SAI GLOBAL

21 August 2014 > Regulatory Newsfeed

SAI Global Corporate Law Bulletin No.>

Index info.regulatory@saiglobal.com

Bulletin No. 204

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

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

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

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

uncertain about your organisation's licensing arrangements, please contact SAI Global on 131 242.

Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Supreme Court of Victoria Commercial Law Conference 2014
1.2 APRA releases framework for supervising conglomerates but defers implementation
1.3 Clear and concise reporting
1.4 Financial promotions in social media
1.5 FCA restricts distribution of CoCos to retail investors
1.6 IOSCO launches public information repository for central clearing requirements
1.7 ICGN global governance principles
1.8 Cross border M&A activity
1.9 IOSCO surveys effects of storage warehouses on price formation in commodity derivatives markets
1.10 First equity crowd funding licences issued in New Zealand
1.11 The honest and reasonable director defence: A proposal for reform
1.12 Proposals to improve responsibility and accountability in the UK banking sector
1.13 New shareholder engagement guidelines
1.14 IOSCO surveys use of social media and automated advice by intermediaries
1.15 SEC adopts money market fund reform rules
1.16 Reforming major interest rate benchmarks
1.17 Rethinking shareholder engagement
1.18 Proposals for corporate governance reform
1.19 Audit committee effectiveness: study
1.20 New Zealand Law Commission proposes capped liability scheme for auditors
1.21 2014 ICGL Forum on Board gender diversity

2. Recent ASIC Developments

2.1 ASIC Statement of Intent
2.2 Wholesale and retail investors and SMSFs
2.3 Auditor registration
2.4 ASIC launches the National Financial Literacy Strategy 2014-17
2.5 ASIC enforcement report - January to June 2014
2.6 ASIC releases ASX assessment report

2.7 ASIC consults on technical changes to trade reporting obligations for OTC derivatives
2.8 Review of property schemes' disclosure

3. Recent ASX Developments

3.1 ASX Clear Operating Rules amendment: Minimum core capital requirement
3.2 ASX Centre Point - Additional functionality
3.3 Austraclear Regulations amendment: Cash transfers in approved foreign currencies
3.4 ASX lowers fees for interest rate futures clearing participants
3.5 Consultation paper: Derivatives account segregation and portability - Enhanced client protection structures
3.6 Reports

4. Recent Takeovers Panel Developments

4.1 Gondwana Resources Ltd 02 - Declaration of unacceptable circumstances and orders
4.2 Ambassador Oil and Gas Ltd 01 - Declaration of unacceptable circumstances and orders
4.3 Proposed guidance note on dividends public consultation response statement

5. Recent Research Papers

5.1 Socially responsible firms
5.2 Employee satisfaction, labour market flexibility and stock returns around the world
5.3 Going when the going gets tough: Does the labour market penalise pre-emptive director resignations?
5.4 Influence of public opinion on investor voting and proxy advisors
5.5 Do the interests of labour union and public pension fund activists align with other shareholders? Evidence from the market for directors
5.6 What do private equity firms (say they) do?

6. Recent Corporate Law Decisions

6.1 Appeal from ICAC corruption findings - including consideration of directors' duties
6.2 Questionable voting process and circumstances surrounding entry into DOCA leads to Court order for termination under s. 445D of the Corporations Act
6.3 Wholly suspended sentence for "Whitehaven Hoaxer"
6.4 Removal of sole director and secretary due to oppression and

conflicts of interest
6.5 Limitations on "entrepreneurial" lawyering in securities class actions
6.6 ASIC may be liable for costs relating to s. 1323 orders if they are not reasonably incurred
6.7 Liquidator removed for conflict of interest
6.8 David Jones scheme approved despite alleged inducement to major shareholder
6.9 Arbitral award may only be set aside for breach of the rules of natural justice where real unfairness or real practical injustice is demonstrated
6.10 Constructive trust over secret commission obtained by an agent in breach of fiduciary duty
6.11 Ex-CFO ordered to deliver up plaintiff ex-employer's business records
6.12 Major client and chairman of majority shareholder found not to be shadow or *de facto* director
6.13 Centre of main interests of Australian company found in United States
6.14 Highest imposed penalty for breach of continuous disclosure obligations under the Corporations Act

1. Recent Corporate Law and Corporate Governance Developments

1.1 Supreme Court of Victoria Commercial Law Conference 2014

On 9 October 2014, the Supreme Court of Victoria will hold its annual Commercial Law Conference. A program of eminent speakers will address topical and important commercial law issues. The Conference details are as follows:

Date	Thursday, 9 October 2014
Venue	Banco Court, Supreme Court of Victoria 210 Williams St, Melbourne
Time	2.30pm - 5.00pm
Cost	$220 (including GST)
Program	*What ever happened to* pacta sunt servanda Speaker: Neil Young QC Comment: The Hon Associate Justice Mark Derham Chair: The Hon Justice John Digby

Reliance and Delegation by Company Directors
Speaker: Jon Webster, Partner, Allens Linklaters
Comment: Professor Ian Ramsay
Chair: Paul Anastassiou QC

Estoppel in commercial law: risk, reliance and reward
Speaker: Professor Elise Bant
Comment: Phillip Crutchfield QC
Chair: the Hon Justice James Elliott

Refreshments will be served following the presentations. To view the conference flyer and registration details, click here.

1.2 APRA releases framework for supervising conglomerates but defers implementation

On 15 August 2014, the Australian Prudential Regulation Authority (APRA) released its planned framework for the supervision of conglomerate groups, but announced that will defer a decision on its final implementation until the recommendations of the Financial System Inquiry (FSI), and the Government's response to them, have been announced.

Conglomerate groups, referred to as Level 3 groups, comprise APRA regulated institutions that have material operations across more than one APRA-regulated industry and/or in one or more non-APRA-regulated sector. The planned framework has been designed to assist APRA to ensure that its supervision adequately captures the risks to which APRA-regulated institutions within conglomerate groups are exposed and which are not adequately covered by existing prudential arrangements for stand-alone entities (Level 1 supervision) and single industry groups (Level 2 supervision).

When implemented, APRA intends to apply the Level 3 framework to the following conglomerate groups: AMP Limited, Australia and New Zealand Banking Group Limited, Challenger Limited, Commonwealth Bank of Australia, Macquarie Group Limited, National Australia Bank Limited, Suncorp Group Limited, and Westpac Banking Corporation.

The eight conglomerate groups to which APRA intends to apply the planned Level 3 framework control approximately 80 per cent of the assets of all APRA-regulated institutions.

The APRA documents includes updated prudential standards in relation to governance, exposure management, risk management and capital adequacy, as well as a response paper that addresses the submissions APRA has received on the December 2012 and May 2013 Level 3 consultation packages. The documents also contains a number of draft prudential practice guides that, when finalised, are intended to accompany the prudential standards.

As currently proposed, the conglomerate groups to which APRA intends to apply the Level 3 framework will not need additional capital to meet the planned new requirements.

The Level 3 package is available on the APRA website.

1.3 Clear and concise reporting

On 12 August 2014, the UK Financial Reporting Council's (FRC) Financial Reporting Lab (the Lab) published the insight report Towards Clear & Concise Reporting (August 2014). The report examines progress made by companies towards producing relevant and succinct annual reports and accounts, and provides ideas on how companies can make further progress.

Based on a review of the most recent round of annual reports published by FTSE 350 companies, the Lab encourages companies to think about:

- the communication channels used and how to match information to users' needs;
- how to focus content on what is most important to investors;
- removing immaterial disclosures;
- using cross-referencing and layout to improve clarity; and
- planning ahead.

The report is available on the FRC website.

1.4 Financial promotions in social media

On 6 August 2014, the UK Financial Conduct Authority (FCA) launched a

consultation which is intended to clarify its approach to the supervision of financial promotions in social media.

Firms are using or wanting to use social media for their communications with customers. However, many firms perceive difficulties in complying with some of the FCA rules, particularly with the financial promotion rule for character-limited forms of social media such as Twitter. The FCA has therefore published a consultation which sets out its approach and seeks feedback.

The consultation paper sets out specific areas that firms need to consider, and provides some solutions and illustrative examples. These include:

- **Promotions for investment products** - There is a specific requirement that financial promotions for investment products are identifiable as such. The FCA's view is that - for social media in particular - it is important that, in all cases, it is clear that a promotion is a promotion. One generally accepted way to do this, for character-limited media, is the use of #ad in online posts.
- **Stand-alone compliance** - Each communication (e.g. a tweet, a Facebook insertion or page, or web page) needs to be considered individually and comply with the relevant rules.
- **Risk warnings and other required statements** - Firms are reminded that there are requirements to include risk warnings or other statements in promotions for certain products/services. These rules are media-neutral and therefore apply to social media as they would to any other medium. When taken into account with the supervisory approach to standalone compliance, this poses particular challenges for the use of character-limited social media. One solution to the problem of character limitation is to insert images, such as infographics into tweets, which allows relatively unrestricted information to be conveyed. However, where the financial promotion triggers a risk warning or other information required by our rules this cannot appear solely in the image.
- **Image advertising** - The FCA reminds firms that it remains possible to advertise their presence in the market through 'image advertising' in a way which is unlikely to present difficulties with character limits.

The consultation is available on the FCA website.

1.5 FCA restricts distribution of CoCos to retail investors

On 5 August 2014, the UK Financial Conduct Authority (FCA) used its consumer protection powers for the first time to restrict firms from distributing contingent convertible securities (CoCos) to the mass retail market from 1 October 2014.

CoCos are highly complex and the FCA believes they are unlikely to be appropriate for the mass retail market, and so has temporarily restricted their distribution only to professional, institutional and sophisticated or high net worth retail investors ahead of consulting on permanent rules later this year.

CoCos can be written off (in part or entirely) or converted into equity when the issuer's capital position falls, while issuers can have unusually broad discretion in relation to coupon payments making it extremely difficult for investors to assess, understand and price CoCos. At present there is little experience of how CoCos operate in practice.

The restriction will apply from 1 October 2014 to 1 October 2015. In the interim the FCA will continue to work with issuers to ensure that the sale of these instruments is appropriately targeted.

The announcement reflects the FCA's objective to secure appropriate protection for consumers and follows announcements by the European Securities and Markets Authority and Joint Committee of European Supervisory Authorities highlighting the risks of CoCos and firms responsibilities when selling them.

Further information is available on the FCA website.

1.6 IOSCO launches public information repository for central clearing requirements

On 5 August 2014, the International Organization of Securities Commissions (IOSCO) unveiled an information repository for central clearing requirements for over-the-counter (OTC) derivatives, which provides regulators and market participants with consolidated information on the clearing requirements of different jurisdictions.

By providing this information, IOSCO seeks to assist authorities in their rule making and help participants comply with the relevant regulations in the OTC derivatives market. The repository sets out central clearing requirements on a product-by-product level, and any exemptions from them. The information in the repository will be updated quarterly.

In February 2012, IOSCO released the report on Requirements for Mandatory Clearing in response to the G20 commitment to ensure that all standardised OTC derivatives contracts were cleared through central counterparties by end-2012. The report recommended that authorities communicate with one another regarding the implementation of mandatory clearing within their own jurisdictions, and encouraged IOSCO to explore the establishment of a central information repository to consolidate

that information.

The information repository is located on the IOSCO website.

1.7 ICGN global governance principles

On 4 August 2014, the corporate governance codes and principles directory maintained by the European Corporate Governance Institute was updated with a copy of the fourth edition of the *Global Governance Principles* published by the International Corporate Governance Network (ICGN).

The global governance principles are available on the ICGN website.

1.8 Cross border M&A activity

On 1 August 2014, the International Institute for the Study of Cross-Border Investment and M&A (XBMA) released its second quarterly review for 2014.

Some of the key findings are:

- global M&A surged in Q2, surpassing US$1 trillion for the first time since the financial crisis, and exceeding the next most active quarter in recent years (Q4 2012) by more than 25%;
- a strong Q2 was headlined by megadeals in the Media/Entertainment, Healthcare, and Materials sectors, including AT&T/DirecTV, Medtronic/Covidien and Holcim/Lafarge;
- annual cross-border volume is on pace to reach US$1.3 trillion - a high-water mark since the financial crisis;
- deal activity in each of North America, Europe, and Asia-Pacific rose sharply in Q2, reaching US$478 billion, US$317 billion, and US$213 billion, respectively, while M&A in Japan dipped to US$13 billion; and
- among BRIC countries, domestic M&A activity in China experienced a particularly strong surge in Q2, exceeding US$90 billion.

The review is available on the XMBA website.

1.9 IOSCO surveys effects of storage warehouses on price formation in commodity derivatives markets

On 1 August 2014, the International Organization of Securities Commissions (IOSCO) gave its Committee on Commodity Derivatives a mandate to research the potential effects of storage infrastructure on the integrity of the price formation process of commodity derivatives in member jurisdictions.

The first stage in the Committee's work has been to develop a questionnaire as a way to gather information to inform its research. IOSCO is asking its members to respond to the questionnaire and to encourage other relevant entities in their jurisdictions (storage and market infrastructure providers, market participants and end users) to do so as well. There are no restrictions on who can answer the questionnaire.

The survey is available on the IOSCO website.

1.10 First equity crowd funding licences issued in New Zealand

On 31 July 2014, the New Zealand Financial Markets Authority (FMA) issued its first equity crowd funding licences under the Financial Markets Conduct Act 2013 (NZ) (the FMC Act).

PledgeMe and Snowball Effect are New Zealand's first licensed providers of this new financial service.

Equity crowd funding is a new financial service in New Zealand. The service provider acts as an intermediary typically between smaller companies offering shares and investors looking to buy these shares. Many of the companies looking to raise funds will be start-up or early-stage businesses. Companies are limited to raising no more than NZ$2 million from the public in any 12-month period.

The licensing of these crowd funding intermediaries forms part of the new capital-raising opportunities facilitated by the FMC Act and the Government's Business Growth Agenda.

The FMC Act enables the licensed intermediary to facilitate the offer of shares by companies using their website. These companies are exempt from the requirement to provide a product disclosure statement (PDS). The crowd funding service is required to provide information about its service and the risks of investing through the service to investors. It must also have adequate disclosure arrangements in place so investors

can find out about the companies offering shares on the crowd funding website.

It is the FMA's role to license and monitor the compliance of the crowd-funding service provider. As part of their licensing requirements, the crowd funding service must display a warning statement telling potential investors about the risks involved. It must also provide information about how the service works, what its fees are and the terms of the client agreement. Crowd funding services must also be a member of a dispute resolution scheme.

Further information is available on the FMA website.

1.11 The honest and reasonable director defence: A proposal for reform

On 31 July 2014, the Australian Institute of Company Directors (AICD) released the reform proposal *The Honest & Reasonable Director Defence*.

The defence is designed to provide a safe harbour for directors who perform their roles with integrity and commitment, but who now operate in an increasingly complex and compliance focused regulatory environment. The proposed defence would be available in circumstances where a director, acting in that capacity, conducts him or herself honestly and with an appropriate degree of care and diligence.

The defence would apply to directors facing an alleged contravention under any provision of the Corporations Act 2001 (Cth) or the Australian Securities and Investments Commission Act 2001 (Cth) and any equivalent grounds at common law or in equity. For example, the provision would operate in relation to alleged contraventions of the statutory directors' duties, financial reporting requirements, continuous disclosure and misleading or deceptive conduct provisions.

The Honest and Reasonable Director Defence is designed to be an overarching defence that may be used as an alternative, or in addition to, any other specific defences which may be available in the named Acts. The defence will not be excluded from operating because other specific defences are available and apply to particular contraventions within the Acts.

According to the AICD, there are a number of pressures in Australia's corporate operating and regulatory environment which suggest that a cultural shift in the regulation of directors is necessary.

These pressures include, but are not limited to:

- directors concerns about personal liability in Australia;

- the limited nature of the statutory business judgment rule;
- the interaction of legislative provisions in the Corporations Act which heighten personal liability concerns for directors;
- the risks for directors when companies approach insolvency;
- recent concerns about forward looking statements; and
- the ongoing expectation gap facing directors.

Further information is available on the AICD website.

1.12 Proposals to improve responsibility and accountability in the UK banking sector

On 30 July 2014, the UK Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) published two joint consultation papers aimed at improving individual responsibility and accountability in the UK banking sector.

These changes include:

- a new approval regime for the most senior individuals whose behaviour and decisions have the potential to bring a bank to failure, or to cause serious harm to customers; and
- introducing new rules on remuneration to strengthen the alignment between long-term risk and reward in the banking sector.

In June 2013, the Parliamentary Commission for Banking Standards (PCBS) published its report "Changing Banking for Good" setting out recommendations for legislative and other action to improve professional standards and culture in the UK banking industry. This was followed by legislation in the Financial Services (Banking Reform) Act 2013 (UK) (the Banking Reform Act). The PRA and FCA are now consulting on proposals that incorporate and build on the Banking Reform Act and the recommendations made by the PCBS.

The proposals are significant and will make it easier for firms and regulators to hold individuals to account.

(a) Accountability

In the joint consultation paper, "Strengthening accountability in banks: a new regulatory framework for individuals", the PRA and FCA proposals include introducing:

- a new Senior Managers Regime which will clarify the lines of responsibility at the top of banks, enhance the regulators' ability to hold senior individuals in banks to account and require banks to regularly vet their senior managers for fitness and propriety;
- a Certification Regime requiring firms to assess fitness and propriety of staff in positions where the decisions they make who could pose significant harm to the bank or any of its customers; and
- a new set of Conduct Rules, which take the form of brief statements of high level principle, setting out the standards of behaviour for bank employees.

(b) Remuneration

In the accompanying joint consultation paper "Strengthening the Alignment of Risk and Reward: New Remuneration Rules", the PRA and FCA proposals include:

- increasing the alignment between risk and reward over the longer term, by requiring firms to defer payment of variable remuneration (e.g. bonuses) for a minimum of five or seven years depending on seniority, with a phased approach to vesting;
- further enhancing the ability of firms to recover variable remuneration, even if paid out or vested, from senior management if risk management or conduct failings come to light at a later date;
- options to address the problem that employees can sometimes evade reductions in unvested awards by changing firms; and
- strengthening the existing presumption against discretionary payments where banks have been bailed out.

The PRA has also published final rules on claw back which introduce a seven-year minimum period for claw back from the date of award. These rules will come into force on 1 January 2015.

The PRA and FCA aim to publish final rules in early 2015.

Further information is available on the FCA website.

1.13 New shareholder engagement guidelines

On 28 July 2014, the Governance Institute of Australia released new shareholder engagement principles and guidelines.

The principles and guidelines encourage better explanations and disclosure of essential information needed for good engagement such as voting policies, governance

guidelines and engagement processes. They also emphasise the use of technology to facilitate effective disclosure and communication, and the importance of establishing a regular, meaningful and well-timed engagement program including on environmental, social and governance issues that affect longer-term performance.

The principles and guidelines seek to address key impediments to positive engagement, such as the complexity of the institutional investor chain which can make it difficult for companies to know who makes the real voting decisions and what factors they consider.

The principles and guidelines recommend that institutional investors publicly disclose who makes voting decisions, what factors they consider and their communication channels for engagement, and companies clarify who is responsible to talk to investors about what matters, including ESG issues.

The guidelines are available on the Governance Institute of Australia website.

1.14 IOSCO surveys use of social media and automated advice by intermediaries

On 24 July 2014, the International Organization of Securities Commissions (IOSCO) published its Report on the IOSCO Social Media and Automation of Advice Tools Surveys (July 2014). The report presents the results of four surveys on the use of social media and automated advice tools in capital markets, and how regulators oversee the use of these tools.

In relation to social media, key results include that:

- the use of social media by intermediaries is in its nascent stage but, across the globe, firms permitting its use prohibit their staff from making recommendations or providing investment advice;
- the most commonly used sites are Facebook, Twitter and LinkedIn;
- regulators have neither defined social media, nor prohibited its use by intermediary firms; and
- increasingly, regulators are using social media sites in the supervision of firms to identify personal relationships between parties and as a source of general information.

In relation to automated advice tools, key results include that:

- the use of automated advice tools is growing around the world. Intermediaries are using these tools to assist with their suitability and Know Your Customer (KYC) obligations;

- when making recommendations, the vast majority of firms do so with respect to asset classes. Specifically, collective investment schemes, mutual funds, exchange traded funds and equity classes are the most common products recommended;
- none of the regulators who responded to the survey prohibits the use of automated advice tools, but very few have specific rules or guidance related to their use. Rather, most regulators rely on, inter alia, suitability, disclosure, supervision and record keeping rules; and
- the report notes that it is too early to identify the unique challenges posed by social media and automated advice. Nor can definitive conclusions be drawn about the best practices in the use and oversight of these mediums. Nonetheless, the exercise has helped regulators understand how intermediaries use these tools and the challenges involved in overseeing them.

The report is available on the IOSCO website.

1.15 SEC adopts money market fund reform rules

On 23 July 2014, the US Securities and Exchange Commission (SEC) adopted amendments to the rules that govern money market mutual funds. The amendments make structural and operational reforms to address risks of investor runs in money market funds, while preserving the benefits of the funds.

The rules build upon the reforms adopted by the Commission in March 2010 that were designed to reduce the interest rate, credit and liquidity risks of money market fund portfolios. When the Commission adopted the 2010 amendments, it recognised that the 2008 financial crisis raised questions of whether more fundamental changes to money market funds might be warranted.

The new rules require a floating net asset value (NAV) for institutional prime money market funds, which allows the daily share prices of these funds to fluctuate along with changes in the market-based value of fund assets and provide non-government money market fund boards new tools - liquidity fees and redemption gates - to address runs.

The rules are available on the SEC website.

1.16 Reforming major interest rate benchmarks

On 22 July 2014, the Financial Stability Board (FSB) published proposals, plans and timelines for the reform and strengthening of existing major interest rate benchmarks and for additional work on the development and introduction of alternative benchmarks.

The major interest reference rates (such as LIBOR, EURIBOR, and TIBOR, collectively the IBORs) are widely used in the global financial system as benchmarks for a large volume and broad range of financial products and contracts. The cases of attempted market manipulation and false reporting of global reference rates, together with the post-crisis decline in liquidity in interbank unsecured funding markets, have lowered confidence in the reliability and robustness of existing benchmark interest rates. Uncertainty surrounding the integrity of these reference rates represents a potentially serious source of vulnerability and systemic risk. Against this background, in February 2013, the G20 asked the FSB to undertake a fundamental review of major interest rate benchmarks and plans for reform to ensure that those plans are consistent and coordinated, and that interest rate benchmarks are robust and appropriately used by market participants.

While each currency area faces particular conditions that affect the specific recommendations, and which imply that there will be some heterogeneity in implementation, the FSB supports a multiple-rate approach to the reform of major interest rate benchmarks. The main elements are:

- strengthening existing IBORs and other potential reference rates based on unsecured bank funding costs by underpinning them to the greatest extent possible with transaction data (the MPG terms such enhanced rates "IBOR+"); and
- developing alternative, nearly risk-free rates. Members believe that there are certain financial transactions, including many derivative transactions that are better suited to reference rates that are closer to risk-free.

Specific timelines are set out in the report for implementing the recommendations. In particular, in relation to IBOR+, by end-2015, administrators should have publicly consulted on any recommended changes, while currency groups will work to develop transition strategies and address any legal obstacles and risks. In respect of risk free rates, where suitable, central banks and supervisory authorities should encourage the industry or work with the administrators to implement at least one IOSCO-compliant risk-free rate by Q2 2016.

The report is available on the FSB website.

1.17 Rethinking shareholder engagement

On 17 July 2014, KPMG published the report Rethinking Shareholder Engagement in the Age of Activism (undated).

Many activist investors are stepping-up their engagement with companies - on strategy and leadership, operational efficiency, capital allocation, corporate governance, and more. And while views are mixed on whether investor activism is good or bad for shareholders, companies are increasing their engagement with shareholders and the investor community to better understand the company's vulnerabilities and opportunities through an investor lens.

The report is available on the KPMG website.

1.18 Proposals for corporate governance reform

On 8 July 2014, the Trades Union Congress (TUC) in the UK published a collection of essays making the case for reforming the UK's corporate governance system.

The book *Beyond Shareholder Value: The Reasons and Choices for Corporate Governance Reform* includes 17 essays. While there are a variety of proposals for how the shareholder value system needs to change, a number of themes are picked up by several authors, including that:

- shareholder value is stifling innovation and holding back investment. Several authors, argue that shareholder value is not conducive to company innovation, and has led to a fall in business investment over the last three decades;
- shareholder value is closely associated with short-termism. Authors argue that with the average time a share is held for now reduced to mere days, a focus on shareholder value discourages companies from taking a long-term view; and
- it is not only shareholders that bear risks or contribute to company success - shareholder value fails to recognise the stake workers have in the success of a business, or the contribution that taxpayers often make through government investment.

The authors broadly agree on two themes for reforming shareholder value - changing who contributes to decision-making both within companies and wider economic institutions such as the Financial Reporting Council, and broader institutional reform to change the environment in which all companies operate. There are different ideas, however, for how to carry out these reforms, with some calling for statutory worker

representation on boards and others for voluntary stakeholder councils and a wider representation on regulatory bodies.

The book includes a number of proposals for institutional reform including the introduction of different classes of shares to differentiate between short-term traders and those with a long-term stake in a company, and tightening the rules surrounding takeovers. Reforms to company and personal taxation, such as using capital gains tax to encourage long-term share ownership, are also suggested.

The book is available on the TUC website.

1.19 Audit committee effectiveness: Study

In July 2014, KPMG published a study on audit committee effectiveness. Directors from France, China, Germany, Taiwan, the UK and the US were interviewed for their views on the fundamentals of audit committee effectiveness, and the practices that they consider vital to being truly effective in a complex and rapidly changing environment. According to those interviewed, audit committee effectiveness depends on fundamentals including the right committee composition and dynamics, an up-to-date charter with well-defined responsibilities, a risk-based approach to setting the committee's agenda, an understanding of current and emerging issues, and proactive, engaged oversight-beyond the boardroom.

The report is available on the KPMG website.

1.20 New Zealand Law Commission proposes capped liability scheme for auditors

The New Zealand Law Commission's report Liability of Multiple Defendants (June 2014) (NZLC R132) recommends that joint and several liability remain the normal rule to govern the liability of multiple defendants for the same damage, but with several modifications to achieve better fairness in more extreme or unusual circumstances or for some classes of defendants.

The modifications propose a scheme or schemes to cap the liability of auditors who undertake the largest and most complex audits, to introduce similar conditions for New Zealand auditors and firms to those available to Australian audit firms, who also participate in the New Zealand market.

NZLC R132 is available on the Law Commission website.

1.21 2014 ICGL Forum on Board Gender Diversity

On Monday, 20 October 2014 (Melbourne) and Friday, 24 October 2014 (Sydney), the 2014 International Corporate Governance and Law (ICGL) Forum on Board Gender Diversity will be held. Presenters from Australia, Germany, Norway, South Africa and The Netherlands will be examining gender diversity on corporate boards, focusing on recent international developments, in particular in Europe.

Speakers include:

- Mijntje Lückerath-Rovers, Professor of Corporate Governance at Tilburg University (The Netherlands);
- Michael Adams, Dean, School of Law at University of Western Sydney (Australia);
- Janine Hills, Founder & CEO, Vuma Reputation Management (South Africa);
- Judith Fox, National Director, Governance Institute of Australia;
- Peta Spender, Professor of Law at the College of Law, Australian National University (Australia);
- Raphael Koch, Professor of Law at the University of Augsburg (Germany);
- John Stanhope, Chairperson of Australia Post;
- Renée Adams, Commonwealth Bank Chair in Finance, UNSW (Australia);
- Beate Sjåfjell, University of Oslo, Faculty of Law (Norway); and
- Peter Lamell, Director of the Melbourne Forum, Director of Renew Australia.

Further information about registration and the programs is available on the ICGL website.

2. Recent ASIC Developments

2.1 ASIC Statement of Intent

On 8 August 2014, ASIC published its Statement of Intent (July 2014) in response to the Australian Government's Statement of Expectations (undated). The Statement of Intent responds to the government on ASIC's high-level priorities and intentions around its role, responsibilities and relationship with government.

Further information is available on the ASIC website.

2.2 Wholesale and retail investors and SMSFs

On 8 August 2014, ASIC clarified how it will apply the wholesale investor test to self-managed superannuation funds (SMSFs).

This has been an area of ongoing legal uncertainty. The recent Senate Economics References Committee's final report (June 2014) on the performance of ASIC recommended that the Australian Government clarify the definitions of retail and wholesale investors. The 2011 Treasury options paper Wholesale and Retail Clients: Future of Financial Advice (January 2011) acknowledged the confusion about how the wholesale investor test applied in the context of superannuation trustees. ASIC is also aware of general uncertainty in the market about when a financial service relates to a superannuation product.

Further information is available on the ASIC website.

2.3 Auditor registration

On 7 August 2014, ASIC announced that it has provided relief to deal with a potential technical defect in the registration of some auditors since December 2005. The relief enables, to the maximum extent possible, affected auditors and their clients to conduct their affairs despite the potential defect. The provision commenced on 7 August 2014.

In order to provide certainty to industry, the Australian Government will also introduce legislation to correct the potential defect as soon as practicable.

The Corporations Act 2001 (Cth) requires certain entities to appoint registered company auditors, audit firms or authorised audit companies to conduct audits or perform other tasks. Audit firms and authorised audit companies must, among other things, include registered company auditors as members.

ASIC must register a person as an auditor if, among other things, ASIC is satisfied that the person satisfies all the components of an auditing competency standard approved by ASIC or has 3,000 hours of auditing experience of a certain kind. In November 2004, ASIC approved the auditing competency standard issued by CPA

Australia and The Institute of Chartered Accountants in Australia (now operating as Chartered Accountants Australia and New Zealand) for this purpose.

Under the Legislative Instruments Act 2003 (Cth) (the Legislative Instruments Act), which commenced on 1 January 2005, legislative instruments made in 2004 were required to have been lodged with the Attorney-General's Department by 1 December 2005, for registration on the Federal Register of Legislative Instruments. Failure to have lodged such an instrument by that date has the effect that the instrument is taken to have been repealed.

ASIC has recently become aware that the instrument by which it approved the auditing competency standard is likely to be a legislative instrument. It was never lodged for registration. It is therefore possible that it was taken to have been repealed by the Legislative Instruments Act on 1 December 2005.

ASIC has been registering auditors in reliance on the standard since that date. The legal efficacy of those registrations is uncertain. Auditors registered before 1 December 2005, and those registered since 1 December 2005 in reliance on the hours-based experience test, are not affected. Similarly, auditors registered from 7 August 2014 will not be affected.

ASIC Class Order [CO 14/757] on relief in relation to the registration of auditors gives prospective relief to the maximum extent possible, so that acts and things that must be done by registered company auditors may also be done by auditors whose registration may have been adversely affected.

The relevant audit competency standard has been reapproved. This ensures that it can be applied prospectively to applications for registration as an auditor.

The Australian Government will be supporting ASIC's measures by introducing remedial legislation to ensure that the past registration of people as auditors will be legally effective from the time that ASIC purported to effect the registration.

The Australian Parliament has previously enacted retrospective legislation to deal with the possible consequences of the failure to register legislative instruments.

The class order is available via the ASIC website.

2.4 ASIC launches the National Financial Literacy Strategy 2014-17

On 1 August 2014, ASIC launched the new National Financial Literacy Strategy 2014-17 (August 2014).

The new strategy aims to improve the financial literacy of all Australians by providing a national framework for action for stakeholders across the government, business, community and education sectors, led and coordinated by ASIC, the Australian Government agency responsible for financial literacy.

The strategic priorities set out in the strategy are to:

- educate the next generation, particularly through the formal education system;
- increase the use of free, impartial information, tools and resources;
- provide quality targeted guidance and support;
- strengthen co-ordination and effective partnerships, and
- improve research, measurements and evaluation.

The strategy is accompanied by an Action Plan (August 2014) that describes indicative actions for ASIC and other relevant stakeholders, under the five strategic priorities.

Further details are available on the National Financial Literacy Strategy website.

2.5 ASIC enforcement report - January to June 2014

ASIC has released (31 July 2014) its sixth six-monthly enforcement report, detailing outcomes achieved between 1 January 2014 and 30 June 2014.

ASIC achieved 256 enforcement outcomes to protect financial consumers and enhance the fairness and efficiency of the financial markets. This included criminal as well as civil and administrative (e.g. a banning or disqualification) actions, and negotiated outcomes, including enforceable undertakings.

There were 83 outcomes achieved in the market integrity, corporate governance and financial services areas, and 173 in the small business area.

Current areas of focus for ASIC include taking action against credit providers for misleading consumers and loan fraud, and working with overseas counterparts to combat cross-border fraud.

The report also includes discussion of the life cycle of some enforcement actions taken by ASIC recently to demonstrate the factors that need to be accounted for in an enforcement action.

The report is available on the ASIC website.

2.6 ASIC releases ASX assessment report

On 28 July 2014, ASIC released Report 401 - Market assessment report: ASX Group (July 2014), its annual assessment report of the ASX Group (ASX) licensees.

The assessment pays attention to how ASX dealt with a number of specific issues, including:

- the sufficiency of ASX's technological resources in order to properly operate their facilities;
- the operation and monitoring of the ASX 24 futures market during the assessment period, and the period 1 September 2013 - 3 October 2013;
- procedures for considering listing applications from emerging market issuers;
- its arrangements for ensuring compliance with the recently introduced capital-raising initiatives for small and mid-cap companies;
- its processes for ensuring that fraudulent or unauthorised announcements are not made to the market through ASX Group's market announcements platform (MAP);
- its processes for identifying and managing any conflicts of interest concerning its directors, and
- the operation and supervision of ASX's Clearing and Settlement (CS) facilities.

The report sets out a number of areas the ASX has agreed to address, working closely with ASIC. While important, these issues did not cause ASIC to qualify the conclusion that ASX adequately met its obligations for the assessment period.

The agreed actions from the report deal with:

- **Technology** - ASX's obligation to have sufficient technological resources to properly operate markets and clearing and settlement facilities. Any subsequent post-implementation review of Australian Market Regulation Feed projects by ASX should also focus on the processes of third-party vendors' and vendor quality assurance practices when estimating the cost and duration of new projects;
- **Monitoring and enforcing compliance** - ASX's obligation to have adequate arrangements for monitoring and enforcing compliance with its operating rules. ASX will make a number of changes including exploring improvements to its processes and procedures around the operation of the ASX 24 futures market, considering listing applications from emerging market issuers,

detecting fraudulent or unauthorised company announcements and ensuring that small to mid-cap entities comply with newly introduced capital raising rules; and

- **Clearing and Settlement** - ASX's obligation to provide fair and effective clearing and settlement services. ASX will update internal processes to separately capture complaints it receives regarding the operation of the Trade Acceptance Service (TAS), which is the service it uses to provide clearing and settlement arrangements to Chi-X. ASX has also agreed to capture significant clearing participant complaints and corresponding responses within its complaints handling system.

The report is available on the ASIC website.

2.7 ASIC consults on technical changes to trade reporting obligations for OTC derivatives

On 25 July 2014, ASIC released a consultation seeking feedback on proposed revisions to the rules that require the mandatory trade reporting of over-the-counter (OTC) derivatives such as interest rate swaps.

The proposals are aimed at ensuring a smooth transition to the reporting regime and follow a recent revision by ASIC of the timetable for so-called Phase 3 reporting entities (i.e. financial entities holding less than $50 billion in OTC derivatives outstanding) to start reporting OTC derivative transactions to trade repositories.

ASIC's Consultation Paper 221 - OTC derivatives reform: Proposed amendments to the ASIC Derivative Transaction Rules (Reporting) 2013 (July 2014) (CP 221) proposes changes governing the reporting of OTC derivative transactions to derivative trade repositories.

The changes proposed are:

- a number of technical changes to the rules, designed to make the reporting regime more effective and easier to comply with;
- clarifying the rules around delegated reporting to provide a "safe harbour" from liability if certain conditions are met; and
- requiring certain larger overseas subsidiaries of Australian financial entities to report transactions.

ASIC has already granted a delay to Phase 3 financial entities from their requirement to report. Under ASIC Instrument [14/0633], these entities will now need to start reporting no earlier than 13 April 2015, and there is further phasing by size of entity

and asset class.

CP 221 is available on the ASIC website.

2.8 Review of property schemes' disclosure

ASIC has announced (23 July 2014) the results of its review of disclosure to investors by the unlisted property industry.

The review, part of a recent broader surveillance into the managed investment and superannuation sectors, including listed and unlisted property funds, found unlisted property schemes were failing to adequately disclose against benchmarks put in place to improve investors' awareness of the risks of investing in these products.

In 2012 ASIC introduced (28 March 2012) benchmarks that unlisted property schemes are required to address on an "if not, why not" basis. The benchmarks addressed key issues including schemes' gearing policy, interest cover policy, related party transactions and distribution practices.

ASIC's review found schemes' responsible entities (REs) either failed to address certain benchmarks or did not provide enough information. They also failed to provide the information in a single location on their website and/or in a single designated document.

As a result of ASIC's surveillance, one scheme withdrew its Product Disclosure Statement from the market. A further three entities will be questioned about their disclosure. ASIC will also be meeting with industry to discuss its concerns and follow up on compliance.

3. Recent ASX Developments

3.1 ASX Clear Operating Rules amendment: Minimum core capital requirement

On 1 August 2014, the Minimum Core Capital requirement in Schedule 1 to the ASX Clear Operating Rules was amended.

Under ASX Clear Rule 5.1 non-bank clearing participants wishing to clear cash market transactions or options market transactions for third parties (called General Participants in the rules) must comply with the risk based capital requirements set out

in Schedule 1 to the ASX Clear Operating Rules (see Schedule 1, Rule S1.2.1(1)).

The amendment changes the table of core capital requirements in Schedule 1 to the Operating Rules for general clearing participants by removing the present requirement to have a core capital of $20 million and replacing it with a tiered table of core capital amounts based on the number of participants for whom the general clearing participant provides clearing services.

The changes allow for a graduated approach to minimum core capital requirements for general clearing participants and reflect minimum core capital that should be associated with the nature and level of clearing activity being undertaken.

The notice announcing the amendment is available on the ASX website.

3.2 ASX Centre Point - Additional functionality

On 28 July 2014, ASX made changes to ASX Centre Point, and the relevant ASX Operating Rules and Procedures, to introduce additional functionality. Centre Point is an anonymous matching system operated as part of the ASX market. It includes Centre Point Block orders, which have a participant-defined Minimum Acceptable Quantity for execution, and Centre Point Sweep orders, which provide routing between ASX Centre Point and ASX TradeMatch.

The additional functionality provided under the amendments builds on existing functionality and allows for:

- Centre Point and Centre Point Block orders to execute at any dark price permitted under the ASX Market Integrity Rules (Competition in Exchange Markets) 2011 for trades with price improvement, up to the limit price. Hence, orders are no longer restricted to being matched only at the mid-point of the best bid and offer; and
- Centre Point Block orders and Sweep orders (Centre Point component) which allow the Minimum Acceptable Quantity to be single fill only. That is, the orders will be executed only if the Minimum Acceptable Quantity is matched with only one other order.

For more information see ASX's notice #1 (16 June 2014) describing the enhancements to ASX Centre Point. ASX's notice #2 (22 July 2014) includes links to the ASX Operating Rule and Procedure amendments.

3.3 Austraclear Regulations amendment: Cash transfers in approved foreign currencies

On 25 July 2014, the Austraclear Regulations and Procedures, Determinations and Practice Notes were amended to allow participants to instruct cash transfers in approved foreign currencies through the Austraclear system.

Initially, the new rules will facilitate cash transfers by participants in the currency of People's Republic of China (Renminbi) using Bank of China (Sydney Branch) as their settlement bank. Renminbi has been approved for the settlement of transactions in Austraclear and Bank of China (Sydney Branch) has been approved as a Foreign Currency Settlement Bank under the Austraclear Regulations for transactions in Renminbi.

Looking forward, the new rules will provide the framework for Austraclear to support cash and securities transactions in any approved foreign currency.

The notice (25 July 2014) announcing the amendment is available on the ASX website. For further information, see the Renminbi Settlement page on the ASX website.

3.4 ASX lowers fees for interest rate futures clearing participants

On 24 July 2014, ASX announced that it will lower fees and increase growth incentives for clearing participants from 1 October 2014, in its interest rate futures and over-the-counter (OTC) clearing business. This will be achieved by implementing a new fee schedule for interest rate futures and by providing volume discounts for OTC clearing.

The new fee schedule recognises that volumes have grown strongly and that fees have not changed for more than ten years. The new fees improve the sustainability of the derivatives business, encourage volume growth and position ASX to compete for liquidity in an evolving global market structure. The fee schedule and growth incentives reflect that customers use exchange-traded and OTC interest rate products together.

The media release is available on the ASX website.

3.5 Consultation paper: Derivatives account segregation and portability - Enhanced client protection structures

On 14 July 2014, ASX released the consultation paper Derivatives Account Segregation and Portability - Enhanced Client Protection Structures (July 2014).

ASX is seeking feedback on the design of an enhanced client account structure which is intended to be implemented across the ASX Clear (Futures) Client Clearing Service for ASX 24 Exchange Traded Derivatives and OTC Interest Rate Derivatives. Potential enhancements include the protection of excess client collateral and the tracking of client non-cash collateral.

Further information is available on the ASX website.

3.6 Reports

In August 2014 ASX released:

- the ASX Group Monthly Activity Report;
- the ASX 24 Monthly Volume and Open Interest Report; and
- the ASX Compliance Monthly Activity Report

for July 2014.

4. Recent Takeovers Panel Developments

4.1 Gondwana Resources Ltd 02 - Declaration of unacceptable circumstances and orders

The Takeovers Panel has announced (15 August 2014) that it has made a declaration of unacceptable circumstances and final orders in relation to an application dated 17 July 2014 by Ochre Group Holdings Ltd in relation to the affairs of Gondwana Resources Ltd (Gondwana) (further information).

(a) Background

Gondwana is currently the subject of a conditional off-market bid announced on 12 May 2014 by Ochre Industries Pty Ltd (Ochre Industries), a wholly owned subsidiary of Ochre Group, at $0.082 per share for all the shares in Gondwana.

On or about 11 July 2014, Gondwana sent shareholders a notice of annual general meeting and explanatory statement, which included resolutions (among others) to approve the issue of shares and options. The annual general meeting was held on 11 August 2014.

On 17 July 2014, Gondwana announced a fully underwritten one-for-one non-renounceable entitlement issue at $0.032 per share.

Ochre Group submitted that (among other things):

- Gondwana's notice of annual general meeting contained information deficiencies;
- the entitlement issue would trigger a condition of Ochre Industries' bid and was a frustrating action; and
- certain shareholders in Gondwana are associates and had contravened s. 606.

Duncan Merrin, a substantial holder of 11.81% of Gondwana shares, failed to disclose his substantial holding until 9 July 2014 and then made incomplete disclosure until a substantial holder notice correcting previous notices was lodged on 30 July 2014. Mr Merrin was a substantial holder in Gondwana before Ochre Industries announced its bid.

(b) Declaration

The Panel considered that the circumstances were unacceptable because (among other things):

- in the explanatory statement for Gondwana's annual general meeting Gondwana shareholders had not been given enough information to enable them to understand and assess the control impact of the resolutions and the merits of the resolutions compared with the entitlement issue and Ochre Industries' bid;
- if the entitlement issue proceeds it will trigger a condition of Ochre Industries' bid and constitutes a frustrating action but it has not been subject to shareholder approval; and
- Gondwana shareholders and the market did not know the identity of a person who had acquired a substantial interest in the company.

The Panel was not satisfied that there was an association between certain Gondwana shareholders and declined to make a declaration in respect of that matter.

(c) Orders

The Panel has made orders to the effect that:

- the entitlement issue be subject to shareholder approval;
- any issue of shares, options or convertible notes by Gondwana pursuant to the resolutions passed at its annual general meeting be subject to shareholder approval if they are to be issued during Ochre Industries' bid (this order has effect for a maximum of three months after the date of the orders);
- shareholders must receive disclosure in a form approved by the Panel when seeking shareholder approval for the above actions; and
- if Ochre Group obtains a relevant interest of 50% or more of Gondwana shares (excluding its own holding of 15.93% at the commencement of the offer period and Mr Merrin's 11.81% holding) and its bid is unconditional, Mr Merrin must accept 6.81% of Gondwana shares (being his recently disclosed interest of 11.81% less 5%) into the bid unless he has accepted a superior unconditional takeover offer which is recommended by the board of Gondwana (this order has effect for a maximum of three months after the date of the orders).

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

4.2 Ambassador Oil and Gas Ltd 01 - Declaration of unacceptable circumstances and orders

The Takeovers Panel has announced (28 July 2014) that it has made a declaration of unacceptable circumstances and orders on an application dated 18 June 2014 by Magnum Hunter Resources Corporation in relation to the affairs of Ambassador Oil and Gas Ltd (Ambassador) (further information).

(a) Background

On 28 May 2014, Drillsearch Energy Ltd and Ambassador announced Drillsearch's intention to make a recommended conditional off-market scrip bid for Ambassador. The offer consideration comprised 1 Drillsearch share for every 5.4 Ambassador shares. Drillsearch and Ambassador also announced that:

- Drillsearch had acquired a relevant interest in 19.9% of Ambassador; and
- Mrs Fotoula Hatziladas and Eye Investment Fund Ltd, who collectively held 17.6% of Ambassador, and the directors of Ambassador, who collectively held 7.4% of Ambassador, had advised Ambassador that they intended to accept the bid "within 14 days from the opening of the offer, in the absence of a superior offer [or proposal]" (Intention Statements).

The 19.9% pre-bid stake and Intention Statements were arranged either by a director of Ambassador or by Mr Kleo Hatziladas. Mr Hatziladas has a relevant interest in his spouse's shareholding. Mr Hatziladas was also corporate adviser to Ambassador and negotiated the proposed offer with Drillsearch on Ambassador's behalf.

On 10 June 2014, Magnum announced its intention to make an off-market conditional scrip bid for Ambassador. The offer consideration comprised one share of Magnum common stock for every 27.8 Ambassador shares.

On 12 June 2014, Drillsearch's offer opened.

On 16 June 2014, Drillsearch increased its bid by adding $0.05 cash per Ambassador share and declared its bid unconditional. On the same day, Ambassador announced that its board had determined that Drillsearch's revised offer was superior to Magnum's offer and that it had become aware that shareholders representing approximately 32.77% of the issued shares in Ambassador had accepted Drillsearch's offer (including Mrs Hatziladas, Eye Investment and two Ambassador directors, Mr David Shaw and Mr Giustino Guglielmo).

On 17 June 2014, Magnum increased the scrip consideration offered under its bid by offering one share of Magnum common stock for every 23.6 Ambassador shares and declared its offer unconditional.

Magnum submitted that (among other things):

- Drillsearch was associated with each of the shareholders who gave an Intention Statement and therefore acquired its pre-bid stake in breach of s. 606; and
- in accepting Drillsearch's bid early, Mrs Hatziladas, Eye Investment, Mr Guglielmo and Mr Shaw had acted contrary to their Intention Statements.

(b) Declaration

The Panel considered that the circumstances were unacceptable because (among other things):

- Drillsearch was associated with each of Mr Hatziladas, Mrs Hatziladas, Mr Guglielmo, Mr Shaw and Mr Correia under s. 12(2)(b) for the purpose of controlling or influencing the conduct of Ambassador's affairs or under s. 12(2)(c) in relation to Ambassador's affairs. As a result, Drillsearch had voting power of at least approximately 19.55% of Ambassador prior to acquiring the 19.9% pre-bid stake. Accordingly, the pre-bid stake was acquired in breach of s. 606; and
- Mrs Hatziladas, Eye Investment, Mr Guglielmo and Mr Shaw did not give effect to their respective Intention Statements, by accepting four days after

Drillsearch's offer opened rather than the 14 days referenced in their intention statements.

(c) Orders

The Panel has made orders to the effect that:

- Drillsearch lodge with ASIC, ASX and dispatch to Ambassador shareholders a supplementary bidder's statement in a form approved by the Panel;
- Drillsearch must ensure that its offer remains open for a period of not less than 21 days after the date on which its supplementary bidder's statement is sent to shareholdersMrs Hatziladas, Eye Investment, Mr Guglielmo and Mr Shaw's acceptances of Drillsearch's offer are reversed and they must wait 14 days from the release of Drillsearch's supplementary bidder's statement before deciding whether to accept Drillsearch's offer; and
- the former Ambassador shareholders who sold their shares as part of the pre-bid stake, and all other shareholders who have accepted Drillsearch's offer, are given a "withdrawal" right which is operative up until 14 days after the release of Drillsearch's supplementary bidder's statement.

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

4.3 Proposed guidance note on dividends public consultation response statement

The Panel has advised (24 July 2014) that it has decided not to publish a guidance note on dividends at this time, following consideration of the submissions of a consultation paper released on 10 January 2014.

The Consultation Paper sought public comments on a proposed guidance notice in relation to dividends.

As the Panel's position on a number of issues arising from the consultation paper has not been settled, the Panel has decided not to publicly respond to the submissions made. The Panel will take the submissions into account should it revisit the making of policy in this area.

5. Recent Research Papers

5.1 Socially responsible firms

In the corporate finance tradition starting with Berle & Means (1923), corporations should generally be run so as to maximise shareholder value. The agency view of corporate social responsibility (CSR) generally considers CSR as a managerial agency problem and a waste of corporate resources, since corporate insiders do good with other people's money. The authors evaluate this agency view using large-scale datasets with global coverage (59 countries) on firm-level corporate engagement and compliance with respect to environmental, social, and governance issues. Using an instrumental variable approach, they document that CSR ratings are higher for companies with fewer agency problems (using standard proxies such as having lower levels of free cash flow and higher dividend payout and leverage ratios). Moreover, certain aspects of CSR (e.g., environmental, labour and social protection) are associated with increased executive pay-for-performance sensitivity and the maximisation of shareholder value.

The paper is available on the SSRN website.

5.2 Employee satisfaction, labour market flexibility and stock returns around the world

The authors study the relationship between employee satisfaction and abnormal stock returns around the world, using lists of the "Best Companies to Work For" in 14 countries. They show that employee satisfaction is associated with positive abnormal returns in countries with high labour market flexibility, such as the US and UK, but not in countries with low labour market flexibility, such as Germany. These results are consistent with high employee satisfaction being a valuable tool for recruitment, retention, and motivation in flexible labour markets, where firms face fewer constraints on hiring and firing. In contrast, in rigid labour markets, legislation already provides minimum standards for worker welfare and so additional expenditure may exhibit diminishing returns. The results have implications for the differential profitability of socially responsible investing (SRI) strategies around the world. In particular, the results emphasise the importance of taking institutional features into account when forming such strategies.

The paper is available on the SSRN website.

5.3 Going when the going gets tough: Does the labour market penalise pre-emptive director resignations?

Previous literature documents that the director labour market penalises directors involved in negative events such as lawsuits or earnings restatements. As such, directors might have incentives to leave before the going gets tough. However, the author shows that labour market penalties for directors who leave are higher than those for directors who remain during the event. These results are robust to addressing concerns about endogeneity and alternative explanations. The author concludes that the labour market can effectively provide incentives for directors not to abandon a firm facing difficult times.

The paper is available on the SSRN website.

5.4 Influence of public opinion on investor voting and proxy advisors

The authors examine the evolution in voting patterns across firms over time. They find that investors have become more independent in their voting decisions, voting less with the recommendations of management or proxy advisors. Even when the proxy advisor recommends voting against a proposal, they find that over time investors are more likely to ignore the recommendation. Moreover, they also find that proxy advisory recommendations have become more supportive of shareholder proposals. The authors' main contribution is to examine the role of public opinion in influencing institutional voting. They show that public opinion on corporate governance issues, as reflected in media coverage and surveys, is strongly associated with investor voting, particularly mutual fund voting.

The paper is available on the SSRN website.

5.5 Do the interests of labour union and public pension fund activists align with other shareholders? Evidence from the market for directors

Labour union pension funds and public pension funds are frequent sponsors of shareholder proposals and prominent advocates for corporate governance reforms. Some argue that their large shareholdings and lack of business ties make them ideal monitors of corporate management. Critics, however, maintain that their activism is either politically motivated or designed to advance the interests of union employees

rather than their fellow shareholders. The authors provide new evidence on this question by analysing the labour market for directorships. Previous literature has found this market to be discriminating in rewarding directors who make decisions in the best interests of shareholders and punishing directors who do not. The authors find that directors are significantly more likely to make the governance change requested in a shareholder proposal if (1) the proposal sponsor is a union pension fund and (2) the firm has a unionised workforce. They find that directors at unionised firms who comply with the requests of union pension fund sponsors are significantly more likely to lose seats at external public companies. In contrast, they find that directors who comply with the requests of public pension fund sponsors are rewarded with additional external board seats. They conclude that directors who comply with union pension fund requests at unionised firms damage their reputation as monitors, and that the interests of union fund activists that also represent the firms' employee stakeholders are not aligned with those of other shareholders. In contrast, they do not find evidence to support the criticism that public pension fund activism is politically motivated or "labour-friendly".

The paper is available on the SSRN website.

5.6 What do private equity firms (say they) do?

The authors survey 79 private equity (buyout) investors with a total of over US$750 billion of assets under management about their practices in firm valuation, capital structure, governance and value creation. Few investors use discounted cash flow or present value techniques to evaluate investments. Rather, they rely on internal rates of return and multiples of invested capital. Private equity investors typically target a 22% internal rate of return on their investments on average with most firms clustered tightly between 20% and 25%. They also use comparable company multiples to calculate exit values rather than discounted cash flows. Capital structure choice is based equally on optimal trade-off and market timing considerations. Private equity investors anticipate improving the performance of the companies in which they invest, with a greater focus on increasing growth than on reducing costs. They devote meaningful firm resources to do this. The authors also explore cross-sectional differences based on private equity investor size, age, location and performance.

The paper is available on the SSRN website.

6. Recent Corporate Law Decisions

6.1 Appeal from ICAC corruption findings - including consideration of directors' duties

(By Daniel Kornberg, DLA Piper)

Duncan, McGuigan, Kinghorn and Cascade Coal Pty Ltd v ICAC [2014] NSWSC 1018, Supreme Court of New South Wales, McDougall J, 29 July 2014

The full text of this judgment is available online.

(a) Summary

This case concerned claims made for declaratory relief in respect of reports published by the NSW Independent Commission Against Corruption (ICAC). The reports found that five prominent Sydney businesspersons and Cascade Coal Pty Ltd (Cascade), a company in which the five businesspersons were founding investors, had engaged in corrupt conduct in respect of the procurement of the Mount Penny mining tenement (the Tenement), and the grant of an exploration licence over that tenement.

The individual plaintiffs sought declarations that the findings of corruption in the ICAC report Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others (July 2013) (the Report) be nullified. Cascade sought a declaration to remove the recommendation made by the ICAC to expunge its authorities granted under the Mining Act 1992 (NSW) over the Mount Penny tenement and nearby tenement known as Glendon Brook.

The findings of corruption by the ICAC against four of the five individual plaintiffs were upheld by the Supreme Court and no relief was granted. Additionally, Cascade's claim for declaratory relief was dismissed as there was no decision or finding that was amenable to review, nor would there have been any utility in granting the desired relief.

Only the claim of one of the individual plaintiffs, John Kinghorn, was overturned as it was found that the ICAC's findings lacked jurisdictional fact, and as such, there could be no finding of corrupt conduct under the Independent Commission Against Corruption Act 1988 (NSW) (the ICAC Act).

(b) Facts

(i) Findings of Corruption by the ICAC

The meaning of "corrupt conduct" under ss. 8 and 9 of the ICAC Act includes conduct of any person that could adversely affect the exercise of official functions by any public official or any public authority and the conduct must constitute an offence,

which may be criminal in nature. Both of these elements are needed for corrupt conduct to have occurred.

The ICAC's reports from a public inquiry into the creation of the Tenement, and the grant of an exploration licence over it, found corrupt conduct by the then NSW Primary Industries Minister Ian MacDonald, Member of the NSW Legislative Council Eddie Obeid, Mr Obeid's family (the Obeid Family) and the plaintiffs Travers Duncan, John McGuigan, John Atkinson, Richard Poole and John Kinghorn.

The plaintiffs' corrupt conduct stemmed from their withholding of information in regard to the Obeid Family's involvement in the Tenement in the negotiations conducted between Cascade and White Energy Company Ltd (White Energy).

The individual plaintiffs challenged the findings contained in the ICAC's report on the following grounds:

- that the ICAC failed to identify the "official functions" and the "public officials or authorities" that could be adversely affected by their alleged corrupt conduct as is required by the ICAC Act;
- that even if the ICAC had sufficiently identified the functions and officials, the alleged corrupt conduct could not have affected the exercise of those functions;
- that the findings did not satisfy the requirement of s. 9 of the ICAC Act that the alleged corrupt conduct could constitute or involve an offence and therefore lacked jurisdictional fact; and
- that they had been denied natural justice as they had not been given proper notice of the proposed findings nor had they had an opportunity to answer those submissions.

(c) Decision

McDougall J considered each of the grounds of the challenges made by the plaintiffs separately.

(i) Identification of "official functions" and "public officials or authorities"

In the Report, the ICAC identified the following categories of public officials and official functions:

- a public official reviewing the creation of the Tenement;
- a public official reviewing the grant of exploration licences over the Tenement; and
- a public official considering whether to grant a mining lease of the Tenement.

McDougall J agreed with the plaintiffs that the first two official functions did not have any statutory foundation, nor could the relevant official be identified with sufficient particularity. In regard to the third category identified by the ICAC, however, his

Honour was satisfied that the functions, and by implication the officials who exercised them, could be adequately identified. The relevant official for these purposes was the Planning Minister, whose decision to grant a lease was to be made after taking into account a report given by the departmental director-general on any public interest issues. The plaintiffs' claim, therefore, failed on this ground.

(ii) Alleged conduct affecting the exercise of official functions

The plaintiffs submitted that the alleged conduct could not have adversely affected the exercise of the official functions mentioned above, and therefore could not constitute corrupt conduct under the ICAC Act. They submitted that information about the Obeid Family's involvement in Mount Penny was already in the public arena and therefore could not have had an effect on the grant of a mining lease.

His Honour found that the information suppressed by the plaintiffs went beyond public knowledge at the time, and had it been publicly available, the mining lease would not have been granted. Therefore he held that the official function of deciding whether to grant a mining lease could have been adversely affected, confirming the findings of the ICAC.

(iii) Conduct must constitute an offence

The ICAC Act stipulates that in order for corrupt conduct to occur, a jurisdictional fact must be satisfied that the relevant conduct constitutes an offence. The ICAC found that the conduct of the plaintiffs (apart from John Kinghorn) could have involved the criminal offence of obtaining financial advantage by deception under s. 192E(1) of the Crimes Act 1900 (NSW) or (except for Richard Poole, who was not a director of White Energy) a breach of the directors' duty under s. 184 of the Corporations Act 2001 (Cth) (the Corporations Act) to exercise their powers and duties as directors of White Energy honestly and in good faith.

McDougall J found that Cascade, through its subsidiaries, held financial interests in Mount Penny. The plaintiffs, except for John Kinghorn, through their withholding of information, enabled Cascade to retain those interests in the tenement. As the plaintiffs had financial interests in Cascade, they gained financial advantage by averting the loss which would have occurred had Cascade lost its interests in the Tenement. This constitutes an offence for the purposes of satisfying the jurisdictional preconditions of corrupt conduct.

With regard to the alleged breach of a directors' duty under s. 184 of the Corporations Act, his Honour explained that fiduciary duties have two components. Quoting Hayne and Crennan JJ in *Howard v Federal Commissioner of Taxation* (2014) 88 ALJR 667, he stated that the director of a company is firstly, "not to obtain any unauthorised benefit from the relationship" and secondly, "not to be in a position of conflict". He further explained that those obligations are proscriptive in nature, not prescriptive.

In determining whether the plaintiffs discharged their fiduciary duties, McDougall J concluded that this case was not a situation where it was necessary for the directors to perform some positive act to avoid a conflict of interest. He stated that the relevant plaintiffs, who were directors of both Cascade and White Energy, by removing themselves from the negotiations due to their position of conflict, were not acting in their capacity as directors of White Energy at the time. His Honour acknowledged that the plaintiffs, by withholding information, had been "intentionally dishonest"; however, this dishonesty did not occur in their discharge of their duties as directors, and therefore there could not be a breach of s. 184 of the Corporations Act.

(iv) Denial of natural justice

McDougall J found that there had not been a denial of natural justice for the plaintiffs. He dismissed their claims that they had not been given adequate notice of the submissions made against them. Additionally, his Honour stated they were given ample opportunity to respond to the submissions.

(v) Cascade Coal Pty Ltd

Cascade's claim for declaratory relief was denied by McDougall J.

The reasons for this were that:

- the recommendations in the ICAC's report were not amenable to judicial review as they were merely recommendations;
- as the recommendations were made on the basis of the claims against the individuals, which had failed in their attempt to nullify them, the recommendations could not be expunged; and
- a grant of declaratory relief would lack utility as any reputational damage stemmed from the findings in the first report and not from the ICAC's recommendations.

For these reasons the plaintiffs Travers Duncan, John McGuigan, John Atkinson, Richard Poole and Cascade Coal Pty Ltd failed in their attempt to nullify the ICAC's findings of corrupt conduct against them. Only the findings against John Kinghorn were successfully overturned.

6.2 Questionable voting process and circumstances surrounding entry into DOCA leads to Court order for termination under s. 445D of the Corporations Act

(By Jeremy Tan, Herbert Smith Freehills)

Canadian Solar v ACN 138 535 832 Pty Ltd, In the Matter of ACN 138 535 832 Pty Ltd (Subject to a Deed of Company Arrangement) [2014] FCA 783, Federal Court of Australia, Perry J, 29 July 2014

The full text of this judgment is available online.

(a) Summary

A number of suspicious and potentially voidable transactions surrounding the execution of a deed of company arrangement (DOCA) led the Court to terminate the DOCA and wind up the company on the basis that further investigations should be pursued by a court appointed liquidator.

(b) Facts

The first defendant, formerly known as Redset Group Pty Ltd (Redset), was a proprietary company owned and controlled by the third defendant, Ross Young. In March 2013, Redset received a report from external accountants advising that it was distressed.

On 6 August 2013, Mr Young entered into an agreement with Mawson, a firm of business advisers, to identify a buyer for and to sell the whole of the business undertaken by Redset, including its assets. Under the agreement, Mawson would receive a fee upon the successful sale of Redset.

On 7 August 2013, AJK Group Pty Ltd (AJK), an entity with related links to Mawson, was incorporated. AJK was connected to Mawson in that its sole director and secretary was an employee or officer of Mawson. On that same day, Redset entered into an asset sale agreement with AJK for the sale of its assets. AJK paid Mawson $300,000 as part of its fee for brokering the deal.

The agreement was structured in a way that no money actually passed between AJK and Redset for the assets.

Under the asset sale agreement, the purchase price was defined as:

- the amount equal to the transferring key employees entitlements and aggregate value of other creditor liabilities agreed to be assumed by the buyer; and
- the amount equal to the aggregate of the secured creditor liabilities which included a debt of $800,000 owed to Mr Young's parents-in-law.

AJK assumed the secured creditor liabilities by taking a novation of Redset's obligations in relation to those debts. Additionally, AJK agreed to assume the transferring key employee entitlements and assume Redset's liabilities to certain

creditors. The effect of the agreement was to deprive Redset of all its assets, leaving it a bare corporate shell with its business being reincarnated as the business of AJK. While the beneficial owners of the shares in AJK were not known at the time of the hearing, it appeared that Mr Young had assumed the role of manager of the business now undertaken by AJK.

On 28 August 2013, voluntary administrators were appointed to Redset. Subsequently, these voluntary administrators resigned and were replaced by the second defendants (the Deed Administrators) who then undertook a detailed investigation of the history and affairs of Redset.

During the course of their investigations, Mr Young proposed a DOCA to the Deed Administrators for their consideration. In a report to creditors on 1 November 2013, the deed administrators recommended that the DOCA not be executed and that the creditors should instead resolve to wind up the company. In making their recommendation, the Deed Administrators took into account that in contrast to the execution of a DOCA, the liquidator in a winding up could pursue further investigations into the propriety of the asset sale agreement, together with the payment of monies to Mawson and specific creditors of Redset which could be potentially recoverable under the unfair preferences regime.

Subsequently, Mr Young proposed a revised DOCA which the Deed Administrators again recommended against accepting. The revised DOCA included two new provisions. A cash contribution was to be paid to the Deed Administrators after the sale of two properties owned by Mr Young, and if the properties were not sold, a creditors meeting would be convened to consider terminating the revised DOCA.

Contrary to the Deed Administrators' recommendations, a majority of creditors voted in November 2013 to execute the revised DOCA. The resolution was approved by the creditors on poll with 57 creditors voting for the resolution and 31 creditors against.

There were questionable circumstances surrounding the approval of the DOCA. Of the 57 creditors who had voted in favour of the DOCA, 54 had appointed employees or officers of Mawson as their general proxy. Mr Young had also cut secret deals with certain creditors offering them either cash or discounted terms on future trading, in return for their vote in favour of the revised DOCA. In addition, Mr Young's parents-in-law participated in the voting of the DOCA. However, under the asset sale agreement with AJK, their secured debt was to be released in September 2013, prior to the voting process in relation to the DOCA. The required number of votes to pass the DOCA would not have been achieved if Mr Young's parents-in-law had been properly excluded from voting.

In April 2014, the members of Redset passed a resolution winding up the company voluntarily and appointing liquidators to the company. The liquidators were not

advised that Redset was subject to a DOCA or that it had previously been in administration.

(c) Decision

Perry J found for the plaintiff and made an order to terminate the DOCA under ss. 445D(1)(d), (f) and (g) of the Corporations Act 2001 (Cth).

On the facts, she was satisfied that:

- there had been a material contravention of the deed by a person bound by the deed (s. 445D(1)(d));
- the deed or provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be so done or made would be, oppressive or unfairly prejudicial to, or unfairly discriminatory against one or more creditors or contrary to the interests of the company as a whole (s. 445D(1)(f)); and
- the deed should be terminated for some other reason (s. 445D(1)(g)).

Perry J was satisfied of the above for the following reasons:

- Mr Young had breached the DOCA materially. The DOCA imposed obligations on Mr Young to keep the Deed Administrators informed about the sale of the two properties he owned and to pay any proceeds to the Deed Administrators. This was not done despite there being evidence that the two properties had subsequently been sold at the time of the hearing.
- The DOCA was clearly contrary to the interests of the creditors as a whole, aside from the creditors who were given preferential treatment under the asset sale agreement. Perry J emphasised that it was not necessary for her to be satisfied that a winding up would, on the balance of probabilities, produce greater dividends being returned to creditors. Rather, she made it clear that it was the loss of the investigations into the questionable transactions and the opportunity for greater returns that rendered the DOCA contrary to the creditors' interest. She commented that on its face, the asset sale agreement between AJK and Redset had the appearance of a "so called phoenix transaction". In the circumstances, a proper investigation by a liquidator was necessary.
- Finally, the evidence of the secret deals that Mr Young had entered into with other creditors to secure their votes for entry into the DOCA and the inclusion of Mr Young's parents-in-law as creditors in the voting process meant that the voting process for the DOCA had been corrupt. Perry J commented that such deception was a "species of equitable fraud" and could not be left without remedy. As a result, she held that further investigation into "serious questions regarding director misconduct, colourable transactions and preferable

arrangements" were required. Not terminating the DOCA would preclude this necessary investigation.

In addition, Perry J made an order for Redset to be wound up and for the Deed Administrators to be appointed as liquidators on the basis that traditionally, it was the normal practice for the plaintiff's nominee to be appointed as liquidators, as was the case here. More importantly, she also held that the immediate task for any court appointed liquidator would be to investigate and pursue the suspect transactions. The Deed Administrators were already familiar with the transactions and had already undertaken a substantial amount of work in this respect. It was held that it was advantageous for the creditors if the Deed Administrators were appointed.

6.3 Wholly suspended sentence for "Whitehaven Hoaxer"

(By Matthew Churkovich, Ashurst)

R v Moylan [2014] NSWSC 944, Supreme Court of New South Wales, Davies J, 28 July 2014

The full text of this judgment is available online.

(a) Summary

Jonathan Moylan (the Offender) received a wholly suspended two year sentence for charges brought under s. 1041E of the Corporations Act 2001 (Cth) (the Corporations Act), relating to a press release which he issued purportedly from Australian and New Zealand Banking Group Ltd (ANZ) announcing that it was withdrawing a $1.2 billion loan facility to Whitehaven Coal Ltd (Whitehaven), resulting in a $300 million reduction in Whitehaven's market capitalisation.

(b) Facts

After purchasing the domain name "anzcorporate.com" and creating the email address "media@anzcorporate.com", the Offender issued a press release purportedly from ANZ on 7 January 2013. The press release contained an ANZ logo and named "Toby Kent" as the principal media contact and "Joanne McCulloch" as the secondary contact, both of whom were actual employees of ANZ.

The press release purported that ANZ was withdrawing its $1.2 billion loan facility to Whitehaven, which Whitehaven intended to use to develop its Maules Creek Coal Project, due to "volatility in the global coal market, expected cost blow-outs and ANZ's [c]orporate [r]esponsibility policy". The Offender disseminated the press

release by sending an email to 306 recipients at 104 different organisations, including 295 recipients at 98 media organisations.

After the press release was issued, a number of persons, including journalists, telephoned the person they thought was Toby Kent at the telephone number provided in the false media release. The Offender, having initially answered the calls while identifying himself as "Toby Kent", when pressed, admitted that he was in fact Jonathan Moylan and that the press release was a hoax. The Offender went on to explain that the hoax was a media stunt aimed at drawing attention to ANZ's funding of Whitehaven's Maules Creek Coal Project, which the Offender opposed.

The story was covered by a variety of media organisations including The Australian Financial Review and Bloomberg. The resulting press coverage led to Whitehaven's share price falling from $3.515 at 12.19pm to $3.21 at 12.39pm before Whitehaven become aware of the fake press release and placed its shares in a "pre-open" phase that prevented trading orders being executed. After trading on Whitehaven shares re-opened, the share price recovered to close at $3.50. However, Whitehaven shares traded at three times the volume of the previous four days on that day and the dip in share price represented $300 million reduction in its market capitalisation.

(c) Decision

After the initial arraignment and committal, which set the case against the Offender down for trial, the Offender subsequently entered a guilty plea to a charge under s. 1041E of the Corporations Act for disseminating information which was false in a material particular and which was likely to induce persons in Australia to dispose of financial products, namely shares in Whitehaven, and when he disseminated the information he knew or ought reasonably to have known that it was false in a material particular.

(i) Objective criminality

As the offence was a Commonwealth offence, it was necessary for Davies J to sentence the Offender in accordance with Part 1B of the Crimes Act 1914 (Cth). In doing so, Davies J said that it was necessary for him to come to a view about the objective seriousness of the offence.

Davies J held that he could not be satisfied beyond reasonable doubt that the Offender realised beforehand how investors would be hurt and that it was not his intention to hurt them. In addition, there was sufficient evidence to justify on the balance of probabilities that the Offender expected and intended that the hoax would have been discovered within a relatively short period of time, perhaps no longer than a few hours. Davies J found that in all of the circumstances the objective seriousness of the offence was about halfway between the low and medium ranges of offending.

(ii) Plea of guilty

In Commonwealth matters a guilty plea is taken into account as a mitigating factor demonstrating a willingness to facilitate the course of justice. The Crown case against the Offender was a strong one. However, the Offender's Senior Counsel submitted that the late guilty plea should not be seen as a reflection of any lack of contrition. He submitted that there was a serious legal question to be worked through concerning the issue of inducement in subsection (1)(b) of s. 1041E of the Corporations Act although strict liability applies to that element of the offence.

Davies J accepted that the assessment of a legal issue was the reason for the delay and that it would not be fair to the Offender to say that he was not, before the plea, willing to facilitate the course of justice. As such, Davies J said that he was willing to give the offender a discount of 15% based on his guilty plea.

(iii) Term

Davies J noted that in this case the market was manipulated, shares were unnecessarily traded and some investors lost money or their investment in Whitehaven. Davies J held that but for the guilty plea, he would have imposed a sentence of two years' imprisonment. Davies J considered that the offender's term of imprisonment should be suspended on account of his guilty plea, with relevant factors being that the hoax was readily admitted within a short period of time, the Offender had not previously been convicted of a serious offence, and the offence was not committed for the purpose of personal financial gain.

6.4 Removal of sole director and secretary due to oppression and conflicts of interest

(By Peter Motti, Minter Ellison)

Solanki v Cufari [2014] VSC 345, Supreme Court of Victoria, Elliott J, 25 July 2014

The full text of this judgment is available online.

(a) Summary

The plaintiffs, Josephine Shaesta Solanki and her father, Jamal Ud Din, sought orders that the first defendant, Bruno Cufari (B Cufari), be removed as sole director of the fourth defendant, Postcode Lygon Developments Pty Ltd (Postcode Lygon) and that

Ms Solanki be appointed instead. The principal orders sought relied on ss. 232 and 233 of the Corporations Act 2001 (Cth) (the Corporations Act).

Section 232 of the Corporations Act provides that the court may make an order under s. 233 if the conduct of a company's affairs is either contrary to the interests of the members as a whole, or oppressive to, unfairly prejudicial to or unfairly discriminatory against a member(s) whether in that capacity or in any other capacity. The court may make any order under s. 233 that it considers appropriate in relation to the company, including an order restraining a person from engaging in specified conduct or from doing a specified act or requiring a person to do a specified act. Ms Solanki also alleged breaches of duty in B Cufari's role as a director.

The Court found that B Cufari had breached an essential term of the Joint Venture Agreement concerning his obligations as director and had not acted in accordance with his statutory duties as a director.

(b) Facts

On 21 July 2009, Ms Solanki and Mr Ud Din executed a trust deed prepared by B Cufari's lawyers titled the "218 Lygon Street unit trust" (the Trust). The plaintiffs jointly held one of the two issued shares in the trustee of the Trust (the 218 Trustee) and B Cufari's company, BGC Global, held the remaining share. On 10 August 2009, Ms Solanki paid $600,000 to the 218 Trustee and as consideration, the plaintiffs jointly received one A class unit in the Trust. BGC Global held one B class unit. On 21 October 2009, BGC Global, Ms Solanki and Mr Ud Din entered into a joint venture agreement (Previous Joint Venture Agreement). Clause 8.6 of the trust deed provided that a class A unit entitled the unit holder to share in the distribution of the proceeds of the Trust as described in the Previous Joint Venture Agreement.

Pursuant to the Previous Joint Venture Agreement, the returns to be made to Ms Solanki were fixed as:

- $2,000 per week deducted off a total of $680,000; and
- $600,000, being repayment in full of her initial investment, totalling a return of $1.2 million.

The 218 Trustee engaged BGC Global to manage the development of 218 Lygon Street (218 Development) and to hold all titles to the constructed units on trust on behalf of the 218 Trustee. Between 10 August 2009 and October 2013, $241,500 was paid to Solanki. These payments then ceased despite the terms of the Previous Joint Venture Agreement and B Cufari's assurances to the effect that she would be paid.

In October 2009, Ms Solanki, B Cufari and Postcode Lygon entered into a joint venture agreement (the Joint Venture Agreement), this time for the development (the Development) of the land at 32-34 Lygon Street, Brunswick East (the Property). Postcode Lygon appointed BGC Global to manage the Project. In accordance with cl.

3.4 of the Joint Venture Agreement, B Cufari's obligations as Postcode Lygon's sole director were, among other things, to ensure that:

- Postcode Lygon performed its obligations in respect of the Development and under the Joint Venture Agreement; and
- Postcode Lygon did not "dispose" of or deal with any right, title or interest held by Postcode Lygon in the Property, without the prior written consent of the joint venturers.

In the period between 10 August 2009 and 28 April 2012, Solanki paid a total of $1,338,000 towards the 218 Development and the Development. Postcode Lygon borrowed additional amounts from other mortgagees, including third mortgagee, Sylina Pty Ltd (Sylina). Sylina was a company owned and controlled by P Cufari, a brother of B Cufari. Each of the other mortgagees held a registered mortgage over the titles to the Property. In October 2013, B Cufari said to Ms Solanki that there would be no funds available after the sale of the units at the Property to pay her, and that, in order for her to recover her investments in both the 218 Development and the Development, she would need to "roll" her investments into his new project in Northcote. B Cufari also said that he was now "out of [the Development]" and that his brother P Cufari had taken over. B Cufari did not provide Ms Solanki with any meaningful documentation in respect of any of these matters, despite numerous requests by Ms Solanki. In June 2014, Ms Solanki learned that Sylina was acting as a trustee for a family trust in which B Cufari was a beneficiary. It was also suggested that B Cufari may have used some of the funds raised from the mortgage with Sylina to pay his private debts.

(c) Decision

(i) Obligations and duties of B Cufari

Elliott J noted that the contractual obligations owed by B Cufari were in addition to the specific statutory duties he owed. His Honour cited the decision in *Australian Securities and Investments Commission v Adler* [2002] NSWSC 171, where Santow J summarised the principles applicable to the statutory duties imposed by ss. 181 and 182 of the Corporations Act, which included the following:

- "a director (as a fiduciary) is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances where there is a conflict or a real or substantial possibility of a conflict between his personal interests and those of the company [...]; [and]
- in order to assess whether or not there is a real sensible possibility of conflict one must adopt the position of the reasonable person looking at the relevant facts and circumstances of the particular case ...".

(ii) B Cufari's breaches of duty

His Honour referred to the events of September 2012, where B Cufari caused Postcode Lygon to enter into a loan agreement with Sylina and also gave a mortgage over the Property as security for the repayment of that loan. His Honour emphasised that those arrangements were "made without [Ms] Solanki's knowledge" and that accordingly:

> ... the transactions entered into were in breach of the express terms of the Joint Venture Agreement. ... there was clearly a conflict of interest or a real or substantial possibility of a conflict of interest between B Cufari's personal interests on the one hand, and those of Postcode Lygon and [Ms] Solanki on the other, in engaging in this transaction in September 2012.

His Honour considered that, on the evidence, it was "irrefutable that B Cufari has breached an essential term of the Joint Venture Agreement concerning his obligations as a director and has not acted in accordance with his statutory duties as a director".

(iii) B Cufari's oppressive conduct

His Honour noted that the language and history of s. 232 of the Corporations Act and its predecessors indicated that the section is to be read broadly and that the task of determining whether or not there has been commercial unfairness:

> ... must be considered in the context of the particular relationship in issue, which will not infrequently involve a balancing exercise between competing considerations, including examination of the conduct of the applicant. The mere fact that there are irreconcilable differences between the parties is not sufficient to establish oppressive conduct.

In his Honour's opinion, the authorities make it clear that the court must carefully consider the conduct of both parties before making any determination about whether s. 232 had been contravened and, if so, whether and what relief ought to be granted.

His Honour held that:

> ... the affairs of Postcode Lygon have been conducted by B Cufari contrary to the interests of the members as a whole and in a manner which is oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member of Postcode Lygon. The elements of s. 232 have been satisfied. B Cufari's procurement of the secured loan agreement with Sylina, in circumstances where he gained a potential collateral benefit, and, it appears, also a direct personal benefit, constituted conduct that was either contrary to the interests of the members as a whole or oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member or members, whether in that capacity or in any other capacity. ... Without some relief being ordered by the court, there appears to be little doubt [Ms] Solanki will continue to be

deprived of information concerning Postcode Lygon and will be shut out of the management of that company.

(iv) Relief

The court ordered, *inter alia*, that:

- B Cufari be removed as director of Postcode Lygon and Ms Solanki be appointed in his place.
- Ms Solanki be given access to the books of Postcode Lygon pursuant to s. 247A of the Corporations Act.

6.5 Limitations on "entrepreneurial" lawyering in securities class actions

(By Tracey Kile and Clementyne Rawlyk, Corrs Chambers Westgarth)

Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 3) [2014] VSC 340, Supreme Court of Victoria, Ferguson J, 23 July 2014

The full text of this judgment is available online.

(a) Summary

In this case in the Victorian Supreme Court, Ferguson J was required to consider whether to grant a stay of proceedings on the grounds that the proceedings amounted to an abuse of process. Melbourne City Investments (MCI) commenced a class action against Treasury Wine Estates Ltd (Treasury) and Leighton Holdings Ltd (Leighton) for alleged breaches of their statutory continuous disclosure obligations. MCI is acting as lead plaintiff for the class action members, while Mark Elliott, the sole shareholder and director of MCI, is the legal representative for the group and is funding the litigation on a "no win, no fee" basis.

Treasury and Leighton primarily sought an order that the proceedings be stayed as an abuse of process on the basis that they were initiated by MCI for a predominant purpose that was improper (i.e. to generate legal fees for Mr Elliot). However, Ferguson J was not satisfied that the proceedings were an abuse of process, and held that to categorise the proceedings as such would involve too great an expansion of the concept. Her Honour did, however, exercise the inherent jurisdiction of the Court to order that Mr Elliott should be restrained from acting for MCI while MCI remained as the representative plaintiff.

(b) Facts

MCI is a Victorian investment company managed and controlled by Mark Elliott, a Melbourne-based solicitor. On the same day it was incorporated in November 2012, MCI purchased small parcels of shares (each valued just under $700) in 20 companies, including Treasury, Leighton and WorleyParsons Ltd (WorleyParsons). In February 2014, MCI purchased parcels of shares in an additional 145 publicly listed companies, together with further small parcels of shares in Leighton, Treasury and WorleyParsons.

Towards the end of 2013, MCI commenced separate group proceedings against Treasury, Leighton and WorleyParsons, alleging failure to make certain disclosures in breach of s. 674(2) of the Corporations Act 2001 (Cth) (the Corporations Act) and for misleading or deceptive conduct in breach of s. 1041H of the Corporations Act. In the proceedings against Treasury and Leighton (the Defendants) (the WorleyParsons proceedings were subject to a separate and earlier decision by Ferguson J), MCI claimed its loss to be the difference between the price at which MCI acquired its shares and the price that would have been attained had each company made what MCI alleged to be the proper disclosures. Given the price it had paid for each parcel of shares, the most MCI could recover in each action if successful would be $700.

The defendants submitted that, based on the facts presented:

- MCI was created by Mr Elliott as a vehicle for bringing class actions against listed companies alleging breaches of continuous disclosure obligations;
- MCI would be the representative plaintiff in such proceedings; and
- Mr Elliott would act as its solicitor, with Mr Elliott earning fees from doing so.

Treasury and Leighton each sought orders to halt the proceedings as an abuse of process on the basis that they were brought by MCI for the predominant improper purpose of generating legal fees for Mr Elliott.

Alternate orders were also sought that:

- the Court exercise its inherent jurisdiction to restrain Mr Elliott from acting for MCI while MCI continues in its role as lead plaintiff; and
- under the group proceedings provisions of the Supreme Court Act 1986 (Vic), the proceedings not continue as a group proceeding while MCI acted as lead plaintiff and Mr Elliott remained as solicitor.

(c) Decision

Ferguson J accepted the defendants' submissions, concluding that the probable reason for MCI's existence was to commence class actions to enable Mr Elliott to earn legal fees from representing MCI in those class actions. Her Honour reached this conclusion based on MCI's share purchases on the day of its incorporation, the subsequent

commencement of the three group proceedings against Treasury, Leighton and WorleyParsons and MCI's purchases of similarly small parcels of shares in publicly listed companies in February 2014.

Her Honour also determined that, given the very low quantum of damages that would be recoverable by MCI if it was successful in its claims, it was unlikely that MCI had commenced the proceedings to recover compensation. Interestingly, Ferguson J further stated that it was unlikely MCI was motivated by a general desire to ensure that publicly listed companies complied with the law, particularly given that MCI had not engaged indep endent solicitors to represent the plaintiffs in the proceedings.

Regarding the defendants' claim that the proceedings amounted to an abuse of process, Ferguson J noted that the power to grant a stay should only be exercised in the most exceptional circumstances. One of the grounds for determining an abuse of process is where a proceeding has been initiated for a predominant purpose that is improper. In this case, although MCI had commenced the action for the predominant purpose of earning legal fees for Mr Elliot, Ferguson J held that this did not amount to an abuse of process because MCI's immediate purpose was to obtain orders for compensation in the proceedings (which would then lead to an award of costs).

The Court has inherent jurisdiction to make orders restraining a lawyer from acting so as to ensure the due administration of justice, and to protect the integrity of the judicial process. In considering whether Mr Elliott should be restrained from acting for MCI, her Honour applied the test of whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice required it.

Ferguson J held that a fair-minded, independent observer, with knowledge of Mr Elliott's and the plaintiff's role in the proceedings, would reasonably conclude that:

- the success of Mr Elliott's and MCI's business model likely depended on the outcome of the proceedings against the defendants; and
- there would be a real risk that Mr Elliott could not give detached, independent and impartial advice, taking into account not only the interests of MCI, but also the interests of the other class action members.

Accordingly, while acknowledging that the relevant jurisdiction is exceptional and to be exercised with caution, Ferguson J was satisfied that in this instance Mr Elliott should not continue to act for MCI while MCI continued to be lead plaintiff, and that the proceedings should not be permitted to continue as group proceedings for so long as MCI and Mr Elliott act in tandem as plaintiff and solicitor.

6.6 ASIC may be liable for costs relating to s. 1323 orders if they are not reasonably incurred

(By Jack Quirk, DLA Piper)

ASIC v Rangwala and Go Markets Pty Ltd [2014] NSWSC 961, Supreme Court of New South Wales, Bergin CJ in Eq, 21 July 2014

The full text of this judgment is available online.

(a) Summary

This costs application concerned whether a party who is subject to an ASIC investigation is required to bear its own costs or whether it can seek the costs of conducting such proceedings from ASIC. Bergin CJ of the Supreme Court of NSW found that to the extent that ASIC's carriage of the investigatory process remained reasonable and that no party costs were incurred as a result of want of diligence on ASIC's part, the parties will bear their own costs of the proceedings. However, to the extent that costs were incurred as a result of ASIC having acted "unreasonably" without "justification", ASIC could be liable to bear the costs of the other party.

(b) Facts

Go Markets Pty Ltd (Go Markets) was the holder of an Australian Financial Services Licence (AFSL), with one of its principal activities being the provision of an online trading platform that enabled clients to trade margin foreign exchange contracts.

In May 2013, ASIC commenced an investigation pursuant to s. 13 of the Australian Securities and Investments Commission Act 2001 (Cth) in respect of a number of companies, including Go Markets, and their former and current officers, including Soyeb Roshanali Rangwala, a director of Go Markets.

ASIC's investigations related to suspected contraventions of the Corporations Act 2001 (Cth) (the Corporations Act) by, among others, Go Markets and Mr Rangwala, including:

- false trading and market rigging (s. 1041C of the Corporations Act);
- false or misleading statements (s. 1041E of the Corporations Act);
- inducing persons to deal (s. 1041F of the Corporations Act);
- dishonest conduct (s. 1041G of the Corporations Act);
- misleading or deceptive conduct (s. 1041H of the Corporations Act); and
- falsification of books (s. 1307 of the Corporations Act).

On 21 October 2013, ASIC appeared *ex parte* before the Corporations List Judge seeking, *inter alia*, freezing orders against Go Markets and Mr Rangwala (the

Freezing Orders) and travel restraint orders against Mr Rangwala (the Travel Restraint Orders) under s. 1323 of the Act.

However, by mid-February 2014, it became apparent that certain allegations against Go Markets and Mr Rangwala were unlikely to be made out, and that any alleged and proven loss to investors was not statistically significant.

On 27 February 2014, Timothy Dixon, being Go Markets' and Mr Rangwala's lawyer, had a telephone conversation with ASIC in which he informed them that Go Markets and Mr Rangwala had instructed him to make application to vacate the restraining orders. Mr Dixon also wrote to ASIC regarding the same.

Mr Dixon wrote to ASIC on 20 March 2014 observing that, although the orders had been in place for more than four months, there had been no contact initiated by ASIC (outside telephone conversations) with him or his clients for three months. Mr Dixon advised that he was not aware of any valid basis for the continuance of the restraining orders and noted that ASIC had informed him recently that there did not appear to be any person "aggrieved" who might seek recompense from his clients (a requirement for the making of the orders under s. 1323 of the Corporations Act).

On 1 April 2014, ASIC agreed to the proposal for consent orders. Mr Dixon wrote to ASIC stating that Mr Rangwala and Go Markets were prepared to reserve the question of costs for resolution at a later date.

On 10 April 2014, the Court made orders by consent as between ASIC, and Mr Rangwala and Go Markets.

These included:

- the freezing orders and travel restraint orders be vacated; and
- the costs of the proceeding as between ASIC, Mr Rangwala and Go Markets be reserved.

On 26 May 2014, the proceedings were dismissed against Mr Rangwala and Go Markets, and orders were made for the filing and service of evidence in relation to the question of costs of the proceedings, bringing the question of costs to 7 July 2014.

It was contended on behalf of Mr Rangwala and Go Markets that when the evidence was reviewed in light of ss. 42.1 and 42.20(1) of the Uniform Civil Procedure Rules 2005 (NSW) (the UCPR), ASIC should be ordered to pay the costs incurred by Mr Rangwala and Go Markets during the period between 20 March 2014 to 10 April 2014 inclusive. This was on the basis that ASIC had not acted reasonably in bringing and maintaining the proceedings against Mr Rangwala and Go Markets, and that there was no basis for freezing orders and the travel restraint orders.

(c) Decision

Bergin CJ commenced by considering the cases relied upon by ASIC in contending that no costs order should be made. These cases all considered whether ASIC had acted "unreasonably" or whether ASIC had been "justified" in what it did in determining whether ASIC should pay the costs of proceedings of the other party. Among others, Bergin CJ noted that the following cases relied upon by ASIC in support of its argument could be distinguished from the current matter.

- In the case of *ASIC v Munro*, Lyons J was satisfied that, despite the Director of Public Prosecutions deciding not to proceed with ASIC's recommendations to prosecute because there were no reasonable prospects of conviction, the significance of the claims made against the accused were such that ASIC was "entirely justified in making the investigation that it did" and that there was no evidence that ASIC had acted unreasonably. An order was therefore made that each party pay their own costs. In comparison, there were no complaints of any losses against Mr Rangwala and Go Markets, nor was there any concluded investigation that justified a referral to a prosecuting authority.
- In the case of *ASIC v Groves*, Lindgren J was not persuaded that, in the relevant short period from the commencement of the proceedings on 24 June 2009 to its conclusion late on 27 July 2009, any of the parties had behaved so unreasonably that any one of them should be ordered to pay costs to the other. In the present matter, however, the restraints were in place for six months and, unlike in *ASIC v Groves*, the applicants in the present case were cooperative and agreed to the continuation of restraints until ASIC applied for the consent orders in April 2014 discharging them from those orders.
- In the case of *ASIC v Aust-Home Investments*, the "grave defects" in the way the scheme was carried out justified the proceedings that were commenced by ASIC, and thus Hill J found that the costs "should fall as they fall". No such grave defects were identified in the present case.

Bergin CJ was satisfied that the appropriate order as to costs incurred up to February 2014 was that each party pay their own costs, as ASIC had acted reasonably in conducting its investigation. However, Bergin CJ was satisfied that the position was different following this period (from 20 March 2014 to 10 April 2014) as:

- Mr Dixon made numerous attempts to avoid the incursion of additional costs by seeking ASIC's response to his letters of 27 February 2014, 20 March 2014 and 1 April 2014, and Mr Rangwala and Go Markets had little option but to incur those costs;
- Mr Rangwala and Go Markets should not have been put to further costs of preparation for the discharge of the orders from March 2014 when it should have been clear to ASIC that certain allegations were likely to be dropped; and

- where ASIC obtains orders under s. 1323 of the Corporations Act affecting an individual's freedom of movement and bank accounts are frozen, it is imperative that it vigorously monitors the necessity for such orders.

In these circumstances, Bergin CJ found that ASIC should pay the costs of the proceedings from 20 March 2014 to 10 April 2014 inclusive that were incurred by Mr Rangwala and Go Markets, but that otherwise the parties should pay their own costs in respect of the proceedings.

6.7 Liquidator removed for conflict of interest

(By Josh Underhill and Adela Woliansky, King & Wood Mallesons)

Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd [2014] FCAFC 85, Federal Court of Australia, Full Court, Jessup, Robertson and White JJ, 18 July 2014

The full text of this judgment is available online.

(a) Summary

Walton Construction Pty Ltd and Walton Construction (Qld) Pty Ltd (together, the Companies) were placed into voluntary administration and later liquidation. Administrators and liquidators were appointed from the firm Lawler Draper Dillon (LDD), following a referral from the Mawson Group. Prior to becoming insolvent, the Companies had entered into transactions involving the Mawson Group.

The issue in this case was whether (considering the previous transactions between the Companies and the Mawson Group) the referral relationship between the Mawson Group and LDD gave rise to a conflict of interest, warranting the removal of LDD as liquidator. The decision of Davies J at first instance against removal was overturned by this judgment of the Full Federal Court.

The Full Federal Court stated that the relevant test is whether a fair-minded observer "might" reasonably apprehend that the liquidator "might not" act impartially. The Court held that this test had been satisfied since the fees generated by LDD as a result of regular referrals from the Mawson Group were not insignificant and considering the requirement for the liquidator to investigate the previous transactions with the Mawson Group. A Mawson Group representative had also been present at the initial pre-appointment meeting between the Companies and LDD.

The second issue addressed was whether the Declaration of Independence, Relevant Relationships and Indemnities (the DIRRI) provided by LDD to creditors was deficient. The Court upheld Davies J's decision that it was sufficient for the DIRRI to disclose the referral relationship between LDD and the Mawson Group. There was no obligation to disclose why a potential investigation of the transactions with the Mawson Group did not give rise to a conflict of interest.

(b) Facts

The Companies carried on business in the construction industry in Victoria and Queensland, and were experiencing financial difficulties. Prior to becoming insolvent, the Companies had entered into a number of transactions involving the sale of assets and assignment of debts to entities connected with the Mawson Group (the Transactions).

In October 2013, the Companies were placed into voluntary administration. On the recommendation of the Mawson Group, the respondents, LDD, were appointed as administrators. The circumstances of the respondents' appointment involved the Mawson Group arranging a meeting at its offices, which was attended by one of the (proposed) administrators, a director of the Companies and a representative of the Mawson Group.

Representatives of LDD, acting as administrators, provided a DIRRI to the Companies' creditors which outlined LDD's referral relationship with the Mawson Group. The administrators were later appointed as liquidators. ASIC applied to the Federal Court for an order that the liquidators be removed under s. 503 of the Corporations Act 2001 (Cth) (the Corporations Act). ASIC argued that the closeness of the referral relationship between the Mawson Group and LDD gave rise to a reasonable apprehension that LDD lacked independence. This was particularly acute considering that LDD would need to investigate whether the Transactions were "phoenix" transactions, intended to shift assets from the insolvent Companies and reduce the pool of assets for distribution to creditors.

ASIC also sought a declaration that the respondents had breached s. 436DA of the Corporations Act by failing to fully disclose in the DIRRI why the relationship between the Mawson Group and LDD did not give rise to a conflict of interest.

(c) Decision at first instance

At first instance, Davies J denied ASIC's application on both counts.

Her Honour stated that the discretion to remove a liquidator can be exercised where a "hypothetical fair-minded observer would perceive a lack of independence" in the discharge of the liquidator's functions. There was nothing about LDD's conduct in other insolvencies referred to it by the Mawson Group that brought the firm's

impartiality into question. Her Honour noted that a liquidator also has a statutory duty to identify voidable transactions and unlawful conduct.

In relation to the DIRRI, Davies J held that LDD had satisfied its obligation to disclose its relationship with the Companies and the Mawson Group and to explain why these relationships did not give rise to a conflict of interest. The DIRRI stated that "referrals ... are common place and do not impact on our independence in carrying out our function as Administrators". Her Honour held that this was sufficient and that there was no ancillary obligation to notify creditors that LDD would need to investigate the Mawson Group and the Transactions in particular.

ASIC appealed to the Full Court, which reconsidered both issues.

(c) Decision of the Full Court

White J considered the issue of alleged apprehension of bias and Robertson J addressed the sufficiency of the DIRRI. Jessup J concurred with both judgments.

(i) Apprehension of bias (White J)

White J held that Davies J did not apply the correct test at first instance and that instead the Court should have applied the "double-might test". The question that should have been asked is whether the fair-minded observer "might" reasonably apprehend that the liquidator "might not" impartially discharge his or her obligations. White J noted that while the "double-might test" was concerned with the "possibility" of a conflict of interest, the formulation put forward by Davies J was concerned with "reasonable expectation".

The Court recognised that insolvency practitioners operate in a commercial environment and that referral relationships are common practice. Whether a referral relationship is too close, and warranting the removal of a liquidator will depend on the perceived lack of impartiality in the circumstances.

White J concluded that in the circumstances, the "double might test" had been satisfied in the circumstances.

Two key factors were that:

- LDD received significant remuneration by way of referrals from the Mawson Group. A reasonable observer might therefore be expected to question whether LDD could impartially investigate the pre-administration Transactions, involving the Mawson Group.
- Phillip Spry (an employee of the Mawson Group) was present at the first meeting between the director of the Companies and the respondents, prior to their appointment. By allowing Mr Spry to be present, the respondents had

effectively made the Mawson Group privy to preliminary insolvency advice given to the Companies.

(ii) DIRRI disclosure (Robertson J)

LDD did not disclose the Mawson Group's involvement in the Transactions or potential investigation of the Transactions involving the Mawson Group. ASIC contended that the DIRRI should have disclosed why the requirement to investigate these Transactions did not give rise to a conflict of interest.

The Court rejected ASIC's argument and endorsed Davies J's reasoning at first instance. The Court held that the need for LDD to investigate the Transactions goes to the performance of the liquidator's duties and does not of itself give rise to a conflict of interest.

The Court also noted that the *Code of Professional Practice for Insolvency Practitioners* published by the Insolvency Practitioners Association (now known as the Australian Restructuring Insolvency & Turnaround Association) should not be taken into account in determining the DIRRI disclosure standard. Although extrinsic materials are permissible as aids in statutory interpretation, extrinsic materials are typically parliamentary or legal documents, and did not extend to that code.

6.8 David Jones scheme approved despite alleged inducement to major shareholder

(By Luke Furness, Clayton Utz)

David Jones Ltd, in the matter of David Jones Ltd (No 2) [2014] FCA 720, Federal Court of Australia, Farrell J, 2 July 2014 (*David Jones No. 2*)

The full text of this judgment is available online.

David Jones Ltd, in the matter of David Jones Ltd (No 3) [2014] FCA 753, Federal Court of Australia, Farrell J, 17 July 2014 (*David Jones No. 3*)

The full text of this judgment is available online.

(a) Summary

In *David Jones No. 2*, the Federal Court approved the despatch of a supplementary scheme booklet, including a supplementary independent expert report, dealing with circumstances involving a potential collateral benefit to a major shareholder of David

Jones Ltd (David Jones) which had arisen after the despatch of the scheme booklet, even though the information did not include a valuation of the benefit.

In *David Jones No. 3*, the Federal Court approved the scheme of arrangement despite the major shareholder receiving a potential collateral benefit not available to other shareholders and information about the value of that potential benefit not being available before the scheme meeting or the second court hearing.

(b) Facts

The decisions involved a scheme of arrangement proposed by David Jones and South African retailer Woolworths.

After the first court date and the issue of the scheme booklet, various entities associated with Solomon Lew lodged a substantial holding notice in relation to David Jones, having acquired 9.89% of the company. Seven days later, Woolworths announced a takeover bid for the remaining shares it did not already own in separate retailer, Country Road. Woolworths owned 87.88% of Country Road (after a takeover offer in 1997 that failed to secure the 90% compulsory acquisition threshold) and Mr Lew owned 11.8% of the shares in Country Road. Since 1997, Woolworths and Mr Lew had been in a number of public disputes about the strategic direction of Country Road.

The bid for Country Road was at a premium to the thinly traded market price of Country Road shares and was conditional upon the David Jones scheme becoming effective.

In *David Jones No. 2*, David Jones sought approval under s. 1319 of the Corporations Act 2001 (Cth) (the Corporations Act) to the release of supplementary disclosure to explore the significance of Mr Lew's shareholding and the Country Road bid that had not come to light before the first court hearing. The supplementary disclosure by David Jones was to the following effect:

- if Mr Lew accepted the Country Road bid, he would receive consideration that some media commentary had suggested was "generous", though the directors were not in a position to make an assessment on that matter;
- David Jones had been informed by Woolworths that before Mr Lew acquired his stake in David Jones, Woolworths had an ongoing desire to acquire Mr Lew's interest in Country Road, and the acquisition of the stake had prompted Woolworths to make the Country Road bid to "resolve the stalemate with Mr Lew" with respect to Country Road and to achieve "synergy benefits" in owning both David Jones and Country Road;
- the supplementary disclosure included the closing price of Country Road shares before the Woolworths bid and high and low trading prices of Country Road over the previous three months and 12 months, as well as a statement that

the shares were thinly traded and its trading price may not be a reliable guide to value;

- the directors considered this a unique set of circumstances and that, if the Country Road bid had not been made, none of the cash or value offered under that bid would have been offered to David Jones shareholders. The Country Road bid was positive for David Jones shareholders because it reduced risk to the scheme;
- the directors continued to recommend the scheme and the independent expert remained of the view that the scheme was fair and reasonable; and
- shareholders may consider the benefit Mr Lew may derive from the Country Road bid as unfair and a reason to vote against the David Jones scheme.

ASIC raised a number of concerns about the supplementary disclosure being inadequate and misleading, principally on the basis that the information did not include a valuation by an independent expert of the fair value of Country Road shares and the benefit available to Mr Lew. Despite ASIC's concerns, the Court approved the despatch of the supplementary materials in the form originally proposed by David Jones (for the reasons discussed below). David Jones's shareholders subsequently voted in favour of the scheme.

In *David Jones No. 3*, David Jones sought the Court's approval of the scheme under s. 411(4)(b) of the Corporations Act. Although ASIC did not oppose the approval of the scheme by the Court, it refused to provide its usual letter under s. 411(17)(b) on the basis that the Country Road bid was an inducement to Mr Lew that was not provided to other David Jones shareholders. ASIC submitted that an inducement would offend the equality principle in s. 602(c) applicable to takeovers and the provision, during the bid period in a takeover under Chapter 6, of a benefit likely to induce acceptance of a bid or disposal of shares in the bid class would be a beach of s. 623 if that benefit were not offered to all shareholders of the same class.

(c) Decision

The Court approved both the supplementary disclosure and the scheme.

In determining that the supplementary disclosure was not inadequate or misleading (*David Jones No. 2*), the Court held that, although an independent expert report identifying the nature and extent of Mr Lew's benefit (if any) was the best way to satisfy the Court that the shareholders were adequately informed, it was not the only way.

The Court found that the supplementary disclosure adequately set out that Mr Lew might receive a benefit not available to all shareholders and that David Jones was not in a position to detail the nature and extent of that benefit. The Court also found that it was not misleading for David Jones to set out recent Country Road trading prices accompanied by a comment about their potential unreliability given their limited trading. Further, David Jones and Country Road were not (yet) part of the same group,

and valid confidentiality claims (noting that they were competitors and David Jones was a customer of Country Road) could prevent David Jones or its independent expert from accessing all the information necessary to assess whether or not the Country Road bid was fair and reasonable. Additionally, the preparation of such a report could take up to six weeks.

The Court also noted that Country Road would be required to produce a target's statement that would include a report on whether or not the bid was fair and reasonable, which might be available before the scheme meeting or the second court hearing on the scheme (although, as events subsequently eventuated, that target's statement was ultimately not prepared in time for the scheme meeting or the second court hearing).

The Court also noted that David Jones was willing to risk proceeding with the scheme meeting on the basis of the disclosure made, and determined that the second court hearing would be the appropriate time to determine if the information provided to shareholders was adequate and whether there were grounds to consider Mr Lew as a separate class of shareholder for the purpose of the David Jones scheme.

In approving the scheme (*David Jones No. 3*), the Court pointed out that it is not illegal to offer collateral benefits in schemes of arrangement (a scheme being a flexible option for a takeover to accommodate differences in treatment between shareholders) nor is it illegal for there to be differential consideration or collateral benefits "subject to how the related questions of fairness and adequacy of disclosure to shareholders who will not participate in a benefit are addressed".

The Court found that questions of fairness in a scheme are dealt with by either deciding that differences are "class creating" or (and arguably more appropriately where the issue is a collateral benefit) by tagging the interested shareholders' votes or having interested shareholders abstain from voting. The Court was satisfied that Mr Lew's interest was not class creating (being mindful that care needs to be taken in defining classes to avoid giving minority shareholders "veto" rights). David Jones took appropriate steps to "tag" Mr Lew's votes to allow shareholders to determine the outcome of the approval resolution but in any case, Mr Lew abstained from voting on the resolution to approve the scheme.

The Court accepted this was an unusual case and that it was not possible to provide the usual independent expert analysis of a collateral benefit. Although the Court had accepted the logistical difficulty in providing an independent expert report on the benefit when it arose, it also accepted that logistical difficulties should not be accepted as an adequate reason for inadequate disclosure. The Court expressed its disappointment that the Country Road target's statement was not released before the scheme meeting or the second court hearing.

Having regard to these circumstances, the Court considered whether the second hearing should be adjourned until after the County Road target's statement and independent expert report were released to the market.

The Court considered that the following factors justified the approval of the scheme without adjournment:

- Mr Lew abstained from voting on the resolution to approve the scheme.
- While the supplementary disclosure was not a substitute for an independent expert's report, it did disclose that:
    - David Jones could not be precise about the benefit to Mr Lew from the Country Road bid and trading of Country Road shares was not a good guide to value because the shares were thinly traded;
    - the Country Road bid gave Mr Lew the opportunity to sell an illiquid holding he had held for 17 years;
    - the Country Road bid was conditional on the scheme;
    - some shareholders might not think it fair that Mr Lew receive the consideration from the Country Road bid and might accordingly vote against the David Jones scheme; and
    - the directors continued to recommend the scheme and the independent expert remained of the view that the scheme was fair and reasonable.
- A high proportion of David Jones shareholders approved the bid (representing 96.81% of the shares and 89.64% of the shareholders).
- In light of the supplementary disclosure, any David Jones shareholder could have sought an adjournment of the scheme meeting until after the Country Road target statement, but no shareholder sought to do so.
- No David Jones shareholder elected to appear at the second court hearing to raise concerns.
- ASIC, while not providing its customary s. 411(17)(b) letter, did not oppose the scheme.

6.9 Arbitral award may only be set aside for breach of the rules of natural justice where real unfairness or real practical injustice is demonstrated

(By Jin Ooi and Nishant Khanna, Corrs Chambers Westgarth)

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83, Federal Court of Australia, Full Court, Allsop CJ, Middleton and Foster JJ, 16 July 2014

The full text of this judgment is available online.

(a) Summary

This case concerned an appeal by TCL Air Conditioner (Zhongshan) Co Ltd (TCL) from the dismissal of its application to set aside an international arbitral award under Article 34 of the United Nations Commission on International Trade Law's (UNCITRAL) *Model Law on International Commercial Arbitration* (the Model Law). TCL's primary complaint was that the arbitral tribunal had failed to accord it procedural fairness such that there had been a breach of the rules of natural justice in connection with the making of the award, and so, it was asserted, the award was in conflict with, or contrary to, the public policy of Australia, and liable to be set aside pursuant to Article 34(2)(b)(ii) of the Model Law. The Full Court of the Federal Court of Australia unanimously held that real unfairness or real practical injustice must be demonstrated in how the arbitral hearing was conducted or resolved, by reference to established principles of natural justice or procedural fairness, before an arbitral award is set aside or refused recognition or enforcement. In this case, the Full Court was not persuade d that TCL had been, in essence, denied the opportunity to be heard on an important and material issue as revealed by such a finding made without probative evidence. In other words, real unfairness or real practical injustice was not demonstrated, and the award made against TCL was not set aside.

(b) Facts

TCL (based in the People's Republic of China) and Castel Electronics Pty Ltd (Castel) (based in Australia) were parties to an agreement for the distribution of air conditioning units manufactured by TCL. The agreement provided for arbitration in the event of a dispute. Disagreement arose between the parties and the dispute was submitted to arbitration. On 23 December 2010, the arbitral tribunal delivered an award in Castel's favour. On 27 January 2011, a further costs award was delivered.

TCL sought to set aside the awards under Article 34 of the Model Law, which has the force of law in Australia by virtue of subsection 16(1) of the International Arbitration Act 1974 (Cth) (the IAA). Castel sought to enforce the awards under Article 35 of the Model Law. TCL sought to resist enforcement under Article 36 of the Model Law. In seeking to set aside and resist enforcement of the award, TCL contended that the arbitral tribunal failed to accord it procedural fairness such that there had been a breach of the rules of natural justice in connection with the making of the award, and so, it was asserted, the award was in conflict with, or contrary to, the public policy of Australia, and liable to be set aside pursuant to Article 34(2)(b)(ii) of the Model Law or refused recognition or enforcement pursuant to Article 36(1)(b)(ii) of the Model Law (see also s. 19 of the IAA). The asserted breaches of natural justice arose f rom the arbitral tribunal's three central findings of fact, upon which TCL was said to have been denied an opportunity to present evidence and argument and which findings of fact were said to have been made in the absence of probative evidence.

TCL advanced a number of appeal grounds, challenging, *inter alia*:

- the primary judge's finding that the Model Law required a demonstrated offence to fundamental notions of fairness and justice before the relevant discretion in Articles 34 or 36 of the Model Law could be exercised; and
- the primary judge's reference to the need to balance the efficacy of enforcing arbitral awards and the public policy of Australia, including the importance of uniformity of international jurisprudence dealing with public policy (TCL asserted that the primary judge should have held that any breach of the rules of natural justice as understood in Australian domestic law required the award to be set aside or to be refused enforcement).

In related proceedings, TCL also applied in the High Court of Australia's original jurisdiction for the issue of constitutional writs of prohibition, directed to the Judges of the Federal Court, and of certiorari, to restrain them from enforcing the awards and to quash the first instance Federal Court decisions. In *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5, the High Court unanimously upheld the constitutional validity of the IAA and rejected TCL's arguments that the IAA substantially impairs the institutional integrity of the Federal Court or impermissibly vests the judicial power of the Commonwealth on the arbitral tribunal that made the award.

(c) Decision

In a unanimous decision of the Full Court of the Federal Court, it was held that an international commercial arbitration award will not be set aside or refused recognition or enforcement under Articles 34 and 36 of the Model Law for breach of the rules of natural justice unless there is demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness.

An arbitral award may be set aside or refused recognition or enforcement if it is in conflict with, or contrary to, the public policy of the State (Articles 34(2)(b)(ii) and Article 36(1)(b)(ii) of the Model Law).

The Court considered the intention and meaning behind the "public policy" ground and, after examining the negotiation and discussion leading up to agreement on Articles 34 and 36 of the Model Law, recognised that:

- the rules of natural justice were within the conception of "public policy"; and
- "public policy" was understood to be limited to the fundamental principles of justice and morality of the State conformable with, and suited to operation within, the international nature of the subject matter, namely, international commercial arbitration - a context very different from the review of public power in administrative law.

In confining the scope of public policy in this manner, the Court had regard to the widespread international judicial support for, and emphasised the importance of

attempting to create or maintain, as far as the language in the IAA permits, a degree of international harmony and concordance of approach to international commercial arbitration.

While there is no doubt that, at common law (through the exercise of public power), it is an error of law to make a finding of fact for which there is no probative evidence, the context of international commercial arbitration is the exercise of private power and is one which recognises the autonomy, independence and free will of the contracting parties, wherein errors of fact or law are not legitimate bases for curial intervention: see *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5. The Court's strong view was that, if the rules of natural justice (in the context of international commercial arbitration) encompass a requirement of probative evidence for the finding of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by judicial review in which the factual findings of an arbitral tribunal are re-agitated and gone over in the name of natural justice, in circumstances where the hearing has been conducted regularly and fairly. The danger would be even greater if natural justice was reduced in its application to black-letter rules in the sense that this may foster a mindset that the rules of natural justice may be breached in a minor and technical manne r.

The Court accepted, without the slightest hesitation, that the making of a factual finding by an arbitral tribunal without probative evidence may reveal a breach of the rules of natural justice in the context of an international commercial arbitration. This, the Court said, would be so when the fact was critical and was never the subject of attention by the parties to the dispute, and where the making of the finding occurred without the parties having an opportunity to deal with it. That is unfairness. It does not follow, however, that any wrong factual conclusion that may be seen to lack probative evidence (and so amount to legal error) should necessarily, and without more, be characterised as a breach of the rules of natural justice in this context.

The Court emphasised that the essence of natural justice is fairness. Unless there is unfairness or true practical injustice, there can be no breach of any rule of natural justice. The required content of fairness in any particular case will depend on all the circumstances of the case. It is not an abstract concept, but essentially practical. Fairness, the Court said, is normative, evaluative, context-specific and relative.

The relevant context being international commercial arbitration, the Court held that no arbitral award should be set aside for being contrary to Australian public policy unless fundamental norms of justice and fairness are breached. The Court remarked that in most if not all cases, real unfairness or real practical injustice should be capable of being demonstrated and expressed tolerably shortly with tolerable clarity and expedition rather than by requiring the Court to repeat or re-examine the fact-finding and analysis process in detail (which TCL contended was the proper approach).

While TCL sought to argue exactly that, the Court said that real unfairness or real practical injustice will not be demonstrated as a result of a detailed factual analysis of evidence regularly and fairly advanced involving asserted conclusions of facts different to those reached by the arbitral tribunal. The Court was ultimately not persuaded that TCL had been, in essence, denied the opportunity to be heard on an important and material issue as revealed by such a finding made without probative evidence - no real unfairness or real practical injustice was demonstrated. In the circumstances, the Court dismissed TCL's appeal to have the award set aside.

6.10 Constructive trust over secret commission obtained by an agent in breach of fiduciary duty

(By Josh Underhill and Georgia Boyce, King & Wood Mallesons)

FHR European Ventures LLP v Cedar Capital Partners LLC [2014] UKSC 45, United Kingdom Supreme Court, Lord Neuberger P, Lord Mance, Lord Sumption, Lord Carnwath, Lord Toulson, Lord Hodge and Lord Collins SCJJ, 16 July 2014

The full text of this judgment is available online.

(a) Summary

Cedar Capital Partners LLC (Cedar) acted as agent for FHR European Ventures LLP (FHR) and others (together, the Claimants) in relation to FHR's purchase of shares in a European company. Cedar also entered into an agreement with the vendor to receive (and did receive) a €10 million fee following the successful completion of the transaction.

At first instance, Cedar was found liable for breach of fiduciary duty for failing to obtain the Claimants' fully informed consent to the €10 million fee, and was ordered to pay the sum to the Claimants by way of equitable compensation. The Claimants were not, however, granted a proprietary remedy in respect of the monies.

The Claimants appealed against the finding that they were only entitled to equitable compensation rather than a proprietary remedy. The Court of Appeal (and subsequently the Supreme Court) found for the Claimants, deciding that Cedar received the €10 million fee on constructive trust for the Claimants, and so the Claimants were entitled to a proprietary remedy in respect of the fee.

(b) Facts

FHR, a joint venture vehicle for the other Claimants, purchased the issued share capital of Monte Carlo Grand Hotel SAM. Cedar acted as the Claimants' agent in negotiating the purchase and accordingly owed fiduciary duties to them. Cedar also entered into an Exclusive Brokerage Agreement with the vendor, which provided for payment to Cedar of a €10 million fee following the successful completion of the transaction.

The Claimants brought proceedings to recover the €10 million fee. At trial Cedar was unsuccessful in arguing that it had made proper disclosure to the claimants of the Exclusive Brokerage Agreement. The court made a declaration of liability for breach of fiduciary duty by Cedar for failing to obtain the Claimants' fully informed consent to the €10 million fee. It ordered that Cedar pay such sum to the Claimants by way of the personal remedy of equitable compensation, but refused to grant the Claimants a proprietary remedy in respect of the monies.

The Claimants successfully appealed against the conclusion that no proprietary remedy was available. Cedar then appealed that decision to the Supreme Court.

(c) Decision of the Supreme Court

(i) The question of whether a secret commission obtained by an agent in breach of fiduciary duty is held on constructive trust

Lord Neuberger delivered the judgment of the Supreme Court. His Lordship restated well-established principles of fiduciary obligations, including that where an agent receives a benefit in breach of a fiduciary duty, the agent is obliged to account to the principal for such a benefit, and to pay a sum equal to the profit by way of equitable compensation. This right to seek an account undoubtedly gives rise to a right to equitable compensation equal to the sum of a bribe or secret commission, and is a personal remedy against the agent.

However, in some cases where an agent acquires a benefit as a result of its fiduciary position, the equitable "Rule" is that the agent is treated as having acquired the benefit on behalf of its principal, so that the benefit is beneficially owned by the principal. In such cases the principal has a proprietary remedy (of constructive trust) in addition to its personal remedy, and may elect between the two. A proprietary remedy gives the principal priority over the agent's unsecured creditors in the event of the agent's insolvency, and the right to trace and follow the bribe or commission in equity. The issue before the court was whether this Rule applies where the benefit is a bribe or secret commission obtained by an agent in breach of its fiduciary duty.

(ii) Cedar's argument

Cedar argued that the Rule should not apply to a bribe or secret commission paid to an agent, because it is not a benefit which can properly be said to be the property of the principal. A proprietary remedy should only arise where the benefit either flows from

an asset which was beneficially owned by the principal or intended for the principal, or where the benefit was derived from an activity or opportunity of the agent within the scope of the agent's endeavours on behalf of the principal.

(iii) The Claimants' argument

The Claimants argued that the Rule applies to bribes and secret commissions because in any case where an agent receives a benefit which is, or results from, a breach of fiduciary duty owed to the principal, the agent holds the benefit on trust for the principal. Under this view, equity should not permit an agent to rely on its own breach of fiduciary duty to justify retaining the benefit on the ground that it was a bribe or secret commission.

(iv) Authorities, while inconsistent, favour granting a proprietary remedy

The judgment of Lord Neuberger examines the considerable body of judicial authority and academic commentary on the issue. First, Lord Neuberger observed that the Rule had been applied in a series of 19th century cases not involving bribes or secret commissions, where an agent made an unauthorised profit by taking advantage of an opportunity which came to its attention as a result of its agency. Second, Lord Neuberger examined cases concerning bribes and secret commissions specifically. In the majority of cases it was not disputed that if the recipient of the benefit had received it in breach of its fiduciary duty to the plaintiff, then it held the benefit on trust for the plaintiff, and it was tacitly accepted that the plaintiff was entitled not merely to an equitable account but to beneficial ownership of the benefit and therefore had a proprietary interest.

Lord Neuberger then addressed the House of Lords decision in *Tyrrell v Bank of London* (1862) 10 HL Cas 26, and several Court of Appeal decisions which are inconsistent with the Rule and support the contrary argument that no proprietary interest arises in such circumstances. On balance, Lord Neuberger concluded that it was not possible to identify any plainly right or plainly wrong answer as a matter of pure legal authority and so practical and policy considerations needed to be assessed.

(v) Principle and practicality favour granting a proprietary remedy

Lord Neuberger found that the Claimants' submission that the Rule applies to all unauthorised benefits which an agent receives, was preferable to Cedar's position on grounds of principle and practicality.

In particular, Lord Neuberger considered that the Rule applies to all unauthorised benefits including bribes and secret commissions because:

- it is consistent with the fundamental principles of the law of agency. The agent owes undivided loyalty to the principal, and the principal is thus entitled to the entire benefit of the agent's acts in the course of its agency. This extends to acts

in excess of the agent's authority. The agent's duty is to deliver up the benefit, not simply to pay compensation;

- it has the merit of simplicity, whereas Cedar's formulation excluding bribes and secret commissions is more likely to result in uncertainty;
- it aligns the circumstances in which an agent is obliged to account for any benefit received in breach of fiduciary duty and those in which the principal can claim the beneficial ownership of the benefit;
- it is unattractive that the Rule not apply to a bribe or secret commission on the ground that it could not have been received by the principal, because a bribe or secret commission still puts an agent in conflict with its duty and is likely to disadvantage the principal;
- it would be a paradox if a principal whose agent receives a bribe or secret commission does not have a proprietary remedy and is therefore worse off than a principal whose agent receives a benefit under less opprobrious circumstances;
- policy considerations support the Rule applying to bribes and secret commissions, including that the law should be stringent against bribes, and consistency with other common law jurisdictions (including Australia); and
- the argument that unsecured creditors of the agent will be disadvantaged in the event of the agent's insolvency is answered by the fact that the bribe or secret commission is property which should not be in the agent's estate at all.

(v) Conclusion

The court concluded that the prior cases which did not apply the Rule to bribes or secret commissions were a "wrong turn", and the authorities taken as a whole favour the Claimant's case, and found in favour of the Claimants.

6.11 Ex-CFO ordered to deliver up plaintiff ex-employer's business records

(By Lachlan Salt, Ashurst)

Armstrong World Industries (Australia) Pty Ltd v Parma [2014] FCA 743, Federal Court of Australia, Beach J, 11 July 2014

The full text of this judgment is available online.

(a) Summary

A plaintiff company brought proceedings against a defendant, whose employment as Chief Financial Officer was terminated by the plaintiff in May 2014, seeking declarations and injunctions for breaches of his employment contract and of s. 183(1)

of the Corporations Act 2001 (Cth) (the Corporations Act). The breaches were said to relate to the defendant's alleged retention of documents containing the plaintiff's business records and other confidential information following his termination, and his proposed use of those documents in planned general protections proceedings in the Fair Work Commission. This case considered the plaintiff's application for an interlocutory injunction compelling the defendant to deliver up and destroy the documents and information in his possession. Beach J concluded that the plaintiff had established strong *prima facie* cases that the defendant had breached his employment contract and also s. 183(1) of the Corporations Act. His Honour also held that the balance of convenience favoured the plaintiff. Accordingly, the injunction was granted.

(b) Facts

The plaintiff company employed the defendant as its Chief Financial Officer and appointed him as a director in July 2012. In January 2014 the plaintiff issued the defendant with a new notebook computer to assist him to fulfil his role in the company. In response to bullying complaints, the plaintiff suspended the defendant's employment as Chief Financial Officer on 1 May 2014. On 9 May 2014, the defendant resigned his position as a director and his employment was terminated. The defendant was then required to return all property, including the notebook computer, to the plaintiff in accordance with his employment contract. The notebook computer was not returned to the plaintiff until 5 June 2014.

On 27 May 2014 the defendant filed a general protections application with the Fair Work Commission (FWC) alleging that his termination by the plaintiff breached the Fair Work Act 2009 (Cth) (the FW Act). On 23 June 2014 a conciliation conference was unsuccessfully held, and the Commission proceedings were terminated with the defendant flagging that a further application under the FW Act might be made in the Federal Court of Australia. During the conciliation conference the plaintiff observed two folders of documents in the possession of the defendant, causing the plaintiff to suspect that the defendant had accessed, retained or used some of the plaintiff's business records in a manner inconsistent with the defendant's employment contract and s. 183(1) of the Corporations Act. The defendant did not contest the plaintiff's assertion that he was in possession of the material. However he did claim an entitlement, and stated an intention, to use the documents in the FWC proceedings or any other proceedings that might be brought by him in the Federal Court of Australia subsequently.

The notebook computer returned by the defendant on 5 June 2014 was examined by a forensic specialist engaged by the plaintiff. The plaintiff in this interlocutory application filed an affidavit sworn by the forensic specialist containing evidence that files were transferred to two USB devices that had been connected to the notebook computer during the period 1 May 2014 to 5 June 2014. It was unclear as to precisely what files had been transferred to those USB devices. The forensic specialist's

affidavit also contained evidence that "anti-forensic" software had been used on the notebook computer, causing 9,398 files to be deleted.

The plaintiff made an application against the defendant in the Federal Court of Australia on 3 July 2014 seeking declarations and injunctions for breaches of the employment contract and breaches of s. 183(1) of the Corporations Act. Section 183(1) prohibits the improper use of information of a corporation obtained by a person because they are or have been a director or other officer or employee of the corporation. The plaintiff made this interlocutory application also on 3 July 2014 seeking, essentially, orders for the delivery up and the destruction of any of the plaintiff's business records and its confidential information in the defendant's possession, as well as a restraint on further use of the material by the defendant.

The plaintiff made its interlocutory application under both s. 1324 of the Corporations Act and the standard equitable basis flowing from the alleged breach of contract.

(c) Decision

It was decided that an injunction ought to be granted.

Beach J first considered whether a *prima facie* case had been established, as required by the test set out by the majority in *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46.

The defendant had argued that his conduct should be viewed as falling within s. 198F of the Corporations Act (providing a director with a right to access company books for specified statutory purposes) and that accordingly his retention and proposed use of the plaintiff's business records was not improper under s. 183(1). But noting that s. 198F applies only to a director acting in his or her capacity as such, Beach J found instead that the defendant's general protections application was, and any further applications of that type would be, proceedings brought by the defendant in a non-director capacity because the they relate to his position as an employee or the Chief Financial Officer.

His Honour concluded that a strong *prima facie* case had been established by the plaintiff that the defendant's obtaining of, and stated purpose for using, the plaintiff's business documents would amount to a breach of s. 183(1) of the Corporations Act. In this regard, Beach J observed that use of information in breach of a contractual obligation can constitute "improper" use of that information.

Beach J also accepted that a strong *prima facie* case had been established by the plaintiff for a breach of the contract of employment, finding it reasonably arguable that at least the employment contract clauses regarding the surrender of company property and company information remaining confidential would survive termination.

Beach J next considered what inconvenience, injury or injustice there would be to each of the plaintiff and defendant if an injunction were respectively refused or granted. In response to the defendant's argument that the granting of an injunction would impair his foreshadowed proceedings, his Honour observed that such prejudice should not justify the condoning of an arguably illegitimate self-help remedy to get the relevant material. The defendant's other argument that his draft application for the proposed Federal Court proceedings could not be supported without reference to and production of the documentary evidence did not persuade His Honour that the defendant needed to have the plaintiff's business records in his possession before lodging a future application. It was also observed that the defendant could engage in pre-action discovery to obtain the records if they were indeed critical.

Ultimately, the balance of convenience was held to favour the plaintiff. The prejudice that the defendant said he would suffer if an injunction were granted was described as underwhelming and outweighed by the plaintiff's prejudice if the injunction were refused.

Accordingly, Beach J ordered that the defendant deliver up within six days to the plaintiff's solicitors all of the plaintiff's business documents in his possession, power or control, except documents relating to his employment by and time as a director of the plaintiff, his suspension as Chief Financial Officer and the subsequent termination of his employment. The parties also provided undertakings: the plaintiff among other things undertook to preserve the documents delivered up to it, while the defendant undertook to not use the documents he was permitted to retain for any purpose other than prosecuting his current or potential proceedings under the FW Act and/or the Accident Compensation Act 1985 (Vic).

6.12 Major client and chairman of majority shareholder found not to be shadow or *de facto* director

(By James Siemon, Minter Ellison Lawyers)

Smithton Limited v Naggar [2014] EWCA Civ 939, England and Wales Court of Appeal (Civil Division), Arden, Elias and Tomlinson LJJ, 10 July 2014

The full text of this judgment is available online.

(a) Summary

This case examines the approach taken by the courts in determining under English law whether a person is a shadow or de facto director of a company, and the duties owed by such directors. It also examines the application of s. 190 of the Companies Act

2006 (UK) (the UK Act), which prohibits the provision to or receipt from a director or connected person of a substantial non-cash asset without approval of the members of the company.

(b) Facts

The first defendant, Guy Naggar, had been involved in the financial services sector in the City of London for a number of years, and held a substantial interest in Dawnay Day International (DDI) and the Dawnay Day group, together with Peter Klimt. That group also extended to companies in which DDI held an interest, which were jointly owned by Mr Naggar and Mr Klimt or their families. Other companies were owned entirely by Mr Naggar's family. Collectively, these different companies were referred to as "the Connected Companies".

Mr Naggar led the financial services side of the Dawnay Day group. Part of its business model included the development of new businesses to be spun off as separate companies within the group. This included the claimant and appellant, which was incorporated in 2007 as a joint venture company, Dawnay Day Capital Markets Ltd. After the collapse of the Dawnay Day group, the company became Hobart Capital Markets Ltd, and then Smithton Limited. It is referred to below as "Hobart".

Over time, Hobart's business became that of a provider of contracts for differences (CFDs), the operation of which was discussed in both the trial and appellate decisions. It is worth noting that CFD providers may choose to hedge their risk under a CFD by purchasing the shares referenced by the CFD. It is also relevant that, in order to be approved by the UK Financial Services Authority (FSA), Hobart could only purchase stock in two ways: as an agent or as a "riskless princ ipal".

At the time of the events which led to the dispute, CFDs had increased in use, partly because they could be used to build up a substantial interest in a company while avoiding some disclosure obligations to the market. When the client (the CFD Holder) closed the CFD, and where the shares referenced were held by the CFD provider as a hedge, the client might purchase those shares (taking the shares physical).

The dispute the subject of the decision particularly arose from CFDs written by Hobart for the Connected Companies which referenced Foreign & Colonial Asset Management Ltd (F&C). Part of Dawnay Day's investment strategy involved entering into CFDs referencing a company and subsequently taking active steps to interest third parties in acquiring the company, causing the share price to rise. It was alleged that this was why the Connected Companies took a substantial position in CFDs referencing shares in F&C. When the price of F&C shares instead fell, the Connected Companies defaulted on their payment of margin calls under those CFDs and entered into insolvency proceedings, leaving Hobart facing substantial losses.

(c) Decision

On appeal, the decision of the Court of Appeal was delivered by Arden LJ, with whom Elias and Tomlinson LJJ agreed. The appeal raised two grounds or issues for consideration. At trial, Hobart had raised a third claim alleging misrepresentation by Mr Naggar, through his representatives on the board of Hobart, as to the financial strength of the Dawnay Day group. This was dismissed by the trial judge as unsupported by the evidence and was not raised again on appeal.

(i) Was Mr Naggar a shadow or *de facto* director?

The first issue raised was whether Mr Naggar had acted in breach of his duties as a *de facto* or shadow director of Hobart. Hobart alleged that he had breached his duties by instructing Hobart (in effect) to transfer a CFD from one company with some assets to another that was not able to meet its obligations. As both companies were owned by Mr Naggar's family, Hobart submitted that this involved a conflict of interest.

The definition of a de facto director appears in s. 250 of the UK Act, which provides that "director" includes any person occupying the position of director, by whatever name called'. The term "shadow director" is specifically defined by s. 251 as "a person in accordance with whose directions or instructions the directors of the company are accustomed to act". Section 170(5) provides that the general duties applicable to directors under ss. 171 to 177 "apply to shadow directors where, and to the extent that, the corresponding common law rules or equitable principles so apply".

Both at trial and on appeal, the Courts examined various authorities in relation to de facto and shadow directors, including the leading case of *HMRC v Holland* [2010] 1 WLR 2793. The appeal, however, focused on the approach of Rose J at trial. As Mr Naggar had multiple roles in relation to Hobart, Rose J said that "[t]he case law indicates that the identification of the hat which the individual was wearing in his dealings with and for the company is crucial in determining whether he is a *de facto* or shadow director". After proceeding to examine the evidence relied upon by Hobart, Rose J concluded that was insufficient to show that Mr Naggar had remained significantly involved in the management of Hobart, after it became a separate company, "beyond the involvement one would expect to see from a person who combined the roles of major client and chairman of the majority shareholder". She therefore held that the evidence failed to show that Mr Naggar was either a *de facto* or a shadow director.

On appeal, Hobart submitted, in particular, that Rose J had failed to analyse the corporate governance structure of Hobart and was wrong in her approach to "hat identification", suggesting that she had proceeded on the basis that if the person could possibly have acted in a role other than that of informal director, their acts should be attributed to that role. As Mr Naggar's defence had been run on the basis that he had multiple roles, the Court of Appeal found that the trial judge had met the defence run and that the latter argument by Hobart actually went to the trial judge's findings of fact

about the capacity in which Mr Naggar acted, which she was entitled to make. The Court ultimately dismissed this ground of appeal.

(ii) Had s. 190 of the UK Act been breached?

At trial, Hobart alleged that Mr Naggar's conduct had breached s. 190 of the UK Act, which provides that:

> ... [a] company must not enter into an arrangement under which ... a director of the company or of its holding company, or a person connected with such a director, *acquires or is to acquire* [emphasis added] from the company (directly or indirectly) a substantial non-cash asset ...

or vice-versa, without approval or being conditional on approval by the company's members. Hobart alleged that s. 190 had been infringed on two bases.

On the narrow basis for the claim, Hobart alleged that during the process by which Hobart created a CFD for the Connected Companies, Mr Naggar or a Connected Company must have acquired the shares themselves or an interest in them, which comprised a "non-cash asset". It was alleged that this occurred due to a difference in timing between purchase of the shares as a hedge (at which point the particular CFD holder was unknown) and the subsequent issuance of the CFD.

Rose J accepted evidence that beneficial ownership did not pass to Mr Naggar, and noted that the FSA required that the counterparty be identified and treated as having assumed the market risk from the time of purchase of the shares. She therefore found that the mechanism for creation of the CFD did not infringe s. 190.

On the wider basis for the claim, Hobart alleged that Mr Naggar had entered into the CFDs referencing F&C shares in order to take the F&C shares physical when closing the CFDs, with the intention to cast the associated votes in support of a takeover of F&C. Because the intention in creating the CFDs was for Mr Naggar to obtain the shares, this resulted in the provision to him of a substantial non-cash asset.

At trial, although Rose J did not accept Mr Naggar's evidence that he did not envisage taking the F&C shares physical, she equally did not accept that he had a settled intention to that effect. On the basis that s. 190(1) of the UK Act requires a "high degree of certainty", Rose J found that the second claim also failed on the wider basis.

On appeal, the appellant focused on the wider basis, but the Court of Appeal upheld Rose J's conclusions on both bases. In relation to the wider basis, they noted that there was no foundation for interpreting "is to acquire" as "may acquire". As it was not certain that the CFD holder would take the shares physical, s. 190 did not apply.

The Court of Appeal therefore dismissed all grounds of appeal by Hobart.

6.13 Centre of main interests of Australian company found in United States

(By James Siemon, Minter Ellison Lawyers)

Young Jr, in the matter of Buccaneer Energy Ltd v Buccaneer Energy Ltd [2014] FCA 711, Federal Court of Australia, Jagot J, 2 July 2014

The full text of this judgment is available online.

(a) Summary

This case relates to the determination of the "centre of ... main interests" for the purpose of article 17(2) of the UNCITRAL's *Model Law on Cross-Border Insolvency* (the Model Law). In particular, the decision examines the weight to be given in making that determination to the registration of the defendant, Buccaneer Energy Limited (Buccaneer), in Australia and its listing on the Australian Securities Exchange (ASX).

(b) Facts

This case arose from an originating process filed in the Federal Court pursuant to s. 6 of, and articles 15, 20 and 21 of Schedule 1 to, the Cross-Border Insolvency Act 2008 (Cth) (the CBI Act) and rl. 15A.3 of the Federal Court (Corporations) Rules (2000) 1999 (Cth) (the FCC Rules).

Section 6 of the CBI Act provides force of law in Australia to the Model Law as set out in, and subject to, that Act. Rule 15A.3 of the FCC Rules enables a foreign representative to apply, by way of originating process, for recognition of a foreign proceeding under article 15 of the Model Law.

Under the Model Law:

- article 5 provides that "[a] foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed" and sets out the documents that must be provided;
- article 20 sets out the effects of recognition of a foreign main proceeding; and
- article 21 sets out the relief that may be granted upon recognition of a foreign proceeding.

It is article 17(2) of the Model Law, however, that provides that a foreign proceeding:

> shall be recognized:
>
> a. As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
> b. As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.

The defendant company, Buccaneer, was an Australian-registered, ASX-listed public company with a number of wholly owned subsidiaries incorporated in the United States. Its main activity was described as "[l]eading the oil & gas revitalisation of the Cook Inlet, Alaska", with a wholly owned subsidiary, Buccaneer Resources, being an upstream oil and gas company based in Houston, Texas. At least some of its executives were paid in United States dollars and had business cards identifying Buccaneer's address as a Houston office address. It conducted various activities from the United States for its oil and gas assets, including technical evaluation, engineering design, operational and logistical preparation and execution, accounting functions and payment of accounts and employees, and appointed United States accountants to prepare its United States tax returns.

The plaintiffs, Buccaneer's chief restructuring officer and board of directors, applied for recognition of a United States proceeding concerning a voluntary petition under Chapter 11 of the United States Code in respect of the insolvency of Buccaneer.

That originating process was opposed by Chrystal Capital Partners LLP (Chrystal), an unsecured creditor of Buccaneer, on the grounds that the United States proceeding was not a foreign main proceeding. Chrystal pointed to evidence of this, including:

- an ASIC company extract showing Buccaneer's state of registration as Queensland, its registered office and principal place of business as being in Sydney, and that its current and recent former company officers were predominantly located in Australia; and
- Buccaneer's 2013 annual report, which referred to Buccaneer as an "Australian listed company" and identified Australian directors. The annual report also addressed Buccaneer's compliance with the ASX Corporate Governance Council's principles of corporate governance.

(c) Decision

Jagot J noted that article 16(3) of the Model Law provides that, "[i]n the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests".

However, her Honour also referred to various authorities raised by the parties where the phrase "centre of main interests" had been considered. Those authorities supported the proposition that the centre of main interest "must be identified by reference to criteria that are objective and ascertainable by third parties". In particular, her Honour referred to the application of that proposition by *Rares J in Ackers v Saad Investments Company Ltd (in liq)* (2010) 190 FCR 285.

Referring to the evidence set out by the parties, including that outlined above, Jagot J found that "the totality of the evidence points to it having been objectively ascertainable by a third party that the centre of main interests of Buccaneer was the United States, notwithstanding that Buccaneer was a company registered in Australia and listed on the ASX". His Honour was in agreement with the plaintiffs that Chrystal's submissions ignored the commercial reality that the substance of Buccaneer's activities were in the United States, but instead sought to place "almost conclusive weight" on Buccaneer's Australian registration and listing. His Honour was therefore satisfied that the centre of Buccaneer's main interests was the United States and recognised the United States proceeding as a foreign main proceeding.

6.14 Highest imposed penalty for breach of continuous disclosure obligations under the Corporations Act

(By Penny Jones, Herbert Smith Freehills)

Australian Securities and Investments Commission v Newcrest Mining Limited [2014] FCA 698, Federal Court of Australia, Middleton J, 2 July 2014

The full text of this judgment is available online.

(a) Summary

In this proceeding, the Australian Securities and Investments Commission (ASIC) alleged against Newcrest Mining Ltd (Newcrest) two contraventions of the continuous disclosure obligations contained within s. 674(2) of the Corporations Act 2001 (Cth) (the Corporations Act). The alleged contraventions related to a failure to disclose, to the ASX, Newcrest's total expected gold production and capital expenditure for the 2013-14 financial year. Newcrest admitted both contraventions, and consented to appropriate declarations being made and the imposition of pecuniary penalties.

Newcrest and ASIC made joint submissions in relation to the allegations in the form of an Agreed Statement of Facts and Admissions, which was annexed to the judgment of Middleton J. The Court was satisfied that the agreed facts and admissions were sufficient for the Court to determine the appropriate relief and impose appropriate

penalties, and declared that Newcrest had contravened s. 674(2) of the Corporations Act as alleged. The Court ordered that Newcrest pay the Commonwealth $1.2 million in penalties, being the highest penalty imposed for breach of continuous disclosure obligations under the Corporations Act to date.

(b) Facts

(i) Background

Newcrest annually undertakes a process of planning and budgeting which culminates, in the period between April and June of each year, in the preparation and presentation to the Newcrest Board of a detailed business and operating budget for the next financial year. As a part of this process, in the period between May and June 2013, the management of Newcrest developed expectations, which were recorded in drafts of the budget, in relation to Newcrest's total expected gold production (the Total Production Information) and capital expenditure (the Capex Information) for the 2014 financial year. Those expectations differed from the information which was known to the market and which constituted the consensus of analysts in relation to those matters.

On 28 May and 5 June 2013, Newcrest investor relations manager Spencer Cole disclosed the substance of the Total Production Information and Capex Information, respectively, to a number of analysts and investors. It was agreed that Mr Cole believed the information had already been disclosed to the market, although it had not been. Newcrest did not disclose the information to the ASX until 7 June 2013.

In 2013, ASIC carried out an investigation into the selective disclosure of the Total Production Information and Capex Information in the period between 28 May and 7 June 2013. As a consequence of that investigation, Newcrest reached a settlement agreement with ASIC whereby it admitted two contraventions of s. 674(2) of the Corporations Act and consented to appropriate declarations being made and the imposition of pecuniary penalties.

Newcrest admitted that it had failed to notify the ASX:

- in the period 28 May - 7 June 2013, of the Total Production Information (the First Contravention); and
- in the period 5 - 7 June 2013, of the Capex Information (the Second Contravention).

Newcrest and ASIC prepared and submitted to the Court an Agreed Statement of Facts and Admissions which set out the factual context of the contraventions.

(ii) Statutory framework

The continuous disclosure regime is set out in Chapter 6CA of the Corporations Act. Section 674(2) of the Act imposes a statutory obligation on companies whose

securities are listed on the ASX to disclose to the ASX information required to be disclosed by the Listing Rules in circumstances where that information is price sensitive and not "generally available". ASX Listing Rule 3.1 provides that "once an entity becomes aware of any information concerning it, that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information".

Listing Rule 3.1 is subject to the exceptions set out in Listing Rule 3.1A. Relevantly, Listing Rule 3.1 does not apply to particular information while:

a. one or more of the five situations set out in Listing Rule 3.1A.1 applies:
    - it would be a breach of a law to disclose the information;
    - the information concerns an incomplete proposal or negotiation;
    - the information comprises matters of supposition or is insufficiently definite to warrant disclosure;
    - the information is generated for the internal management purposes of the entity;
    - the information is a trade secret; and
b. the information "is confidential and ASX has not formed the view that the information has ceased to be confidential"; and
c. "a reasonable person would not expect the information to be disclosed".

When the exceptions in Listing Rule 3.1A cease to apply, the entity is required to make immediate disclosure of price sensitive information which is not generally available to the ASX under Listing Rule 3.1.

(c) Decision

(i) Declarations of contravention

The Court found that the Total Production Information and Capex Information were management expectations as to production levels and capital expenditure, which, at all relevant times, were matters for the Board to determine. It was found that those expectations, as recorded in drafts of the budget, constituted a proposal to the Board by management, which, for the purpose of Listing Rule 3.1A, was incomplete until the budget had been reviewed and approved by the Board. Accordingly, Middleton J accepted that the information was not required to be disclosed, by operation of the Listing Rule 3.1A, until confidentiality in that information was lost upon the disclosure by Mr Cole of the Total Production Information on 28 May 2013 and the Capex Information on 5 June 2013.

The Court was satisfied that the Total Production Information and Capex Information was otherwise price sensitive and was not generally available and found that Newcrest had contravened s. 674(2) of the Corporations Act in respect of each of the admitted

contraventions. Declarations of contravention were made pursuant to s. 1317E(1) of the Act.

(ii) Appropriate penalty

The Court found that, as s. 674(2) is a "financial services civil penalty provision" pursuant to s. 1317DA(b) of the Corporations Act, a pecuniary penalty may be imposed by the Court for each contravention by Newcrest in accordance with s. 1317G(1A) of the Corporations Act. The maximum penalty for each contravention by Newcrest, as a body corporate, was found to be $1,000,000 (s. 1317G(1B)), on the basis that each contravention was "serious" within the meaning of s. 1317G(1A) of the Corporations Act.

The Court accepted that each of the First and Second Contraventions met the statutory threshold of being "serious" contraventions. ASIC and Newcrest jointly proposed, by way of the agreed facts and admissions, that on the basis that each contravention was serious within the meaning of the Corporations Act, the appropriate penalties were $800,000 for the First Contravention and $400,000 for the Second Contravention. While the Court was satisfied that the agreed facts and admissions provided a sound and proper basis upon which to proceed to impose appropriate penalties, Middleton J emphasised that the role of the Court in determining the appropriate penalty is not an exercise of "rubber stamping" or "approving" a settlement reached between the regulator and defendant. Rather, "the Court must form its own opinion about the penalty" in all the circumstances of the case before it.

In this instance, the Court ultimately accepted that the penalties proposed by the parties were appropriate in the circumstances. In fixing the penalties, the Court took the following significant factors into account:

- the size and financial position of Newcrest, including the likelihood of the penalty providing specific deterrence;
- market impact and prejudice to investors, namely that the delay in the disclosure of the information the subject of the contraventions may have resulted in persons acquiring securities at an inflated price during the period of non-disclosure;
- the impact of the selective disclosure of information to analysts, including that it may have generated confusion and a loss of faith in market integrity;
- the fact that the contraventions involved conduct which was inconsistent with Newcrest's own continuous disclosure policy and involved a senior level of management; and
- mitigating factors, including that:
    - this was not a case where Newcrest knowingly or intentionally contravened its continuous disclosure obligations, nor was there any suggestion that there was a systemic problem with Newcrest as to continuous disclosure obligations;

- Newcrest had commissioned an independent review of its disclosure and investor relations policies and practices, and had made changes following the recommendations arising from the review; and
- Newcrest had cooperated fully with ASIC in relation to the contraventions, and admitted each of the First and Second Contraventions, thereby saving court resources and public resources (in the form of regulators' resources), and negating the need for specific deterrence in fixing the penalty.

In light of these considerations, the Court found that a penalty of $800,000, being towards the higher end of the scale of contraventions, was appropriate for the First Contravention, accepting that there were mitigating factors making a penalty at the statutory maximum inappropriate, and found that a penalty of $400,000, lower on the scale, was appropriate for the Second Contravention. The Court also considered that the combined penalty of $1,200,000 for both contraventions was appropriate, particularly given that the maximum penalty for the two contraventions iss $2,000,000 and that the combined penalty was in excess of any previously imposed for misconduct under the continuous disclosure provisions.

In imposing the penalties upon Newcrest, the Court emphasised that the penalties "are such to send a strong message to market participants to be mindful of the care and caution needed when interacting with analysts" and "reinforce the message that access to market sensitive information is paramount in ensuring the markets operate on an informed and equally informed basis".