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Bulletin No. 250

Legislation Hotline

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Report on blockchain and corporate reporting

19 June 2018 - The Financial Reporting Lab of the UK Financial Reporting Council (the FRC) has published a report that considers how current developments in blockchain technology might impact corporate reporting processes: Blockchain and the future of corporate reporting: How does it measure up? (June 2018).

The report concludes that, whilst cost, complexity and lack of standardisation of blockchains might be inhibiting factors, the growing use of blockchain means that those involved in corporate reporting processes need to consider its potential disruptive impact.

Specifically, the following potential uses for blockchain are considered:

- in the production of corporate reporting: how transactions processed on a blockchain may help to improve accounting records;

- in the distribution of corporate reporting: how a blockchain based European corporate reporting platform (European Financial Transparency Gateway) may help to open up access to corporate reporting; and
- in the consumption of corporate reporting: how blockchain might help to rethink the way that reporting content is defined.

1.2 Consultation on the first tranche of the Corporate Collective Investment Vehicle Bill

13 June 2018 - The federal government has released the first tranche of consultations on the Corporate Collective Investment Vehicle (CCIV) Bill (Cth) (the CCIV Bill) for public consultation.

The vehicle complements the Corporations Amendment (Asia Region Funds Passport) Bill (Cth) initiative, which the government introduced into Parliament earlier this year.

The first tranche of the CCIV Bill covers:

- a revised draft of the new chapter in the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), containing the core provisions establishing how the Corporate Collective Investment Vehicle (the CCIV) and its sub-funds will operate;
- amendments to apply Chapters 2A to 2P of the Corporations Act (such as the meetings rules and members' rights and remedies) to CCIVs; and
- an outline in the explanatory materials of the proposed legislative approach to depositary independence.

The second tranche of consultations will cover the remaining substantive aspects of the regulatory framework for CCIVs, including external administration, consequential amendments to apply the Chapter 7 financial services regime to CCIVs, and penalty provisions.

1.3 Reforms to address corporate misuse of taxpayer funded Fair Entitlements Guarantee scheme

12 June 2018 - The federal government is implementing changes to stop the corporate misuse of the taxpayer funded Fair Entitlements Guarantee (FEG) scheme.

Draft legislation has been released for public consultation. The draft legislation will strengthen and improve enforcement and recovery options of unpaid employee entitlements to deter misuse of the FEG scheme.

The FEG scheme provides financial assistance to employees left with unpaid employment entitlements when they lose their job due to the insolvency of their employer.

Evidence shows that some employers are structuring their corporate affairs to avoid paying employee entitlements when a business becomes insolvent. This results in the improper shift of costs of meeting employee liabilities that can and should be paid directly by the employer onto Australian taxpayers through the drain on the taxpayer funded scheme. Average annual costs under the FEG scheme have more than tripled from $70.7 million in the four years to 30 June 2009, to $243.6 million in the four years to 30 June 2017.

The proposed changes will:

- penalise company directors and other persons who engage in transactions that are directed at preventing, avoiding or reducing employer liability for employee entitlements;
- strengthen the ability under the law to sanction directors and company officers with a track record of insolvencies where the FEG is repeatedly relied upon; and
- ensure recovery of FEG from other entities in a corporate group where it would be just and equitable and where those other entities have benefited from the work done by the insolvent entity's employees.

1.4 FSB launches thematic peer review on bank resolution planning

4 June 2018 - The Financial Stability Board (the FSB) is seeking feedback from stakeholders as part of its third thematic peer review on resolution regimes. The objective of the review is to evaluate implementation by jurisdictions of the FSB resolution planning standard set out in the FSB's Key Attributes of Effective Resolution Regimes for Financial Institutions (the Key Attributes) and in associated guidance in relation to banks. The Key Attributes are the international standard on resolution regimes, and form a key component of the FSB's policy framework to address the risks associated with institutions that are "too big to fail".

The peer review will cover resolution planning for all domestically incorporated banks in the FSB member jurisdictions that could be systemically significant or critical if they fail, i.e. global systemically important banks (G-SIBs), domestic systemically important banks and any other banks that could be systemic in failure and that are included in resolution planning at a jurisdictional level. Given that the FSB work in recent years has been primarily focussed on resolution planning for G-SIBs, the review will focus in particular on banks other than G-SIBs and will explore the extent to which, and how, expectations set out in the FSB guidance are applied to these institutions.

The Summary Terms of Reference provide more details on the objectives, scope and process for this review. The peer review report will be published in the first half of 2019.

As part of this peer review, the FSB invites feedback from financial institutions, industry and consumer associations, plus other stakeholders, on the aspects of bank resolution planning covered by the peer review. This could include comments on:

- the adequacy and nature of requirements and practices for resolution planning in the FSB jurisdictions, including proportionality considerations for different types of banks;
- the nature and scope of guidance by authorities in relation to resolution planning;
- experiences and challenges from the development of resolution strategies and plans, including in a cross-border context;
- the adequacy of public disclosures on bank resolution planning; and
- experiences and challenges in addressing barriers to resolvability, and implications for resolution planning.

1.5 UK: Parliamentary Committee recommends mandatory climate risk reporting by 2022

4 June 2018 - The UK Environmental Audit Committee of the UK Parliament (the Committee) has published a report concluding that the UK Government should make it mandatory for large companies and asset owners-such as pension funds-to report their exposure to climate change risks and opportunities by 2022.

The Greening Finance: embedding sustainability in financial decision making report found that structural incentives across the UK investment chain encourage a focus on short-term returns, often to the neglect of longer-term considerations, including environmental sustainability and climate change-related risks and opportunities. Confusion about the extent to which pension trustees have a duty to consider environmental risks can also prevent institutional investors addressing climate change risks. The Committee is calling on the government to clarify in law that pension schemes have a duty to protect long-term value and should be considering environmental risks in light of this.

According to the Committee, the UK's existing framework of financial law and governance should be used to implement climate-related risk reporting. The government should issue guidance immediately making clear that the *Companies Act 2006* (UK) already requires companies to disclose climate change risks where they are financially material. The *Corporate Governance Code* and *UK Stewardship Code* of the FRC, and the listing rules of the Financial Conduct Authority should likewise be amended to require climate-related financial disclosures on a comply or explain basis by 2022.

View:

- report summary; and
- conclusions and recommendations.

1.6 Inquiry into class action proceedings and third-party litigation funding releases discussion paper

31 May 2018 - The Australian Law Reform Commission (the ALRC) has released the Discussion Paper Class Action Proceedings and Third-Party Litigation Funders (DP 85) (the Discussion Paper), and is calling for comments and feedback on its questions and proposals for law and system reform.

The Terms of Reference for this inquiry ask the ALRC to consider whether, and to what extent, class action proceedings and third-party litigation funders should be subject to Commonwealth regulation, and whether there is adequate regulation of:

- conflicts of interest between third-party litigation funders, lawyers and class members;
- prudential requirements and character requirements of funders; and
- the proportion of settlement available to be retained by lawyers and litigation funders in class action proceedings.

The ALRC was asked to have regard to:

- the increased prevalence of class action proceedings;
- the importance that costs in these matters are appropriate and proportionate; and

- the need to protect the interest of plaintiffs and class members.

The majority of class action proceedings that are filed in the Federal Court of Australia receive funding from third-party litigation funders. In the last five years, 64% of class action proceedings filed in the Federal Court received funding. All shareholder class action proceedings, which are the most likely type of class action proceeding, filed in the Federal Court during that time were funded.

The Discussion Paper provides 16 proposals and asks 11 questions that focus on the introduction of regulation appropriate for third-party litigation funders and strengthening the role of the Federal Court to further supervise funded class action proceedings.

The Discussion Paper asks whether the introduction of contingency fee billing for solicitors acting in class actions would provide better protection for class members than the current system where both lawyers and funders receive a proportion of settlement. It also proposes a system for regulatory collective redress, enabling potential class members to recover damages without going through the statutory class action regime.

1.7 Use of behavioural insights may help educate investors, say IOSCO/OECD

30 May 2018 - Financial regulators, public authorities, and other organisations are increasingly using behavioural insights to educate investors to make more informed financial decisions, according to The Application of Behavioural Insights to Financial Literacy and Investor Education Programmes and Initiatives, a report by the International Network on Financial Education of the International Organization of Securities Commission (IOSCO) and the Organisation for Economic Co-operation and Development (the OECD).

The accelerated growth of new and innovative technologies, an excessive amount of available financial information, and increasingly sophisticated financial products make it progressively more difficult for retail investors to navigate today's complex financial markets. Although many organisations offer education and financial literacy programs, investors often fail to make rational financial choices because of their own cognitive, social and psychological biases, all of which can act as barriers to sound financial decision making.

The report examines how findings from behavioural sciences can be used to develop investor education and financial literacy initiatives that may be more effective than traditional programs, largely by mitigating the effects of behavioural biases. Behavioural sciences focus on the way individuals think and behave, based on empirical evidence from a range of social sciences, such as economics, psychology, and social marketing, as well as from other fields like neuroscience.

The report also provides various approaches for regulators, policy-makers, and practitioners to choose from when considering whether and how to apply behavioural insights. These approaches include such things as:

- gaining a full understanding of the problem that consumers or investors face before designing a solution;
- taking the context of financial decision making into account;
- conducting small-scale pilot and field tests before implementing and scaling up initiatives;
- evaluating outcomes rigorously;
- sharing knowledge and experiences within organisations and with stakeholders and keeping track of this information;
- preparing the groundwork within organisations before starting to consider behavioural insights;

- combining traditional approaches and behavioural insights; and
- reviewing programs and initiatives regularly.

1.8 Royal Commission update - background papers and recent developments

May 2018 - The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission) has made available Background Paper 13: The regulatory capital framework - Impairment, provisioning and enforcing security, which was prepared by the Australian Prudential Regulatory Authority (APRA) and considers "the effect on an authorised deposit-taking institution's ... Tier 1 capital where a loan is classified as impaired, a provision is raised and enforcement action against the loan's security is taken".

The Royal Commission has also made available:

- Background Paper 14: General Insurance;
- Background Paper 15: Catastrophes and Natural Disasters Insurance;
- Background Paper 16: Some Features of Finance in the Agriculture, Forestry and Fishing Industry;
- Background Paper 17: Department of Agriculture and Water Resources; and
- Background Paper 18: Some Features of Financial Services in Regional and Remote Communities.

2. Recent ASIC Developments

2.1 Guidance for oversight of the Australian Financial Complaints Authority

20 June 2018 - Ahead of the commencement of the Australian Financial Complaints Authority (AFCA) on 1 November 2018, the Australian Securities and Investments Commission (ASIC) has released new Regulatory Guide 267 Oversight of the Australian Financial Complaints Authority (RG 267).

ASIC is releasing new guidance in advance of AFCA commencement to provide policy certainty for stakeholders and to support an efficient transition to the new single scheme.

The release of RG 267 completes another transitional step to AFCA commencement. This follows:

- the relevant Minister's authorisation of the operator of the scheme on 23 April 2018;
- the relevant Minister's announcements confirming AFCA will commence accepting complaints on 1 November 2018;
- financial firms required to be members of AFCA must be members by 21 September 2018;
- AFCA commencing public consultation on the proposed *AFCA Rules*; and
- ASIC giving disclosure relief for financial firms during the transition to AFCA.

In March 2018, ASIC issued Consultation Paper 298 Oversight of the Australian Financial Complaints Authority: Update to RG 139 (CP 298), consulting on:

- the framework for reporting by AFCA to regulators;
- the role of the AFCA independent assessor; and

- whether the transition period to the commencement of AFCA allowed sufficient time for firms to comply with their dispute resolution disclosure obligations.

The REP 577 Response to submissions on CP 298 Oversight of the Australian Financial Complaints Authority (REP 577) sets out ASIC's response to submissions received to CP 298.

ASIC will retain its existing guidance in Regulatory Guide 139 Approval and oversight of external dispute resolution schemes (RG 139) until all complaints made under the existing approved schemes, the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (the CIO) have been resolved. ASIC will then repeal that guidance.

Licensees and credit representatives must continue to maintain their external dispute resolution (EDR) scheme membership through the transitional period, including paying membership and other scheme fees in full as required.

2.2 Report on relief applications - October 2017 to March 2018

15 June 2018 - ASIC has released its latest report outlining decisions on relief applications. The reporting of ASIC's decisions on relief applications aims to provide transparency about ASIC's decision making and to better inform businesses about the circumstances in which ASIC grants relief.

Report 574 Overview of decisions on relief applications (October 2017 to March 2018) (REP 574) notes that between 1 October 2017 and 31 March 2018, ASIC granted relief from provisions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) or the National Consumer Credit Protection Act 2009 No. 134 (Cth) (the National Credit Act) in relation to 766 applications.

REP 574 sets out various publications released by ASIC during the six months that may be relevant to prospective applicants for relief.

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

2.3 Report on registered liquidators compliance with obligations

13 June 2018 - The ASIC review Report 573 Registered liquidators' compliance with lodgement and publication requirements (REP 573) has found that while registered liquidators are mostly complying with their lodgement and publication obligations, there is room for improvement.

The review examined around 26,000 insolvency administrations over a three year period to June 2017 and tested how registered liquidators complied with their obligations. ASIC found that 3.3% of required forms were not lodged and 7% of the required notices were not published.

While the overall percentage of non-lodgements was low, 70% of registered liquidators reviewed had at least one non-lodgement and were therefore not fully compliant with their obligations.

The report includes detail on ASIC's response when more systemic non-lodgement issues were identified. ASIC agreed to the registered liquidator engaging an independent party to undertake a quality review. These independent reviews provide both ASIC and the registered liquidator with a level of assurance that issues identified are not symptomatic of wider problems.

REP 573 includes guidance for registered liquidators to assist them improve their practice management and efficiency regarding lodgement and publication compliance.

ASIC's guidance to registered liquidators includes:

- it is the registered liquidators' responsibility to ensure all aspects of external administrations are conducted properly;
- ongoing review and update of internal systems and procedures by registered liquidators is vital to ensuring compliance with lodgement and publication obligations; and
- registered liquidators must ensure they supervise staff and provide timely and regular education and training for their staff.

2.4 Financial benchmark regulatory regime

12 June 2018 - ASIC has finalised and published benchmarks rules, a significant benchmarks declaration, and a regulatory guide in a further series of measures towards establishing a comprehensive regulatory regime for financial benchmarks. This follows the establishment of a licensing regime for financial benchmarks through the recent passage of legislation through the Parliament.

Actions by ASIC include:

- declaring certain financial benchmarks to be significant;
- writing rules to support the implementation of a licensing regime for the administrators of significant benchmarks; and
- allowing ASIC, by written notice, to require the continued administration of a significant benchmark or compel submissions to a significant benchmark.

The rules, declaration and regulatory guide are available on the ASIC website.

The measures are also important in aligning financial benchmarks in the Australian economy with the IOSCO Principles for Financial Benchmarks. The rules are also expected to facilitate equivalence assessments under overseas regimes, including the European Benchmarks Regulation.

These steps follow passage through the Parliament in March of legislation that provides for a licensing framework for significant benchmark administrators in Australia. As is the case in a number of other jurisdictions, these legislative reforms make manipulation of any financial benchmark, or products used to determine such a benchmark, a specific offence and subject to civil and criminal penalties.

This follows the implementation of new bank bill swap methodology, with the benchmark now calculated directly from market transactions during a longer rate-set window and involving a larger number of participants (see 18-144MR).

View:

- Financial benchmarks rules and declaration; and

- Regulatory Guide 268 Licensing regime for financial benchmark administrators.

2.5 Relief for managed investment and superannuation schemes for certain disclosure obligations

4 June 2018 - ASIC has extended two ASIC instruments to allow additional time to consider the policy position in relation to certain disclosure obligations of managed investment schemes and superannuation trustees.

The relevant instruments are:

- ASIC Class Order [CO 12/749] Relief from the Shorter PDS regime (CO 12/749); and
- ASIC Superannuation (RSE Websites) Instrument 2017/570.

Each instrument had been due to expire on 30 June 2018.

These extensions will maintain the status quo in the meantime, enabling ASIC to adjust or revoke the relief once the policy position is settled by government.

The expiry dates specified in the instruments align with the usual 10-year sunsetting period for legislative instruments under the Legislation Act 2003 No. 139 (Cth). No assumption should be made that the instruments will continue in force for that length of time.

Effect of shorter PDS regime relief

CO 12/749, as extended by the ASIC Corporations (Amendment) Instrument 2018/473 provides relief to exclude multifunds, superannuation platforms and hedge funds from the disclosure requirements of the shorter Product Disclosure Statement (PDS) regime under Part 7.9 of the Corporations Regulations 2001 No. 93 (Cth).

The shorter PDS regime requires disclosure for certain financial products to be presented in a short and simple way. As multifunds, superannuation platforms and hedge funds are complex products, there are questions about the appropriate application of the shorter PDS regime to these products.

Following an announcement made by the then government, ASIC first provided relief under the class order in 2012. Since then, ASIC has extended the period of relief in successive instruments to permit the policy position in relation to operation of the shorter PDS regime to be further considered.

Under the extension issuers of multifunds, superannuation platforms and hedge funds remain subject to the full PDS requirements.

Effect of relief for website publication of employer sub-plan information

The ASIC Superannuation (RSE Websites) Instrument 2017/570, as extended by ASIC Corporations (Amendment) Instrument 2018/474, provides relief from s. 29QB of the Superannuation Industry (Supervision) Act 1993 No. 78 (Cth) to the extent it requires the publication on superannuation fund websites of personal information and information about standard employer sub-plans.

ASIC first provided this relief by class order in 2014, and since then has extended the period of relief in successive instruments. This has been to facilitate government consideration of industry feedback in relation to the operation of s. 29QB to require potentially sensitive information in relation to the commercial terms negotiated with different employer sponsors.

Under the extension, the relief in relation to the operation of s. 29QB to the extent it requires the publication of personal information continues unaffected.

2.6 Consultation on foreign financial services providers relief proposals

1 June 2018 - ASIC has released a consultation paper proposing a modified licensing regime for foreign financial service providers carrying on a financial services business in Australia with wholesale clients. These foreign providers are global investment banks or wholesale managed funds. This approach would provide ASIC with a broader range of tools to regulate the activities of foreign providers in Australia.

Consultation Paper 301 Foreign financial services providers sets out ASIC's proposal to enable foreign providers to apply for a modified form of Australian Financial Services (AFS) licence (foreign AFS licence). Currently foreign providers of services to wholesale clients are not required to hold an AFS licence in some circumstances under ASIC relief.

Providers holding a foreign AFS licence will be exempt from certain licensee provisions under the Corporations Act 2001 No. 50 (Cth). This is on the basis that there are similar regulatory outcomes achieved through the regime applying to the foreign provider in its home jurisdiction.

This follows ASIC's review of the regulatory settings behind ASIC's foreign providers relief. The review identified some supervisory and regulatory concerns about the operation of the relief.

ASIC has also taken action in response to failures to comply with the terms of the relief by certain foreign providers of investment banking services.

ASIC considers that it is important for foreign providers to adhere to fundamental conduct obligations in the AFS licensing regime that govern how financial services are provided to Australian wholesale clients and promote market integrity.

The current foreign provider licensing relief is due to sunset on 27 September 2018. ASIC will extend the current relief for 12 months until 30 September 2019 while ASIC consults with stakeholders.

The consultation paper proposes a further transition period of 12 months to 30 September 2020 if ASIC proceeds with foreign AFS licensing.

2.7 Disclosure relief during transition to AFCA

31 May 2018 - ASIC has announced it will give financial firms, including superannuation trustees, transitional relief until 1 July 2019 to allow them time to update mandatory disclosure documents and periodic statements with the contact details of AFCA.

AFCA is the new single EDR scheme for consumer and small business complaints. It will replace the three existing schemes:

- FOS;
- the CIO; and
- the Superannuation Complaints Tribunal.

Under the disclosure relief provided by ASIC:

- financial firms will have until 1 July 2019 to update EDR details to refer to AFCA in mandatory disclosure documents, periodic statements and exit statements;
- financial firms will not have to issue significant event notifications under s.1017B of the Corporations Act 2001 No. 50 (Cth) associated with the transition to AFCA; and
- Regulatory Guide 165 Licensing: Internal and external dispute resolution (RG 165) has also been amended to require information about predecessor schemes and AFCA to be provided to complainants from 21 September 2018.

Financial firms who wish to rely on the disclosure relief will need to review both the legislative instruments and the updated text in the box under RG 165.88.

View:

- 2018 Legislative instruments; and
- Updated RG 165.

2.8 Major changes affecting reported net assets and profit, and other focuses for 30 June 2018 reporting

31 May 2018 - ASIC has announced its focus areas for 30 June 2018 financial reports of listed and other entities, calling on companies to focus on new requirements that can materially affect reported assets, liabilities and profits.

New accounting standards

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

Full-year reports at 30 June 2018 must disclose the future impact of these new accounting standards. Half-year financial reports at 30 June 2018 must comply with the new requirements for revenue recognition and financial instrument valuation.

The new standards cover:

- revenue recognition;
- financial instrument valuation (including hedge accounting and loan loss provisioning);
- lease accounting; accounting by insurers; and
- the definition and recognition criteria for assets, liabilities, income and expenses.

ASIC will be reviewing more than 200 full-year financial reports at 30 June 2018 and selected half-year reports.

The role of directors and management

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

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

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

Operating and financial review

Listed companies should disclose information on risks and other matters that may have a material impact on the future financial position or performance of the entity. This could include, for example, matters relating to digital disruption, new technologies, climate change, Brexit, or cyber-security.

For more information see ASIC's Regulatory Guide 247 Effective disclosure in an operating and financial review.

Directors may also consider whether it would be worthwhile to disclose additional information that would be relevant under integrated reporting, sustainability reporting or the recommendations of the Task Force on Climate-related Financial Disclosures where that information is not already required for the Operating and Financial Review.

Material disclosures

ASIC's surveillance continues to focus on material disclosures of information useful to investors and others using financial reports, such as assumptions supporting accounting estimates and significant accounting policy choices.

ASIC will not pursue immaterial disclosures that may add unnecessary clutter to financial reports, efforts should be made to communicate information more clearly in financial reports.

Proprietary companies

ASIC continues to review the financial reports of proprietary companies and unlisted public companies, based on complaints and other intelligence. ASIC wrote to more than 1,000 proprietary companies that appeared to be large with no reporting exemption and had not lodged financial reports. ASIC will be writing to several hundred more companies later this year.

3. Recent ASX Developments

3.1 ASX 24 Operating Rules Amendments - Deliverable Futures Contracts

The Australian Securities Exchange (the ASX) has amended the *ASX 24 Operating Rules* to clarify the effect of settlement for deliverable Futures Contracts. The amendments are effective as of 1 June 2018.

More information relating to these amendments is available on the ASX Website.

3.2 Reports

On 6 June 2018, ASX released the ASX Monthly Activity Report for May 2018.

4. Recent Takeovers Panel Developments

4.1 Molopo Energy Limited 10 & 11 - Declaration of unacceptable circumstances

8 June 2018 - The Takeovers Panel (the Panel) has made a declaration of unacceptable circumstances in relation to an application dated 11 May 2018 by Aurora Funds Management Ltd in its capacity as responsible entity of the Aurora Fortitude Absolute Return Fund (Aurora) in relation to the affairs of Molopo Energy Limited (Molopo) (see TP18/34).

There is no suggestion that the current directors of Molopo (who were elected at Molopo's AGM on 31 May 2018) are responsible for these circumstances.

Background

Molopo is currently the subject of an off-market takeover bid by Aurora. On 8 May 2018, Molopo released an announcement advising of several transactions and events during the preceding four months that had not been previously disclosed to the market.

The Panel considered that unacceptable circumstances arose from these and other matters, including:

- Molopo shareholders have not been given enough information to enable them to assess the merits of Aurora's bid and have not had a reasonable and equal opportunity to participate in any benefits accruing under Aurora's bid; and
- former directors of Molopo (who were not re-elected at Molopo's AGM on 31 May 2018) by their action, including such action which may contribute to Aurora's bid not proceeding, have not given Molopo shareholders a reasonable and equal opportunity to participate in any benefits accruing under Aurora's bid.

Declaration

The Panel considered that the circumstances were unacceptable:

- having regard to the effect on the control, or potential control, of Molopo or the acquisition, or proposed acquisition, by a person of a substantial interest in Molopo;
- in the alternative, having regard to the purposes of Chapter 6 set out in s. 602 of the Corporations Act 2001 No. 50 (Cth);

- in the further alternative, because they constituted, constitute, will constitute, or are likely to constitute, a contravention of a provision of Chapter 6.

The Panel is considering what, if any, final orders to make and will publish details in due course. The Panel will also publish its reasons for the decision in due course on its website.

4.2 Finders Resources Limited 03R - Review Panel decision

6 June 2018 - The review Panel has affirmed the decision of the initial Panel to make a declaration of unacceptable circumstances in Finders Resources Limited 02 and (by a 2:1 decision) set aside the initial Panel's decision to make orders and made new orders.

The review Panel considered that the unusual facts of this case left considerable room for reasonable minds to differ on the interaction and effects of the unacceptable circumstances and the application to them of "truth in takeovers" principles. On the majority's views on such matters, it was not open to them to make the same orders as the initial Panel, even though they fully agreed with the declaration. One Panel member (Mr Malek) supported the initial Panel's orders.

The majority were satisfied that their compensation orders will appropriately protect the rights and interests of persons who acquired Finders shares on market above the Eastern Field bid price.

The majority were also satisfied that the remaining orders will appropriately protect the rights and interests of Eastern Field by effectively allowing it to defer payment for the acquisition of Taurus's shares until 30 November 2018. They considered that this would give Eastern Field opportunity to mitigate the effects of any reliance on Taurus's statement.

The majority were not satisfied that the orders would unfairly prejudice any person.

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

5. Recent Research Papers

5.1 Hostile takeover regimes in Asia: A comparative approach

The market for corporate control (operating through hostile takeovers) acts as a key corporate governance mechanism to discipline corporate managers. However, the process and substance of regulating hostile takeovers differs remarkably among various jurisdictions. Existing and influential scholarship has focused on the differences in hostile takeover regulation between the United States (US) and the United Kingdom (UK), with the explanations being founded in interest group politics. The authors pose the question whether the theory can be extended outside of the US and the UK, particularly to their legal transplants in Asia. In the last few decades, several Asian jurisdictions have drawn heavily from the US and the UK when framing their own takeover regulation. Yet, Asia differs significantly from the US and the UK, particularly in respect of the much higher concentration of shareholdings among their publicly listed companies, and their institutions supporting takeover regulation, such as the securities regulator, the stock exchange and the judiciary. Thus, it is not surprising that the outcome of the substantive regulation also differs despite the legal transplantation, though there may be superficial formal convergence. The differences in takeover regulation and the reasons therefore have not been the subject matter of extensive study in the existing scholarship.

The study fills the gap by focusing on the regulation of hostile takeover regimes in Asia. In this article, drawing from an earlier work that studies, among others, takeover regulation in six significant Asian economies of China, Hong Kong, Japan, India, Korea and Singapore, the authors examine the differences in the takeover law and regulation between the exporting countries (US and the UK) and recipient countries (the six Asian economies), and explain the reasons for the differences. In particular, the authors focus on three questions:

- What interest groups are relevant to the choice of initial takeover regulation in Asian economies?;
- After the selection has occurred, what are the reasons for the continued lack of functional convergence?; and
- Are there any unintended consequences of legal transplantation of the US or UK model of takeover regulation in the Asian economies?.

The authors argue that takeover regulation in Asia must be viewed through a lens that is different from the Anglo-American approach in view of the institutional factors that are at play when choices were (and are continuing to be) made. The study has important implications on the academic debates on the efficacy of legal transplantations, comparative studies of hostile takeover regimes and the role of interest groups in shaping takeover regulation to a wider set of Asian countries than examined by current scholarship.

Hostile Takeover Regimes in Asia: A Comparative Approach

5.2 Assessing the performance of takeover panels: A comparative study

Takeover regulatory regimes around the world seek to balance the conflicting interests of the parties involved in takeovers. The clearest conflict arises from the opposing aims of the shareholders of the company being taken over (target) and the acquirer (bidder) in regard to the price paid for the target shares and the amount of information provided. Another involves the target company's directors, who are in the best position to advise target shareholders on the merits of the takeover bid and yet are likely to be concerned not to lose their position as a result of the takeover. Different takeover regimes adopt varying approaches to deal with these conflicts.

This paper focuses on regulatory systems that use a Panel or like body to make decisions in relation to takeover matters. Of all of the Panel bodies, the Panel on Takeovers and Mergers in the United Kingdom is the most well known. This is principally because it was the first of its kind, and has subsequently provided a model for a number of other like bodies around the world. In Asia, these bodies are the Takeovers and Mergers Panel in Hong Kong and Securities Industry Council in Singapore . Both of these jurisdictions have adopted a Takeover Code that is modelled to varying extents on *The City Code on Take-overs and Mergers* (the UK Code). In contrast, the Takeovers Panel in Australia (the Australian Panel) operates on a different basis from the takeover bodies in Hong Kong, Singapore and the UK (the Code jurisdictions). That is, rather than having a proactive role in enforcing a Takeover Code, the Australian Panel only decides applications made before it based on the Australian takeover legislation. As a result, the Australian Panel's role focuses on resolving disputes between the parties involved in a takeover. Notwithstanding the differences in their names and functions, each of the above takeover bodies is responsible for ensuring that parties to a takeover act appropriately. Importantly, the bodies make their decisions based on similar aims and regulatory principles underpinning the respective regimes.

Assessing the Performance of Takeover Panels: A Comparative Study

5.3 Speed in decision-making: An assessment of the Australian Takeovers Panel

Timely decision-making is an important element of an effective system of dispute resolution. The ability of tribunals to make relatively speedy decisions is accordingly a key advantage of using administrative tribunals in place of courts. This paper examines the speed with which the Australian Takeovers Panel has made its decisions since it became the primary forum for resolving takeover disputes from 13 March 2000 to 30 June 2016. The assessment is conducted based on an empirical analysis of the timing of Panel decision-making. It focuses particularly on the time taken by the Panel to make its decisions and publish the reasons for its decisions over that period.

Speed in Decision-Making: An Assessment of the Australian Takeovers Panel

5.4 Governance issues in dual class share firms

In a typical public company, shareholders can elect the board, appoint auditors, and approve fundamental changes. Firms with dual class share (DCS) structures alter this balance by inviting the subordinate shareholders to carry the financial risk of investing in the corporation without providing them with the corresponding power to elect the board or exercise other fundamental voting rights. This article fills a conspicuous gap in the scholarly literature by providing empirical data regarding the governance of DCS firms beyond the presence of sunrise and sunset provisions. The summary data suggest that the governance of DCS firms is variable. A large proportion of DCS firms have no majority of the minority voting provisions and no independent chair. By contrast, almost half of the DCS firms have a sunset clause and a majority of independent directors. Finally, just under one third of DCS firms have change of control provisions over and above existing law. On the basis of this evidence, this article argues against complete private ordering in favour of limited reforms to protect shareholders in DCS firms including:

- mandatory sunset provisions;
- disclosure relating to shareholder votes; and
- buyout protections that would address weaknesses inherent in DCS firms.

Governance Issues in Dual Class Share Firms

5.5 Stock market short-termism's impact

Stock-market-driven short-termism is crippling the American economy, according to legal, judicial, and media analyses. Firms are forgoing the research and development (R&D) they need, sharply cutting capital expenditures, and buying back their own stock so feverishly that they starve themselves of cash. The stock market is the primary cause:

- corporate directors and senior executives cannot manage for the long-term when their shareholders furiously trade their company's stock;
- they cannot make long-term investments when stockholders demand to see profits on this quarter's financial statements;
- they cannot even strategize about the long-term when shareholder activists demand immediate results; and
- they cannot keep the cash to invest in their future when stock market pressure drains away that cash in stock buybacks.

This doomsday version of the stock-market-driven short-termism argument embeds economy-wide predictions that have not been well-examined and that could tell us how severe these problems are. If the scenario is correct and strong, we should first see sharp increases in stock trading in recent decades and more frequent activist interventions, and these increases should be accompanied by:

- economy-wide R&D spending declining;
- cash bleeding out from the corporate sector; and
- sharply declining investment spending in the US, where large firms depend on stock markets and where activists are important, as compared with advanced economies that do not depend as much on stock markets.

These baseline predictions flow directly from the short-termist critique of stock markets and corporate America. They are the central negative consequences of stock-market-driven short-termism and they justify corporate law policies that seek to prevent these outcomes.

But none of these predicted outcomes can be found in the data. Corporate R&D is not declining, corporate cash is not bleeding out, and the developed nations with neither American-style quarterly-oriented stock markets nor aggressive activist investors are not investing any more in capital equipment than the US. Hence, the stock-market-driven short-termist argument needs to be reconsidered, recalibrated, and, quite plausibly, rejected.

The author then indicates why, even if some firms suffer from short-termism, the economy as an ecosystem does not. Lastly comes the broadest question of why has a view that lacks evidentiary support in the economy-wide data become one of the few corporate governance issues that attracts attention from the media, senators and other political and policymaking leaders, and the public. The author suggests why in this paper's final part.

Stock Market Short-Termism's Impact

5.6 Does firing a CEO pay off?

The authors examine whether involuntary chief executive officer (CEO) replacements pay off by improving firm prospects. They find CEO successors' acquisition investments to be associated with significantly higher shareholder gains relative to their predecessors and the average CEO. This improvement in post-turnover acquisition performance appears to be a function of board independence, hedge fund ownership, and the new CEO's relative experience. CEO successors also create sizeable shareholder value by reversing prior investments through asset disposals and discontinuing operations and by employing more efficient investment strategies. The evidence suggests that firing a CEO pays off.

Does Firing a CEO Pay Off?

5.7 Mergers and the market for busy directors: An international analysis

Using 13,233 acquisitions from 57 countries, the authors examine merger and acquisition decisions made by busy boards. They find that few busy acquirers originate from emerging markets and that they tend to undertake cross-border mergers, favour public targets, finance with cash and equity, pursue non-diversifying mergers, avoid targets with multiple bidders, and long-term underperform relative to non-busy acquirers. Importantly, the authors discover a non-linear relation between an acquirer's board busyness and announcement returns. They find that the labour market penalises directors who approve bad acquisitions, but does not reward them for good mergers. They observe that acquirers with busy boards consistently underperform.

[Mergers and the Market for Busy Directors: An International Analysis]

6. Recent Corporate Law Decisions

6.1 Former liquidator not "interested person" for the purposes of s. 1322(4) of the Corporations Act

(By Bonnie Johnston, MinterEllison)

In the matter of Bernsteen Pty Ltd (in liquidation) [2018] SASC 76 (6 June 2018) Supreme Court of South Australia, Doyle J

(a) Summary

The plaintiff, the former liquidator of Bernsteen Pty Ltd (in liquidation) (Bernsteen), made an application for declaratory relief pursuant to s. 1322(4) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The declaratory relief was sought in relation to the conduct of meetings of the committee of inspection for Bernsteen, held while the plaintiff was the liquidator. A threshold issue was whether the former liquidator was an interested person for the purposes of obtaining this relief. In dismissing the former liquidator's claim for declaratory relief, Doyle J considered that the former liquidator was not an interested person because his interest was too slight and insubstantial. Doyle J considered there were circumstances where a former liquidator could have a sufficient interest, but in the circumstances of this case, the former liquidator:

- was not able to advance any real and identifiable interest beyond his status as the former liquidator;
- failed to demonstrate any tangible personal or professional motivation for seeking to vindicate his past actions; and
- indicated the proceedings were only brought to comply with a direction from ASIC which, although relevant, was not sufficient to make the former liquidator an interested person.

(b) Facts

The plaintiff was appointed liquidator of both Bernsteen and another company, Newmore Pty Ltd (in liquidation) (Newmore) on 21 December 2001. On 14 November 2005, concurrent meetings of the committees of inspection for both companies were held. At these meetings, resolutions were passed which approved the plaintiff's remuneration as liquidator for the period from 1 March to 31 October 2005.

In 2010 and 2011, ASIC reviewed the liquidation of Bernsteen and identified an irregularity in the minutes for the meeting held on 14 November 2005, which concerned the purported lack of a quorum for the resolution approving the plaintiff's remuneration to be passed. ASIC also identified concerns in relation to the approval and funding of litigation on behalf of Bernsteen (the George Proceedings). At ASIC's direction, the plaintiff convened concurrent meetings of the committees for each company on 8 and 21 September 2011. At these meetings, the Bernsteen committee passed resolutions confirming the attendance of the members required for the quorum at the meeting on 14 November 2005, approving the plaintiff's remuneration for the period from 1 March to 31 October 2005 and providing approval pursuant to s. 477(2B) of the Corporations Act for Bernsteen's funding of the George Proceedings.

As a result of their investigation, ASIC directed the plaintiff to bring these proceedings, seeking declarations pursuant to s. 1322(4) of the Corporations Act that:

- the minutes of the Bernsteen committee meeting on 14 November 2005 be amended to reflect the attendance of the members required for the quorum;
- the resolution approving the plaintiff's remuneration as liquidator was validly made by a requisite quorum, pursuant to s. 549(3) of the Corporations Act; and
- the approval of the funding of the George Proceedings was valid for the purposes of s. 477(2B) of the Corporations Act (the s. 1322 Proceedings).

Shortly after their commencement in 2012, the s. 1322 Proceedings were adjourned pending the hearing of separate proceedings brought by Mr Viscariello (a shareholder, creditor and former director of Bernsteen) in relation to matters arising out of the plaintiff's role as liquidator of Bernsteen (Viscariello Proceedings). In 2015, as a result of the initial decision of Kourakis J in the Viscariello Proceedings, the plaintiff consented to an order that he be removed as liquidator of Bernsteen.

Following the ultimate resolution of the Viscariello Proceedings, in April 2018, ASIC confirmed it still required the plaintiff to prosecute the s. 1322 proceedings. However, Mr Viscariello sought to intervene in the proceedings, challenged the plaintiff's standing to seek relief under s. 1322(4) and contended that the plaintiff was precluded from seeking relief on the basis it was either an abuse of process or some form of *Anshun* estoppel. In the course of considering arguments on these preliminary matters, it became clear that there was a threshold issue about whether the plaintiff had a sufficient interest to qualify as an interested person under s. 1322(4).

(c) Decision

Section 1322 is a remedial provision intended to prevent procedural irregularities from invalidating transactions and decisions which would otherwise be a contravention of the Corporations Act. Section 1322(4) provides that, on application by an interested person, the court may make any of the following orders:

- an order declaring that an act purporting to be under the Corporations Act or in relation to a corporation is not invalid because of failure to comply with the Corporations Act or the corporation's constituent documents;
- an order directing the rectification of a register kept by ASIC;
- an order relieving a person (in whole or in part) from civil liability in relation to acts or contraventions referred to in s. 1322(4)(a); and
- an order extending or abridging the period for doing any act, matter or thing or instituting or taking any proceeding under the Corporations Act or in relation to a corporation.

Given the remedial purpose of s. 1322, Doyle J considered that the concept of an "interested person" in s. 1322(4) should not be narrowly interpreted. Doyle J referred to both *Re Golden Gate Petroleum Ltd*

(2010) 77 ACSR 17 and *Twin v Deputy Commissioner of Taxation* [2004] 1 Qd R 450, where the courts found the legislature intended that s. 1322(4) be available to a wide class of applicants, which would "include an applicant whose material legal rights or pecuniary or other economic interests are or may be substantially affected by the matter in issue".

In identifying his interest in the proceedings, the plaintiff relied on:

- the fact ASIC had requested or directed him to pursue the proceedings (and maintained this direction or request following both the Viscariello proceedings and the plaintiff being removed as liquidator), however, the plaintiff acknowledged he would not have either brought or continued with these proceedings without the continued direction from ASIC;
- the fact of being the former liquidator of Bernsteen; and
- the contentions that determination of the s. 1322 Proceedings had the potential to reflect upon his conduct (and therefore his professional standing or reputation) and could lead to consequential claims against Bernsteen, however, he also acknowledged the hypothetical nature of these claims.

Consequently, Doyle J found that the plaintiff did not advance any real and identifiable interest in terms of either his financial or legal position or his professional standing or reputation. The plaintiff was found not to be motivated by any personal or subjective desire to address or vindicate the propriety of his conduct as the former liquidator. The only personal or professional motivation he had was to ensure his continued compliance with ASIC's requirements.

In finding that the plaintiff's interest was not of a substantial or practical nature, Doyle J then considered the significance of ASIC's direction to the plaintiff. Although ordinarily, a direction to bring proceedings would not be relevant to whether a person has a relevant interest, it was considered to be significant that in this case, the plaintiff received a direction from ASIC. The significance arose because ASIC is the relevant regulator, who had also investigated the administration of Bernsteen's affairs and identified irregularities to be addressed. Despite this, Doyle J found that the direction from ASIC was only a matter of background relevance, and only as a proxy for the general public interest in ensuring the affairs of a company in liquidation were conducted regularly and in accordance with the law.

Finally, Doyle J also considered it was significant that the plaintiff was no longer the representative of Bernsteen, noting the position would have been different if the plaintiff was still the liquidator (as they would have an interest in relation to the regularity of the affairs of Bernsteen).

Doyle J therefore dismissed the plaintiff's claim for declaratory relief, finding the plaintiff's interest was too slight and insubstantial to qualify him as an interested person under s. 1322(4) of the Corporations Act.

6.2 Liquidator removed after resisting creditors

(By Sarah Dressler, DLA Piper)

In the matter of Iris Diversified Property Pty Ltd (in liq) [2018] NSWSC 834 (6 June 2018) Supreme Court of New South Wales, Black J

(a) Summary

By Amended Originating Process filed, by leave, on 28 May 2018 the Plaintiff, The Owners - Strata Plan 84741 (Owners Corporation), sought orders under s. 75-41(3)(d) or s. 75-43(4) of the Insolvency Practice Schedule (Corporations) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to give effect to a resolution, previously not passed at a creditors' meeting, for the removal of Mr McKenna as liquidator of Iris Diversified Property Pty Ltd (in liq) (the Company) and the appointment of Messrs Bailey and Palmer as liquidators of the Company.

In this case, Black J addressed the issues of whether failure to pass the resolution was adverse to the interests of the creditors of the Company as a whole, whether failure to pass the resolution prejudiced (or was reasonably likely to prejudice) the interests of the creditor which voted against the proposal to an unreasonable extent, and whether the resolution to remove Mr McKenna as liquidator should be treated as passed.

(b) Facts

By letter dated 30 October 2017 from its solicitors, the Owners Corporation requested Mr McKenna assemble a meeting of creditors of the Company and requested that a resolution be put to that meeting. The resolution provided that Mr McKenna be removed as liquidator of the Company, and that Messrs Bailey and Palmer be appointed joint and several liquidators of the Company, in accordance with s. 90-35 of the Insolvency Practice Schedule (Corporations) of the Corporations Act.

Mr McKenna received advice from his lawyers before the meeting, which correctly advised that, in the event of a deadlock at the meeting, he could exercise his casting vote in favour of the resolution so that it passed or not exercise his casting vote so that the resolution failed to pass. However, Mr McKenna was also incorrectly advised that he could exercise his casting vote against the resolution so that it failed to pass, which he ended up doing. McKenna's lawyers did, however, draw Mr McKenna's attention to the *ARITA Code of Professional Practice*, specifically that when exercising a casting vote, the decision needs to be made with the interests of the creditors above anything else.

The Owners Corporation voted in favour of the resolution for Mr McKenna's removal and replacement by Messrs Bailey and Palmer, Iris Group Management Pty Ltd voted against that resolution, and the resolution was passed by a majority of the creditors by value, but not by a majority in number. Mr McKenna then exercised his casting vote against the resolution.

(c) Decision

The Owners Corporation sought a declaration that Mr McKenna had no power, by reason of rl. 75-115(5) of the Insolvency Practice Rules (Corporations) 2016 (Cth), to exercise a casting vote against the resolution. Rule 75-115 provides for the circumstances in which a resolution is passed at a meeting of creditors after a poll is demanded. Black J concluded that it was not necessary or appropriate to make a declaration as to whether Mr. McKenna had power to exercise a casting vote against the resolution for his removal because it would have no impact on the outcome of the resolution or the application.

The Owners Corporation sought an order under ss. 75-41(3)(d), 75-43(4) or 90-15(1) of the Insolvency Practice Schedule (Corporations) that Mr McKenna's decision to exercise his casting vote against the resolution be set aside, that the resolution for his removal as liquidator be taken to have been passed at the meeting and that Messrs Bailey and Palmer be appointed as joint liquidators of the Company.

Black J observed that the first requirement of s. 75-41(1) is satisfied, where the proposal to remove Mr McKenna was voted on and defeated at a meeting of creditors. The second requirement of s. 75-41(1) is satisfied, since, if the vote of Iris Group Management Pty Ltd had been ignored in order to determine whether the proposal was passed, the proposal to remove Mr McKenna would have passed by the vote of the Owners Corporation. Finally, Black J was satisfied that the failure to pass the resolution for the removal of Mr McKenna as liquidator was not consistent with the interests of the creditors as a whole, satisfying the requirement in s. 75-41(1)(c)(i) of the Insolvency Practice Schedule (Corporations).

At the time the resolution was put to the creditors' meeting, the Owners Corporation had communicated its lack of confidence in Mr McKenna and suggested that it was not willing to fund more investigations by Mr McKenna. It was known that the Iris Group would not fund investigations if they were not consistent with the interests of the Iris Group. Black J concluded that the Owners Corporation's preference to fund another liquidator was not irrational and it was relevant to the assessment of the creditors' interests. Black J went on to state that the failure to pass the resolution unreasonably prejudiced, or was likely to prejudice, the interests of the Owners Corporation.

Black J considered whether orders should be made by reason of Mr McKenna's failure to exercise a casting vote in favour of the resolution for his removal. Black J stated that if he had not concluded that the orders sought by the Owners Corporation under s. 75-41 of the Insolvency Practice Schedule (Corporations) should be made, he would have made orders under s. 75-43(4). Similarly, Black J stated that it was not necessary to make orders sought by the Owners Corporation under s. 90-15(1) of the Insolvency Practice Schedule (Corporations) where the orders sought are properly made under ss. 75-41 or 75-43.

The Owners Corporation sought an order that Mr McKenna be removed as liquidator of the Company because among other reasons, they were concerned he would favour the interests of the Company's director or its related parties who appointed him, and he had exercised a casting vote against the resolution when he had no power to do so and favoured the interests of Iris Group Management Pty Ltd in doing so. Black J concluded that there was no need to determine Mr McKenna's removal on any other grounds other than to give effect to the resolution.

Finally, the Owners Corporation applied under s. 90-15 of the Insolvency Practice Schedule (Corporations) for the appointment of Messrs Bailey and Palmer as joint special purpose liquidators of the Company, with specified powers. Black J concluded it was not necessary to appoint a special purpose liquidator because of the orders made under r. 75-41 of the Insolvency Practice Schedule (Corporations).

The court ordered that:

- the resolution that Mr. McKenna be removed as liquidator of the Company put at a meeting of the creditors held on 16 November 2017 is taken to have been passed at that meeting;
- Messrs Bailey and Palmer be appointed as joint liquidators of the Company; and
- Mr McKenna pay O'Neill Partners' (solicitors of the Owners Corporation) costs of and incidental to the proceedings, as agreed or as assessed, without recourse to the assets of the Company.

6.3 Reinstatement of companies to pursue litigation

(By Katrina Sleiman, Corrs Chambers Westgarth)

Manny v David Lardner & Associates [2018] ACTSC 159 (31 May 2018) Supreme Court of the Australia Capital Territory, McWilliam AsJ

(a) Summary

The Court considered applications to reinstate three deregistered companies and to join those entities as co-plaintiffs in a substantive claim against the first defendant. Subject to the appointment of a liquidator, the Court considered it appropriate to reinstate the companies. If the liquidator agreed to pursue the litigation, the Court determined it would be appropriate to join the companies to the litigation.

(b) Facts

The plaintiff was the sole director and shareholder of three corporate entities:

- Jeff Manny Constructions Pty Ltd;
- JK3L Pty Ltd; and
- Lonagann Pty Ltd (the Companies).

The Companies were deregistered on 15 May 2016. In March 2013 (after the Companies had gone into liquidation), the plaintiff issued invoices to each of the Companies for substantial director's remuneration over the period July 2003 to June 2009. The plaintiff claimed to be a creditor of the Companies.

The first defendant was the former solicitor for the plaintiff and the Companies, who were all parties in family law proceedings conducted in 2010 and 2011.

The plaintiff filed two applications. The first was to reinstate the Companies pursuant to s. 601AH of the [Corporations Act 2001 No. 50 (Cth)] (the Corporations Act). If successful, the plaintiff sought a further order pursuant to s. 482 of the Corporations Act for the grant of a stay of the winding up either indefinitely or for a limited time. The second application was to join those Companies to substantive proceedings against the first defendant.

(c) Decision

(i) Reinstatement of the Companies

Section 601AH(s) of the Corporations Act provides:

Reinstatement by Court

- (2) The Court may make an order that ASIC reinstate the registration of a company if:
    - (a) an application for reinstatement is made to the Court by:
        - (i) a person aggrieved by the deregistration; or
        - (ii) a former liquidator of the company; and
    - (b) the Court is satisfied that it is just that the company's registration be reinstated.

The Court identified the following legal principles relevant to the decision whether to reinstate a company:

- the Court considers the circumstances in which the company came to be dissolved, whether good use could be made of the order, whether any person is likely to be prejudiced by the reinstatement, and the public interest;
- the power to reinstate is purely discretionary and this includes a residual discretion to refuse the order even where the elements are satisfied;
- if the basis for reinstatement is that the company has a cause of action it might litigate, evidence is needed to show that reinstatement is likely to lead to the litigation being pursued and that there is a benefit to the company or its creditors, including the applicant for reinstatement, in the litigation being pursued;
- if a company would be insolvent upon reinstatement, reinstatement may be refused in the event that the applicant fails to undertake to pay the reasonable fees of a liquidator; and

- the Court is entitled to impose conditions upon reinstatement to ensure the order operates in a just manner, and such conditions may include an order for payment of costs of a third party incurred in considering the reinstatement application served upon it.

While the expression "a person is aggrieved by the deregistration" in s. 601AH(2)(a)(i) of the Corporations Act should be given a broad construction, the person must show a real economic interest in the company being reinstated. In this case, the Court accepted the plaintiff was aggrieved:

- there was evidence of invoices issued by the plaintiff;
- evidence that the liquidators were aware of the claims of related entities as unsecured creditors; and
- there was the possibility that the plaintiff as shareholder may recover some worth in the Companies through the legal claim if it succeeded.

On the question of whether good use could be made of the reinstatement, the Court noted two matters. First, the purpose for reinstatement was to pursue the cause of action in negligence against the first defendant and there appeared to be at least an arguable case. Second, while the evidence established a lack of solvency which led to the Companies being wound up, the evidence did not establish the Companies were hopelessly insolvent such that the Court would be satisfied there was no prospect of a benefit ultimately being obtained by the pursuit of the litigation.

On the issue of prejudice, the court is concerned with matters that might affect the justice of the reinstatement, not the justice of any proceedings proposed to be instituted. Here, the Court found that the first defendant did not suffer any operable prejudice by reason of the reinstatement. Prejudice to creditors is also a consideration. As the Court could not be confident that all creditors had been served, it directed that a copy of the judgment be served on each creditor so they could be heard before the making of final orders, which required the consent of a liquidator.

The Court determined that the public interest consideration was neutral on the facts of the case.

ASIC was named as a respondent to the application. It did not oppose the reinstatement if a registered liquidator was appointed to each of the Companies.

The plaintiff confirmed to the Court that he would be prepared to give a personal undertaking to fund the liquidator in the pursuit of proceedings by the Companies, in the event they were reinstated. However, as no liquidator had been identified, the likely fees were not yet known. The Court determined that the form of any such undertaking could await the critical step of the appointment of a liquidator. The Court considered it just to reinstate the Companies upon those two matters being addressed.

(ii) Power to grant a stay of a winding up

The plaintiff sought relief under s. 482 of the Corporations Act to stay the winding up of the Companies because he did not want the involvement of a liquidator in the pursuit and conduct of proceedings against the first defendant.

The Court identified the legal principles relevant to the Court's power under s. 482 of the Corporations Act, including:

- the grant of a stay is discretionary and the onus is on the applicant to make out a positive case for a stay;
- the provision is available even if the affairs of the company are fully wound up and the liquidator has commenced the process of deregistration;
- relevant factors to the exercise of the discretion include:
    - the persons affected, whether they have notice of the application, and their attitude to it;

  - the company's financial position (trading and solvency) and any investigations by the liquidator;
  - the timing of the application; and
  - broader policy and public interest concerns; and
- it is contrary to the public interest to terminate the winding up of a company if, after termination, it would remain insolvent.

The Court was not persuaded that an order under s. 482 of the Corporations Act should be made. The overriding difficulty being the failure to establish that the Companies either were or would be solvent. While the Court did not accept the Companies to be hopelessly insolvent, such that a successful legal action may carry some benefit for the plaintiff, that did not mean the Court was able to find that any of the Companies would be solvent upon reinstatement (as opposed to following any successful litigation). Accordingly, it would be contrary to the public interest to terminate the winding up of any of them upon reinstatement.

(iii) Joinder of the Companies to proceedings against first defendant

The Court determined that if reinstatement is ordered, it would be appropriate that the Companies be joined pursuant to rll. 210 and 223 of the Court Procedures Rules 2006 No. 29 (ACT), as the Companies are interested persons. However, if the plaintiff is unable to obtain a liquidator, or having received legal advice, the liquidator determines not to pursue the proceedings, the application for joinder will become unnecessary. Accordingly, the outcome of the application for joinder must await the finalisation of the application for reinstatement.

6.4 Giving (or not giving) priority to eligible employee creditors under deeds of company arrangement

(By Ailsa Wallace, King & Wood Mallesons)

Albarran, Kijurina and Shaw as joint and several administrators of Cooper & Oxley Builders Pty Ltd (administrators appointed) [2018] WASC 161 (29 May 2018) Supreme Court of Western Australia, Vaughan J

(a) Summary

This case deals with the circumstances in which the rights of priority of eligible employee creditors can be excluded under deeds of company arrangement (DoCA).

Here, the company Cooper & Oxley Builders Pty Ltd (Cooper & Oxley) had entered voluntary administration. The directors decided to enter a deed of company arrangement, under which priority provisions for eligible employee creditors had been excluded. The administrators had not obtained approval from the employee creditors to do so as required under the Corporations Act 2001 No. 50 (Cth) (the Corporation Act). The administrators applied to the Court for an order allowing the exclusion of those priority provisions.

Vaughan J granted the order. On balance, the likely outcome for the eligible employee creditors would be better under the DoCA than if Cooper & Oxley was wound up. This was because, among other things, it was likely the eligible employee creditors would receive payments in full under the DoCA, rather than 18 cents in the dollar if the Cooper & Oxley was wound up.

(b) Facts

Albarran, Kijurina and Shaw (the administrators) were appointed as the administrators of Cooper & Oxley.

At the time of their appointment in February 2018, Cooper & Oxley had around 70 employees, and by May 2018, it had around 30. Cooper & Oxley owed approximately $2.119 million in entitlements to these employees, comprising:

- $849,662 to those whose employment had been terminated; and
- $1,269,368 to the continuing employees.

Cooper & Oxley proposed a DoCA to the administrators. The DoCA contained no priority provision for eligible employees.

Under s. 444DA of the Corporations Act, deeds of company arrangement must afford eligible employee creditors with the same priorities as those that would arise if the company was being wound up. Provisions with respect to eligible employee priorities can be excluded if:

- the eligible employee creditors approve the exclusions at a meeting before the meeting of creditors approving the execution of the deed of arrangement; or
- the Court makes an order allowing their exclusion.

Under the DoCA, the eligible employee creditors would not be entitled to the same priority regime they would have been afforded if Cooper & Oxley was wound up because:

- the employees who continued to be employed by Cooper & Oxley were excluded from receiving a dividend for amounts due to them in relation to leave and other entitlements; and
- funds Cooper & Oxley received due a successful litigation claim were not to be applied first to eligible employees.

This meant that the eligible employees would not be entitled to the same priority regime they would be afforded if the Cooper & Oxley was wound up.

On 16 April 2018, the administrators sought the approval of the eligible employee creditors to exclude the priority provisions. However, the resolution proposed only dealt with the exclusion of priority in relation to the leave and other entitlements. On 24 April 2018, Cooper & Oxley convened a meeting of all creditors to pass a resolution to execute the DoCA. The resolution passed (with all eligible employee creditors in attendance voting in favour of the resolution).

However, by this time, it was too late for the eligible employee creditors to approve the non-inclusion of the priority provisions relating to the funds provided in connection with a successful litigation claim (given that the meeting of all creditors had occurred). Accordingly, the administrators sought an urgent Court order allowing their non-inclusion.

The question before Vaughan J was whether the Court should approve the non-inclusion of the priority provisions for eligible employee creditors.

(c) Decision

Vaughan J approved the non-inclusion of the priority provisions for eligible employees in the DoCA.

(i) What are the factors the Court can consider?

The Court has a broad discretion to approve the non-inclusion of the priority provisions for eligible employees. Section 444DA(5) provides that the Court can approve the non-inclusion if it is satisfied that excluding the provisions would:

> "be likely to result in the same or a better outcome for eligible employee creditors as a whole than would result from an immediate winding up of the company".

Vaughan J held that the exercise of the Court's discretion should involve the following four-step process:

- the determination of the likely outcome for employees if the priority provision was not included (scenario 1);
- the determination of the likely outcome for employees if the company was wound up (scenario 2);
- the determination of whether the outcome in scenario 1 is better than scenario 2; and
- the decision of the Court to exercise its discretion to approve the non-inclusion.

(ii) Should the DoCA exclude priority provisions for eligible employee creditors?

Vaughan J held, first, that the DoCA would likely result in a better outcome for eligible employee creditors than if Cooper & Oxley was wound up (the assessment required in the above steps 1-3). This was because:

- under the DoCA, the eligible employee creditors would receive 100 cents in the dollar, compared to 18 cents in the dollar if Cooper & Oxley was wound up; and
- under the DoCA, Cooper & Oxley would continue to operate, meaning the remaining 30 employees would continue their employment (as opposed to if Cooper & Oxley was wound up).

While Vaughan J acknowledged the inevitable risk that Cooper & Oxley would not meet its obligations to continuing employees, his Honour noted that the comparison between scenarios 1 and 2 is to be done looking at the "likely resultant outcome", and not "possible risks".

Vaughan J also took into account the below additional factors in exercising his broad discretion under step 4:

- the DoCA would allow Cooper & Oxley to continue to operate;
- the eligible employees had agreed to the non-inclusion of priority provisions to the extent they related to continuing employees' entitlements to leave and other entitlements, funds received from any successful litigation was a "matter of speculation", and it was likely that employee entitlements would be satisfied without these funds;
- the eligible employees agreed to the resolution to execute the DoCA under which the provisions of priority for eligible employees were not included;
- no eligible employee had protested the non-inclusion, having now all received sufficient notice of this intention; and
- if a meeting had been convened to obtain the approval of the eligible employees in respect of non-inclusion of the priority provision, it was likely the resolution would have passed.

6.5 Whether creditor "subordinate claims" under the Corporations Act can vote at the second meeting of creditors

(By Shamma Clarke and Janet Pham, Herbert Smith Freehills)

Ingram, in the matter of 5Star Sinai Limited (administrators appointed) [2018] FCA 734 (24 May 2018)
Federal Court of Australia, Farrell J

(a) Summary

There are two main issues in this case. The first stems from an application by the joint and several administrators of 5Star Sinai Limited (Sinai), 5Star Sion Ltd (Sion) and 5 Star Properties Pty Ltd (Properties) for leave in accordance with s. 600H(1)(b) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to allow creditors with "subordinate claims" within the meaning of s. 563A(2) to establish a claim in accordance with rl. 75-85 of the Insolvency Practice Rules (Corporations) 2016 (Cth) (the Rules) that they are entitled to vote as a creditor of Sinai or Sion at the second meeting of creditors to be convened pursuant to s. 439A of the Corporations Act. (Issue 1)

The second issue is brought by Mr Golledge for the plaintiff who submitted that applying for shares (whether or not the shares are issued) amounts to a "dealing" under s. 563A(2)(b) of the Corporations Act taking into account ss. 766C(1) to (7) to decipher whether or not the issue of shares to the subscriber is relevant to the purpose of s. 563A(2) of the Corporations Act. (Issue 2)

(b) Facts

Sinai and Sion raised funds from members of the public and purchased real estate with those funds. However, the companies did not lodge disclosure documents with ASIC as required by s. 718 of the Corporations Act and failed to comply with the form and content requirements of ss. 710 and 711. As a result, ASIC investigated the companies for failing to comply with the fundraising provisions of Chapter 6D of the Corporations Act.

(i) Sinai

As of 18 April 2018, an ASIC search indicated that there were 51 "A" class shares and 149 ordinary shares on issue for Sinai resulting in an aggregate amount of around $5,552,502. A PDS and a share application form were means by which the subscriptions were attained. These funds were used to purchase a Menangle Park property for $4.25 million and to pay expenses of $780,000. Subordinate creditors, who bought subscriptions under the PDS would likely be paid 100 cents in the dollar according to the administrators assessment on 30 January 2018.

(ii) Sion

Sion had 203 subscribers who also received a PDS submitted via a share application form. Sion accepted an initial $4,071,300 for a proposed $15 million fundraising. However, due to the inquiry with ASIC, the directors "gave undertakings that they would cease fundraising until non-compliance by Sion with Chapter 6D has been rectified [at 20]". Sion intended to purchase land for $11.5 million at Luddenham. However, due to the undertaking given to ASIC this fell through as they were unable to raise sufficient funds from the public nor raise the funds privately. The administrators assessment was that those creditors with "subordinate claims" would receive between 14.48 cents and 27.85 cents in the dollar after priority claims had been paid and subject to administrator costs.

(iii) Relevant legislation

The relevant sections of the Corporations Act are as follows:

- Section 600H(1)(b) of the Corporations Act provides that "a person whose claim against a company is postponed under s. 563A is entitled to vote in their capacity as a creditor of the company, at a meeting ordered under s. 411(1) or during the external administration of the company, only if the Court so orders;

- "Section 563A(2)(b) of the Corporations Act provides that "a subordinate claim" encompasses "any other claim that arises from buying, holding, selling or otherwise dealing in shares in the company"; and
- Rule 75-85 of the Rules outlines the entitlements to vote at meetings of creditors.

(c) Decision

Pursuant to s. 600H(1)(b) of the Corporations Act, any person who may have a "subordinate claim" within the meaning of s. 563A(2) for the repayment of money paid as subscription monies for the issue of shares in Sinai or Sion, and who is able to establish that claim in accordance with rl. 75-85 of the Rules, is entitled to vote as a creditor of that company at the meeting of creditors to be convened pursuant to s. 439A of the Corporations Act.

Farrell J accepted that s. 600H applies in the context of voluntary administration and that subscribers in Sion and Sinai "might reasonably be considered to possess a real financial interest in the external administration" as they might be expected to receive a return after other creditors had been paid (as per Black J in the matter of *Ten Network Holdings Limited (Administrators Appointed) (Receivers and Managers Appointed) and Others* [2017] NSWSC 1247 at [160- 161]). Farrell J was also satisfied that s. 1325 of the Corporations Act is a basis for making claims for compensation for loss which arise from breach of provisions of Chapter 6D and might include s. 718. She was of the view that although neither the subscribers for shares in Sion or Sinai had commenced proceedings to recover moneys subscribed or any loss based on breach of Chapter 6D even though this was available, the circumstances justify the grant of leave to enable subscribers to vote at the second creditors' meeting of the relevant company if their claims are "subordinate claims" within s. 563A(2)(b).

In relation to Sinai, Farrell J found that on the basis of breach of a provision of Chapter 6D, the shareholders who applied under the PDS would fall within s. 563A(a) and s. 563A(b) as a person who is a shareholder for the return of capital subscribed (*Cadence Asset Management Pty Ltd v Concept Sports Ltd* [2005] FCA 1280). She held that the claims of Sinai shareholders are "subordinate claims" and consistent with the parliamentary intent to address the effect of the High Court's decision in *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 expressed in the Revised Explanatory Memorandum [at 37].

However, Sion subscribers appear to never have been registered as members, administrators say they have not found a share register reflecting issues to them, the ASIC register does not indicate that any shares were issued to them and the Sion interveners say that they did not receive share certificates. Therefore, since they never became members of Sion, s. 563A, as enacted prior to its amendment by the Corporations Amendment (Sons of Gwalia) Act 2010, would not have applied to them [at 38]. However, Farrell J found that it was appropriate to grant leave under s. 600H to subscribers for shares in Sion to vote at the second meeting of its creditors and to also include the requirement that the person be "able to establish a claim in accordance with rl. 75-85" of the Rules.

Farrell J accepted that an application of this kind is generally not the appropriate vehicle to determine finally the question of whether the claims of subscribers for shares in Sion are "subordinate claims" and stated that the dominant issue should be whether it is fair that those persons be included in the process of decision-making at the second creditors' meeting having regard to whether they might reasonably be considered to possess a real financial interest in the external administration. Farrell J held that it would not be fair to exclude subscribers for shares in Sion from voting.

Creditors of Properties were denied an order under s. 600H as nothing suggests that shares were offered for subscription or purchase.

6.6 Parallel proceedings: a valid ground to set aside a statutory demand?

(By Eve Coulter and Maniqa Kumar, Ashurst)

B.S.B. Mining Pty Ltd v Ranger Resources Pty Ltd [2018] VSC 263 (24 May 2018) Supreme Court of Victoria, Randall AsJ

(a) Summary

The Court considered whether service of a statutory demand where a creditor had commenced separate proceedings to recover the same amount pursuant to a guarantee, constituted grounds to set aside the statutory demand under s. 459J(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporation Act).

(b) Facts

Ranger Resources Pty Ltd (Ranger) and B.S.B Mining Pty Ltd (BSB) entered into a loan agreement, pursuant to which Ranger advanced to BSB $500,000. The agreement contained a clause providing for Mr Brunner, the director of BSB, to guarantee to Ranger the amount owing. BSB repaid only half of the amount owing, being $250,000.

Ranger took two steps to recover the remaining amount owed of $250,000. First, Ranger filed a proceeding in the District Court of Queensland against Mr Brunner, the director of BSB, for payment of $250,000 pursuant to the guarantee. Several months later, Ranger served BSB with a statutory demand for payment of $250,000.

BSB commenced proceedings in the Supreme Court of Victoria to set aside the statutory demand on the basis of "some other reason" in s. 459J(1)(b) of the Corporations Act. This claim was supported by an affidavit sworn by Mr Brunner.

BSB contended that there were two reasons why the statutory demand should be set aside, namely:

- there was a genuine dispute between the parties about the existence of the debt; and
- the service of a statutory demand after Ranger had instituted separate proceedings in the District Court for payment, constituted an abuse of process.

(c) Decision

Randall AsJ refused to set aside the statutory demand, but accepted BSB's offsetting claim in the amount of $2,000, with the effect that the statutory demand is re-written in the amount of $248,000.

(i) Abuse of statutory process

The service of a statutory demand where separate proceedings had been commenced to recover pursuant to the guarantee, did not amount to an abuse of process. Randall AsJ distinguished *Perlake Pty Ltd v Finance & Mortgage Corporation (NSW) Pty Ltd* (1997) 15 ACLC 76 from the present matter. *Perlake* involved the issue of a creditor's statutory demand on the plaintiff company (Perlake Pty Ltd) for the same debt that was claimed in other proceedings against the directors of the plaintiff company. The Court held this to be an abuse of process, and a valid "reason" (within the meaning of s. 459J(1)(b)) why the demand should be set aside.

In present matter, the claim for payment pursuant to the guarantee was a distinct proceeding brought against Mr Brunner alone that was necessary and appropriate to recover an amount under the guarantee.

(ii) Genuine dispute

BSB failed to demonstrate that there was a genuine dispute between the parties as to the existence of the debt. The Court refused to permit an adjournment so BSB could submit a supplementary affidavit.

Randall AsJ applied the *Graywinter* principle, that a supporting affidavit must "disclose facts showing a genuine dispute between the parties" (*Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* [1996] FCA 822). Mr Brunner's supporting affidavit, which indicated Mr Brunner had instructed counsel to prepare a defence in the proceedings to recover pursuant to the guarantee, did not demonstrate a genuine dispute.

Counsel for BSB submitted that the company was limited by the information available to it at the time of the application, and an adjournment should be permitted to facilitate the filing of further affidavits. Randall AsJ rejected this submission on the basis that the requirement to demonstrate a genuine dispute is a jurisdictional requirement to allow an adjournment. Further, Mr Brunner knew all of the facts and matters relied upon to defend the proceedings to recover under the guarantee.

6.7 And then there was one: GetSwift and competing class actions in the Federal Court

(By Moira Saville, Alexander Morris and Peta Stevenson, King & Wood Mallesons)

Perera v GetSwift Limited [2018] FCA 732 (23 May 2018) Federal Court of Australia, Lee J

(a) Summary

In *Perera v GetSwift Limited* [2018] FCA 732, Lee J dealt with the issue of multiple, competing class actions. The judgment addresses the factors to be considered in determining which of competing class actions should be allowed to proceed.

(b) Background

GetSwift was listed on the ASX in 2016. On 19 January 2018, the Australian Financial Review reported that GetSwift had allegedly failed to disclose to the market that some customer agreements had been terminated and that certain revenue forecasts tied to an agreement with the Commonwealth Bank of Australia had been announced prematurely. GetSwift shares were subsequently placed in a trading halt on 22 January 2018, and then suspended from official quotation. Following reinstatement on 19 February 2018, its share price had declined by approximately 82.5%.

Three class actions were commenced:

- the "Perera Proceeding", which commenced on 20 February 2018 (with Squire Patton Boggs for the plaintiffs, funded by International Litigation Partners No 18 Pte Ltd);
- the "McTaggart Proceeding", which commenced on 26 March 2018 (with Corrs Chambers Westgarth for the plaintiffs, funded by Vannin Capital Operations Limited); and

- the "Webb Proceeding" (with Phi Finney McDonald for the plaintiffs, funded by TheriumCapital Management Limited), which Lee J granted leave to file on 13 April 2018.

The proceedings were all open class proceedings arising out of the same factual circumstances. All parties proceeded on the basis that the group membership in all proceedings was the same.

(c) The possible options

Justice Lee surveyed the history of securities class actions and considered how the "phenomenon of competing securities class actions" had arisen. His Honour identified the following avenues which could be available to deal with the competing class actions:

- consolidation of the proceedings;
- a permanent stay of proceedings;
- an order declassing two of the proceedings under either ss. 33N(1) or 33ZF of the Federal Court of Australia Act 1976 No. 156 (Cth) (the Federal Court Act);
- an order closing the class in two proceedings; and
- orders allowing a joint trial of the proceedings with each action constituted as open class representative proceedings.

The parties did not advocate for the consolidation of the proceedings or for orders permitting each open class proceeding to continue to a joint trial. As Lee J explained, consolidation would be an impractical option without agreement between the parties. As for the possibility of a joint trial, his Honour said that this was "rightly seen as an unacceptable option".

(d) Factors to be considered in resolving issue of overlapping class actions

Justice Lee was ultimately of the view that only one open class proceeding should continue so as to:

- protect the processes of the Court;
- further the overarching purpose (to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible); and
- protect the interest of group members.

In coming to this decision, his Honour considered a number of factors which had been relied upon by each of the applicant parties in their submissions and described in the decision of Beach J in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 including:

- the experience of the legal practitioners involved;
- the resources made available by each firm of solicitors and their accessibility to clients;
- the state of preparation of each proceeding;
- the position offered by each funder on security for costs and resources available to fund costs of the applicant and adverse costs;
- the respective merits of the common issue cases as pleaded or as foreshadowed;
- the respective strength of the individual cases of the representative applicants;
- the decision or choice of some group members to enter into funding agreements and retainer agreements;
- the relative number of the funded group members;
- he estimated costs;
- proposals made or adopted by the applicants to reduce and control legal and expert costs; and
- the comparative consequences of a permanent stay, closure, or declassing order in each proceeding.

Not all of these factors were given equal weight by Lee J. A number of points which emerged from the judgment are worth noting. First, Lee J omitted from this list the order in which the proceedings were commenced. His Honour observed that "if 'first in time' was a consideration in and of itself, the deleterious consequences could easily be imagined". His Honour rejected "doomster argument[s]" put by Perera and McTaggart that Webb had come along "at the heel of the hunt" in circumstances where Webb had applied to intervene in the Perera and McTaggart Proceedings after each had already submitted their proposals for why their respective proceedings should continue instead of the other.

Secondly, his Honour noted that the "mere existence of funding agreements" was not a factor to which any real weight should be given, particularly where, as here, each party agreed that the appropriate way forward was for the Court to make a common fund order. In such circumstances, "the existence of funding agreements is a complication rather than being of assistance".

Thirdly, as for estimated costs, his Honour was particularly persuaded by the "novel suggestion" that the Court should appoint a referee to conduct periodic reviews of the reasonableness of the applicant's legal costs.

(e) One open class

Similarity among the competing proceedings was a significant factor - given the insignificant differences in the scope, causes of action and case theories between the proceedings, his Honour concluded that there was no reason why the claims of group members could not be advanced in one open class proceeding. Additionally, cost inefficiencies, unnecessary duplicity (which would serve only to advance the financial interests of those other than group members), vexation to GetSwift occasioned by facing more than one class action, and his Honour's finding that no applicant faced a more significant risk of suffering an adverse costs order than the others, led his Honour to conclude that only one of the competing proceedings should be allowed to continue.

(f) The result - Webb proposal superior

Ultimately, Lee J was of the view that many factors were equal but the Webb Proceeding had proposed:

- innovative ways of seeking to reduce legal costs by being willing to subject ongoing legal costs to an independently appointed referee, and by being open to the prospect of a court appointed expert being utilised to assist the Court; and
- a novel funding model, being the lesser of a multiple of expenses (2.2 or 2.8 depending on the time to settlement) or 20% of net litigation proceeds, which his Honour considered superior to the Perera and the McTaggart proposals.

His Honour noted that while there were limitations on modelling, on a comparative basis, the Webb Proceeding was very likely, in most scenarios at all stages of the proceeding, to produce a better return for group members. Additionally, his Honour noted the proposal by Webb:

- departed from the terms of other common fund orders made in other proceedings which were typically based on percentage sums of net or gross proceeds;
- avoided the potential for a windfall return in the event that there is a late settlement at a very significant amount; and
- potentially removed the funder's incentive to control the expenditure of legal costs, but allowed for costs to be scrutinised during the course of the litigation by an investigating referee.

Accordingly, his Honour ordered that the Perera Proceeding and the McTaggart Proceeding be permanently stayed. His Honour explained that "to allow duplicative open class proceedings to proceed when they perpetuate unnecessary multiplicity . would bring the administration of justice into disrepute". It was in the interests of justice to grant a stay to:

- protect group members from unnecessary costs;
- prevent unfairness to GetSwift; and

- otherwise safeguard the effective operation of Part IVA of the Federal Court Act.

His Honour also added that were he wrong to grant a stay he would have enjoined the Perera and McTaggart applicants from further conduct of their proceedings in equity, or alternatively, made a declassing order under s. 33N.

(g) Takeaways

The judgment in *Perera v GetSwift* is significant. This is the first time that a Court has stayed competing class actions rather than allowing them to co-exist in some form. His Honour was careful to say "one size does not necessarily fit all", and that the appropriate remedial response to the issue of overlapping class actions is a case management decision which must be informed by considerations peculiar to the circumstances of those cases. His Honour noted that "[t]here will, however, be cases (for example, where multiple promoters commence essentially similar, funded open class securities actions), where it might be thought delay will only increase cost and uncertainty and would simply defer addressing a problem which affects the processes of the Court and, as a consequence, should be resolved".

The decision, if followed, may quell the apparent "race to file", as Lee J made it clear that this would provide no particular advantage. It remains to be seen whether it will have a greater impact on the current appetite of lawyers and funders to bring multiple actions regarding the same factual circumstances.

6.8 Appeal from the Administrative Appeals Tribunal's affirmation of a decision to disqualify applicant from managing corporations

(By Andrew Hay and Marcia Vlahovic, Clayton Utz)

Zivanovic v Australian Securities and Investments Commission (No 2) [2018] FCA 676 (17 May 2018)
Federal Court of Australia, Gleeson J

(a) Summary

Mr Zivanovic (the "Applicant") appealed a decision of the Administrative Appeals Tribunal (Tribunal) upholding a decision made by the Australian Securities and Investments Commission ("ASIC") to disqualify the Applicant from managing corporations for a period of three years.

ASIC's (the Respondent) decision was made under s. 206F(3) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The appeal was brought pursuant to s. 44(1) of the Administrative Appeals Tribunal Act 1975 No. 91 (Cth) (the AAT Act), whereby a party to a proceeding before the Tribunal may appeal to the Federal Court on a question of law from any decision of the Tribunal.

The Applicant submitted five grounds of appeal as the basis for arguing that the Tribunal's decision should be regarded as an error of law, all of which were rejected by Gleeson J.

Gleeson J ultimately dismissed the Applicant's appeal and ordered the Applicant to pay the Respondent's costs of the appeal.

(b) Facts

Between October 2008 and November 2014, eighteen companies were wound up in insolvency. The Applicant was a director of each company (at least until a few months before the liquidations). The liquidator of each company reported that unsecured creditors were unlikely to be paid any dividend.

The Applicant accepted that the conditions in s. 206F(1)(a) and (b) of the Corporations Act were satisfied and the Respondent disqualified him from managing corporations for the period of three years under this section.

In February 2016 the Applicant applied to the Tribunal to review the Respondent's decision. Under s. 43(6) of the AAT Act, the Tribunal had to determine whether it was satisfied that the disqualification was justified under s. 206F(1)(c) of the Corporations Act, and if so, whether the Applicant should be disqualified and for what period. The Tribunal was required to apply s. 206F(2) in making its decision.

ASIC's power to disqualification

Grounds for disqualification - s. 206F(2) provides as follows:

- (2) In determining whether disqualification is justified, ASIC:
    - (a) must have regard to whether any of the corporations mentioned in subsection (1) were related to one another; and
    - (b) may have regard to:
        - (i) the person's conduct in relation to the management, business or property of any corporation;
        - (ii) whether the disqualification would be in the public interest; and
        - (iii) any other matters that ASIC considers appropriate.

(c) Decision

(i) Ground One

The Applicant submitted that the Tribunal erred by relying on its finding that disqualification would not have an adverse impact on the business of the Applicant's continuing group of companies, their companies, their employees and clients, based on the evidence before it.

The Tribunal concluded that there was no sufficient basis to accept the proposition that the group's trading success was dependent on the Applicant and it was not satisfied that the group's prospects in relation to those projects were likely to be adversely affected by the Applicant's temporary disqualification. Gleeson J considered the submission only raised the question of whether the Tribunal made an error of fact.

Further, Gleeson J found that there was no reason why the disqualification would diminish the Applicant's future ability to play a substantive role in facilitating the group's development activities and there was evidence that the Applicant and the group of companies continued to have a good reputation and a significant volume of work. As such, ground one was rejected by Gleeson J.

(ii) Ground Two

The Applicant submitted that the Tribunal erred by evaluating the Applicant's past management of corporations and discharge of his duties as a company director by reference to levels of skill and diligence which were materially greater than the levels of skill and diligence required by the Corporations Act and the general law.

Gleeson J considered that while the Applicant's competence is a matter of potential relevance to whether the disqualification was justified, it was not a matter that the Tribunal was required to consider. Gleeson J concluded that ground 2 did not disclose any error on a question of law.

(iii) Ground Three

The Applicant submitted that there was an error in disqualifying the Applicant due to an absence of any finding that the disqualification was required for public protection; the disqualification decision was made in reliance on general deterrence. Gleeson J accepted that the Tribunal's conclusion was based on considerations of general deterrence and that general deterrence may justify a disqualification under s. 206F.

(iv) Grounds Four and Five

The Applicant requested that the Tribunal exercise its powers under s. 206F(5) to permit him to act as a director of several of the companies. The Tribunal rejected this request stating that it was not satisfied that there was sufficient reason to do so. The Applicant submitted that the Tribunal erred on a question of law by failing to give genuine, proper and realistic consideration to the Applicant's case for permission to manage particular corporations, and in the alternative, by failing to adequately provide the process of reasoning which led to the refusal to grant that permission.

Gleeson J rejected the first submission stating that having found that considerations of general deterrence justified disqualification, it would have been perverse to give the Applicant permission under s. 206F(5). Gleeson J further rejected the second submission of ground five, as paragraph 128 of the Tribunal's judgment demonstrated that the Tribunal gave proper consideration to the request and the reasons provided by the Tribunal were logical for its rejection.

7. Contributions

If you would like to contribute an article or news item to the Bulletin, please email it to: law-cclsr@unimelb.edu.au.