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1. Recent Corporate Law and Corporate Governance Developments

1.1 Harold Ford Memorial Lecture 2016

The 2016 Harold Ford Memorial Lecture will be delivered by The Hon Marilyn Warren AC, Chief Justice of the Supreme Court of Victoria.

Date: Thursday 5 May, 6:30 pm

Topic: Corporate Structures, the Veil and the Role of the Courts

Courts are frequently called upon to grapple with the consequences of the principle that corporations are separate legal entities with limited liability. These consequences arise in a range of contexts, from corporate groups to tort liability. The rise of the corporate trustee has added yet further complexity to issues of corporate knowledge, power and responsibility. In this context, an age-old question is more relevant than ever: to what extent can courts look behind corporate structures to commercial realities in determining the disputes before them?

For more information, visit Melbourne Law School website.

1.2 Financial System Resilience Bill 2016 introduced

On 16 March 2016, the Minister for Small Business and Assistant Treasurer Kelly O'Dwyer introduced the Financial System Legislation Amendment (Resilience and Collateral Protection) Bill 2016 (Cth) (the Bill) into the Commonwealth House of Representatives.

The Bill proposes amendments to numerous financially-related Acts, principally in regard to their regulation of over-the-counter (OTC) derivatives, including the Banking Act 1959 (Cth), the Financial Sector (Business Transfer and Group Restructure) Act 1999 (Cth) and particularly the Payment Systems and Netting Act 1998 (Cth) (the PSN Act).

The introduction of the draft legislation and the resulting Bill is principally in response to the Financial System Inquiry. The Inquiry, formed in late 2013 to "establish a direction for the future of Australia's financial system", released its final report on 7 December 2014. The Federal Government responded to the report in 20 October 2015, proposing several changes to be made in response to the findings of the Inquiry.

Some of the changes proposed by the Bill include amendments to the PSN Act and other associated Acts to assist in bringing Australian financial institutions more into line with international standards of OTC derivative margin requirements, particularly regarding rights given and enforced in respect of margin provided by way of security. Another effect of the Bill is to solidify existing Australian law regarding termination (or close out) rights under particular financial market transactions.

1.3 Senate Committee report on agribusiness managed investment schemes

On 15 March 2016 the Senate Economic References Committee published its report on agribusiness managed investment schemes.

The report is available on the Parliament of Australia website. The background to the inquiry conducted by the Committee was the collapse of a number of large agribusiness managed investment schemes (MIS) including Timbercorp and Great Southern. According to the Committee:

"The causes for this financial failure on such a large scale were many and varied, and all participants in the industry must bear some responsibility for it. They include: the product manufacturers and promoters; the experts who rated the schemes; the financial advisers who recommended the investments; the finance companies, credit assistance advisers and lenders that facilitated and provided the loans; the regulators and governments for their lack of decisive action in monitoring the marketing and performance of these schemes; and retail investors enticed to enter into highly speculative ventures on borrowed money".

The Committee has made 24 recommendations. They include the following:

- The government give high priority to developing and implementing a code of ethics to which all financial advice providers must subscribe.
- The government consider legislative amendments that would give ASIC the power to immediately suspend a financial adviser or planner, subject to the principles of natural justice, where ASIC suspects that the adviser or planner has engaged in egregious misconduct causing widespread harm to clients.
- The government review the penalties for breaches of advisers and Australian Financial Services Licensees' obligations and, under the proposed legislation governing product issuers, ensure that the penalties align with the seriousness of the breach and serve as an effective deterrent.
- The government use the Corporations and Markets Advisory Committee report on managed investment schemes as the platform for further discussion and consultation with the industry with a view to introducing

legislative reforms that would remedy the identified shortcomings in managing an MIS in financial difficulties and the winding-up of collapsed schemes.

- The committee notes that neither the ATO nor Treasury have undertaken a comprehensive review of the tax incentives for MIS and whether they have unintended consequences, such as diverting funds away from more productive enterprises; inflating up front expenses; or encouraging poorly-researched management decisions (planting in unsuitable locations). The committee recommends that Treasury commission a review to better inform the policy around providing tax concessions for agribusiness MIS.
- ASIC review the complaints made against advisers and accountants, licensed or unlicensed, who engaged in alleged unscrupulous practices when recommending that their clients invest in agribusiness MIS. The review would identify any weaknesses in the current legislation that impeded ASIC from taking effective action against those who engaged in such unsound practices. This review would also examine the adequacy of the penalties available to ASIC to impose on such wrong doers. In particular, ASIC should consider the adequacy of penalties that apply to those who were unlicensed or have since become unlicensed. Banning in such cases is redundant. The committee also recommends that as part of this review, ASIC consider the practice of advisers using bankruptcy as a means to avoid recompensing clients who have suffered financial loss as a result of their poor financial advice and any possible remedies.

1.4 Australian CFOs concerned about effectiveness of corporate reporting

11 March 2016 - Australian CFOs are losing confidence in corporate reporting and its effectiveness, as pressure from audit committees, the complexity of implementing new reporting requirements and reporting overload affect performance, according to EY's Financial Accounting and Advisory Services' (FAAS) annual survey, Are you prepared for corporate reporting's perfect storm?

EY's global survey of 1,000 CFOs in organisations with revenue greater than US$500m across 25 countries, including Australia, found CFOs' confidence across all aspects of corporate reporting had fallen compared to the previous year, with only 55% confident that they are achieving full compliance, compared with 84% last year.

The responses from Australian CFOs depicted a similar trend, with only 40% of CFOs confident in their overall level of compliance and only 22% having confidence in the clarity and relevance of messages to respective audiences.

Part of this drop in confidence may be due to the fact that the level of attention given to reporting by key stakeholders has increased dramatically over the past three years, with Australian respondents identifying increased attention from audit committees (90% of respondents), analysts, investors, and financial regulators.

Increased complexity is also having an impact on reporting effectiveness. CFOs identified their top challenges as complexity of the regulatory environment, as well as the complexity of the organisation's global structure. This partly explains why more than half of Australian respondents said there has been an increase in the number of reports issued, both internal and external.

1.5 Basel Committee consults on revisions to the Pillar 3 disclosure framework

11 March 2016 - The Basel Committee on Banking Supervision has issued for consultation Pillar 3 disclosure requirements - consolidated and enhanced framework.

Pillar 3 of the Basel framework seeks to promote market discipline through regulatory disclosure requirements. The proposed enhancements issued include:

- the addition of a "dashboard" of key metrics;
- a draft disclosure requirement of hypothetical risk-weighted assets calculated based on the Basel framework's standardised approaches; and
- enhanced granularity for disclosure of prudent valuation adjustments.

The proposal also incorporates additions to the Pillar 3 framework to reflect ongoing reforms to the regulatory framework. These include, for example, disclosure requirements for:

- the total loss-absorbing capacity (TLAC) regime for global systemically important banks;
- the proposed operational risk framework; and
- the final standard for market risk.

The Committee's proposal would also consolidate all existing Pillar 3 disclosure requirements of the Basel framework, including the leverage ratio and liquidity ratios disclosure templates. Together with the Revised Pillar 3 disclosure requirements issued in January 2015, the proposed disclosure requirements included in this consultation would comprise the single Pillar 3 framework.

1.6 Discussion paper: Objective of superannuation

9 March 2016 - In 2015, the Australian Government announced that it would develop legislation to enshrine the objective of superannuation, as part of its

response to the Financial System Inquiry (FSI). The Government has released the discussion paper titled The objective of superannuation. This paper provides background and questions for consultation on the proposed objective of the superannuation system.

1.7 Choice of board leadership structure may impact CEO pay levels

9 March 2016 - The average annual compensation for chief executive officers of large US corporations varies significantly depending on board leadership structure, according to a report released by Institutional Shareholder Services (ISS).

An ISS analysis of S&P500 companies finds compensation over a three year period was 42% higher on average for CEOs that had an insider chairman (excluding those in a combined role), than for CEOs of companies chaired by an independent outsider. CEOs who also held the post of board chair were the next highest group, receiving 29% more in average annual compensation compared to CEOs of companies chaired by an independent outsider. Average CEO pay was also sensitive to company revenue, but regressions showed no significant association with other potential explanatory factors, such as indexed shareholder return performance or CEO tenure.

While the number of US companies that combine the top two titles has declined in recent years, the dual role is still the most prevalent leadership structure among S&P 500 companies, according to ISS QuickScore data. For 2015, approximately 51% of S&P 500 companies combined the chair and CEO roles, down from approximately 54% in 2014.

The fact that, on average, a CEO's pay is generally higher when that post is held in conjunction with the board chair role or when there is an insider chairman provides, according to ISS, some support for views that insiders are not the best monitors of shareholder interests in the board room, at least as measured by CEO pay.

1.8 Diversity gathering pace in Australian boardrooms

7 March 2016 - Companies in the ASX200 with no women on their board are fast becoming an anomaly, according to new data by the Australian Council of Superannuation Investors.

By the end of February 2016, only 22 of Australia's largest listed companies had failed to appoint a woman director - a number which has shrunk by a third since 1 July 2015.

- Women now comprise 22% of ASX200 boards (19% at the start of 2015);
- Women have represented slightly more than 50% of all appointments announced for ASX200 companies so far in 2016 (19 out of 37);
- Large companies are still leading the way, with boards of ASX50 companies at 27% women;
- Only two companies in the ASX100 still have no women on their boards; and
- Smaller companies are much slower to adjust, with boards of the ASX201-300 comprising only 16% women.

Further information from the Australian Council of Superannuation Investors website.

1.9 Hong Kong consultation conclusions on Principles of Responsible Ownership published

7 March 2016, Hong Kong - The Securities and Futures Commission (SFC) released consultation conclusions on the Principles of Responsible Ownership which aim to provide guidance on how investors should fulfil their ownership responsibilities in relation to investments in Hong Kong listed companies.

The SFC has decided to introduce the proposed principles with minor changes, removing references to individual and retail investors from the principles.

The principles, which are voluntary, are intended to apply to investors who invest money or hold shares on behalf of clients or stakeholders to whom they are accountable. Investors who hold or receive funds from the public which are invested in shares of Hong Kong listed companies are encouraged to adopt the principles and to make disclosures to their stakeholders accordingly.

Investors who do not think the principles are relevant to or suitable for them are encouraged to disclose to stakeholders why they have not been adopted at the outset and what alternative measures they have put in place, if any. The SFC will monitor the application of the principles to determine whether amendments or other changes may be necessary.

1.10 BIS Quarterly Review: Uneasy calm gives way to turbulence

The March 2016 issue of the Bank for International Settlements Quarterly Review:

- recounts how financial market turmoil has emerged and spread since the beginning of 2016;

- shows how international financing flows slowed in the second half of 2015, possibly signalling a turning point in global liquidity. Banks' cross-border claims on emerging economies fell in the third quarter, and outstanding international debt securities contracted by $47 billion in Q4, the biggest fall in three years. Emerging market net debt issuance was essentially flat in the second half of the year; and
- proposes an alternative perspective on the decline in cross-border bank lending to China, the main driver of the drop in cross-border claims on emerging economies. The analysis finds that the outflows ultimately resulted from lower offshore renminbi deposits and Chinese firms' paydown of foreign currency debt both cross-border and inside China.

Four special features examine a range of economic, financial and policy issues:

- Morten Bech and Aytek Malkhozov (BIS) find that modestly negative policy rates have so far been transmitted through to money markets in a similar way to positive rates. But the pass-through to key bank rates has been uneven, and there is great uncertainty about the behaviour of individuals and institutions if rates were to decline further into negative territory or remain negative for a prolonged period.
- Dietrich Domanski, Michela Scatigna and Anna Zabai (BIS) explore recent trends in household wealth inequality. Their simulation suggests that wealth inequality has risen in the advanced economies at the centre of the Great Financial Crisis. To the extent that it has boosted asset prices, monetary policy may have affected inequality in opposite ways: reducing it through rising house prices, but increasing it through higher equity prices.
- Patrick McGuire and Goetz von Peter (BIS) study the drivers of the contraction in bank credit during and after the Great Financial Crisis and find that banks which provided locally funded credit to borrowers proved to be the most stable post-crisis.
- Drawing from a recent survey of major trading platforms, Morten Bech, Anamaria Illes, Ulf Lewrick and Andreas Schrimpf (BIS) review the rising use of electronic and automated trading in fixed income markets. An important recent development has been the increase in electronic trading of corporate bonds, which has more than doubled over the last five years.

1.11 Financial advice amendments pass Parliament

On 2 March 2016, Australian Parliament passed the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (Cth), which is now the Corporations Amendment (Financial Advice Measures) Act 2016 (Cth). The Act includes a number of elements to improve financial advice. In particular, the Act:

- treats basic insurance products and non-cash payments (such as travel money cards) consistently with other simple financial products;

- clarifies the application of the client-pays and intra-fund advice provisions to ensure they operate as intended;
- broadens the existing "education and training" provision to include education and training that relates to the carrying on of a financial services business, allowing education and training on a broader range of topics to be provided; and
- introduces a limited regulation-making power to allow the Government to wind back existing exemptions to conflicted remuneration, to address any future unintended consequences in relation to the conflicted remuneration provisions.

1.12 ESG reporting: study

2 March 2016 - Environmental, Social and Governance (ESG) investing practices have evolved and grown rapidly over the past five years yet 13% of ASX200 companies currently fail to provide meaningful information on sustainability factors and a further 17% provide only basic information.

In recognising the value of transparency and disclosure in reporting on companies' material risks, the Financial Services Council (FSC) and Australian Council of Superannuation Investors (ACSI) have launched a guide for Australian companies on how to identify and report environmental, social and governance issues.

The guide has been developed to provide Australian companies with a framework to disclose the ESG information that institutional investors would look for when considering their investments. It acknowledges the range of reporting frameworks in existence, and does not aim to recreate these but to provide companies with what Australian institutional investors look for when analysing a company's material ESG risks.

ESG Reporting Guide for Australian Companies 2015

1.13 IOSCO publishes Securities Markets Risk Outlook 2016

2 March 2016 - The International Organization of Securities Commissions (IOSCO) published the IOSCO Securities Markets Risk Outlook 2016, which identifies and examines key trends in global financial markets and the potential risks to financial stability.

The Outlook first examines key trends in global financial markets and their impact on securities markets. It focuses on:

- The impact on securities markets from interventions of central banks worldwide;
- The impact on securities markets from falling commodity prices and uncertainty over global growth trends;
- General growth trends in corporate bond, equity and securitized product markets;
- Recent trends in emerging market securities markets related to leverage, capital flows, and market-based financing; and
- The increasing digitalization of financial markets and potential for technological disruptors.

The Outlook also identifies and examines, in depth, four potential risk areas:

- Corporate bond market liquidity;
- Risks associated with the use of collateral in financial transactions;
- Harmful conduct in relation to retail financial products and services; and
- Cyber threats.

1.14 Draft legislation on client money reforms

29 February 2016 - The Australian Government has released draft legislation and regulations to reform the Australian client money regime, and the associated explanatory materials, all available from the Treasury website.

In October 2015, the Government announced that it would develop legislation to better protect client money, as part of its response to the Financial System Inquiry.

In December 2015, the Government released a policy paper that explains the proposed changes to the regulatory framework, and invited interested parties to comment.

The Corporations Amendment (Client Money) Bill 2016 and Corporations Amendment (Client Money) Regulation 2016 give effect to the proposals made in the policy paper and better protect retail client money - while continuing to facilitate the efficient operation of wholesale derivatives markets.

1.15 US class actions settlements: study

29 February 2016 - 2015 saw six of the 50 largest US approved class action settlements since passage of the Private Securities Litigation Reform Act of 1995, according to a new report released by Securities Class Action Services.

The Top 100 Class Action Settlements Semi-Annual Report also noted that 12 settlements from 2015 made the top 100 list. Among the top 100 class actions tracked by Securities Class Action Services, 2015 ranked sixth all time with a total settlement value of just over US$4 billion amongst those 12 settlements.

1.16 Statement on UK compliance with the EBA guidelines on Sound Remuneration Policies

29 February 2016 - The UK Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) have notified the European Banking Authority (EBA) that the regulators will comply with all aspects of the EBA Guidelines on Sound Remuneration Policies, except for the provision that the limit on awarding variable remuneration to 100% of fixed remuneration, or 200% with shareholder approval (the bonus cap), must be applied to all firms subject to the Capital Requirements Directive (CRD).

The approach to the bonus cap under the Guidelines represents an interpretation of CRD with which neither the PRA nor the FCA agree.

Since the introduction of the bonus cap, a number of firms have markedly increased fixed pay as a percentage of total pay, whilst total pay remained stable during the same period. The PRA and FCA believe that the shift to fixed remuneration makes it more difficult for firms to adjust variable remuneration to reflect their financial health, and limits deferral arrangements that put remuneration at risk should financial or conduct risks subsequently come to light.

The blanket extension of the bonus cap to all firms regulated under CRD would, in the PRA and FCA's view, exacerbate these impacts, and fails to recognise the different incentives and consequences for risk-taking across all CRD-regulated firms by disregarding the size, internal organisation, nature, scope and complexity of their activities.

1.17 IOSCO issues second review of implementation of principles by IBOR administrators

26 February 2016 - The International Organization of Securities Commissions published its report Second Review of the Implementation of IOSCO's Principles for Financial Benchmarks by Administrators of EURIBOR, LIBOR and TIBOR.

The report sets out the findings of the second review of the implementation of IOSCO's Principles for Financial Benchmarks by the administrators of the benchmarks collectively known as the IBORs: the Euro Inter-Bank Offer Rate

(EURIBOR); the London Inter-Bank Offer Rate (LIBOR); and the Tokyo Inter-Bank Offer Rate (TIBOR).

The second review found that all three administrators have been proactively engaged in addressing the issues raised by the first review, which had found an important distinction between the progress made on implementing the Principles related to the quality of the benchmark and that on implementing the Principles related to governance, transparency and accountability.

1.18 Social innovation: Proving the link between corporate and societal value

25 February 2016 - The World Economic Forum launched a new report, Social Innovation: A Guide to Achieving Corporate and Societal Value, profiling companies helping underserved communities and showing why social innovation is becoming an increasingly relevant strategy for companies to pursue.

The report illustrates what social innovation strategies and business models look like, what the range of opportunities are, and the business benefits companies can get from pursuing them. It also covers best practices from companies on how best to implement such models in ways that support business goals.

Social innovation is defined by the Forum's Global Agenda Council on Social Innovation as "the application of innovative, practical, sustainable, market-based approaches to benefit society in general, and low-income or underserved populations in particular".

Case studies include:

- Companies that are creating new products, services and distribution channels to serve consumers that are underserved today. Allianz is offering insurance products to over 57 million consumers in emerging markets. MasterCard is connecting millions of Egyptians to the financial system;
- Companies that are working on initiatives that strengthen their supply chains while increasing incomes of their suppliers including small farmers. For example, Nestlé which is augmenting incomes of 63,000 farmers in 11 countries; ITC's supply chain is serving 4 million farmers across 40,000 villages in India;
- Companies that are investing in increasing education access and employability in ways that secure and diversify their existing and future talent pools. For example, Intercorp is helping create access to education to over 60,000 students and CISCO is training 1 million students a year on IT skills; and
- Companies that are using finance as a tool to create social impact while at the same time, building profitable businesses. Centrica's £10 million ($14.1 million) impact investment fund is investing in energy SMEs that create social and financial value and Barclays is using a £25 million ($35.2

million) Social Innovation Facility to incentivise and support its business units to pursue social innovation ideas.

1.19 APRA consults on margining and risk mitigation requirements for non-centrally cleared derivatives

25 February 2016 - The Australian Prudential Regulation Authority (APRA) has released a consultation package for APRA-regulated institutions on margining and risk mitigation requirements for non-centrally cleared derivatives.

In recent years the G20, through the Basel Committee on Banking Supervision and the International Organization of Securities Commissions, has instituted reforms which aim to reduce systemic risk and contagion effects by ensuring the availability of collateral (margin) to offset losses that may be caused by the default of a derivative counterparty. These reforms are also aimed at promoting central clearing.

APRA proposes to apply margin and risk mitigation requirements to authorised deposit-taking institutions (ADIs), general insurers, life insurers, and RSE licensees of registrable superannuation entities that transact in non-centrally cleared derivatives. APRA's proposals generally follow the internationally-agreed standards, although it has modified them in some areas to avoid placing undue cost on regulated entities with relatively small levels of non-centrally cleared derivative activity.

APRA's draft *Prudential Standard CPS 226 Margining and risk mitigation for non-centrally cleared derivatives* (CPS 226), proposes to require APRA-regulated institutions that transact in non-centrally cleared derivatives to:

- meet new risk mitigation requirements that are intended to increase the transparency of bilateral positions between counterparties, promote legal certainty over the terms of non-centrally cleared derivative transactions and facilitate the timely resolution of disputes; and
- exchange margin (i.e. collateral) to mitigate counterparty credit risk associated with their derivative activities, when the level of this activity exceeds minimum qualifying levels.

While the risk mitigation standards apply to all APRA-regulated institutions (excluding private health insurers), APRA expects only a small number of institutions will exceed the proposed minimum qualifying levels and therefore be subject to the new margin requirements.

1.20 New false accounting offences

23 February 2016 - The Australian Government has introduced two new criminal offences for false accounting into the Criminal Code Act 1995 (Cth) (the Criminal Code) under the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act. The offences came into effect on 1 March 2016.

Schedule 2 of the Act inserts Division 490 into the Criminal Code with the following two new offences:

- intentional false dealing with accounting documents (Division 490.1); and
- reckless false dealing with accounting documents (Division 490.2).

The first offence applies to companies or individuals that intentionally conceal illegitimate payments by making, altering, or destroying accounting records, or by failing to make or alter accounting records that the person is under a legal duty to make or alter. The second offence applies to companies and individuals that recklessly do so. The new provisions remove the need for prosecutors to establish actual payment or receipt of bribes, or the targeting of a particular person.

1.21 Insolvency Law Reform Bill passed by Parliament

On 22 February 2016, the Insolvency Law Reform Act 2016 (Cth) was passed by both the Senate and the House of Representatives.

The Act amends:

1. the Bankruptcy Act 1966 (Cth) and the Corporations Act 2001 (Cth) (the Corporations Act) to align the registration and disciplinary frameworks that apply to registered liquidators and registered trustees (through the rules made by the Insolvency Practice Schedule (Bankruptcy) and Insolvency Practice Schedule (Corporations)); and align a range of specific rules relating to the handling of personal bankruptcies and corporate external administrations;
2. the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act) to provide the Australian Securities and Investments Commission with further powers to assist in the oversight of the regulation of registered liquidators;
3. the Corporations Act in relation to payments for property; use of a company's former name; termination of a deed of company arrangement; relation-back day; and the lodgement of documents with ASIC which require a notice to be in the prescribed form;
4. the Corporations Act and the Private Health Insurance (Prudential Supervision) Act 2015 (Cth) in relation to notifications of contraventions of deeds of company arrangement. The Act also makes consequential amendments to 25 Acts.

1.22 Crowd-sourced Funding Bill considered by parliamentary committee

22 February 2016 - The Australian Government has introduced into Parliament the Corporations Amendment (Crowd-sourced Funding) Bill 2015 (Cth).

The Bill will amend:

1. the Corporations Act 2001 (Cth) to establish a framework to facilitate crowd-sourced funding offers by small unlisted public companies; provide new public companies that are eligible to crowd fund with temporary relief from reporting and corporate governance requirements that would usually apply; and enable the minister to provide that certain financial market and clearing and settlement facility operators are exempt from specified parts of the Australian Market Licence and clearing and settlement facility licensing regimes; and
2. the Australian Securities and Investments Commission Act 2001 (Cth) to make consequential amendments.

The Bill was considered by the Senate Economics Committee which recommended that the Bill be passed without amendment. The Opposition issued a dissenting report in which it is proposed that the types of entities that can access crowd sourced equity funding be expanded beyond unlisted public companies. The report of the Committee is available on the Parliament of Australia website.

On 21 March 2016, the Hon Scott Morrison MP, the Australian Treasurer, announced that the government will extend eligibility to raise funds via crowd sourced equity funding to private companies and will consult further on the appropriate regulatory framework for crowd sourced equity funding. The announcement is available from the Treasurer's website.

1.23 Investors want transparency, ethics and performance: survey

17 February 2016 - Investors are expecting higher levels of transparency than ever before, holding their investment managers to the highest ethical standards, and are focused on returns, according to a study from CFA Institute, the global association of investment professionals.

The survey, From Trust to Loyalty: A Global Survey of What Investors Want, measures the opinions of both retail and institutional investors globally. The findings reveal that investors want regular, clear communications about fees and upfront conversations about conflicts of interest. The biggest gaps between investor expectations and what they receive relate to fees and performance. Clients want fees that are structured to align their interests, are well disclosed and fairly reflect the value they are getting from their investment firms.

Key findings from the study include that while trust has increased, investors remain concerned about ethics, transparency and performance.

- Since 2013, retail investors show a significant increase in trust of the financial services industry - rising from 50% to 61%. About half the gain is thanks to strong increases in the US, UK and Australia. The other half is due to higher absolute trust levels in markets not included in the 2013 study, notably China, India and Singapore.
- Both retail and institutional investors share the view that financial professionals are falling short on issues of fees, transparency and performance. Among retail investors, the most important actions from an investment firm are that it "fully discloses fees and other costs" and "has reliable security measures." These even surpass protecting their portfolio from losses. Among institutional investors, "acts in an ethical manner" rated as the most important attribute followed by "fully discloses fees and other costs".
- This is not to say that performance is unimportant - 53% of retail investors and 60% of institutional investors cited "underperformance" as the biggest factor that would lead them to switch firms. This was followed by "increases in fees," "data/confidentiality breach," and "lack of communication/responsiveness".
- Forty-five percent of institutional investors and 43% of retail investors would leave an investment firm if data security were to be compromised, demonstrating the importance placed on cybersecurity in today's markets.
- The study found that once an issue has triggered an investor to re-evaluate their relationship with an investment manager, the majority - 76% of retail investors and 74% of institutional investors - are likely to leave within six months.

2. Recent ASIC Developments

2.1 Guidance on marketplace lending

21 March 2016 - ASIC released guidance to help providers of marketplace (also known as "peer-to-peer") lending products, including information about legal obligations.

The information sheet describes the current regulatory regime and ASIC will review the guidance in light of any future changes in the law or business structures. The information sheet also includes good practice strategies that marketplace lenders may consider adopting.

[Information Sheet 213 - Providers of Marketplace Lending Products]

2.2 Consultation on proposed guidance about "robo-advice"

21 March 2016 - ASIC released a consultation paper and a draft Regulatory Guide on regulating digital financial product advice (also commonly known as robo-advice).

As part of its commitment to encouraging innovation that may benefit consumers, ASIC has developed draft guidance on the provision of digital product advice to retail clients. This guidance follows direct engagement with digital advice providers about their business models. During that engagement it became clear that digital advice providers would benefit from additional ASIC guidance specific to digital advice.

ASIC's draft regulatory guide brings together some of the issues that persons providing, or intending to provide, digital advice to retail clients need to consider when operating in Australia-from the licensing stage (i.e. obtaining an Australian financial services (AFS) licence) through to the actual provision of advice.

ASIC is also seeking feedback on issues that are unique to digital advice businesses, in particular:

- the organisational competence obligation that applies in a digital advice context; and
- the ways in which digital advice licensees should monitor and test their algorithms.

[Consultation Paper 254 Regulating digital financial advice and draft Regulatory Guide 000 Providing digital financial product advice to retail clients]

2.3 Report on culture, conduct and conflicts of interest in vertically integrated funds management businesses

21 March 2016 - ASIC released a report outlining its findings of an extensive review of the conflicts management practices in vertically integrated businesses in the funds management industry.

ASIC was specifically concerned about those entities with a vertically integrated business, that is, those entities which operate at least two of funds management, responsible entity, superannuation trustee, platform structure

(IDPS and IDPS-like structure), investment administration and custody business. ASIC's view is that these models may create more opportunity for conflict to arise. The review did not address the deposit taking, insurance, financial advice and product manufacturing businesses.

The two-stage review involved 12 significant participants in the funds management industry. It was informed by ASIC's other work on conduct risk and culture, for example, in the investment banking space.

ASIC is encouraged that many organisations appear to take their conflicts management obligations seriously, with detailed and tailored policies that appear to be embedded in business practices from boards and senior management, cascading down to business units. Entities were able to demonstrate a commitment to reviewing and updating the policy, communication and training.

However, in some organisations reviewed, it appears that the conflicts policy is one of many policies which has been prepared to satisfy a regulatory requirement rather than seeking to properly identify and address conflicts and embed requirements to address conflicts into business practices.

Going forward, ASIC will continue its focus on culture and conflicts management across the financial services industry and will work with individual participants to address any shortcomings identified in this review.

Report 474 Culture, conduct and conflicts of interest in vertically integrated businesses in the funds-management industry

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2.4 Consolidated instruments and guidance on fundraising

17 March 2016 - ASIC has updated its fundraising relief and guidance, to continue the important role these regulatory documents serve in facilitating efficient public fundraising in Australia. ASIC has remade fundraising class orders that were due to expire ("sunset"), updated and consolidated its fundraising regulatory guidance, and issued two new legislative instruments aimed at helping reduce business costs.

ASIC reviewed 31 sunsetting class orders relating to Chapter 6D of the Corporations Act 2001 (Cth) (the Corporations Act), reissuing the relief in 26 of those class orders which were operating efficiently and effectively, and repealing five class orders that were no longer required.

To assist users of this relief, the 26 class orders have been consolidated by subject matter into 13 new legislative instruments, which have been drafted using ASIC's current style and format while preserving their effect.

To help reduce business costs ASIC has issued two new legislative instruments which will promote commercial certainty and reduce the need for issuers to seek individual relief. These instruments:

- facilitate issuers extending the time limits within which the minimum subscription and/or quotation conditions applying to an offer of securities must be satisfied, and clarify how these time periods are calculated; and
- provide relief for prudentially-regulated issuers undertaking certain offers of regulatory capital securities to allow the use of a transaction-specific prospectus.

ASIC has also-in the interests of promoting clarity, certainty and accessibility-updated its regulatory guidance on the procedure for offering securities for issue or sale under a disclosure document lodged in accordance with Chapter 6D of the Corporations Act including:

- consolidating and updating seven existing regulatory guides into one new regulatory guide: Regulatory Guide 254 Offering securities under a disclosure document (RG 254);
- updating ASIC's guidance on minimum subscription and quotation conditions and clarifying how ASIC administers the exposure period; and
- minor updates to a further five related regulatory guides.

ASIC also released Report 473 Response to submissions on CP 239 Disclosure documents: Update to ASIC instruments and Guidance (REP 473).

REP 473 highlights the key issues which arose from the submissions ASIC received in response to Consultation Paper 239 Disclosure documents: Update to ASIC instruments and guidance (CP 239).

2.5 Former Hanlong managing director sentenced to more than 8 years jail for insider trading

11 March 2016 - Former Hanlong Mining managing director Hui Xiao has been sentenced to a total of 8 years and 3 months imprisonment on insider trading charges.

Mr Xiao had previously pleaded guilty to two "rolled up" charges of insider trading, and formally admitted a third "rolled up" charge, involving a total of 102 illegal trades in financial products related to Sundance Resources Limited and Bannerman Resources Limited in July 2011, while he was the managing director of Hanlong Mining Investment Pty Ltd.

Mr Xiao was sentenced to imprisonment for a total term of 8 years and 3 months, with a non-parole period of 5 years and 6 months.

Mr Xiao has been in custody since his arrest in Hong Kong in January 2014 and his extradition from Hong Kong to Australia in October 2014. Taking into consideration time already served, Mr Xiao will not qualify for release until after 11 July 2019.

The Commonwealth Director of Public Prosecutions prosecuted the matter.

2.6 Report on cyber resilience and shares examples of emerging good practices

7 March 2016 - ASIC has released its first assessment report on the cyber resilience of ASX and Chi-X. In addition, ASIC has highlighted emerging good practices being implemented by a wider sample of organisations within the financial sector.

Report 468 Cyber resilience assessment report: ASX Group and Chi-X Australia Pty Ltd

The report concludes that ASX and Chi-X have, up to this point in time, met their statutory obligations to have sufficient resources for the management of cyber resilience.

Cyber resilience is now widely regarded as one of the most significant concerns for the financial services industry and the economy at large. The cyber resilience of ASIC's regulated population is, therefore, a key focus for ASIC. Given the central role that financial market infrastructure providers play in the economy, their cyber resilience is of particular importance.

ASIC has included in the report aggregated data from self-assessments undertaken by a sample of important financial organisations. This provides a point-in-time snapshot of the current state of cyber resilience of this wider group. In general, ASIC identified some consistent and encouraging practices in the organisations assessed; however, a consistent industry-wide approach is required to address developing cyber threats.

The report calls on the wider financial services sector to recognise the growing threat to cyber security, and to refine systems and processes to prevent and address critical issues.

The report calls for senior management of organisations to closely manage cyber risk from both internal and third-party sources, establish robust collaboration and information-sharing networks to access the best defensive intelligence and technology, and implement thorough cyber awareness training programs.

2.7 Remake of "sunsetting" class orders on superannuation

2 March 2016 - ASIC has issued two legislative instruments that relate to superannuation. The instruments will continue the substantive effect of relief that ASIC had granted by Class Order. This relief was due to expire ("sunset") under the Legislation Act 2003 (Cth) (previously know as the Legislative Instruments Act 2003 (Cth)) later in 2016.

The new legislative instruments are:

- ASIC Corporations (Superannuation: Accrued Default Amount and Intra-fund Transfers) Instrument 2016/64. This instrument provides relief from the application form and cooling-off requirements to a superannuation trustee for all transfers of an accrued default amount to a MySuper product and intra-fund transfers (that are not movements of an accrued default amount). The terms of the previous relief were set out in Class Order [CO 04/1574] Application form and cooling-off relief for certain transfers of members between financial products and interests within a superannuation fund; and
- ASIC Corporations (Superannuation: Investment Strategies) Instrument 2016/65. This instrument continues, with minor and technical changes, the relief under Class Order [CO 06/636] Superannuation: Delivery of product disclosure for investment strategies.

In issuing the new instruments, ASIC made non-significant changes to the terms of the preceding relief. ASIC Corporations (Superannuation: Accrued Default Amount and Intra-fund Transfers) Instrument 2016/64 extends the scope of the previous relief to cover all transfers of an accrued default amount to a MySuper product, regardless of whether the MySuper product is in a different fund. The existing relief for intra-fund transfers (that are not movements of an accrued default amount) will continue with non-substantive changes to the terms of the relief.

ASIC Corporations (Superannuation: Investment Strategies) Instrument 2016/65 continues the relief under [CO 06/636] with minor and technical changes that will accommodate, where applicable, the operation of the shorter product disclosure statement provisions.

2.8 Further improvements from home insurers needed

1 March 2016 - Following a survey of 23 home insurance brands covering 12 insurers, ASIC is calling for further improvements across the sector to help consumers make good decisions about their home insurance cover.

In response to ASIC's recommendations from October 2014, insurers have made a range of improvements. In particular, most insurers have implemented, or are implementing, the following changes:

- Incorporating a sum insured calculator into point of sale processes, including through updated sales scripts, and providing better access to online calculators. This helps consumers select an appropriate sum insured amount during the quote and sales process, an important way to help reduce the risk of underinsurance; since October 2014, four additional insurers have made available sum insured calculators in both their telephone and online sales channels.
- Training staff so that information provided to consumers about the sum insured, and the maximum amount paid by the insurer, is clear and in plain English; since October 2014, an additional eight insurers have adopted this practice for their telephone sales and an additional 11 for their online sales.
- Providing information or assistance to consumers about the effect of changes to building codes which may increase the cost of rebuilding homes after a total loss; since October 2014, four additional insurers have made changes to provide this information.

Although welcoming these changes, ASIC's survey identified that there is scope for insurers to take additional steps to help consumers select the right insurance cover, by:

- explaining that the sum insured amount needs to enable complete replacement of contents or complete rebuilding of their home;
- providing guidance about coverage or sum insured amounts, rather than simply referring consumers to the product disclosure statement;
- referring to the Key Facts Sheet to assist decision making; and

- providing information and guidance about natural perils risks and additional rebuilding costs due to natural perils, to better estimate rebuilding costs after a total loss.

Further information is available from the ASIC website.

2.9 Consultation on "sunsetting" dollar disclosure class orders

29 February 2016 - ASIC has released a consultation paper proposing to maintain relief that ASIC has previously provided from certain obligations under the Corporations Act 2001 to state various costs, fees, charges expenses and interests as amounts in dollars in certain disclosure documents. The consultation paper also sets out ASIC's proposal to withdraw some relief.

Consultation Paper 253 Remaking and repealing ASIC class orders on dollar disclosure

The instruments which ASIC proposes to remake are:

- Class Order [CO 04/1431] Dollar disclosure: Cost of derivatives, foreign exchange contracts, general insurance products and life risk insurance products;
- Class Order [CO 04/1433] Dollar disclosure: Non-monetary benefits and interests; and
- Class Order [CO 04/1435] Dollar disclosure: Amounts denominated in a foreign currency.

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

Consultation Paper 253 proposes remaking all three class orders into a single instrument so that the substantive effect of the relief in each class order is continued beyond the expiration date in a new legislative instrument. A draft of the proposed new legislative instrument is attached to the consultation paper.

The class orders proposed to be repealed are:

- Class Order [CO 04/1430] Dollar disclosure: Unknown facts or circumstances; and
- Class Order [CO 04/1432] Dollar disclosure: Interest payable on deposit products.

ASIC proposes to repeal [CO 04/1430] and [CO 04/1432] because ASIC has formed the preliminary view that these class orders have limited use and do not form a necessary and useful part of the regulatory framework.

2.10 Fourth report on corporate finance regulation

26 February 2016 - ASIC has published its fourth report on the regulation of corporate finance issues in Australia.

The report, which covers the period July to December 2015, provides companies and their advisers with insights into ASIC's regulatory approach in the corporate finance sector and aims to assist them with their associated legal and compliance obligations.

Report 469 ASIC regulation of corporate finance: July to December 2015 (REP 469) provides statistical data, highlights key focus areas, and includes relevant guidance about ASIC's regulation of:

- fundraising transactions
- mergers and acquisitions
- corporate governance issues
- related party transactions, and
- financial reporting.

The report discusses a number of regulatory initiatives ASIC has undertaken in relation to emerging market issuers, disclosure of historical information in prospectuses, review and monitoring of control transactions and sunsetting of class orders.

3. Recent ASX Developments

3.1 ASX Clear (Futures): Margin optimisation service for portfolio margining - ASX OTC Handbook amendments

The ASX OTC Handbook of ASX Clear (Futures) has been amended to set out the procedures for how an OTC Participant can use the new Margin Optimisation Service for portfolio margining of interest rate Futures and Swaps.

The ASX Notice is available on the ASX website.

3.2 Nasdaq selected to support ASX in post-trade technology overhaul

Nasdaq (Nasdaq: NDAQ) and Australian Securities Exchange (ASX) have announced that Nasdaq will replace ASX's existing equities and equity options clearing technology platforms - a significant element of ASX's technology transformation program outlined in February 2015. This technology development will be undertaken on Nasdaq's Genium INET Clearing platform, which is already in use at ASX for futures clearing. It reflects ASX's commitment to consolidate its number of post-trade platforms and improve efficiencies for its customers.

The media release is available on the ASX website.

3.3 Consultation paper: Clearing participant liquidity risk management frameworks

On 24 February 2016, ASX released a consultation paper, Clearing Participant Liquidity Risk Management Frameworks. This paper seeks feedback on the proposed contents of a guidance note for Clearing Participants' liquidity risk management frameworks. This guidance note is intended to establish a minimum "baseline" standard for Clearing Participants' liquidity management.

The paper is available on the ASX website

3.4 Consultation paper: Proposed revisions to ASX Listing Rules Appendices 4C and 5B

On 26 February 2016, ASX released a consultation paper Proposed Revisions to ASX Listing Rules Appendices 4C and 5B. The paper seeks feedback on proposed changes to the quarterly cash flow statements in Appendices 4C and 5B to the ASX Listing Rules.

The paper is available on the ASX website

3.5 Consultation paper: ASX settlement non-business days policy review

On 1 March 2016, ASX released a consultation paper ASX Settlement Non-Business Days Policy Review. The paper seeks feedback in relation to the method used to determine ASX Settlement "non-business" days whereby ASX is inclined to align its methodology with The Reserve Bank of Australia's Reserve Bank Information and Transfer System (RITS) availability.

The paper is available at ASX.com.au

3.6 Reports

On 3 March 2016 ASX released:

- the ASX Group Monthly Activity Report; and
- the ASX Compliance Monthly Activity Report

for February 2016.

4. Recent Takeovers Panel Developments

4.1 Gulf Alumina Limited - Declaration of unacceptable circumstances and orders

15 March 2016 - The Takeovers Panel has made a declaration of unacceptable circumstances and final orders in relation to an application dated 15 February 2016 by Metro Mining Limited in relation to the affairs of Gulf Alumina Limited.

Gulf Alumina Limited (Gulf) is an unlisted company with more than 50 members. Gulf is currently the subject of an off-market takeover bid from Metro Mining Limited (Metro) for all the shares in Gulf at 3.3 Metro shares for every Gulf share.

The application concerned, among other things, value statements by Gulf in a letter to its shareholders and disclosure issues in the target's statement.

The Panel considered that the letter to shareholders and the target's statement contained insufficient or misleading information regarding the value of Gulf and, in respect of the target's statement, required:

- information about the comparative value of Gulf as a standalone entity and the Metro offer;
- the bases on which the directors recommend that shareholders reject the Metro offer;
- more information on the intention statements provided by the non-participating Gulf shareholders; and
- other, more minor, additional disclosures.

The Panel has made orders that Gulf:

- provide additional disclosure on value or procure an independent expert's report to opine on whether the Metro takeover offer is fair and reasonable; and
- issue a supplementary target's statement which includes the disclosure on value (if provided) as well as other corrective disclosure.

The Panel has been informed by Gulf that it intends to seek an independent expert's report.

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

4.2 Panel amends Guidance Note 13 broker handling fees

9 March 2016 - The Takeovers Panel has amended Guidance Note 13 on broker handling fees, to note that such fees appear to fall under the definition of "conflicted remuneration" in the Corporations Act 2001 (Cth) (the Act) and are therefore prohibited unless an exception applies. This follows the conclusion to the Australian Government's Future of Financial Advice reforms with the passage of the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (Cth), which is now the Corporations Amendment (Financial Advice Measures) Act 2016 (Cth), on 24 November 2015.

5. Recent Research Papers

5.1 What factors drive director perceptions of their board's effectiveness?

The authors use a survey of directors to collect data on their ratings of board effectiveness as well as board internal dynamics and key processes. Controlling for many of the governance metrics examined by prior research, they find that directors' ratings of their boards' effectiveness are positively related to measures of board internal dynamics (such as relations with the CEO and senior management, and its ability to perform well as a team), director engagement (reflected in meeting preparedness), and the breadth of the board's experiences. Tests for a subset of firms that are identified in the survey show that boards rated as ineffective have a higher likelihood of losses one year after the survey, consistent with effective governance enhancing the management of risk.

What Factors Drive Director Perceptions of Their Board's Effectiveness?

5.2 The long-term efficacy of activist directors

Over the past two decades, hedge fund activism has emerged as a new mechanism of corporate governance that brings about operational, financial and governance reforms to a corporation. Many prominent business executives and legal scholars are convinced that the entire American economy will suffer unless hedge fund activism with its perceived short-termism agenda is significantly restricted. Shareholder activists and their proponents claim they function as a disciplinary mechanism to monitor management and are instrumental in mitigating the agency conflict between managers and shareholders.

The author finds statistically meaningful empirical evidence to suggest that hedge fund activism generates substantial long-term value for target firms and its long-term shareholders when they function as a shareholder advocate to monitor management through active board engagement. Furthermore, contrary to conventional wisdom and extant literature, hedge fund activists that seek board representation are focused on long-term corporate initiatives to increase shareholder value rather than a perceived short-term agenda. It is very common for hedge fund activists to seek replacement of the incumbent management team to accomplish the activist's strategic plan as opposed to forcing a "sale of the company" ex post the board seat grant date.

The Long-Term Efficacy of Activist Directors

5.3 The effects of takeover defences: Evidence from closed-end funds

The author uses a sample of closed-end funds to examine how takeover defences impact shareholder value and promote managerial entrenchment. These funds use the same defences as general corporations but provide an ideal, homogeneous environment for testing their effects. Defences are associated with lower fund market values, weaker reactions to activist 13D filings, and higher compensation levels for both fund managers and directors. This study provides greater clarity on the unresolved impact of takeover defences on firm value, while showing for the first time that directors, who are responsible for adopting takeover defences, financially benefit from their use.

The Effects of Takeover Defenses: Evidence from Closed-End Funds

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5.4 The law and economics of the business judgment rule: Notes for its implementation in non-US jurisdictions

Many jurisdictions have implemented, or are planning to implement, the business judgment rule as a way to improve their corporate governance practices. In this paper, however, the author argues that the implementation of the business judgment rule in many non-US jurisdictions may actually exacerbate, under some circumstances, the misalignment of incentives between managers and shareholders. Indeed, the business judgment rule, as it has been traditionally understood, seems to assume that (i) the main role of the corporation is to maximize the value of the firm; and (ii) shareholders are risk neutral and therefore they do not want their managers to be risk averse.

However, these assumptions might not work in many jurisdictions outside the United States and even in many US corporations. On the one hand, there are jurisdictions with many family businesses and concentrated ownership structures where shareholders do have incentives to be risk averse, since most of their wealth (including human capital) is invested in the family business. Therefore, they are not diversified, or, at least, in the way traditional finance predicts. On the other hand, there are jurisdictions where the main role of the corporation is not exclusively identified with the interest of the shareholders but also with the interest of other stakeholders. Likewise, many corporations may require, depending on their stage or type of business, a more or less risky investment strategy. Therefore, the application of the business judgment rule may encourage the directors to bear a level of risk that, in some circumstances, might not be desired by the shareholders.

Finally, directors in many jurisdictions are not subject to a credible threat of being sued for a potential breach of the duty of care. Therefore, the implementation of the business judgment rule may encourage the directors to "over-request" expert opinions in order to make sure they will be fully protected from a potential -though likely non-existent- lawsuit. On the basis of this exercise, the author draws conclusions about the most efficient way to implement (if so) the business judgment rule across jurisdictions, taking into account the divergences in corporate ownership structures, the level of enforcement of the duty of care, and the main role of a corporation in several jurisdictions.

The Law and Economics of the Business Judgment Rule: Notes for Its Implementation in Non-US Jurisdictions

6. Recent Corporate Law Decisions

6.1 Court grants orders to wind up company due to repeated breaches of the Corporations Act and mismanagement of the affairs of the company

(By Alexander Purcell, DLA Piper)

Australian Securities and Investments Commission, In the matter of Sino Australia Oil and Gas Limited v Sino Australia Oil and Gas Limited [2016] FCA 201, Federal Court of Australia, Davies J, 4 March 2016

(a) Summary

On 4 March 2016, the Federal Court of Australia made orders to wind up Sino Australia Oil and Gas Limited (Sino) and appoint a liquidator.

Davies J determined that there has been substantial and serious misconduct and mismanagement in the affairs of Sino. In the circumstances, having regard to the nature and extent of the contraventions, a strong case had been made out for an order that the company be wound up on just and equitable grounds, pursuant to s. 461(1)(k) of Corporations Act 2001 (Cth) (the Act), notwithstanding the potential that Sino was solvent. Her Honour found the order to be justified in order to "prevent and condemn" repeated breaches of the Act.

(b) Facts

The application to wind up Sino on just and equitable grounds, pursuant to s. 461(1)(k) of the Act, followed an investigation conducted by ASIC into suspected contraventions of the Act by Sino and/or its officers in relation to a capital raising. ASIC's investigation ultimately led it to form the view that there were representations in the prospectus documents that were false and misleading in contravention of s. 728 of the Act and representations made to the company's auditors that were false and misleading in contravention of s. 1041H of the Act. ASIC also formed the view that the company breached its continuous disclosure obligations under s. 674.

On 4 May 2015, Sino was placed into administration by resolution of the directors. On 15 May 2015, ASIC applied, unopposed, for an order terminating the administration of Sino and to appoint a provisional liquidator. ASIC also sought an order that Sino be wound up pursuant to s. 461(1)(k) of the Act on just and equitable grounds. This application had no opposition and was supported by the provisional liquidators.

(c) Decision

(i) Relevant principles

In *Australian Securities and Investments Commission v International Unity Insurance Pty Ltd* [2004] FCA 1059 at 136-139, Lander J usefully provided a summary of the authorities and principles relevant to the exercise of the Court's power under s. 461(1)(k) of the Act. His Honour found there are a number of separate grounds upon which it may be appropriate to make an order under s. 461(1)(k) of the Act, which include:

- mismanagement, misconduct or lack of confidence in the conduct and management of the affairs of a company: *Australian Securities Commission v AS Nominees Limited* (1995) FCR 504 at 532-533; *Australian Securities and Investments Commission v ABC Fund Managers* (2001) 39 ACSR 443 at 469.
- breaches of the provisions of the Act, including, but not limited to, breaches of directors' duties, inadequacy of accounts and inadequacy of record keeping: *Australian Securities Commission v AS Nominees Limited* at 532-533; *Australian Securities and Investments Commission v ABC Fund Managers* at 469.
- if there is a need to ensure investor protection: *Australian Securities Commission v AS Nominees Limited and Others* at 532-533; *Australian Securities and Investments Commission v ABC Fund Managers and Others* at 469.
- if a company has not carried on its business candidly and in a straightforward manner with the public: *Australian Securities and Investments Commission v Austimber Pty Ltd* (1999) 17 ACLC 893. Such an order would also be appropriate where the corporation has acted fraudulently or entered into sham transactions.

Insolvency is not a precondition for the appointment of a liquidator on the just and equitable ground but, as the authorities caution, if a company is solvent, the winding up of a solvent company is an extreme step requiring a strong case: *Australian Securities and Investments Commission v ABC Fund Managers Ltd* (2001) 39 ACSR 443 at 124.

(ii) Consideration

Davies J determined that a strong case had been made out for an order that Sino be wound up on just and equitable grounds, notwithstanding that Sino was potentially solvent. Her Honour found the order to be justified in order to "prevent and condemn" repeated breaches of the Act, which included:

- false representations in its replacement prospectus that Sino and its subsidiary each held two patents, in contravention of s. 728(1)(a) of the Act;
- false representations in its replacement prospectus in relation to the disclosure of material contracts, in contravention of s. 728(1)(a) of the Act. There were significant discrepancies between the statements in Sino's replacement prospectus, regarding the drilling and maintenance service

- contracts that Sino claimed to have in China, as compared to information received by ASIC from a foreign regulatory authority;
- a failure to downgrade Sino's profit forecast in any of the prospectus documents, in contravention of ss. 728(1)(b) and 728(1)(c) of the Act. This occurred in circumstances where Mr Shao, the major shareholder, chairman and managing director of Sino, knew about relevant facts before the close of the initial public offering;
- a failure to disclose its profit downgrade to the market in contravention of the continuous disclosure requirements under s. 674(2) of the Act;
- false and misleading statements in the replacement prospectus concerning the inclusion of $3,114,000 in Sino's cash flows in contravention of s. 728(1)(a) of the Act; and
- representations to Sino's auditors that were false and contrary to s. 1041H of the Act.

Davies J was fortified in her conclusion by evidence that there was serious reason also to have concern about the competency of Sino's management. The evidence showed that Mr Shao on his own admission, had no knowledge or understanding of the regulatory regime for public companies in Australia and totally relied on the two Australian directors. Critically, as he had no ability to read or write English and the prospectus documents were not translated, he did not read the prospectus documents himself, although he signed documents for and on behalf of the company as its chairman. Furthermore, Sino's own solicitors provided advice in May 2015 that the management of the company was dysfunctional.

Davies J further relied on the long established principle that a company may be wound up where there is a "justifiable lack of confidence in the conduct and management of the company's affairs" and thus a risk to the public interest that warrants protection: *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* (2013) 93 ACSR 189 at 20.

6.2 Searching for a chimaera - The UK Supreme Court upholds the close connection test for determining vicarious liability

(By Jake Reynolds, Herbert Smith Freehills)

A M Mohamud v WM Morrison Supermarkets plc [2016] UKSC 11, United Kingdom Supreme Court, Lord Neuberger, Lady Hale, Lord Dyson, Lord Reed and Lord Toulson, 2 March 2016

(a) Summary

In *A M Mohamud v WM Morrison Supermarkets plc*, the UK Supreme Court overturned a decision of the Court of Appeal which held that a supermarket chain was not vicariously liable for a racially motivated attack carried out by one of its employees against a customer. In allowing the appeal, the Supreme Court rejected the appellant's submission that a new test of "representative capacity" ought to be adopted in preference to the "close connection" test originally adopted by the House of Lords in *Lister v Hesley Hall Ltd* [2002] 1 AC 215. Whilst the Court noted the imprecision of the close connection test, it emphasised the inevitability of imprecision in this area of the law. However, for the Court it was not clear how the law would be improved by the proposed test and whether the appellant was, in fact, advocating a different approach as a matter of substance. In these circumstances the new test could not be adopted.

(b) Facts

The respondent company operates a well-known chain of supermarkets in the United Kingdom. Mr Amijd Khan was employed at one of the respondent's petrol stations in Small Heath, Birmingham. His job was to ensure that the petrol pumps and the kiosk were kept in good running order and to serve customers. On the morning of 15 March 2008 the claimant, a man of Somali origin, stopped in at the respondent's petrol station. The claimant (who died from an illness unrelated to his claim before his appeal was heard by the Supreme Court) asked Mr Khan whether it would be possible to print some documents from a USB stick he was carrying with him. Mr Khan, who was behind the counter in the kiosk, responded to the claimant's request with foul, racist and threatening language and ordered him to leave.

The claimant walked out of the kiosk and returned to his car. He was followed by Mr Khan who proceeded to repeatedly assault him. Mr Khan continued the attack despite his supervisor ordering him to stop.

At first instance the trial judge held that the respondent was not vicariously liable for Mr Khan's unprovoked assault. The Court of Appeal upheld the trial judge's decision and concluded that the claim against the company failed the close connection test.

(c) Decision

Lord Toulson (Lord Neuberger, Lady Hale and Lord Reed agreeing) allowed the appeal. Lord Dyson, who also allowed the appeal, wrote a separate judgment which substantially agreed with Lord Toulson's reasons.

The appellant's application for permission to appeal argued that the Supreme Court ought to reformulate the close connection test for vicarious liability. The appellant submitted that the close connection test should be replaced with a broader test of representative capacity. Alternatively, it was submitted that the claimant should succeed through an application of the traditional formulation of close connection. This alternative argument was successful.

(i) Proposed test of representative capacity

The appellant argued that the decisive question in vicarious liability cases should be whether a reasonable observer would consider the employee to be acting in the capacity of a representative of the employer at the time of committing the tort. According to the appellant, a company should be liable for the acts of its human embodiment. In the present case, Mr Khan was the company's employed representative in dealing with a customer. The appellant argued that the fact that the employer had created the setting of close physical proximity between the claimant and the employee was significant.

Lord Toulson rejected the appellant's submission on this point. His Lordship was of the opinion that nothing was wrong with the close connection test as such. His Lordship noted that the House of Lord's formative decision in Lister "has been affirmed many times" and questioned whether "the law would now be improved by a change of vocabulary" (at [46]). This suggests that Lord Toulson viewed the proposed test as merely changing form without affecting substance.

Lord Dyson was more critical of the proposed test. His Lordship stated that "far from being demonstrably better, the proposed new test is hopelessly vague" (at [52]). Further, according to his Lordship, it was not clear "how this test is more precise than the close connection test or how it better reflects modern views of justice" (at [52]). It seems implicit in this statement that a less precise test may have been acceptable for his Lordship if it better reflected modern views of justice.

(ii) Upholding the close connection test

In his reasons, Lord Toulson engages in a detailed consideration of the development of the modern principles of vicarious liability. His Lordship's reasons detail the gradual broadening of these principles. In so doing, his Lordship highlights the central role played by public policy in expanding the scope of vicarious liability. In vicarious liability cases there will often be two "innocent" parties. The law must, in as principled a manner as is possible, reach a just outcome regarding where the burden ought to fall. According to the Supreme Court, the close connection test is currently the most well-equipped test for evaluating this.

The close connection test, first adopted by the House of Lords in Lister v Hesley Hall Ltd [2002] 1 AC 215, and upheld by the Supreme Court in the present case, is whether an employee's tort is so closely connected with his or her employment that it would be just to render the employers liable.

Lord Toulson warned of the risks "in attempting to over-refine, or lay down a list of criteria for determining, what precisely amounts to a sufficiently close connection to make it just for the employer to be held vicariously liable" (at [43]). Rather than attempting to come up with a refined and precise test, the Court took the view that "simplification of the essence is more desirable" (at [43]).

Although the close connection test is imprecise, "that is inevitable given the infinite range of circumstances where the issue of vicarious liability arises" (at [50]). This inevitably of imprecision is made more acute by the central role played by public policy in the development of the principles of vicarious liability. As Lord Dyson eloquently stated: "to search for certainty and precision in vicarious liability is to undertake a quest for a chimaera" (at [54]).

(iii) Allowing the appeal

In allowing the appeal, Lord Toulson disagreed with the primary judge's assertion that there ceased to be any significant connection between Mr Khan's employment and his behaviour towards the claimant for two reasons:

- it is not right to regard Mr Khan as "having metaphorically taken off his uniform the moment he stepped from behind the counter" (at [47]). Mr Khan was following up on what he said to the claimant inside the kiosk; it was a "seamless episode" (at [47]).
- Mr Khan's threatening statement to the claimant that he should never return to the petrol station was "an order to keep away from his employer's premises, which he reinforced by violence" (at [47]). Although it was "a gross abuse of his position", Mr Khan's actions were performed in "connection with the business in which he was employed to serve customers" (at [47]).

Lord Toulson noted that Mr Khan's motive was irrelevant for the purpose of applying the close connection test. According to his Honour, the fact that "he was motivated by personal racism rather than a desire to benefit his employer's business.is neither here nor there" (at [48]). Lord Toulson concluded that it was just, as between the respondent and the appellant, that the respondent should be held responsible for their employee's abuse of the trust they reposed in him.

6.3 Application of UCPR rule 7.1(3): An authorised director of a company cannot commence and carry on proceedings unless the director is also a plaintiff in the proceedings

(By Meagan Ryan, MinterEllison)

Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd [2016] NSWCA 23, Supreme Court of New South Wales, Court of Appeal, McColl JA, Meagher JA, 1 March 2016

(a) Summary

This case concerned an application for leave to appeal a decision of the New South Wales Supreme Court to dismiss proceedings commenced on behalf of the appellant by an authorised director seeking to set aside a statutory demand. The primary judge determined an authorised director did not constitute a plaintiff as required by rl. 7.1(3) of the Uniform Civil Procedure Rules 2005 (NSW) (the

UCPR) and so was not authorised to commence proceedings for the appellant. The Court of Appeal agreed with the decision of the primary judge and ordered the application be dismissed with costs.

(b) Facts

On 22 May 2015 the respondent, Tibra Capital Pty Ltd, issued the appellant, Tanamerah Estates Pty Ltd, with a statutory demand for $118,545 under s. 459E of the Corporations Act 2001 (Cth) (the Corporations Act). A director of the appellant, Mr J Tydeman, authorised by a resolution of the directors of the appellant, brought proceedings to set aside the statutory demand pursuant to ss. 459H and 459J. However, Mr J Tydeman was not separately a plaintiff in the proceedings and the company at no time retained a solicitor to commence and carry on its claim.

On 1 October 2015 the respondent filed a motion seeking a declaration that the appellant was not entitled to commence and carry on the proceedings to set aside the statutory demand as it had not complied with UCPR rl. 7.1. The respondent also sought orders for a stay of proceedings, and following continued non-compliance, for the proceedings to be dismissed.

Relevantly, the UCPR states the following:

7.1 By whom proceedings may be commenced and carried on
(2) A company within the meaning of the Corporations Act of the Commonwealth:
(a) may commence and carry on proceedings in any court by a solicitor or by a director of the company, and
(3) In the case of proceedings in the Supreme Court, subrule (2)(a) authorises a company to commence proceedings by a director only if the director is also a plaintiff in the proceedings.
7.2 Affidavit as to authority to commence and carry on proceedings in Supreme Court or District Court
(1) A person who commences or carries on proceedings in the Supreme Court or District Court:
(a) as the director of a company within the meaning of the Corporations Act of the Commonwealth, or
(2) The affidavit made by the director of a company within the meaning of the Corporations Act of the Commonwealth must contain ... .

On 12 October 2015 the primary judge ordered the proceedings be stayed until 16 November 2015 to allow the appellant to seek legal representation and for a legal representative to appear on its behalf. However, on 16 November 2015 Mr J Tydeman notified the Court, without providing any reasons, that the appellant did not propose to retain a solicitor. The appellant did not seek to dispense with the requirements of UCPR rule 7.1 despite the primary judge raising the possibility of this action. The appellant was allowed until 4pm on 16 November 2015 to file a notice of appearance of a legally qualified representative. This did not occur and on 18 November 2015 the primary judge dismissed the proceedings with costs.

On 9 November 2015 the appellant filed summons seeking leave to appeal interlocutory orders made on 12 October 2015. On 2 December 2015 an amended summons was filed, extending the application for leave to include the orders of 16 and 18 November 2015. The Court permitted Mr J Tydeman to appear on behalf of the company for the purpose of making the application only.

To grant the appellant's application for leave, the Court had to be satisfied that the appellant's proposed appeal had arguable prospects of success and specifically, that the primary judge had erred in concluding the proceedings were commenced and carried on contrary to UCPR rl. 7.1.

(c) Decision

The appellant sought leave to appeal on the following two grounds:

- Mr J Tydeman was a "tutor" of the company appointed because the company fits the description of a "person under legal incapacity" as defined in s. 3 of the Civil Procedure Act 2005 (NSW) (the CPA). Accordingly, as a tutor is a person granted the right to act in legal proceedings on behalf of the person under legal incapacity, Mr J Tydemin was exercising those rights as a "tutor"; and
- UCPR rl. 7.2(2) infers that a company may authorise a director to commence legal proceedings on its behalf and the requirement of UCPR rule 7.1(3) that a director also be a plaintiff is satisfied if the proceedings are commenced by the director as a director fits the description of plaintiff because he or she is a "person by whom proceedings are commenced".

In respect of the first argument, the Court disagreed that a company fits the description of a "person under a legal capacity" on the basis that the term is for individuals and not artificial entities. The consequence of permitting a company to fit the s. 3 CPA definition and require a tutor would be that all companies would be required to sue through a tutor for all cases. Further, Mr J Tydeman had been authorised to commence proceedings in his capacity as a director, not as a tutor. The Court noted that a tutor does not have any interests in proceedings adverse to the person under legal incapacity because a tutor does not pursue any personal interest or cause of action. Thus, the Court noted that a tutor could not be a "plaintiff" for the purposes of UCPR rule 7.1(3).

The second argument was not supported by the Court which applied the ordinary meaning of the language of UCPR rule 7.1(3) to construe that it requires the director "plaintiff" to have a cause of action which may properly be pursued in the same proceedings.

The appellant submitted three further grounds on which the primary judge erred in dismissing its application.

First, the appellant submitted that s. 467A of the Corporations Act applied to the application. Section 467A requires that an application under part 5.4 must not be dismissed merely because of a defect or irregularity. However, the Court found s.

467A did not apply to the dismissal of proceedings on 18 November 2015 as the prejudice that may have followed from the dismissal of proceedings was recognised and accommodated by the primary judge by the adjournment to permit the company to cure the defect or irregularity by obtaining legal representation.

Second, pursuant to s. 63 of the CPA, there was a failure by the primary judge to comply with the requirements of the CPA or the rules of court whether in respect of time, place, manner, form or content, in relation to the appeal filed on 9 November 2015. However, the Court found s. 63 of the CPA did not apply to this case and the fact the appeal was filed on 9 November 2015 did not operate as a stay on the effect of the earlier orders or the enforcement of those orders.

Third, the dismissal of the proceedings would deprive the appellant of an opportunity to have its application under s. 459G assessed on the merits. The Court found that s. 459G applications are subject to the UCPR, the appellant was given an opportunity to comply with UCPR rule 7.1 and without providing reasons chose not to comply.

The Court concluded that the appellant's proposed appeal had no arguable prospects of success and dismissed the proceedings with costs.

6.4 Application to inspect company books by hostile shareholder upheld on appeal

(By Alisdair Reeves and Nina Janic, Clayton Utz)

Mesa Minerals Limited v Mighty River International Limited [2016] FCAFC 16, Federal Court of Australia, Full Court, Siopis, Gilmour & Katzman JJ, 26 February 2016

(a) Summary

Pursuant to s. 247A(1) of the Corporations Act 2001 (Cth) (the Act), Mighty River International Limited (Mighty River) applied to the Federal Court for orders to access certain information of Mesa Minerals Limited (Mesa), an ASX-listed company of which it was a shareholder. Baker J, the primary judge, made orders authorising access. Mesa appealed this decision on the basis that the application was not made in good faith nor for a proper purpose. The Full Federal Court unanimously dismissed Mesa's appeal.

(b) Facts

For several years Mighty River had been a substantial (though minority) shareholder in Mesa, holding approximately 15% of its share capital. There had been hostility during this time between Mighty River's sole director, Yuzheng Xie, and Chris Ellison, a director of Mesa and its parent company. Mesa had allowed third parties, including its parent company, to use its port capacity and access rights at Utah Point and a general purpose lease at the Boodarie Industrial Estate.

Mighty River wished to examine the terms of use for these rights and whether allowing third parties to use Mesa's rights was in the best interests of shareholders. It submitted that the disclosures available were incomplete and that it had genuine concerns in relation to its investment. Mighty River applied for orders under s. 247A(1) of the Act to allow Mr Xie and its solicitors to inspect Mesa's books as they related to these rights.

Section 247A provides as follows:

247A Order for inspection of books of company or registered managed investment scheme
(1) On application by a member of a company or registered managed investment scheme, the Court may make an order:
(a) authorising the applicant to inspect books of the company or scheme; or
(b) authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant's behalf.
The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.
(2) A person authorised to inspect books may make copies of the books unless the Court orders otherwise.

At first instance, Mesa argued that Mighty River intended to use an order under s. 247A to act as a de facto director and involve itself in the company's management. The primary judge, referring to the principles summarised by Debelle J in *Acehill Investments Pty ltd v Incitec Ltd* [2002] SASC 344 and Gordon J in *Hanks v Admiralty Resources NL* [2011] FCA 891, allowed the application. His Honour accepted Mr Xie's evidence and concluded that the grounds for the application were bona fide.

The issues on appeal were whether the primary judge:

- failed to set out his reasoning process sufficiently or alternatively made findings against the evidence;
- erred in the exercise of his discretion, and failed to have regard to several "significant factors which weighed against the making of the orders"; or
- made orders that were too broad.

(c) Decision

(i) Was there a deficiency in the reasoning process? If not, were the primary judge's findings against the evidence?

The appellant argued that the application should be set aside on the grounds that the granting of the application was against the evidence. The Court found no substance to these allegations; Mesa failed to demonstrate that the findings of the primary judge were unsupported by the evidence.

The Court held that Mesa's argument of improper purpose must necessarily require a finding that Mr Xie was not a credible witness. However, following cross-examination of Mr Xie, the primary judge accepted his evidence as to proper purpose. Mesa failed to demonstrate an error in this finding and could not point to any "incontrovertible facts".

Further, the Court found that the matters Mesa relied upon as arguably "fatal" to Mighty River's application were insufficient to demonstrate error in the primary judge's conclusions nor did they preclude the making of the order. The matters advanced by Mesa were:

- Delay in making an application: the Court held that the fact that Mighty River had been concerned about Mesa's operations for some time supported its argument of proper purpose and good faith.
- Prior knowledge of access right being given to third parties: the fact that Mighty River was aware that the port was being used by Mesa's parent company but was denied information regarding the terms of such use was held to support the trial Judge's finding there was a genuine case for investigation.
- Failure to conduct own enquiries: the Court found that this did not detract from Mighty River's stated purpose and noted that the Act does not require preliminary steps to be taken.

(ii) Did the primary judge err in law in the exercise of the Court's discretion by making orders in favour of the respondent?

Mesa argued that the trial Judge failed to take the evidence and matters it submitted (as listed in (i) above) properly into consideration or to give these sufficient weight. The Court found that the trial Judge had not overlooked the matters submitted by the appellant and that his Honour had in fact referred to those matters.

Referring to *Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513, the Court emphasised that, it is not enough to show that such matters were given "insufficient weight" unless it is clear that the Court's discretion has been exercised wrongfully for that reason. The Court also noted that the appellant had not established why, once good faith and proper purpose were established, the discretion should nonetheless be exercised against Mighty River.

(iii) Did the primary judge err in law in determining the scope of the order (giving Mighty River "open-ended and uncontrolled" rights of inspection)?

The Court found that the primary judge's order was limited to books that bear relevance to the purpose for which Mighty River's application was made, not a "wholesale inspection" of Mesa's books. Therefore this third ground of appeal was held by the Court to be equally unmeritorious.

6.5 Independent reviewer not subject to judicial review

(By Simon Brown and Emma Newnham, King & Wood Mallesons)

The Queen on the Application of Holmcroft Properties Limited v KPMG LLP [2016] EWHC 323 (Administrative Court), England and Wales High Court of Justice, Elias LJ and Mitting J, 24 February 2016

(a) Summary

This case concerned a judicial review application brought in connection with KPMG LLP's (KPMG) role as an independent reviewer of a voluntary review and redress scheme, set up to address harm caused by the mis-selling of interest rate hedging products (IRHPs) by Barclays Bank PLC (Barclays).

The issues in this case were firstly, whether KPMG as independent administrator of the scheme was amenable to judicial review; and secondly, if it was, whether KPMG acted in breach of public law principles to which it was subject in approving the offer made by Barclays.

The decision confirms that an independent firm overseeing a redress scheme in this context will not be amenable to judicial review if there is no direct public law element to its role.

(b) Facts

In 2012, the UK Financial Conduct Authority (FCA) determined that there had been widespread mis-selling of IRHPs by certain banks to small businesses.

The FCA decided that the best solution to this mis-selling was to seek an undertaking from the impugned banks that they implement a voluntary review and redress exercise, providing compensation to purchasers where deemed appropriate.

A scheme providing redress to certain customers who had been wrongly sold these products was set up by Barclays after they provided an undertaking to the FCA. An independent party, KPMG, was appointed to oversee the implementation and application of the scheme.

The terms of the contract with KPMG made clear that they were only acting for Barclays, with some ancillary third party rights owed to the FCA. The engagement specified that any advice prepared "would be confidential to Barclays and the

FCA" and "that the role of KPMG would not include reporting to customers or providing them with information".

The arrangements confirmed that no offers of settlement could be made by Barclays without KPMG's opinion that the offer was "appropriate, fair and reasonable". However, KPMG was a mere reviewer and could not propose an offer nor deal directly with customers. The Court found that the effect of the contractual arrangement between Barclays and KPMG was that "there was a contractual obligation on Barclays to make an offer, but that it could not do so unless approved by KPMG".

(i) The Claim

Holmcroft Properties Limited (Holmcroft) applied for judicial review of KPMG's decision in relation to Barclays' refusal to compensate Holmcroft for consequential loss. Holmcroft was a Barclays customer that had taken part in the redress exercise. KPMG had decided that Barclays had acted reasonably in adopting this conclusion.

In March 2005 Barclays had advanced a £2 million loan to Holmcroft and a £400,000 loan to a related company to support the purchase of freehold land, buildings and fixtures. An IRHP in the form of a simple interest rate collar was entered into between Holmcroft and Barclays. Holmcroft and Barclays subsequently entered into a second IRHP, an interest rate swap agreement, to hedge £1.5 million until 10 April 2011.

Consequential losses of £5.2 million were claimed by Holmcroft flowing from Barclays' decision to refuse to renew or call in its advance to Holmcroft and to appoint receivers of its properties.

It was alleged that some of the material that formed the basis of the decision was not made available to the claimant and therefore the claimant was not able to advance its case on an informed basis. The claimant argued that KPMG should not have approved this defective process.

(ii) Defendant's arguments

KPMG and the interested parties (FCA and Barclays) argued that:

- KPMG was not amenable to judicial review - it was not exercising a public function and therefore did not attract the principles of public law; and
- Barclays was entitled to conclude that no consequential loss had been suffered by the claimant and the process in reaching that decision was fair.

(c) Decision

The High Court dismissed Holmcroft's application, finding that KPMG's actions did not have "sufficient public law flavour" required to render it subject to judicial review. Furthermore, there was no actual unfairness in the procedure adopted by Barclays.

(i) KPMG not amenable to judicial review

The Court reiterated the principle that where a body is exercising public functions, even where the source of power to carry out these functions is contract, it may be subject to judicial review. The question of amenability depends upon a careful analysis of the power and function being considered, to see whether the decision has a sufficient public element.

The Court stated that the question of amenability to judicial review "does not depend upon the particular facts in the claimant's case but rather on the proper characterisation of the redress scheme and its role within it".

The Court found that KPMG was "woven into the regulatory function" and there was a "clear public connection between its function and the regulatory duties carried out by the FCA". But this was not enough to subject KPMG to judicial review. The public element of the function was not sufficiently strong for the following reasons:

- the FCA chose to adopt an essentially voluntary scheme of redress - the FCA could not have imposed KPMG's role in the individual case upon Barclays;
- the source of KPMG's powers was conferred by contract. This was considered important but not determinative, as was the fact that KPMG had no relationship with Barclays' customers;
- KPMG were not appointed in any way by the FCA - the FCA's approval of the appointment was not enough to attract public law principles;
- the fact that KPMG was assisting in the achievement of public law objectives by reviewing offers was not enough to subject it to judicial review; and
- KPMG's role was not part of the regulatory obligations of the FCA - the FCA would have had to use other statutory means to achieve redress for customers had there been no willing independent reviewer.

In conclusion the Court found that there was "no direct public law element in KPMG's role". The Court emphasised that the scheme did not guarantee a fair outcome and civil actions and recourse to the Ombudsman were available where the scheme did not allegedly work as it should.

(ii) The substantive process and result was fair

The Court found that there had been no unfairness by Barclays in reaching the decision it did. The Court found that given essential financial information was known to both parties, it was enough for Barclays to provide Holmcroft the gist of its reasoning and the materials they based their decision on. It was not necessary to disclose the full records. Barclays' summary had been substantially complete and

Holmcroft had enough information to make informed representations to the bank and to KPMG.

It was found that KPMG had carried out its reviewing task as required. The Court found that even if KPMG was amenable to judicial review and subject to a public law duty, there was "no unfairness by Barclays in the procedure adopted and therefore there could be no material breach by KPMG of any public law duty to secure fair process".

6.6 Trust issues? When section 556 priorities do not apply, the distribution of trust assets and practitioner remuneration

(By Elly Phelan, MinterEllison)

In the matter of Independent Contractor Services (Aust) Pty Limited ACN 119 186 971(in liquidation) (No 2) [2016] NSWSC 106, Supreme Court of New South Wales, Brereton J, 23 February 2016

(a) Summary

In this decision Brereton J considered three issues of interest to insolvency practitioners, including the proper calculation of a superannuation guarantee charge under s. 556 of the Corporations Act 2001 (Cth) (the Act), the appropriate method to pay trust creditors in the winding up of a corporate trustee, and the calculation of a liquidator's remuneration for administering trust assets.

His Honour held that the priority system in s. 556 of the Act does not apply to the distribution of trust assets, that creditors are to receive payment pari passu (after the costs of the liquidation are paid), and that liquidators' remuneration should be calculated on the basis of the percentage of the assets realised, rather than the time based approach.

(b) Facts

The sole purpose of the plaintiff, Independent Contractor Services (Aust) Pty Limited (ICS), was to act as trustee of a trading trust, the Independent Contractor Services Trust.

Mr Gleeson was appointed liquidator of ICS on 8 November 2012. During the liquidation, trust property in the amount of $130,980 (after various disbursements) was realised and held ready for payment to the creditors of ICS, before allowing for Mr Gleeson's remuneration. On 26 March 2013 the Australian Tax Office (ATO) lodged a proof of debt which included an amount for a superannuation guarantee charge liability calculated under Part 7 of the Superannuation Guarantee (Administration) Act 1992 (Cth) (the SGAA).

Pursuant to the Act, Mr Gleeson sought directions from the Court as to the distribution of the trust assets, including whether the liability to the ATO for the superannuation guarantee charge was entitled to priority pursuant to s. 556 (1)(c) of the Act. Mr Gleeson proposed that the trust assets should be applied (after payment of his remuneration and expenses) towards the unpaid superannuation guarantee charge, or alternatively to the creditors of the company generally. Mr Gleeson also sought approval for his remuneration for work relating exclusively to administering the trust assets and an order appointing him as trustee of the Independent Contractor Trust.

(c) Decision

(i) Findings on the superannuation guarantee charge

Brereton J concluded that the liabilities of the company, including the superannuation guarantee charge, were incurred in the course of acting as a trustee and that accordingly, the creditors were entitled to be indemnified out of the trust's assets. His Honour found that the statutory priority referred to in s. 556 did not apply in respect to trust assets and that creditors share pari passu in the trust assets (after deducting the liquidator's remuneration and expenses).

His Honour went on to hold that even if the s. 556 priorities did apply, the superannuation guarantee charge liability would not be entitled to priority under s. 556(1)(e)(i) as the services rendered to the company were rendered by contractors, not employees, and the section is limited to employees. In this regard, his Honour reasoned that the SGAA has a wider definition of employee which captures payments made to contractors as well as employees. However, s. 556 of the Act only applies to employees of the company at the relevant date. As the superannuation guarantee charge payable by ICS was calculated on payments made to contractors under the extended definition in the SGAA, the Court held that the superannuation guarantee charge was not entitled to priority under the Act.

(ii) Findings on the distribution of trust assets

Brereton J admitted that the correct position is unclear and considered two possibilities for how a liquidator could pay creditors from the trust property:

- in the order the claims arose; or
- pari passu.

The Court held in favour of the latter. His Honour reasoned that a trustee is entitled to apply trust assets to discharge the liabilities incurred under the trust. Such a right of indemnity is secured by an equitable lien in the nature of a floating charge over all the trust assets. On the other hand, the creditors do not acquire any direct interest in the trust assets, but have a right to be subrogated to the trustee's equitable lien. In the event that the trust assets are insufficient (as was the case here), all trust creditors will share pari passu in the trust assets without the benefit of priority under s. 556.

Accordingly ICS, as trustee, had a right of indemnity from, and lien over, the trust assets, which has priority over the interest of the beneficiaries, for liabilities it incurred in acting as trustee.

It is worth noting that distributions to creditors pari passu do not allow for any of the usual s. 556 priority payments to be paid as priority payments.

(iii) Findings on the calculation of the liquidator's remuneration

Brereton J accepted that the liquidator of a company which is the trustee of a trading trust and has no other activities, is entitled to be paid its costs and expenses out of the trust assets, whether those costs and expenses are for administering the trust assets or for "general liquidation work".

Brereton J considered the work done in administering trusts as incidental to the liquidation, approaching the application for remuneration as analogous to one by an official liquidator for approval of remuneration.

Brereton J did not approve remuneration based on Mr Gleeson's hourly rates, but rather (in the interests of ensuring proportionality and incentivising the creation of value) fixed an amount of remuneration by way of commission on assets realised and distributed. His Honour observed that:

- in a simple liquidation remuneration based on 2% of realisation is appropriate; and
- remuneration of 15% on distributions is unusually high.

Ultimately, Brereton J allowed remuneration of $30,000 plus GST (which equated to about 14% of gross realisation), commenting that the Court ought not discourage liquidators from taking on small but difficult liquidations. Mr Gleeson had sought a determination that he was entitled to remuneration in the amount of $49,510.50 (having already written off $64,635 for the purposes of the application).

6.7 What is the scope of the compensation regime under the National Guarantee Fund?

(By Katrina Sleiman, Corrs Chambers Westgarth)

In the matter of Securities Exchanges Guarantee Corporation Limited as trustee for the National Guarantee Fund [2016] NSWSC 76, Supreme Court of New South Wales, Ball J, 17 February 2016

(a) Summary

The applicant, Securities Exchanges Guarantee Corporation Limited (SEGC), sought judicial advice pursuant to s. 63 of the Trustee Act 1925 (NSW) in relation to the settling of contract guarantee claims on the National Guarantee Fund (NGF) arising out of the collapse of BBY Ltd (In Liq) (Receivers and Managers Appointed) (BBY).

The Court held it was appropriate for SEGC to act on the advice of counsel which was as follows:

- rr. 7.5.24 and 7.5.26 of the Corporations Regulations 2001 (Cth) (the Regulations) do not set out exclusively the means by which clients who have suffered losses as a consequence of a broker's failure to carry out the client's instructions are to be compensated; and
- transactions executed by a participant in the financial market operated by ASX Limited (ASX) are reportable transactions even if they are executed on the market operated by Chi-X Australia Pty Ltd (Chi-X) or off market.

(b) Facts

SEGC is the trustee of the NGF, which is a fund established for the purpose of compensating retail clients for losses they suffer as a consequence of a default by a participant in ASX. The compensation regime is established by Part 7.5 of the Corporations Act 2001 (Cth) (the Act).

BBY was, until it went into external administration, admitted as a participant of the market operated by ASX under the ASX Operating Rules and of the market operated by Chi-X under the Chi-X Operating Rules.

The SEGC sought judicial advice about two questions. The first was whether rr. 7.5.24 and 7.5.26 set out exclusively the compensation that is payable to a client where BBY, because of its external administration, failed to execute a client's instructions to buy or sell shares. The question arose because a number of clients suffered losses that are not obviously covered by rr. 7.5.24 and 7.5.26. Those losses arose where the client either sold shares through another broker for a lower price than the client would have obtained if BBY had executed the client's instructions or bought shares for a greater amount than the client would have paid if BBY had executed the client's instructions. On the face of it, rr. 7.5.24 and 7.5.26 do not apply in those cases because they appear to assume either that the client has not sold the shares at the time compensation is sought or has not bought them at that time.

The second question was whether rr. 7.5.24 and 7.5.26 cover a case where the relevant transaction is executed on Chi-X, or as a result of an off market transaction, rather than on ASX. The answer to that question depends on whether such a transaction is a "reportable transaction" and, in particular, whether it can be said that such a transaction is one that the rules of the ASX "require or permit" BBY to report to the ASX. The answer is significant because it was not known whether some transactions executed by BBY for clients were executed on the ASX or Chi-X, with the result that SEGC is prevented from settling those claims, even though it may ultimately turn out that the relevant transactions were executed on the ASX.

SEGC obtained detailed written advice from Mr Sheahan QC and Mr Hutton in relation to the questions on which judicial advice was sought.

(c) Decision

Justice Ball considered it was appropriate for SEGC to act on the advice of counsel.

With respect to the first question, his Honour concluded that r. 7.5.72 should be read as conferring a general power on SEGC to allow and settle claims notwithstanding the specific and detailed provisions contained in subdivision 4.3 and rr. 7.5.24 and 7.5.26. Regulation 7.5.72 provides:

Power of SEGC to allow and settle claim
(1) The SEGC may, at any time after a person becomes entitled to make a claim, allow and settle the claim.
(2) Subregulation (1) authorises the SEGC to partially allow a claim (including, for example, in a case where the SEGC considers that the claimant's conduct contributed to the loss).

His Honour reached that conclusion as a matter of statutory construction. A relevant factor was his Honour's opinion that Part 7.5 of the Act and the regulations by which the compensation scheme is established is beneficial or remedial legislation that should be given a liberal rather than a constrained interpretation.

With respect to the second question, to be a "reportable transaction", the transaction must be entered into before or after the commencement of Part 7.5, it must be for the sale or purchase of securities quoted on the ASX at the time the agreement was made, the sale must be by a participant of the ASX and the rules of the ASX as in force when the agreement was made must "require or permit" the ASX participant to report the transaction to ASX.

His Honour dealt with off market transactions and Chi-X transactions in turn. Starting with off market transactions, his Honour had regard to ASX Operating Rule [3500] and concluded that off market transactions in securities listed on the ASX are "reportable transactions" provided it is a product of a type referred to in rule [3500].

The position in relation to transactions that occur on Chi-X was not as clear. The ASX Operating Rules do not require such a transaction to be reported, however, do they permit it to be reported when they are silent on the question? His Honour was satisfied that they do.

His Honour considered it appropriate to interpret the words "or permit" in the definition of "reportable transaction" in r. 7.5.01 as a reference to the ability of the reporter (that is, a broker) to bring about a state of affairs where it is required to report the transaction to the ASX by executing the transaction on that exchange. In other words, if the Operating Rules of the ASX as they existed at the time the contract was entered into permitted that contract to be made on that exchange, then they permitted the broker to report that transaction to the ASX because they permitted the broker to execute the transaction on that exchange.

His Honour considered this to be consistent with an overall policy of providing a comprehensive compensation scheme to retail clients who invested in shares and other securities so as to ensure that confidence in the market was maintained. His Honour considered that this conclusion is consistent with s. 885D of the Act, which assumes that certain losses are covered by the NGF notwithstanding that the participant used or might have intended to use a market other than the ASX to effect a particular transaction on behalf of a client.

6.8 Rectification of ASIC records permitted

(By Calum Sargeant, King & Wood Mallesons)

In the matter of Centura Global Holdings Pty Ltd [2016] NSWSC 62, Supreme Court of New South Wales, Black J, 12 February 2016

(a) Summary

Notifications of a change in shareholding were made to ASIC following a purported but invalid transfer of shares. The Supreme Court of New South Wales made an order for rectification of the ASIC records to reflect the true shareholdings. A conditional order for rectification of the company's register was found to be inappropriate in circumstances where the existence and contents of the register are unknown.

(b) Facts

The case centred around a dispute as to the ownership of shares in Centura Global Holdings Pty Ltd (Centura). Centura was incorporated in 2012, all shares being held by Mr Kovacic. In 2013, Kovacic established a café business, using Centura as a vehicle to obtain a lease or licence for the café. Two brothers, Messrs Kalantzis, were also involved in the establishment of the business, although the extent of their involvement was disputed. It was agreed between the parties that Kovacic agreed to transfer one third interests in Centura to each of Messrs Kalantzis, although the terms of that transfer remained in dispute. Kovacic claimed that the transfer was conditional upon certain capital contributions by the Kalantzis brothers.

In February 2014 and again in February 2015, notices were lodged with ASIC recording transfers of Centura shares from Kovacic to companies associated with Messrs Kalantzis. Documents purporting to transfer shares were also executed in February 2015, as well as a resolution of a Centura directors' meeting purporting to register the transfer. Later resolutions purported to appoint Messrs Kalantzis as directors and remove Kovacic as director.

Kovacic sought and was successful in obtaining declaratory relief to the effect that his removal as director and the appointment of Messrs Kalantzis was void and of no effect. The court also granted a declaration that Kovacic was at all times the sole shareholder in Centura.

In addition to declaratory relief, Kovacic sought:

(a) an order for rectification of the company's register under s. 175 of the Corporations Act 2001 (Cth) (the Corporations Act). Because there was no evidence that Centura actually had a register or that it had been improperly amended, Kovacic sought a conditional order for rectification; and

(b) an order for rectification of the records kept by ASIC in respect of Centura under s. 1322(4) of the Corporations Act.

Messrs Kalantzis cross-claimed, seeking specific performance of the agreement to transfer one third interests in Centura to their associate companies. They claimed that the promise to transfer the shares was unconditional and the consideration was their agreement to participate in and pursue the business. Kovacic claimed that the transfer was conditional on an equal capital contribution to the business. The Court was tasked with discerning the terms of an agreement that was partly oral and partly implied.

(c) Decision

(i) Rectification of the company register

Section 175(1) of the Corporations Act provides that:

"A company or registered scheme or a person aggrieved may apply to the Court to have a register kept by the company or scheme under this Part corrected."

The Court acknowledged that the power under s. 175 operates alongside and assumes the existence of the equitable jurisdiction to rectify a register. Equitable jurisdiction is enlivened when there is a personal equity that the court will protect, such as the wrongful omission of a name from the register. However, there is a broad discretion not to order rectification.

Black J found several reasons to decline to order rectification. Firstly, there was no evidence that a register existed; secondly, the holder of the register to whom the order would be directed was not known; and thirdly, the contents of the register were unknown.

(ii) Rectification of the ASIC records

Section 1322(4)(b) of the Corporations Act permits the court to make an order directing the rectification of a register kept by ASIC under the Act, on application by any interested person.

Black J considered that the relevant register satisfying s. 1322(4)(b) was the register of companies prescribed by r. 9.1.01(a) of the Corporations Regulations 2001 (Cth), extracted in the database contemplated by s. 1274A, and including information as to the paid-up and unpaid capital of the company, as required by r. 9.1.02(a)(viii).

Black J relied on the broad view of the scope of rectification in *Re MIG Property Services Pty Ltd (No 2)* [2012] VSC 606, where Robson J ordered the rectification of records of shareholding where changes to the records had been made invalidly. Black J reasoned that rectification of information relating to shareholding could be ordered in the present case where incorrect information has been included in a notification that was required to be given to ASIC.

(iii) Ascertaining the terms of the agreement to transfer shares

Black J also made the following observations in discerning the terms of the oral agreement:

- The Court may have regard to the subsequent conduct of parties in determining whether an agreement existed and as to its terms, and this may be a matter of "significant weight". This is to be distinguished from the task of construction (e.g. of the words of a written contract), where subsequent communications cannot be relied upon.
- The subsequent conduct of Messrs Kalantzis in performing some work to contribute to the café business was equivocal, in that it would be explicable by either agreement contended for by the parties.
- It was unlikely that Kovacic would so disregard his own economic interests to give away ownership of Centura without requiring some proportionate contribution.

Consequently, Black J concluded that the version of the agreement contended for by Kovacic was more likely to have been the case, that the relevant contributions had not been made, and that specific performance should not be awarded. Even if Black J had found an agreement on the terms contended for by Messrs Kalantzis, he would not have made an order for specific performance, for the reasons that there was no undertaking by Messrs Kalantzis to make "fair" contributions or evidence of their capacity to do so, and that it would have brought together in a closely held company parties whose relationship had broken down.

6.9 Lessons for lessors: PPS leases and the operation of the PPSA vesting rules

(By Dinisi Sirimanne, Herbert Smith Freehills)

Forge Group Power Pty Ltd (in liquidation) v General Electric International Inc. [2016] NSWSC 52, Supreme Court of New South Wales, Hammerschlag J, 11 February 2016

(a) Summary

This case concerned goods subject to a lease that was not registered under the Personal Property Securities Act 2009 (Cth) (PPSA) and whether the interest in such goods would vest with the lessee on the appointment of voluntary administrators. Having considered the operation of the PPSA vesting rules, the Court ruled in favour of the lessee, finding that its vested right, title to or interest in the goods in the circumstances was superior to that of the lessor. In reaching its decision, the Court provided further guidance on the scope of a lease registered under the PPSA and the appropriate application of key exclusions provided under the legislation.

(b) Facts

The defendant, General Electric International Inc. (GE), leased four mobile gas turbine generator sets (the Turbines) to the plaintiff, Forge Group Power Pty Ltd (Forge), but did not register its interest in the Turbines on the Personal Property Securities Register (PPSR). Forge subsequently appointed voluntary administrators and eventually went into liquidation.

Forge's liquidators sought a court declaration that any security interest that GE held in the Turbines vested in Forge immediately prior to the appointment of voluntary administrators. GE argued against the application of the PPSA in the circumstances, on the basis of two alternative exclusions:

- GE was not "regularly engaged in the business of leasing goods" within the meaning of s. 13(2) of the PPSA and therefore, the lease was not subject to the PPSA; or
- the Turbines were fixtures, and interests in fixtures were not subject to the PPSA (as excluded under s. 8(1)(j) of the PPSA).

(c) Decision

(i) "regularly engaged in the business of leasing goods"

Under s. 13(2) of the PPSA, a lease will not be a "PPS lease" if the relevant lessor is not "regularly engaged in the business of leasing goods". GE sought to rely on this exclusion, claiming that it had not regularly leased goods in Australia. In determining whether this exclusion applied to the facts, Hammerschlag J of the New South Wales Supreme Court considered the following issues:

- the appropriate test for determining if a person is "regularly engaged";
- whether "the business of leasing goods" would include the lessor's activity outside of Australia; and
- the point in time at which the assessment must be made.

Hammerschlag J noted that whilst there were no relevant Australian authorities on what is meant by the phrase "regularly engaged", some guidance could be taken from certain Canadian and New Zealand authorities on the issue (at [41]-[53]). His Honour, in following the Canadian authorities cited, concluded that the correct approach was to "recognise frequency and repetitiveness of transactions" as a relevant factor to being regularly engaged in a certain activity (at [52]) and that at the material time, leasing goods must be a "proper component" of' the lessor's business (at [46]).

This leads to the question of the "material time" at which to apply this test. His Honour's view was that the point in time to which the exclusion under s. 13(2) is directed is the time where "mutual rights and obligations of the parties" under a lease are created, that is the time of entering into the lease (at [40]).

Finally, Hammerschlag J considered whether the exclusion under s. 13(2) is restricted to business activity that occurs solely within Australia (as GE had contended). Following *Thompson v Goold & Co* [1910] AC 409 at 420 and *Bermingham v Corrective Services Commissioner of NSW* (1988) 15 NSWLR 292 at 302, his Honour determined that the appropriate construction of s. 13(2) placed no geographic restriction on the business activity being assessed (at [31]). He also noted that the general operation of the PPSA is not confined to goods or property in Australia (at [32]). Hammerschlag J thus concluded that activity in and out of Australia would be included.

Having considered the above issues, his Honour turned to assessing GE's activities in and outside Australia. As GE had advertised and promoted its intention to lease the Turbines and had leased similar goods to other sites in Australia, his Honour determined that at the time the lease was entered into, GE had regularly engaged in the business of leasing goods. Therefore, the exclusion under s. 13(2) did not apply to the circumstances of this case.

(ii) "fixtures"

Interests in "fixtures" are not governed by the PPSA (see exclusion under s. 8(1)(j)). GE proposed that the goods had become "fixtures" over the duration of the lease and therefore, were not subject to the PPSA. The term "fixture" under s. 10 of the PPSA is defined as goods "affixed to land". GE suggested that this definition called for an approach different to what is established as a "fixture" at common law; it contended that under the PPSA, a "non-trivial attachment" to the land will create a "fixture" within the meaning of the PPSA.

His Honour, however, rejected GE's proposition and instead adopted the common law approach to determining whether the goods were, in fact, "fixtures". That is, in accordance with *Agripower v Blomfield* [2015] NSWCA 30, a "fixture" is determined by the objective intention of the parties who put the goods in place, taking into account the degree and object of annexation (at [79]). Hammerschlag J heavily relied on the judgment of Conti J in *Australian Provincial Assurance Co Ltd v Coroneo* [1938] NSWStRp 35, which included factors that courts should consider when determining the purpose or object and degree of annexation, such as whether the attachment was for the better enjoyment of the property or the land to which it was attached; the nature of the property that was affixed; and whether it was a permanent or temporary affixation (at [81]-[83]).

When the terms of the lease and the general intentions of the parties were assessed, it was evident that the Turbines were designed to be demobilised easily and intended to be on the relevant site for a temporary period of 2 years. Furthermore, the Turbines were to be returned by Forge to GE at the end of the lease term. In consideration of all such factors and the facts before the Court, his Honour concluded that the Turbines had not become fixtures within the meaning of the common law.

In conclusion, Hammerschlag J was not satisfied that either statutory exclusion relied on by GE applied to the facts. His Honour, therefore, found that the interest in the Turbines had vested in Forge prior to the appointment of voluntary administrators, taking priority over and effectively renouncing GE's claim to the goods.

6.10 A liquidator's joinder of an insolvent defendant's insurer

(By Grant Mason, Michael McCarthy and Anieska Deegan, Corrs Chambers Westgarth)

CGU Insurance Limited v Blakeley [2016] HCA 2, High Court of Australia, French CJ, Kiefel, Bell, Keane and Nettle JJ, 11 February 2016

(a) Summary

Akron Roads Pty Limited (Akron) was in the business of civil construction. In 2010, Akron experienced financial difficulties and the company was placed into voluntary administration and subsequently the administrators of Akron were appointed as liquidators of Akron (the Akron Liquidators). The Akron Liquidators commenced proceedings in the Supreme Court of Victoria against a former director and shadow director in which they alleged that those former directors had failed to prevent Akron from trading whilst insolvent (the Insolvent Trading Proceeding). The directors lodged a claim with Akron's insurer, CGU Insurance Limited (CGU), in relation to their potential liability under the Insolvent Trading Proceeding. They considered that their potential liability would be covered by the terms of a professional indemnity insurance policy that had been provided by CGU (the Policy) but CGU denied the directors' claim.

The Akron Liquidators then joined CGU to the Insolvent Trading Proceeding and sought, as against CGU, a declaration that the Policy was responsive to the liability that might arise under the Insolvent Trading Proceeding.

CGU challenged the Supreme Court's jurisdiction to effect the joinder and grant declaratory relief sought. In *CGU Insurance Ltd v Blakeley*, the High Court affirmed the decisions of the Supreme Court and Court of Appeal to allow the joinder of CGU and found that the Supreme Court was empowered to grant a declaration that the Policy responded to the insolvent trading claim.

(b) Facts

In April 2013, the Akron Liquidators commenced the Insolvent Trading Proceeding against, relevantly, Mr Trevor Crewe, a former director of Akron, and Crewe Sharp Pty Ltd, a company controlled by Mr Crewe and which the Akron Liquidators alleged to be a shadow director of Akron (the Directors) for contraventions of s. 588G of the Corporations Act 2001 (Cth) (the Act). The relevant contravention involved a failure to prevent Akron from trading while insolvent The Akron Liquidators sought compensation for the creditors of Akron under s. 588M of the Act in the amount of the debts that had been incurred by Akron during the period that it had traded whilst insolvent.

The Directors made a claim on the Policy in relation to their potential liability arising from the Insolvent Trading Proceeding but were denied indemnity by CGU on the basis of certain exclusions under the Policy. The Directors did not challenge CGU's decision.

Before the proceeding was heard, liquidators were appointed to Crewe Sharp. Further, it was accepted that Mr Crewe did not have assets to cover his potential liability under the Insolvent Trading Proceeding. The Akron Liquidators therefore sought, and ultimately obtained, leave of the Victorian Supreme Court to join CGU to the proceeding and upon joining CGU sought a declaration that CGU was liable to indemnify the Directors under the Policy.

(c) Decision

(i) Judgment at first instance

Judd J allowed the joinder of CGU noting that:

- the Akron Liquidators had a sufficient interest in the proceeds of insurance to provide them with standing to apply for declaratory relief;
- a justiciable dispute existed between the Akron Liquidators and CGU consequent on the denial of liability under the policy; and
- s. 562 of the Act provides that a liquidator (such as the liquidator of Crewe Sharp) who obtained insurance proceeds relating to a liability against which a third party was insured would be obliged to pay those proceeds to the third party; and
- there existed an analogous provision, s. 117 in the Bankruptcy Act 1966 (Cth), in respect of an individual debtor.

Judd J observed that the joinder was consistent with the overarching purpose of the Civil Procedure Act 2010 (Vic) as it allowed for the "just and convenient" resolution of the entirety of the dispute in the same proceeding.

(ii) Judgment on appeal

CGU appealed on the ground that his Honour had erred in law in joining it as a defendant to the proceedings because the Court had no jurisdiction to grant declaratory relief on the application of a stranger to a contract as to the meaning and effect of that contract where the private parties to the contract will not pursue any claim relating to the rights and duties under the contract.

The Court of Appeal dismissed the appeal noting that Australian case law supported the proposition that, in exceptional circumstances, a court will permit a plaintiff who is not a party to a contract to seek a declaration as to rights existing under that contract. The Court placed emphasis on the "practical utility" of joining the insurer and resolving the matter in which the plaintiff had a "real interest".

CGU sought and was granted special leave to appeal to the High Court.

(iii) Decision of the High Court

Ultimately, the Court comprising French CJ, Kiefel, Bell, Keane and Nettle JJ dismissed the appeal (Nettle J, in a separate judgment) and affirmed the decisions of the Supreme Court and Court of Appeal to allow the joinder of CGU. The High Court found that the Supreme Court was empowered to grant a declaration that the professional indemnity policy responded to the insolvent trading claim.

While the issue of federal jurisdiction did not form a part of the appeal, the joint judgment discussed the issue in some detail before ultimately finding that the nature of the proceedings was such to invoke federal jurisdiction.

The determination of the appeal turned on whether the Akron Liquidators' claim for declaratory relief involved a "justiciable controversy".

CGU's asserted that no "justiciable controversy" arose. In making the submission, CGU drew on the fact that different views on the matter had been expressed in the intermediate appellate courts concerning the availability of the relief. Following detailed analysis of cases the majority concluded that the facts of the case disclosed a "justiciable controversy" because:

- if the Akron Liquidators made good their claim against the Directors, and established the liability of CGU to indemnify Crewe Sharp as an "insured" under the Policy, the proceeds of the Policy would have been payable to the Akron Liquidators (for the benefit of the creditors of Akron) as a result of the operation of s. 562 of the Act (or with respect to Mr Crewe's position as an "insured" due to s. 117 of the Bankruptcy Act);
- under the statutory framework, in all practical respects, it was the Akron Liquidators who stood to benefit from the outcome of any findings made in the Insolvent trading Proceeding; and
- the interest of the Akron Liquidators was sufficient to constitute a "justiciable controversy" as between the Akron Liquidators and CGU.

In reaching its conclusion the majority of the Court accepted the Akron Liquidators' submission that their claim did not depend on any incursion on the principle of privity, as their claim was properly based upon the legal consequence created by s. 562 of the Act (and in case of Mr Crewe by s. 117 of the Bankruptcy Act).

The majority also accepted that the declaratory relief, if granted, would be binding as between the parties and could not be re-litigated.

6.11 Court rejects public policy defence to the enforcement of an arbitral award

(By Jason Choi, DLA Piper)

Gutnick v Indian Farmers Fertiliser Cooperative Ltd [2016] VSCA 5, Court of Appeal of the Supreme Court of Victoria, Warren CJ, Santamaria JA and Beach JA, 9 February 2016

(a) Summary

The Court of Appeal of the Supreme Court of Victoria refused an application for leave to appeal against the enforcement of an arbitral award. Joseph Isaac Gutnick (Gutnick) and Legend International Holdings Inc (Legend) (together, the Applicants) had applied for leave to appeal on the basis that the enforcement of an arbitral award would be contrary to public policy, as it would allow Indian Farmers Fertiliser Cooperative Ltd (IFFCO) and Kisan International Trading Fze (KIT) (together, the Respondents) to obtain "double recovery".

(b) Facts

On 14 July 2008, IFFCO and Legend entered into a Share Options Agreement under which IFFCO acquired the option to purchase shares in Legend. On the same day, IFFCO and Gutnick entered into a Shareholders' Agreement in order to regulate their relationship as shareholders in Legend. By an Affiliate Deed of Adherence, KIT agreed to be bound by the terms of the Shareholders' Agreement. Under the terms of these agreements (in respect of which the governing law was English law), the Respondents purchased 20 million shares in Legend for a total price of US$40.4 million. The parties later fell into dispute, and the Respondents subsequently commenced an arbitration in the Singapore International Arbitration Centre (Arbitral Tribunal) claiming that the Applicants misrepresented (and therefore induced) them into making the investments.

In May 2015, the Arbitral Tribunal found that the Applicants had induced the Respondents to purchase the shares in Legend by fraudulent misrepresentation. The arbitral award declared that the relevant agreements be rescinded ab initio and ordered that the Applicants return the purchase price with interest and costs (the Award).

In October 2015, the Respondents applied to the Victorian Supreme Court to enforce the Award under s. 8(2) of the International Arbitration Act 1974 (Cth) (the Act). Section 8(2) of the Act provides that "a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court". The Applicants resisted the Respondents' application contending that, because the Award required repayment of the purchase moneys, but did not include an order requiring the Respondents to return their purchased shares, enforcement of the Award would result in the Respondents obtaining "double recovery" - that is, being refunded their investment while keeping the shares they had acquired.

On 21 December 2015, his Honour Croft J rejected the Applicants' argument that enforcement of the Award should be refused on the grounds of public policy. Although Croft J held that an arbitral award that permitted double recovery would be contrary to public policy, his Honour concluded that the Award did not allow for double recovery. As such, in compliance with s. 8(2), Croft J ordered that the Award "be enforced as if it were a judgment or order of the Supreme Court of Victoria". The Applicants subsequently sought leave to appeal from that decision.

(c) Decision

The Court of Appeal of the Supreme Court of Victoria refused the Applicants' application for leave to appeal, as it had no real prospect of success. In coming to this decision, the Court of Appeal considered two main issues:

i. whether the Arbitral Tribunal's failure to make a specific order for the Respondents to retransfer their shares meant that the contracts were not in fact rescinded; and
ii. whether double recovery would be a ground for refusal of an application to enforce an arbitral award on the basis that it was contrary to public policy under the Act.

(i) Did the Arbitral Tribunal's failure to make a specific order for the Respondents to retransfer their shares mean that the contracts were not in fact rescinded?

The Court of Appeal held that the Award did constitute an effective rescission of the relevant contracts. The Court of Appeal referred to the judgment of the Full Court of the Federal Court in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2013) 251 CLR 533 and noted that the "public policy" defence was to be construed narrowly as referring to the "most basic, fundamental principles of morality and justice in the jurisdiction".

The Court of Appeal cited Croft J's reasoning in relation to foreign arbitral awards, and noted that the limited role of the courts under the Act "does not extend to determining substantive disputes between the parties as to fact or law, or otherwise reviewing the determination of an arbitral tribunal". In the context of this case, this meant that it was "impermissible to consider whether the Tribunal correctly applied the doctrine of rescission of contract for fraudulent misrepresentation under the governing law".

However, the Court of Appeal held that in order to understand the effect of the Arbitral Tribunal's declaration of rescission and to ascertain whether the Award allowed for double recovery, it was necessary to examine the doctrine of rescission for fraudulent misrepresentation of a contract for the purchase of shares in English law.

The Court of Appeal accepted the Respondents' contention that it is not possible either for a court order or an arbitral award to perfect a party's legal ownership of shares. It is not until the court order or arbitral award is executed by alteration of the share register that legal ownership is restored. The Court of Appeal stated:

"Rescission is the act of the parties. A court order is not a condition precedent to the effectiveness of rescission. As much as a court does is to 'confirm' the act of the rescinding party: to declare that the anterior act of rescission was justified and is valid. A court order may also make ancillary or consequential orders that may be needed to restore the parties to the status quo ante."

As such, the Court of Appeal rejected the Applicant's contention that, unless the Award included specific orders for the Respondents to retransfer their shares, the Arbitral Tribunal's declaration of rescission was invalid and ineffective.

(ii) Was double recovery a ground for refusal of an application to enforce an arbitral award on the basis that it was contrary to public policy under the Act?

The Court of Appeal found that there was no risk of double recovery and the Award was not contrary to public policy.

The Court of Appeal held that given Croft J's decision at first instance was that the Award "be enforced as if it were a judgment or order of the Supreme Court of Victoria", the Award had, in effect, become an order of the court. As such, all the powers of the court in aid of its proper execution had become available and those powers included powers to prevent double recovery.

The Court of Appeal also recognised its equitable jurisdiction "to restrain a plaintiff from recovering more than the sum claimed" (i.e. to prevent double recovery) under s. 29 of the Supreme Court Act 1986 (Vic), as well as the court's inherent powers to prevent any abuse of its process that would enable it to make some order which would prevent a party from obtaining double recovery.

6.12 Court considers voluntary administration and a genuine opinion of future insolvency

(By Anna Trevor and Andrew Smith, Clayton Utz)

Australian Securities and Investments Commission v Sino Australia Oil and Gas Ltd (prov liq apptd) [2016] FCA 42, Federal Court of Australia, Davies J, 5 February 2016

(a) Summary

ASIC applied to the Federal Court for orders that the appointment of administrators to Sino Australia Oil and Gas Ltd (prov liq apptd) (Sino) was void, and made for an improper purpose. The Federal Court declined to make those orders.

The Court determined that the directors of Sino were able to form a genuine, bona fide and concluded opinion that Sino was likely to become insolvent, even though they did not have available to them up to date financial statements or audited accounts.

(b) Facts

Sino is the ultimate holding company of the three companies comprising the Sino Australia Oil and Gas group, and its subsidiaries include a China-based company that is the operating entity within the group.

Sino was listed on the ASX in December 2013, following an IPO that raised approximately $12 million. Concerns were subsequently raised with ASIC about Sino's intended use of the raised funds by its Chinese entity, and ASIC commenced an investigation into whether Sino had contravened the [Corporations Act 2001 (Cth)] (the Corporations Act) in relation to the IPO and the accuracy of statements in the prospectus documents. ASIC obtained an order in March 2014 that Sino be restrained from transferring, dealing with or otherwise dissipating the remaining funds from the capital raising, while it continued its investigation.

In May 2015, Sino sought legal advice as to its position and "the best course to protect shareholder interests". The advice noted various governance problems faced by Sino, including that:

- it had been unable to finalise financial accounts for the year ended 31 December 2014, because the management of its Chinese subsidiary had not provided the required financial information;
- the board had been informed by auditors that the subsidiary had run out of cash reserves, and that the collapsing oil price had had a significant impact on its business;
- generally, the management of the Chinese subsidiary appeared to be incompetent, were disregarding governance obligations, and were dishonest; and
- ASIC's investigations into the prospectus were serious, and the Chinese subsidiary was not providing the information required to answer ASIC's questions. In the circumstances, Sino could potentially be required to repay the $12 million investment made by shareholders in the IPO.

On 5 May 2015, the board voted to appoint Mr Christopher Darin and Mr Matthew Jess (being the ninth and tenth respondents) as administrators of Sino, pursuant to s. 436A of the Corporations Act. Section 436A provides that a company may appoint an administrator of the company if the board has resolved that:

- in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and
- an administrator of the company should be appointed.

ASIC filed an application in May 2015, seeking orders that the appointment was void because the directors lacked sufficient financial information to be capable of forming a genuine and bona fide opinion that Sino was insolvent or likely to become insolvent. ASIC relied on *Kazar v Duus* (1998) 88 FCR 218, in which the court stated (at 231) that, "An inability to determine whether a corporation is or is not solvent, without more, cannot found an opinion that is it or is not insolvent or likely to become insolvent."

ASIC also argued that the appointment was made for an improper purpose, as the directors' true purpose was to deal with dysfunction in the management of Sino and its subsidiary. In ASIC's view, the correct course was for Sino to apply for appointment of a provisional liquidator.

The Court ordered on 21 May 2015 that the administration be terminated, and a provisional liquidator was appointed. The question of the validity of the administrators' appointment was adjourned. The administrators subsequently filed a an interlocutory application, seeking orders fixing their remuneration.

(c) Decision

The Court determined that the appointment of the administrators of Sino was valid, and that the administrators were entitled to their remuneration.

Although the directors were not in receipt of the 2014 financial statements and audited accounts for the company at the time of the appointment, the Court determined that the directors' knowledge of the ASIC investigation (including Sino's potential liability to repay $12 million to shareholders, which it did not have) and the deteriorating business operations of the Chinese subsidiary, were sufficient to comprise a rational basis from which the directors could form an opinion that Sino was likely to become insolvent at a future time. Further, the Court was satisfied that the issue of solvency had been given sufficient consideration by the directors in resolving to appoint administrators, such that it was a genuine, bona fide and concluded opinion. Given this conclusion, the evidence did not support ASIC's claim that the appointment was made for an improper purpose.

6.13 Confirmation that Part 5.4 does not apply to demands issued to foreign registered corporations under Part 5.7 of the Corporations Act

(By Lucienne Cassidy and James Sainty, Ashurst)

Cato Brand Partners Pty Ltd v Air India Ltd [2016] VSC 28, Supreme Court of Victoria, Efthim As J, 5 February 2016

(a) Summary

Cato, an Australian company, applied to wind up Air India, a foreign registered corporation, under Part 5.7 of the Corporations Act 2001 (Cth) (the Corporations Act), on the basis that it was "unable to pay its debts" evidenced by a failure to comply with a demand issued by Cato. Air India opposed the wind up application, arguing that the debt had been extinguished by Indian legislation and that, in any event, it was not insolvent. In response, Cato argued that Air India should be precluded from disputing the debt because it was required to raise any disputes within three weeks of being served with the demand and that it failed to do so.

Ultimately, the Court dismissed the application to wind up Air India on the grounds that:

- Part 5.7 does not contain a provision precluding respondents from disputing a debt at the winding up application if they failed to do so within three weeks after service (whereas Part 5.4 does contain such a provision, but that part does not apply to Part 5.7 bodies);
- the contract was governed by Indian law, which law barred any claim being brought more than three years after the debt was incurred, and that Air India could not be estopped from relying on that law; and
- in any event, Air India was solvent.

(b) Facts

The plaintiff, Cato Brand Partners Pty Ltd (Cato), an Australian brand development company, entered into an agreement for services to be provided to the defendant, Air India Ltd (Air India). Air India was incorporated in India and was a foreign registered corporation in Australia, which means it is a Part 5.7 body under the Corporations Act. The agreement was negotiated and signed in India on 2 June 2010 and related to work to be performed in India.

Cato served on Air India a demand for payment of $1,048,287.50 for professional services rendered in accordance with the agreement. Air India failed to pay the amount demanded within three weeks from the date of service (being the time prescribed by s. 585 to avoid a presumption that it was "unable to pay its debts"). Air India also did not provide any explanation to Cato as to why it refused to pay.

(c) Decision

(i) The demand

The demand was served under s. 585(a) of the Corporations Act. That section provides that a Part 5.7 body, which has a demand served on it and fails to pay or secure the sum demanded within 3 weeks from service, is taken to be unable to pay its debts. Section 583(c)(i) provides that a Part 5.7 body may be wound up is if it is unable to pay its debts. Efthim As J relied on authorities to the effect that Part 5.4 does not apply to Part 5.7 bodies and so the Part 5.4 statutory and winding up regime did not apply in these circumstances.

(ii) Opposing the application to wind up

Air India opposed the application to wind it up under s. 583(c)(i) on two grounds: first, that the debt was not in fact due, having been extinguished by the Indian Limitations Act; and second, that it was not insolvent.

Cato submitted that s. 585 required Air India to identify the basis upon which it challenged the debt within the stipulated three week period and that failure to do so would preclude Air India from challenging the debt at the subsequent winding up application.

Efthim As J found that there was nothing in any statute or case precluding Air India from opposing the winding up in circumstances where it had not disputed the debt, and given an explanation for that, within a specified period after service of the demand. Whereas Part 5.7 contains s. 459S, which requires a company that is the subject of a winding up application to seek the leave of the court where it wants to oppose the application on a ground that it did or could have relied on in applying for a statutory demand to be set aside, Part 5.7 does not contain an equivalent provision.

Efthim As J found that in the absence of an equivalent provision in Part 5.7, and in light of case law confirming the scope of the Court's discretion as to whether to wind up a Part 5.7 body, Air India was entitled to challenge the winding up application, despite not challenging the demand.

(iii) Governing law

Air India's first ground of opposition went to the debt's basis. Air India submitted that the contract made with Cato was governed by Indian law and accordingly, the debt had been extinguished by the 3 year period under the Limitations Act.

Efthim As J agreed with this argument and found that the contract made between the parties was governed by Indian law on the basis that, in the absence of an express choice of law provision, there was authority for the fact that the Court ought to search for the system of law that either:

- the contract was made in reference to; or
- the transaction has its closest and most real connection to.

His Honour noted that this enquiry must be limited to the factual circumstances prevailing at the time of the contract, that post-contractual conduct is irrelevant and that, as a matter of Australian law, it is the intention of the parties as manifested in the contract that will determine which law governs it.

Applying these principles, Efthim As J concluded that the following factors supported a determination that Indian law governed the contract:

- the plaintiff travelled to India to negotiate and sign the contract;
- the contract was to be performed in India - despite work done in Australia, designs and plans were delivered to India and physical manifestations of those designs and plans were to occur in India; and
- the contract did not refer to GST or to any Australian office of Air India.

Efthim As J found that in these circumstances, the language of the contract, residence of the parties and currency of payment were neutral factors simply correlated with each party's individual circumstances, rather than with the agreement.

(iv) Extinguishment of the debt

Air India claimed the debt had been extinguished by s. 27 of the Indian Limitations Act, which imposed a prima facie three year limitation on enforcing a debt. Air India argued that Cato was therefore no longer a creditor and could not bring a winding up application.

In response, Cato submitted that, under s. 18(1) of the Indian Limitations Act, the three year time limit had been re-started by Air India acknowledging the debt by signing off on its balance sheet. Ultimately, Efthim As J found that Cato was unable to discharge the onus of proving that the debt was included as a debt in Air India's balance sheet and further that inferences relied on by Cato as to the acknowledgment were contradicted by direct evidence proffered by Air India. His Honour also rejected a submission by Cato that an email sent by Air India asking for more time to pay the debt estopped them from relying on the Indian Limitations Act. Consequently, his Honour concluded that the debt was statute barred.

(vi) Solvency

Efthim As J also found that Air India was solvent by virtue of financial support that the Indian Government provided to the company and concluded that this was a further reason to decline making a winding up order.

6.14 Blunder at Bundaberg: What not to do in an application for a derivative action under s. 237 of the Corporations Act

(By Wilson Lu, Ashurst)

Keenan v Bundaberg Port Authority [2016] FCA 134, Federal Court of Australia, Reeves J, 23 January 2016

(a) Summary

This case involved the rejection of an application for leave to bring an interlocutory application under s. 237 of the Corporations Act 2001 (Cth) (the Act). In the course of doing so, Reeves J of the Federal Court made some observations on the requirements for bringing an application for a derivative action under s. 237 of the Act and the circumstances that may fall short of those requirements.

(b) Facts

Keenan (the applicant) was sole director and a shareholder of Coral Coast Mariculture Pty Ltd (Coral Coast). Both Keenan and Coral Coast had engaged in various leasehold dealings with plots of land that were owned by the Bundaberg Port Authority (the first respondent). The applicant commenced in his own capacity, various civil proceedings against the respondents in this case, all of which were associated with the dealings over the plots of land. The applicant was a self-represented litigant that had been given leave on a number of previous occasions to remedy procedural defects in the civil proceedings. In seeking leave to bring an interlocutory application under s. 237 of the Act, the applicant sought to join Coral Coast (which had since become subject to receivership) into the civil proceedings against the respondents.

The statutory source of the derivative action sought by the applicant was based in s. 236 of the Act. That section allows certain persons, including current and former company members and current and former company officeholders, to bring or intervene in proceedings on behalf of a company. Section 237, specifically subsection 237(2), prescribes the five requirements that an applicant must demonstrate, to the satisfaction of the court, if an application for a derivative action is to be granted.

The requirements in subsection 237(2) relevantly state:

a. it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and
b. the applicant is acting in good faith; and
c. it is in the best interests of the company that the applicant be granted leave; and
d. if the applicant is applying for leave to bring proceedings-there is a serious question to be tried; and
e. either:
    i. at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
    ii. it is appropriate to grant leave even though subparagraph (i) is not satisfied.

(c) Decision

The court held that the applicant had satisfied the requirement of acting in good faith but had failed to satisfy the remaining four requirements in subsection 237(2). Accordingly the application was dismissed. In reaching this decision the court made the following observations in relation to each requirement.

(i) Inaction by the company

It was necessary to establish circumstances that would prove Coral Coast's attitude to the proceeding and its intentions on whether or not to bring the proceedings.

The evidentiary burden that this criterion placed on the applicant had not been discharged. The applicant adduced evidence that demonstrated the unwillingness of Coral Coast's receiver in being joined in the proceeding, however, in the absence of further evidence to show that the appointed receiver had gained express and exclusive control over any decision by Coral Coast to bring proceedings, this was not satisfied.

(ii) Applicant's good faith

The court's inquiry into the applicant's good faith centred on two relevant factors identified in *Swansson v RA Pratt Properties Pty Ltd* [2002] NSWSC 583, namely:

- whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success; and
- whether the applicant is seeking to bring the derivative action for a collateral purpose that would be an abuse of process.

In considering these factors the court was satisfied that the applicant had demonstrated good faith and rejected the first respondent's contention that the application was an abuse of process since the applicant would benefit from an improvement in Coral Coast's financial position were it to be successful in the civil proceedings.

(iii) The company's best interests

The court observed that the standard for this criterion was a high one to which a determination of Coral Coast's actual best interests was required with regard to the surrounding circumstances. Examples of relevant evidence as to these circumstances could relate to the company's financial position, the character and business of the company, the practical benefit of the proceeding to the company and why the applicant is a proper person to bring the proceeding on the company's behalf. The applicant had failed in adducing evidence to these circumstances and with respect to the applicant's lack of legal expertise and representation, the court was of the opinion he was not an appropriate person to bring the proceedings.

(iv) A serious question to be tried

The court did not consider the applicant's broad assertions of the pecuniary amounts connected with the parcels of land in the civil proceedings to be demonstrative of a serious question to be tried. The court observed that while the threshold for this criterion was relatively low, the furnishing of actual evidence was still required rather than a reliance on vague and imprecise pleadings.

(v) Notice of proceedings

The court observed that the company itself is to be the recipient of any notice given under this criterion. As the applicant had erroneously given notice to the creditor that appointed the receiver to Coral Coast, rather than Coral Coast itself, this criterion was not satisfied.

7. Contributions

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