordgold making its Last and Final Statement; and
- there was insufficient material provided on the question of association for the Panel to conduct proceedings on this issue.

The Panel did not express an opinion on whether shareholders who make intention statements in bids will be bound by the statements irrespective of whether they are substantial shareholders.

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

The Panel will publish its reasons for the decision in due course on the Takeovers Panel website.

4.3 Webcentral Group Limited - Panel declines to conduct proceedings

29 October 2020 - The Takeovers Panel has declined to conduct proceedings on an application dated 21 October 2020 from Keybridge Capital Limited in relation to the affairs of Webcentral Group Limited.

Webcentral is subject to a takeover bid from 5G Networks Limited. On 17 September 2020, Webcentral announced (among other things) that 5G Networks would provide funding to Webcentral to enable Webcentral to repay its existing financiers in full (Debt Funding), if 5G Networks has a relevant interest in at least 50.1% of the Webcentral shares and the 5G Networks bid becomes or is declared wholly unconditional. On 13 October 2020, 5G Networks declared its bid unconditional and disclosed that all of Webcentral's directors had accepted into the 5G Networks bid and that 5G Networks had voting power in Webcentral of 34.75% (see TP20/61).

The day after the application was made (i.e. 22 October 2020), 5G Networks lodged a supplementary bidder's statement, disclosing (among other things) that it and Webcentral had entered into an agreement to waive the requirement that 5G Networks has a relevant interest in at least 50.1% of Webcentral shares as a condition to the Debt Funding.

The Panel considered that it was not in the public interest to conduct proceedings in all the circumstances, noting that:

- any coercive effect of 5G Networks waiving its bid conditions and leaving the 50% acceptance condition on 5G Networks' loan offer was partly remedied by 5G Networks waiving the 50% condition to its loan offer;
- Webcentral was financially constrained;
- the Panel is generally reluctant to substitute the decision of target directors when there is little material to suggest any association between them and the bidder;
- the directors waited for a period before accepting into the 5G Networks bid, allowing for a superior proposal to be made; and
- the range of possible remedies were less likely to have an effect given the timing of the application.

The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings. As the Panel has decided not to conduct proceedings, the President's interim orders (see TP20/62) cease to have effect.

The Panel will publish its reasons for the decision in due course on the Takeovers Panel website.

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5. Recent Research Papers

5.1 Green bonds: Legal and policy issues

The market for green bonds has grown rapidly in recent years. This has resulted in increased attention on legal and policy issues associated with green bonds. These issues are the focus of this article. The article first describes key aspects of the green bond market including the nature and role of green bonds. It then discusses the main features of green bonds and the green bond market, including their benefits, cost and the role of green bond standards. The final section of the article examines selected issues, including various aspects relating to "greenwashing" - the practice of falsely attributing environmentally positive credentials to a bond claimed to be "green". Other issues discussed include pressures to relax green bond standards arising from demand for green bonds outstripping supply, and the position applying in cases of "green defaults" - where the green promises made in relation to a bond are not fulfilled.

Green Bonds: Legal and Policy Issues

5.2 Parent company direct liability for overseas human rights violations: Lessons from the UK Supreme Court

Human rights violations are perpetrated by corporate actors with troubling frequency. In most cases, plaintiffs do not have access to a remedy. For 30 years, the United States has been a beacon of hope, its courts adjudicating human rights claims against corporate defendants under the Alien Tort Statute. Then, in *Kiobel v Royal Dutch Petroleum*, the Supreme Court closed the door on human rights plaintiffs. This article charts the rise of the United Kingdom as a venue to bring suit. The U.K. Supreme Court, in a far-reaching judgment from 2019, upheld a decision to allow plaintiffs to sue a London-headquartered parent company for grave environmental damage and harm to local communities' livelihoods that occurred through the operations of the company's Zambian subsidiary. The dichotomy in approaches between the U.S. and the U.K. courts has prompted consideration of the following: is there anything that can be drawn from the U.K. litigation to improve access to remedies in the U.S. courts for victims of human rights violations by corporate actors? The article concludes that the argument used in the U.K. case law to attribute liability directly to parent companies should be taken up in the U.S.

Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court

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5.3 Board risk oversight and environmental and social responsibility

Risk oversight has emerged as an important responsibility of corporate boards. At the same time, firms are increasingly recognising the risks that social and environmental issues pose to investors and stakeholders. In this study, the authors examine the relation between board risk oversight and firms' environmental and social (E&S) ratings. Using proprietary data on the board risk oversight practices of firms from 29 countries, they show that firms with more robust risk oversight have higher E&S ratings, are more likely to integrate E&S issues into their strategies and executive remuneration contracts, and ultimately experience better E&S outcomes.

Board Risk Oversight and Environmental and Social Responsibility

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6. Recent Corporate Law Decisions

6.1 Section 1322 orders made to remedy a failure to lodge cleansing notices

(By Benjamin Depiazzi and Olivia Hodgetts, Clayton Utz)

Whitehawk Ltd [2020] WASC 388 (20 October 2020), Supreme Court of Western Australia, Hill J.

(a) Summary

Whitehawk Limited (Whitehawk) failed to lodge cleansing notices following the issue of ordinary shares on three occasions and sought relief from the Supreme Court of Western Australia. Whitehawk provided a detailed explanation as to the circumstances surrounding each share issue, and Hill J was satisfied that Whitehawk's failure to lodge cleansing notices was caused by inadvertence rather than a deliberate disregard for its obligations. Hill J granted the relief sought by the company.

(b) Facts

Whitehawk issued ordinary shares without disclosure on three separate occasions in July, August and September 2020. Some of the shares issued in July were on-sold within 12 months of their issue.

Relevantly, s.708A(5) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) provides that, if the company lodges what is colloquially known as a "cleansing notice", any on-sale of the issued shares within 12 months of their issue does not need disclosure.

On each occasion that Whitehawk issued shares, the company secretary, Mr Kye, failed to lodge a cleansing notice on behalf of the company. Mr Kye deposed that Whitehawk could have lodged valid cleansing notices on or about the dates of the share issues.

Mr Kye gave evidence that his failure to lodge cleansing notices on behalf of the company was a result of administrative pressure, an increased workload and, in part, an unfamiliarity with ASX's new online system for submitting Appendix 3Bs (and other documents). When uploading an Appendix 3B under ASX's previous system, Mr Kye would include a cleansing notice and submit a single document to ASX; under the new system, the cleansing notice must be uploaded as a separate document.

On 12 October 2020, Mr Kye realised that cleansing notices had not been lodged. Whitehawk promptly sought legal advice, entered a trading halt, lodged cleansing notices in respect of the share issues, commenced the relief proceedings and obtained a voluntary suspension of trading of its shares on ASX.

(c) Decision

Section 1322(4)(d) gives the Court the power to make an order extending the period for doing any act, matter or thing under the Corporations Act. Whitehawk sought orders under this section to extend the timeframe for lodging its cleansing notices to 15 October 2020 (the date of actual lodgement).

Her Honour considered the relevant principles and was satisfied that it was appropriate to extend the time for Whitehawk to lodge its cleansing notices for eight reasons:

- the extension period was short, the longest period being three months and 10 days (from the July share issue);
- the failure to lodge the cleansing notices was due to inadvertence and was promptly rectified upon discovery;

- a continued suspension would create adverse consequences for Whitehawk and its shareholders, as Whitehawk's shares would continue to be suspended from trading and Whitehawk may lose its ability to lodge a cleansing notice under s.708A(5)(b);
- shareholders who purchased shares on market since July 2020 may have purchased some of the shares the subject of the July share issue, which potentially means the transactions may be void or voidable and may create title issues (on the basis that the sales occurred without disclosure);
- the making of the orders sought by Whitehawk was consistent with the conduct of commerce generally;
- Whitehawk brought its application without delay, four days after realising the problem;
- the orders sought by Whitehawk provided for notice to be given to all persons affected and the ability to raise matters with the Court; and
- Whitehawk's application was not opposed by ASIC, the ASX or any shareholders (Hill J noted that ASIC chose not to appear after taking into account a number of matters, including that Whitehawk "did not seek relief as to its own conduct, its directors or company secretary").

Section 1322(4)(a) gives the Court the power to make an order declaring that any act purported to have been done is not invalid by reason of any contravention of a provision of the Corporations Act. Whitehawk sought orders under this section to deem the cleansing notices to have retrospective effect, and to validate any offers or sales of shares in respect of the July share issue (the only shares that had been on-sold).

Hill J noted that Courts have made orders similar to those sought by Whitehawk on a number of occasions and it is not in doubt that the Court can make orders consequential or ancillary to an order extending the time period for doing any act, matter or thing under the Corporations Act. Her Honour considered that it was appropriate to make the orders for the following three reasons:

- to remove any question of title in the shares the subject of the July issue that may have arisen due to the on-sale of those shares;
- the orders concerned a past act and not a future act as, at the time the application was heard, the cleansing notices had been lodged; and
- as some of the shares had been on-sold, the "deeming order" was a corollary to the orders extending the time for the lodgement of the cleansing notices.

In order for the Court to be able to make orders under s. 1322, it must be satisfied that certain pre-conditions in s. 1322(6) have been met. Relevantly:

- s. 1322(6)(a) requires, in the case of an order made under s. 1322(4)(a), that "the person or persons concerned in or party to the contravention or failure acted honestly" (or alternatively one of another two sub-sections is satisfied); and
- s. 1322(6)(c) requires that "no substantial injustice has been or is likely to be caused to any person".

Hill J was satisfied these pre-conditions had been met.

Her Honour accepted that the persons concerned acted honestly as the failure to lodge cleansing notices occurred through inadvertence (rather than deliberate disregard by Whitehawk or its officers of the obligations under Chapter 6D (Fundraising) of the Corporations Act) and the directors had not failed to take an active interest in the company's compliance with the Corporations Act or to properly define roles for the company's officers. Hill J also held there was no basis for inferring that substantial injustice had been or was likely to be caused to any person by the making of the orders.

Her Honour considered that there were no other discretionary reasons to withhold relief, noting that Whitehawk sought to remedy the matter promptly and there was no evidence before her Honour of substantial misconduct, serious wrongdoing or flagrant disregard of the law or Whitehawk's constitution. Nor was there any evidence which suggested that any minority interest might be oppressed or any other interest might be adversely affected.

6.2 Husband and wife directors liable to pay debts for insolvent trading

(By Jordan Soresi and Manisha Pannu, Ashurst)

Yeo, in the matter of Bradi Transport Pty Ltd (in liq) v Sklenovski [2020] FCA 1540 (19 October 2020), Federal Court of Australia, Anderson J.

(a) Summary

Company liquidators brought proceedings against its directors for trading while insolvent. Anderson J considered three main issues, being:

- whether the director's husband was also a director;
- whether the company had traded while insolvent; and
- whether the director(s) owed amounts equal to the company debts.

His Honour held that the husband was a director and that he and his wife (the Defendants) had failed to prevent the company from trading while insolvent. Consequently, they were liable to pay the unsecured creditors the debts incurred during the period of insolvent trading.

(b) Facts

Bradi Transport Pty Ltd (the Company) operated a business providing concrete cartage services for its sole customer, Boral Resources (Vic) Pty Ltd (Boral). The Company had two employees - Mr Ralph Jahnke and the second defendant, Mr Atinlo Sklenovski. Mr Sklenovski's wife - Mrs Elizabeth Sklenovksi - served as the appointed Company director from 27 June 2005. On 7 December 2018, the Company was wound up in insolvency.

(c) Decision

(i) Directorship

The liquidators argued that while not formally appointed, Mr Sklenovski was a de facto director under s. 9 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). This section refers to a person who "act[s] in the position of a director". Anderson J referred to *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, which sets out the relevant guiding principles.

Accordingly, a person without any purported appointment may be a director if they act in a company role and perform functions that a director would reasonably be expected to perform. A person may become a director over time, if only for a limited period. Ultimately, whether someone acts in such a position is a question of both substance and degree, with regard to the nature of the functions and extent of their exercise.

Anderson J agreed that Mr Sklenovski was the controlling mind and a director of the Company due to a number of factors, including the nature of the Company's business serving one customer and having limited staff, and Mr Sklenovski's admission as set out below.

There was evidence that Mr Sklenovski had told the first plaintiff (being one of the liquidators) that he controlled the Company's business and affairs from at least 27 June 2005. The Company's pre-liquidation accountant had advised the liquidation staff that Mr Sklenovski effectively controlled and was the responsible mind of the Company and ran its business, and that Mrs Sklenovski's involvement was extremely limited.

Moreover, it was Mr Sklenovski who instructed Mr Jahnke in the course of his employment and acted as the Company representative with Boral.

(ii) Insolvent trading

In relation to insolvent trading, there were three issues:

- whether s. 588G of the Corporations Act applied to the Defendants;
- whether the Defendants contravened s. 588G; and
- whether s. 588M of the Corporations Act was satisfied.

Section 588G relevantly provides:

588G Director's duty to prevent insolvent trading by company

(1) This section applies if:

(a) a person is a director of a company at the time when the company incurs a debt; and
(b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
(c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and
(d) that time is at or after the commencement of [the Corporations Act].
.

(2) By failing to prevent the company from incurring the debt, the person contravenes this section if:

(a) the person is aware at that time that there are such grounds for so suspecting; or
(b) a reasonable person in a like position in a company in the company's circumstances would be so aware.

Section 588M relevantly provides:

588M Recovery of compensation for loss resulting from insolvent trading

(1) This section applies where:

(a) a person (in this section called the director) has contravened subsection 588G(2) or (3) in relation to the incurring of a debt by a company; and
(b) the person (in this section called the creditor) to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency; and

(c) the debt was wholly or partly unsecured when the loss or damage was suffered; and
(d) the company is being wound up;

whether or not:

(e) the director has been convicted of an offence in relation to the contravention; or
(f) a civil penalty order has been made against the director in relation to the contravention.
.

(2) The company's liquidator may recover from the director, as a debt due to the company, an amount equal to the amount of the loss or damage.

(3) The creditor may, as provided in Subdivision B but not otherwise, recover from the director, as a debt due to the creditor, an amount equal to the amount of the loss or damage.
.

Section 588G thus only applies to a director at the time of incurring a debt, where the company is insolvent or becomes insolvent as a result of that debt and if, at the time, there are reasonable grounds to suspect the company is insolvent.

In view of *Hawkins v Bank of China* (1992) 26 NSWLR 562, 572, Anderson J accepted that a debt will be incurred when the debtor does something to render them liable to pay, whether that be a present or future obligation. The Company had incurred from 1 July 2013 to 7 December 2018, and was found to owe to the Australian Taxation Office (the ATO), HCC Fleet Services Pty Ltd and Mr Jahnke, debts totalling $274,143.05.

By not complying with a creditor's statutory demand issued by the ATO on 24 March 2015, the Company committed an act of insolvency. Anderson J also noted that the Company delayed winding up for 2.5 years.

In reliance on cases such as *Fryer v Powell* [2001] SASC 59 and *Re Overgold Pty Ltd* [2019] VSC 624, Anderson J observed that the question of whether there are reasonable grounds for suspicion is an objective one. From before 30 June 2013, the Company's tax obligations increased. Its only means of satisfying this liability was through free cash flow. However, an analysis of the Company bank statements showed that the Defendants habitually withdrew whatever money was available in the Company bank account without any intention of repaying it, so as to leave only a nominal amount in the account. In this light, Anderson J concluded that there were sufficient grounds for a reasonable person in the Defendants' position to suspect that the Company would be unable to meet its tax obligations as and when they fell due.

The Defendants ultimately contravened s. 588G(2) because they failed to prevent the Company from incurring these debts. Anderson J accepted the liquidators' contention that a reasonable person in the Defendants' position would have been aware of these grounds for suspicion. In reality, the Defendants knew or should have known that the Company could not meet its tax obligations given their regular withdrawals.

In the absence of contrary evidence, the debts were prima facie unsecured. As they remained unpaid at the time of liquidation, Anderson J considered that the creditors had suffered the requisite loss or damage in relation to the Company's insolvency. His Honour ordered that the liquidators recover amounts equal to the debts owed under s. 588M.

6.3 Does a court have jurisdiction to hear and determine a preliminary discovery order during a takeover bid?

(By Ken Ooi, Herbert Smith Freehills)

Cromwell Corporation Limited v ARA Real Estate Investors XXI Pte Ltd [2020] FCA 1492 (16 October 2020), Federal Court of Australia, Anderson J.

(a) Summary

This case relates to applications for preliminary discovery under r. 7.23 of the Federal Court Rules 2011 No. 134 (Cth) (the Federal Court Rules) and the jurisdiction of courts under s. 659B(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), which provides that only specified persons may commence court proceedings in relation to a takeover bid before the end of the bid period.

Cromwell Property Group (Cromwell) applied for a preliminary discovery order under r. 7.23 on the basis that it may have a right to obtain relief from each of the respondents for alleged contraventions of the takeover thresholds in s. 606(1) and the substantial holder notice provisions in s. 671B(1) of the Corporations Act.

The respondents, ARA Real Estate Investors XXI Pte Ltd, a Singaporean company, and its related entities (ARA Respondents), and a Singaporean family together with its connected companies (Tang Respondents) submitted that Cromwell did not fall within any of the categories of persons who may commence court proceedings in relation to a takeover bid before the end of the bid period under s. 659B(1).

To determine if s. 659B(1) applied, Anderson J considered whether the application for preliminary discovery was a proceeding "in relation to a takeover bid". The Court held that it was not. Accordingly, his Honour found that s. 659B(1) did not apply to this proceeding, with the result that the Court had jurisdiction to determine Cromwell's application for preliminary discovery. However, his Honour rejected Cromwell's application on the basis that the requirements for preliminary discovery under r. 7.23 were not met.

(b) Facts

Cromwell's application for preliminary discovery was brought in the context of a long-running dispute between Cromwell and the ARA Respondents regarding the management of Cromwell. The background to this matter includes an application made by Cromwell to the Takeovers Panel for a declaration of unacceptable circumstances based on the same matters which formed the application for this proceeding. Cromwell represented to the Takeovers Panel that there was a substantial body of evidence which established the existence of an alleged undisclosed association between the ARA Respondents and the Tang Respondents. The application was rejected by the Panel which declined to conduct proceedings in January 2020 (*Re Cromwell Property Group* [2020] ATP 1).

On 21 July 2020, an ARA entity lodged a bidder's statement enclosing an offer to Cromwell security holders to purchase 29% of each security holder's securities (Proportional Takeover Bid). That same day, Cromwell released an ASX announcement advising its security holders to take no action.

On 31 July 2020, Cromwell commenced proceedings in the Federal Court.

The ARA Respondents argued that the Court did not have jurisdiction to hear and determine the matter because Cromwell did not fall within any of the categories of persons under s. 659B(1) who may commence court proceedings in relation to a takeover bid before the end of the bid period. On the ARA respondents' submissions, s. 659B(1) applied because the proceeding was a court proceeding "in relation to. an action taken or to be taken as part of, or for the purposes of" the Proportional Takeover Bid. The ARA Respondents contended that the words "in relation to" has a broad meaning, and in particular, that the relationship between the proceeding and the Proportional Takeover Bid was clear and sufficiently close to be characterised as a proceeding "in relation to" the bid.

Cromwell's position was that the proceeding was a preliminary discovery application and was simply not a proceeding in relation to the bid. Cromwell also noted that ARA's intention to make a takeover bid was only announced on 23 June 2020, which was after Cromwell had instructed its lawyers to prepare the preliminary discovery application.

(c) Decision

(i) Jurisdiction

Before considering whether Cromwell had satisfied the requirements of r 7.23, the Court first considered the question of jurisdiction and parties' submissions on the application of s. 659B(1) of the Corporations Act. Section 659B provides:

"(1) Only the following may commence court proceedings in relation to a takeover bid, or proposed takeover bid, before the end of the bid period:

(a) ASIC;
(b) a Minister of the Commonwealth;
(c) a Minister of a State or Territory in this jurisdiction;
(d) the holder of an office established by a law of:

i. the Commonwealth; or
ii. a State or Territory in this jurisdiction;

(e) a body corporate incorporated for a public purpose by a law of:

i. the Commonwealth; or
ii. a State or Territory in this jurisdiction;

to the extent to which it is exercising a power conferred by a law of the Commonwealth or a State or Territory in this jurisdiction."

Guided by the text of s. 659B and several authorities interpreting that provision, Anderson J found that the application was not a proceeding "in relation to a takeover bid" such that s. 659B(1) had no application to the proceedings. His Honour's decision was based on several reasons, which included:

- the fact that Cromwell's application relates to a potential future proceeding under s. 606(1) and s. 671B(1) was not sufficient to characterise the application for preliminary discovery as being "in relation to" a takeover bid;
- the proceeding was about the mere provision of documents rather than whether the takeover bid should be disrupted or allowed to proceed;

- that courts will interpret any provision affecting their jurisdiction narrowly so as to have the minimum effect on it;
- having regard to the context and purpose of s. 659B as well as its explanatory memorandum, the obvious purpose of the provision was to avoid "tactical litigation" that could result in bids being delayed. Nothing indicated that granting Cromwell's application would result in delay to the Proportional Takeover Bid; and
- Cromwell's application was not within the Takeover Panel's province as the Takeovers Panel has limited investigatory powers which do not include broad or preliminary discovery.

(ii) Rule 7.23

In an application for preliminary discovery in the Federal Court, r 7.23 of the Federal Court Rules provides:

(1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant:

(a) reasonably believes that the prospective applicant may have the right to obtain relief in the Court from a prospective respondent whose description has been ascertained;
(b) after making reasonable inquiries, does not have sufficient information to decide whether to start a proceeding in the Court to obtain that relief; and
(c) reasonably believes that:

i. the prospective respondent has or is likely to have or has had or is likely to have had in the prospective respondent's control documents directly relevant to the question whether the prospective applicant has a right to obtain the relief; and
ii. inspection of the documents by the prospective applicant would assist in making the decision.

(2) If the Court is satisfied about matters mentioned in subrule (1), the Court may order the prospective respondent to give discovery to the prospective applicant of the documents of the kind mentioned in subparagraph (1)(c)(i).

Anderson J held that Cromwell's application for preliminary discovery did not meet the requirements of r. 7.23(1)(a) and (b).

In relation to r. 7.23(1)(a), Anderson J was not satisfied that Cromwell believed it *may* have the right to obtain relief under ss. 606(1) and 671B(1) of the Corporations Act, but rather his Honour found that Cromwell believed that it *has* a right to obtain such relief. In this regard, his Honour referred to the affidavits submitted by Cromwell to the Court as well as submissions made by Cromwell to the Takeovers Panel in *Re Cromwell Property Group* [2020] ATP 1, which indicated that Cromwell had already formed the view that there was in fact a relevant agreement between the ARA Respondents and the Tang Respondents and that they were associates.

With regard to r. 7.23(1)(b), given statements by Cromwell which made it "tolerably clear" that Cromwell believed it had a right to relief against the ARA Respondents and the Tang Respondents, Anderson J was not satisfied that Cromwell "did not have sufficient information to decide whether to start a proceeding in the Court to obtain that relief". His Honour noted that r. 7.23 was not about assisting a party to find further proof of a case already known to exist.

Accordingly, Anderson J dismissed Cromwell's application for preliminary discovery under r. 7.23.

6.4 Validating a deficient s. 249D requisition to call a meeting of members under s. 1322
(By Katrina Sleiman, Corrs Chambers Westgarth)

Vaspip 2 Pty Ltd v Thorn Group Ltd [2020] VSC 700 (14 October 2020), Supreme Court of Victoria, Riordan J.

(a) Summary

Thorn Group Limited ("Thorn") received a requisition under s. 249D of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to call and arrange a general meeting of the members of Thorn to consider resolutions to remove directors and appoint further directors and a notice under s. 249P of the Corporations Act to circulate a members' statement in relation to the proposed resolutions. Thorn considered those requests invalid as the requisitions were compiled by attaching separate execution pages.

The Court held that each of the two requisitions did not comply with the sections of the Corporations Act pursuant to which the requisitions were issued. However, the Court declared that the requisitions were not invalidated by the failure to comply with the requirements of the Act as it was a procedural irregularity that did not cause substantial injustice.

(b) Facts

Thorn is a company listed on the official list of the Australian Securities Exchange operated by ASX Ltd. Vaspip 2 Pty Ltd ("Vaspip") is a shareholder in Thorn and together with certain other shareholders (together, "the Requisitioning Shareholders") have a voting power of 5.005% of the votes that may be cast at a general meeting of Thorn.

The Requisitioning Shareholders requisitioned a general meeting of shareholders of Thorn pursuant to s. 249D of the Corporations Act, provided a notice pursuant to s. 203D of the Corporations Act of an intention to move resolutions to remove certain directors of Thorn and requested that Thorn provide to its members a copy of a statement pursuant to s. 249P of the Corporations Act.

The notices provided to Thorn comprised the text of the meeting request on the first page, followed by three pages with signatures from the Requisitioning Shareholders. All of the pages were stapled together and had sequential numbering; however, it was clear that the signature pages had been compiled from separate documents.

Following Thorn's rejection of the requisitions for non-compliance with the notice requirements under the Act, Vaspip commenced proceedings in the Supreme Court of Victoria against Thorn and its directors seeking orders for the meeting to be convened.

(c) Decision

The Court was required to answer the following questions: (1) was the requisition served on Thorn "signed by the members making the request" in accordance with s. 249D(2)(c) of the Corporations Act?; and (2) if no to question 1, is Vaspip entitled to relief under sub-ss. 1322(2) or (4) of the Corporations Act? The validity of the s. 249P notice would follow from the answers to these questions.

(i) Was the requisition "signed by the members making the request" in accordance with s. 249D(2)(c) of the Corporations Act?

Section 249D(2)(c) provides that the request must be signed by the members making the request and s. 249D(3) provides that separate copies of a document setting out the request may be used for signing by members if the wording of the request is identical in each copy.

The Court summarised the authorities as follows: (a) the Court should not have regard to extrinsic evidence about the execution of the document; (b) the question of whether a requisition satisfies the requirement under s. 249D(2)(c) must be answered by reference to the physical document given to the company; and (c) a requisition under s. 249D would be invalid unless persons in the position of the company directors would be reasonably satisfied that, on its face, the requisition was signed by the members making the request.

The Court concluded that as there is no question that the requisition did not comply with s. 249D(3), the issue that arises is whether, under s. 249D(2)(c), the document containing the request given to the company: (a) must be signed by each of the relevant members; or (b) may be signed by members each signing separate documents or execution pages, which can then be compiled into a single stapled document. The Court determined that the former construction is to be preferred.

As the notice was a composite document made up of pages extracted from other documents, the Court held that the requisition did not comply with the requirements of s. 249D.

(ii) Is Vaspip entitled to relief under sub-ss. 1322(2) or (4) of the Corporations Act?

Vaspip sought relief from any non-compliance under sub-ss .1322(2) and (4) of the Corporations Act, which relevantly provide:

(2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.

..

(4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

(a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation;

..

The first question considered by the Court was whether the giving of the requisition was a proceeding under the Corporations Act. The Court noted that s. 1322(1)(a) specifically provides that a "proceeding" is not limited to a legal proceeding, and it is well established that a proceeding extends to every type of procedure which might be undertaken by a company or in relation to a company's affairs, including a procedure the Act required to be taken if a company or its members wish to successfully achieve certain legal consequences.

In this case, the Requisitioning Shareholders wished to achieve the legal consequence of requiring Thorn's directors to call a general meeting. To do so, they were required by the Corporations Act to adopt the statutory procedure for giving such a request, which they purported to do. Accordingly, the Court concluded that the purported giving of the requisition under s. 249D was a proceeding under the Corporations Act.

The second question considered by the Court was whether the defect in the requisition was a procedural irregularity. In *Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd* (2005) 194 FLR 322, Palmer J formulated the following propositions for the purposes of determining whether an irregularity was procedural or substantive under s. 1322 of the Corporations Act:

- what is a "procedural irregularity" will be ascertained by first determining what is "the thing to be done" which the procedure is to regulate;
- if there is an irregularity which changes the substance of "the thing to be done", the irregularity will be substantive; and
- if the irregularity merely departs from the prescribed manner in which the thing is to be done without changing the substance of the thing, the irregularity is procedural.

The Court concluded that the thing to be done in this matter, being the request for the calling of a meeting, had not been changed substantially by the irregularity in the requisition. Rather, the irregularity merely departed from the prescribed manner in which such a request is to be given under s. 249D. Accordingly, the Court concluded that the deficiency in the requisition was a procedural irregularity.

The third question considered by the Court was whether the procedural irregularity caused or is likely to cause substantial injustice. In answering this question, the Court is concerned with the effect of the procedural irregularity and not with what might be said to be the best interests of the company in the commercial sense. Further, there must be a nexus between the procedural irregularity and the matters of prejudice relied upon as constituting injustice.

Thorn did not point to any substantial injustice that had been caused by the irregularity in the requisition. The Court determined that the cost and inconvenience of calling a general meeting cannot be said to be a substantial injustice caused by the irregularity. Accordingly, the Court declared that the requisition was not invalid. For the same reasons the Court declared that the s. 249P notice was not invalid.

Finally, while not necessary to consider the issue, the Court stated that Vaspip would also have been entitled to relief under s. 1322(4).

6.5 Shareholder standing to seek, and permitted scope of, injunctive relief

(By Joshua Travers, MinterEllison)

Brusa v Brusa [2020] WASC 362 (12 October 2020), Supreme Court of Western Australia, Hill J.

(a) Summary

This case considered s.1324 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and concluded its focus is on preventing continuing breaches of the Corporations Act. Here, the scope of the proposed permanent injunction went "significantly further" and sought to prevent the defendants from operating (rather than preventing further breaches of the Corporations Act), effectively seeking to "enforce a restraint of trade" where there was not one, for which damages (or other equitable relief) would instead be an adequate remedy. The application for a permanent injunction was unsuccessful.

(b) Facts

The plaintiff, Paul Basso Brusa ("Paul") and two of the defendants, Carl Basso Brusa ("Carl") and Mark Basso Brusa ("Mark") were equal shareholders in, and directors of, Materon Investments WA Pty Ltd ("Materon") which relevantly operated a business known as "WA Building Company" (the "Business"). Following a falling out between the brothers, Carl and Mark incorporated a new entity, Brusa Pty Ltd ("Brusa") in which they were equal shareholders. Their wives, Krista Basso Brusa ("Krista") and Maria Basso Brusa ("Maria") were subsequently appointed as directors of Brusa.

Following incorporation, the Business name was transferred from Materon to Brusa, allegedly without Paul's knowledge or consent. Paul filed an originating application under ss.181, 182, 232, 233 and 1324 of Act against the defendants on the grounds that:

- the conduct of the affairs of Materon by Carl and Mark in permitting the transfer of the Business name;
- actual and proposed acts of Carl and Mark to compete with Materon or divert the business of Materon to Brusa; and
- the acts or omissions by Carl and Mark on behalf of Materon by failing to prevent Brusa from competing with Materon,

were contrary to the interests of the members of Materon as a whole and were oppressive to, unfairly prejudicial to or unfairly discriminatory against Paul (the "Oppressive Conduct"). As Carl and Mark were directors of Materon when the Oppressive Conduct occurred, it was alleged they were in breach of their directors' duties.

Paul sought as final relief a series of injunctions to restrain Carl, Mark, Brusa, and Krista and Maria as directors of Brusa (collectively, the "Defendants"), from diverting Materon's business to Brusa or otherwise competing with Materon. The interlocutory process Paul filed was in substantially similar terms and heard on an urgent basis before Tottle J, who issued interim orders in the form sought by Paul, which in summary provided that Brusa was restrained from using the business name "WA Business Corp" or similar, undertaking work that was similar to or which competed with Materon, and (along with Carl, Mark, Krista and Maria) diverting work from Materon or undertaking work diverted from Materon (the "Interim Orders").

The interlocutory process was heard before Hill J, where the defendants sought to have the Interim Orders discharged.

(c) Decision

The Interim Orders made by Tottle J were discharged, with a further hearing as to the appropriate orders, including costs, to follow.

Hill J considered the legal principles governing the court's power to grant injunctions under s.1324 of the Corporations Act summarised by Palmer J in *Australian Securities and Investments*

Commission v Mauer-Swisse Securities Ltd (2002) 42 ACSR 605 at [36] ("Summary") and had regard to the debate in the authorities as to whether, in respect of the grant of an interim injunction the Summary was an accurate summary of the applicable principles. Her Honour referred to *CME Properties (Australia) Pty Ltd v Prime Capital Securities Pty Ltd* [2016] WASC 231 where Le Miere J at [13] concluded that when considering an application for an interim injunction under s.1324(4) of the Corporations Act, "the court will always examine whether there is a serious question to be tried and where the balance of convenience lies and will not grant an injunction where it would not have done so if it were exercising its traditional equity jurisdiction unless there are matters relating to the statutory obligation sought to be enforced or the public interest which require the grant of the injunction". Here, Paul was a private litigant and there was no public interest involved. Thus, the two principles for consideration were whether there is a serious question to be tried and where the balance of convenience lies.

(i) Serious question to be tried

Hill J determined that Paul had established there was a serious question to be tried relating to the Oppressive Conduct. Her Honour then turned to the question of Paul's standing to seek an injunction under s.1324 of the Corporations Act ("s. 1324 Injunction") in relation to the alleged breach of directors' duties, noting that directors' duties are owed to the company (here, Materon) and not Paul individually as a shareholder. Her Honour noted that the question of whether a shareholder or creditor could seek a s.1324 Injunction was not settled, referring to a number of authorities including *Re Ikon Group Ltd* [2015] NSWSC 980 and *Mesenberg v Cord Industrial Recruiters* (1996) 39 NSWLR 128. Her Honour ultimately decided that the matter of standing is a matter of statutory construction and took the view that on a plain reading of s.1324, a director, shareholder, or creditor has standing seek a s.1324 Injunction against directors for a breach of directors' duties, and that "it is a matter of discretion as to whether, in the circumstances of a particular case, the court will grant the relief sought". Her Honour determined that Paul had standing for a s.1324 Injunction. Hill J further stated, citing Ford, Austin and Ramsay's *Principles of Corporations Law* at [10.310.24], that even if she was incorrect and Paul did not have standing to seek a s. 1324 Injunction for a breach of directors' duties, breaches of directors' duties can constitute oppression and a remedy available to an oppressed shareholder is an injunction. Therefore, Paul would have standing to seek an order under s. 1324 to restrain conduct which may constitute oppression until trial.

The Interim Orders also extended to Brusa, Maria and Krista, none of whom were directors or shareholders of Materon or owed directors' duties to Paul. While Paul had not adduced direct evidence in respect of Brusa, Maria or Krista, her Honour inferred that Brusa (via its directors), Maria and Krista knew Carl and Mark had engaged in the Oppressive Conduct and were directors of Materon. As such, there was a prima facie case Brusa, Maria and Krista were knowingly concerned in Carl and Mark's conduct and could be the subject of a s.1324 Injunction.

(ii) Balance of convenience

Her Honour rejected the Defendants' submission that the balance of convenience did not favour the continuation of the injunction because it would force Carl and Mark to continue to work to preserve the value of Paul's shareholding in Materon, noting that the s.1324 Injunction sought was to restrain Carl and Mark from effectively transferring the property and business of Materon to their own benefit (for no value) and did not require Carl and Mark to continue working for Materon.

Her Honour considered there was a strong case against Carl and Mark for breach of their directors' duties and for acting in a commercially unfair manner (described as the "hallmark of oppressive conduct"). However, while Paul may have been entitled to a s.1324 Injunction to prevent Carl and Mark continuing to breach their directors' duties, the orders he sought by way of a permanent s.1324 Injunction went "significantly further" in that the orders:

- sought to protect Materon from competition and prevent Brusa from operating (rather than preventing further breaches of the Act); and
- effectively sought to "enforce a restraint of trade" where there was not one,

for which damages (or other equitable relief) would be an adequate remedy.

(iii) Conclusion

Hill J concluded that the focus of s. 1324 of the Corporations Act is on preventing continuing breaches of the Corporations Act and while the final relief sought by the plaintiff was a series of permanent injunctions under s. 1324, her Honour did not consider that meant the consideration of whether damages is an adequate remedy was not relevant or that, on establishing there is a serious question to be tried, Paul was entitled to an interlocutory injunction. She further noted that the court may, under s. 1324(10) of the Corporations Act, make an order for damages in addition to or in substitution for the grant of an injunction.

6.6 Shareholder application to inspect books trumps company's claims of improper purpose
(By Tim Wells, King & Wood Mallesons)

Rasley (Singapore) Pte Ltd v Financial & Energy Exchange Ltd [2020] FCA 1462 (12 October 2020), Federal Court of Australia, Jackson J.

(a) Summary

This decision involved an application to the Federal Court by Rasley (Singapore) Pte Ltd (Rasley) under s. 247A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to inspect the books of Financial and Energy Exchange Ltd (FEX). Section 247A of the Corporations Act empowers the court, on application from a shareholder, to make an order authorising the shareholder to inspect the books of the company, provided the court is satisfied that the shareholder is acting in good faith and for a proper purpose.

Rasley, a shareholder of FEX, argued that the application was for the purpose of investigating concerns it had about certain share issues and related party transactions (including leases, funding and option agreements) entered into by FEX, which Rasley alleged were uncommercial. The application was partially successful (with costs reserved), with the Court deciding that documents relating to the share issues and leases warranted further inspection and that the application was made in good faith and for a proper purpose in relation to those categories of documents.

The Court held, however, that Rasley's application to inspect all documents relating to the share issues and leases was too wide, and that counsel should confer about the precise documents to be inspected and who should inspect the documents, with orders to be settled at a later date.

(b) Facts

Rasley's lawyers wrote to FEX on 28 May 2019, raising the following concerns:

- several share issues undertaken by FEX in recent years had substantially diluted Rasley's shareholding (down from 3.64% of FEX's issued share capital to 0.44%) and were made for apparently negligible consideration (Share Issue Transactions); and
- several related party transactions entered into by FEX did not appear to be in the company's best interests and were not made on arm's length terms (Related Party Transactions). These transactions included a lease for above-market rent between FEX and a related party (Lease Transaction).

The letter further alleged that the Share Issue Transactions and Related Party Transactions were entered into without shareholder notice, consultation or consent. The letter stated that if documentation relating to the transactions was not produced by FEX, then Rasley would apply to the Court for inspection of the documents. Rasley commenced proceedings on 16 October 2019.

(c) Decision

The two preconditions to an order under s. 247 of the Corporations Act are that the shareholder applicant be acting in good faith and the inspection be made for a proper purpose. Jackson J noted that, due to the variety of situations when a shareholder may make an application under s. 247 of the Corporations Act, it is not possible nor appropriate to set out a blanket rule as to when such an application will succeed. However, case law demonstrates that "more than curiosity or general suspicion of management is required" and that "an applicant must at least be able to articulate a basis on which it might be found that illegal, improper or otherwise undesirable conduct has occurred". His Honour further noted that concern about a management decision is capable of animating a proper purpose under the section.

His Honour considered the legal issues in the context of each transaction as follows.

(i) Share Issue Transactions

There were three issues of FEX shares from 3 June 2017 to 5 April 2018 which increased the total number of issued shares by approximately 85%, diluting the holdings of any existing shareholders who did not participate in the issues. Two of the issues were for nil consideration and the third was for $0.003.

Given FEX was not listed on any stock exchange, the only available evidence regarding the true value of its shares was the amount paid per share for Rasley's shareholding (50 cents) and FEX's financial statements (which showed ongoing losses and a deficiency of assets over liabilities). FEX made no submissions as to the true value of its shares and was unable to shed light on discrepancies between the price of the issued shares as set out in its annual report compared to the ASIC forms relating to the share issues.

Jackson J found that the evidence provided a case for investigation of the share issues. His Honour held that a shareholder seeking to inspect documents regarding a transaction which, on the limited evidence available, substantially diluted its shareholding, for potentially nil or small consideration is "seeking inspection for a proper purpose reasonably connected with its shareholding".

(ii) Lease Transaction

FEX's annual reports suggested that from 1 July 2015 to 30 June 2017, FEX paid rent to its related party, Financial Market Infrastructure Fund Pty Ltd (FMI) for an amount of $678,599. However, no lease for that time period was shown to the Court.

The lease that was tendered in evidence between FEX and FMI commenced on 1 October 2017. The starting rent was $388,356.81 with an annual increase of 3%. However, the annual report for the year ending 30 June 2018 showed payments of $850,912 for amounts regarding rent of premises from FMI.

Rasley claimed that FMI was paid above-market rent as it received 30% more rent per square metre than what FEX was paying for the lease of an adjoining lot. Jackson J stated that there may be good reasons for the differences in rent, but held that in the absence of other evidence, the inspection of documents was appropriate to demonstrate whether FEX was paying above market rent to a related party.

(iii) Other Related Party Transactions

Jackson J noted that related party transactions with public companies are not by themselves unlawful. His Honour further noted that Rasley's knowledge of the transactions arose from audited financial reports which stated that the transactions were on ordinary commercial terms. Jackson J stated that such reports were not necessarily proof that the transactions were on arm's length terms, but here it was appropriate to take them at face value, in particular given the transactions were understandable in the context of a business such as FEX's which was not yet earning revenue.

Rasley argued that its more concrete concerns with the Share Issue and Lease Transactions raised the possibility that the related party transactions were not on commercial terms. Jackson J disagreed, however, stating that this placed too much weight on the other claims, as all they did was establish grounds for investigation - not impropriety. As such, the precondition to an exercise of power under s. 247A in respect of the Related Party Transactions (excluding the Lease Transaction) was not satisfied.

(iv) Good faith and proper purpose

Jackson J dismissed FEX's arguments that Rasley was not acting for a proper purpose. Notably, his Honour found that:

- while an applicant's small shareholding can point away from a proper purpose, Rasley's 0.44% shareholding was not determinative in this case;
- it is possible for concerns about management decisions to form the basis of an application under s. 247A of the Corporations Act. This is particularly in claims such as Rasley's where the decisions had a sufficient connection to Rasley's shareholding, the value of its investment and to the governance of FEX; and
- a threatening email from Rasley's director saying "I will ensure [FEX] never trades" was incapable of demonstrating an improper purpose because FEX did not propose to cross-examine the director. Instead, the Court accepted the director's explanation that the email was sent in frustration rather than as a threat.

(v) Court's exercise of discretion and conditions of inspection

Rasley's original application to inspect all documents relating to the Share Issue Transactions and Lease Transaction was deemed too wide, on the basis that the scope of the documents to be inspected must be reasonably related to the concerns raised. Jackson J stated that opposing counsel should further refine and agree the precise categories of documents to be inspected. Jackson J also imposed a condition that Rasley was prohibited from disclosing information obtained from the inspection except to legal or other advisors.

6.7 Court considers insufficient records and the s. 588H(2) Corporations Act insolvency defence

(By Mary Aidonopoulos, King & Wood Mallesons)

Re Balmz Pty Ltd (in liq) [2020] VSC 652 (7 October 2020) Supreme Court of Victoria, Randall AsJ.

(a) Summary

Mr and Mrs Patch ("Defendants") were the directors and creditors of Balmz Pty Ltd ("Company"). On 12 November 2012, the Deputy Commissioner of Taxation ("Deputy Commissioner") sought an order to wind up the Company in insolvency. The winding up order was made on 17 December 2012 and a liquidator was appointed.

The liquidator sought that the Defendants pay compensation of $101,151.91 for the failure to prevent the Company from trading whilst insolvent: s. 588G of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). In determining this issue, Randall AsJ considered whether:

- the Company was insolvent during the "relevant period"; and
- the Defendants had "reasonable grounds to expect, and did expect, that the Company was solvent" (s. 588H(2) Corporations Act).

The Victorian Supreme Court held that the Company was insolvent, no defence was available to the Defendants and the Defendants had to pay $101,151.91 to the Company.

(b) Facts

A winding up order was made against the Company on 17 December 2012. After this order was issued, the Deputy Commissioner made multiple requests to the Company for activity statements from 1 October 2008 to 17 December 2012. The Company did not provide these.

In 2010-2011, the Company had the following debts to trade suppliers:

- $55,852.63 to D Borthwick and Sons Pty Ltd;
- $2,741.42 to National Foods Australia Pty Ltd; and
- $57,135.76 to Austexx Spencer Street Pty Ltd and Austexx Spencer Pty Ltd.

On 13 October 2011, the Deputy Commissioner notified the Company it was to be audited. Mrs Patch attended a meeting with the ATO and dates for lodging activity statements and returns were set. No documents were lodged by the due dates.

On 30 July 2012, the Deputy Commissioner served a statutory demand on the Company for $108,218.23 (comprising the running balance account deficit as at 31 July 2012 and the detailed quarterly superannuation guarantee charges from 1 October 2006 to 1 April 2011).

On 23 November 2012, a voluntary administrator was appointed who recommended that the Company be wound up.

On 17 December 2012, the Company was wound up and a liquidator was appointed. The liquidator determined that the Defendants had made numerous personal contributions to the Company's overdraft account from 8 October 2010 to 8 November 2012 totalling $116,175.00.

The liquidator contended that the relevant period to determine insolvency was 30 September 2009 to 17 December 2012, and that the Company was insolvent at all times during this period because of the:

- failure to lodge activity statements from 1 October 2008 to 17 December 2012;
- failure to lodge PAYG annual reports and/or income tax returns for the financial years ended 30 June 2007 to 2012;
- failure to lodge assessments;
- failure to pay pursuant to the audit carried out by the ATO;
- failure to meet its trading terms with its trade suppliers;
- actions taken by these trade suppliers to recover the debts;
- Company never preparing income tax returns; and
- Company never paying any employee superannuation.

The liquidator stated that the Company incurred debts of $101,151.91.

The Defendants (who were self-represented) contended that Mrs Patch's computer suffered "catastrophic document corruption" which wiped out all records of supplies, payments, wages and staff entitlements. Mrs Patch had been suffering from PTSD and coupled with the pressure of business, the remediation task became overwhelming and she continued to fall behind until no tax returns or financial reports were produced. Your Business Angels (a business consultancy firm) were appointed to rectify the outstanding statements and clear the debts.

As to incurring debts and solvency, Mrs Patch contended that the Company met all its traders' debts during operations other than those outstanding at the date of liquidation. Further, Mrs Patch refuted completely that the Company at any time traded while insolvent.

The two issues for consideration were:

1 whether the Company was insolvent during the relevant period; and
2 whether the Defendants had a defence pursuant to s. 588H(2) of the Corporations Act.

(c) Decision

(i) The first issue: the Company was insolvent

Failure to maintain proper records: s. 286 of the Corporations Act

Randall AsJ made the distinction that the question was not how the records were maintained (as they were kept in a "mess"), but whether they were sufficient to enable the Company to record and explain the Company's transaction, financial position and performance. Randall AsJ concluded that the records were not sufficient due to the answers provided in the liquidator's questionnaire, the failure to generate monthly management accounts (therefore the Company did not know its financial performance at any one time) and it had taken this court hearing and some "detective work" to determine that the Defendants were the greatest creditors of the Company.

Insolvency

Randall AsJ stated that as Mrs Patch conceded that the ATO liability was unable to be paid out of cash flow, it did not make a difference if this liability was considered to be "incurred" at the time each return ought to have been lodged or at the time each default assessment was provided to the Company.

In determining whether the Defendants had funds available, Randall AsJ cited *Lewis v Doran* [2004] NSWSC 608 for the proposition that the court can consider funds made available to the company by a third party without security to establish solvency. Citing *Barboutis* [2020] WASCA 41, the Defendants would need sufficient evidence to show that their personal contributions of funds to the Company were sufficient to establish solvency. Randall AsJ considered that funds were not paid by the Defendants to the company prior to the liquidation of the Company when money was obtained from the sale of two properties (one being a personal property of the Defendants). Ultimately no evidence was adduced which showed that any such equity was used to meet this liability and therefore, these circumstances showed a lack of ability to meet this liability from the Defendants' own personal assets.

Randall AsJ concluded that the Defendants did not have the ability to raise funds and the Company was insolvent during the relevant period.

(ii) The second issue: defence pursuant to s. 588H(2) of the Corporations Act

Mrs Patch

The court considered that the "reasonable grounds" defence in s. 588H(2) of the Corporations Act required an actual expectation that the company was and would continue to be solvent. Mrs Patch stated that she believed that funds could be raised through the sale of property or finance raised against the equity in the property. The court decided this defence was not available to her. Randall AsJ further determined that a reasonable person in the position of Mrs Patch would have reasons to suspect that the Company was insolvent due to:

- the failure to prepare and lodge statutory returns;
- the failure of the Company to maintain proper records;
- the failure to comply with the agreement with the ATO to file outstanding lodgements;
- the absence of cash flow to meet the ATO payments;
- the absence of cash flow to meet relatively minor creditor claims;
- the requirement to inject superannuation funds to meet liabilities and reduce the overdraft; and
- a director of the Company, Mrs Patch, not being paid for her services as the accounts manager.

Randall AsJ also concluded that the other s. 588H of the Corporations Act defences were not available to her.

Mr Patch

The court concluded that the s. 588(2) defence was also not available to Mr Patch as he failed to take reasonable steps to acquire information about the Company's financial state.

(iii) Conclusion

The court held that the Company was insolvent, no defence was available to the Defendants and the Defendants had to pay $101,151.91 to the Company.

6.8 Leave granted for former director claiming improper distributions of funds following the sale of property
(By Morgan Hartley-Marschner, DLA Piper)

In the matter of Lotus Property Fund No 8 Pty Ltd atf Lotus Property Fund No 8 [2020] NSWSC 1349 (2 October 2020), New South Wales Supreme Court, Stevenson J.

(a) Summary

This proceeding concerned an application by the plaintiff, Mr Brown, to prosecute proceedings against LEP C9 Ltd (LEP) on behalf of Lotus Property Fund No 8 Pty Ltd (Lotus). The application was made under s 237 of the Corporations Act 2001 No. 50 (Cth). The application concerned the distribution of the proceeds of a sale of property in which LEP, Lotus and other parties were involved. Mr Brown, as a former director of Lotus, sought leave that LEP produce information relating to the above and that the funds be dealt with in a specified manner. Leave was granted by the court.

(b) Facts

(i) Background of parties

As well as the entities mentioned above (LEP and Lotus), the following were also parties to the proceedings:

- LEP C9 Trust (the LEP Trust);
- EP Australia Holdings Pty Ltd (Euro);
- Lotus Property Fund No 8 Pty Ltd Trust (the Lotus Trust);
- Lotus Pacific Pty Ltd (Lotus Pacific); and
- Mosman Finance No 2 Pty Ltd (Mosman).

LEP is the trustee of the LEP Trust, both of which were established for the purpose of developing land in Willoughby (the Property) through a joint venture between Lotus and Euro. The units in the LEP Trust are owned equally by Lotus and Euro. The directors of LEP are Mr Jiang, representing the interests of Lotus, and Mr Yau, representing the interests of Euro. Following a shareholders' resolution on 27 August 2020, Mr Brown was removed as a director of Lotus, leaving Mr Jiang as the sole director. Mr Jiang is also the sole director and shareholder of Lotus Pacific. The sole shareholder and unit holder in the Lotus Trust is Lotus Pacific. Lotus and Lotus Pacific have no function other than as trustees for the Lotus Trust and the Lotus Pacific Trust.

Mr Brown claims that he has an investment interest in a project that Mosman is a party to with Lotus Pacific. The project document is titled "Lotus Property Fund No 8 Side Deed" dated 15 February 2018 (the Side Deed). Mr Brown is a director of Mosman and his wife is the sole shareholder. Pursuant to the Side Deed, Lotus Pacific agreed to pay Mosman 25% or on the happening of a contingency, 50% of the amount it received by way of distributions from Lotus as trustee of the Lotus Trust.

(i) The Project

On 18 August 2015, LEP contracted with TCN Chanel Nine Pty Ltd to purchase the Property. On the same date, Lotus entered into an Investment Agreement with LEP and Euro (the LEP Investors Agreement) and with Lotus Pacific (the Lotus Investors Agreement). On 7 February

2020 LEP sold the Property to Mirvac for $200 million. On 14 August 2020 LEP received $100,475,991 from Mirvac (the Completion Funds). Mr Brown seeks to have Lotus challenge the way the Completion Funds were dealt with, claiming that Lotus should have been granted a greater share to the Completion Funds.

(ii) Completion Funds

Certain Completion Funds were distributed in the following way between 10 and 11 August 2020:

- $214,446.68 to a company associated with Mr Jiang for project management expenses;
- $997,680.20 to another company associated with Mr Jiang to cover various fees including transaction project management and transaction costs;
- $199,803.54 to a company evidently associated with Euro for project management fees that were in arrears; and
- $896,982 to another company associated with Euro to cover various costs including transaction project management and Euro transaction costs.

On or around 11 August 2020, Mr Brown's assistant, on his behalf, asked Mr Jiang about the Completion Funds. Mr Jiang responded that he would provide an update in the next few weeks. Mr Brown, concerned by the lack of transparency, sent notice for a Lotus board meeting to be held on 20 August 2020.

On 13 August 2020 Mr Jiang forwarded to Mr Brown a notice he had received from Euro to represent Lotus' interests at a meeting of the Project Control Group on 19 August 2020 (the Project Control Group Meeting). The Project Control Group was established under the LEP Investors Agreement and convened to discuss and review matters relating to the Project and the Property, make decisions in accordance with the LEP Investors Agreement and pass certain resolutions concerning the Completion Funds. Mr Jiang communicated to Mr Brown that he would not attend the Project Control Group Meeting. Mr Jiang did not in fact attend the Project Control Group Meeting, which led to its adjournment.

Leading up to the Lotus Board Meeting, Mr Brown made several enquiries and received inadequate responses from Mr Jiang. On the day of the Lotus Board Meeting Mr Brown contacted Mr Jiang to confirm his attendance. Mr Jiang indicated that he would not attend as he believed his responses to Mr Brown's enquires were sufficient. Mr Brown made clear that the contrary was true and requested that Mr Jiang attend the Project Control Group Meeting and vote "no" to the proposed resolutions. Mr Brown did not attend the adjourned Project Control Group Meeting and the resolutions were passed by the only attendee, Mr Yau.

On 27 August 2020, Mr Brown enclosed notice of a meeting of the Lotus Management Committee, proposing a resolution to commence proceedings against LEP. Subsequently, Mr Jiang wrote to Mr Brown's solicitor informing him that Mr Brown had been removed as a director of Lotus by shareholders' resolution and that $6,653,519.88 would be paid to Mosman on behalf of Lotus, as authorised by the Project Control Group.

(c) Decision

Under s. 237 of the Corporations Act 2001 the Court must grant an application by a person to bring proceedings on behalf of a company if the Court is satisfied that:

(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them;

(b) the applicant is acting in good faith;
(c) it is in the best interests of the company to grant the leave;
(d) there is a serious question to be tried; and
(e) either:

i. at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
ii. it is appropriate to grant leave even though subparagraph (i) is not satisfied.

Mr Brown also had to establish that he had standing under s. 236(1) to bring the proceedings on behalf of Lotus against LEP. The Court was satisfied that Mr Brown had standing to bring the proceedings on behalf of Lotus, as he was an officer of Lotus by virtue of his continuing membership of the Management Committee established under the Lotus Investors Agreement and his former position as a director of Lotus. As for the requirements under s. 237 of the Corporations Act, the court found in favour of Mr Brown's application, subject to him providing an undertaking concerning the costs of the proceedings and the provision of security for that undertaking.
