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Bulletin No. 215

Legislation Hotline

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1. Recent Corporate Law and Corporate Governance Developments

1.1 Supreme Court of Victoria Commercial Law Conference 2015

On 7 September 2015, the Supreme Court of Victoria will hold its annual Commercial Law Conference. The conference is a joint initiative of the Court and Melbourne Law School. A program of eminent speakers will address topical and important commercial law issues.

The conference details are as follows:

Date	Monday 7 September 2015

Time	2:30–5:00 pm (Drinks 5:00–7:00 pm)
Venue	Banco Court, Supreme Court of Victoria, 210 William Street, Melbourne
Cost	$ 220 (incl. GST)
Program	Welcome by The Hon Justice Marilyn Warren AC, Chief Justice, Supreme Court of Victoria, and Professor Carolyn Evans, Dean, Melbourne Law School

Questions of causation and attribution of responsibility

Speaker	Justice James Edelman, Federal Court of Australia
Commentator	Paul Anastassiou QC
Chair	The Hon Justice John Digby

Securities class actions (market-based causation)

Speaker	Wendy Harris QC, Barrister
Commentator	Belinda Thompson, Partner, Allens
Chair	Professor Ian Ramsay

***Korda & ors v Australian Executor Trustees (SA) Limited* [2015] HCA 6**

Speaker	Dr Pamela Hanrahan, Associate Professor, Melbourne Law School
Commentator	The Hon Justice Ross Robson
Chair	The Hon Justice Melanie Sloss

Refreshments will be served following the presentations. To register and pay, click here.

1.2 APRA releases international capital comparison study

The Australian Prudential Regulation Authority (APRA) has released Information Paper - International capital comparison study (13 July 2015) setting out the results of a study comparing the capital position of the Australian major banks against a group of international banking peers.

The study was conducted by APRA in response to Recommendation 1 of the Financial System Inquiry (FSI). The FSI recommended that APRA should "set capital standards such that Australian authorised deposit-taking institution [ADI] capital ratios are unquestionably strong".

In its final report, the FSI suggests that for banks to be regarded as "unquestionably strong" they should have capital ratios that position them in the top quartile of internationally-active banks. APRA's study, which adjusts for differences in measurement methodology across jurisdictions and uses a number of different measures of capital strength, finds that the Australian major banks are well-capitalised, but not in the top quartile of international peers.

The results of the study will inform, but will not ultimately determine, APRA's

approach for setting "unquestionably strong" capital adequacy requirements. APRA regards the top quartile positioning as a useful "sense check" of the strength of the Australian framework, but does not intend to tightly tie Australian requirements to a benchmark based on the capital adequacy ratios of international banks.

A final response to the determination of "unquestionably strong" capital standards will require further consideration by APRA, taking into account the results of this study, changes arising from the Basel Committee on Banking Supervision's current review of the global capital adequacy framework, and the extent of further strengthening in the capital ratios of peer international banks. Taking all of these factors into account, APRA's current judgement is that the major banks would need to increase their capital adequacy ratios by at least 200 basis points, relative to their position in June 2014, to be comfortably positioned in the top quartile of their international peers over the medium- to long-term, as recommended by the FSI.

Further information is available on the APRA website.

1.3 ACSI policy on women on boards

On 10 July 2015, the Australian Council of Superannuation Investors (ACSI) announced that it is targeting companies in the ASX200 with poor representation of women at board level in the run up to the 2015 annual meeting season.

ACSI has written to the chairs of more than 30 companies in the ASX200 yet to appoint a woman, and to those companies which still have only one female director, reminding them of the 30% target that is fast becoming seen as the minimum benchmark in corporate Australia. In February 2015, ACSI formally launched its new policy, which aims to lift the representation of women on the boards of ASX200 companies to at least 30% of all directors by the end of 2017.

Further information is available on the ACSI website.

1.4 IOSCO publishes report on SME financing through capital markets

On 9 July 2015, the International Organization of Securities Commissions (IOSCO) published the report SME financing through capital markets (July 2015), which provides recommendations for regulators to facilitate capital raising by small and medium sized enterprises (SMEs) in emerging markets.

The report identifies the challenges facing SMEs in accessing market-based financing, and examines some of the successful measures implemented by regulators and other policymakers to assist SMEs in tapping capital markets. The findings are based on survey responses and best practice by member jurisdictions.

The results of the survey indicate that bank loans are the primary source of financing for both publicly and privately held SMEs in most jurisdictions, followed by equity finance, venture capital and other related governmental and international funds. Capital markets also offer other funding alternatives, including equity financing via listing on alternative exchange boards, issuance of

debt securities, crowd funding, Sukuk funds, securitisation and government initiatives that encourage private investment.

In many jurisdictions, SMEs continue to face impediments that discourage them from raising financing on capital markets, such as fear of losing ownership and relatively high regulatory costs. In response, most of the jurisdictions surveyed have been reviewing their respective regulatory frameworks and taking specific initiatives to facilitate SME access to capital markets.

Successful measures include establishing separate equity and fixed income markets with regulatory requirements tailored to SMEs, establishing market advisor and market-making systems, and introducing alternative methods of financing such as private equity, venture capital and securitisation.

Further information is available on the IOSCO website.

1.5 Revised principles on corporate governance for banks issued by the Basel Committee

On 8 July 2015, the Basel Committee issued Corporate governance principles for banks (July 2015).

This set of principles supersedes guidance published by the committee in 2010. The revised guidance emphasises the critical importance of effective corporate governance for the safe and sound functioning of banks. It stresses the importance of risk governance as part of a bank's overall corporate governance framework and promotes the value of strong boards and board committees together with effective control functions.

More specifically, the revised principles:

- expand the guidance on the role of the board of directors in overseeing the implementation of effective risk management systems;
- emphasise the importance of the board's collective competence as well as the obligation of individual board members to dedicate sufficient time to their mandates and to keep abreast of developments in banking;
- strengthen the guidance on risk governance, including the risk management roles played by business units, risk management teams, and internal audit and control functions, as well as underline the importance of a sound risk culture to drive risk management within a bank;
- provide guidance for bank supervisors in evaluating the processes used by banks to select board members and senior management; and
- recognise that compensation systems form a key component of the governance and incentive structure through which the board and senior management of a bank convey acceptable risk-taking behaviour and reinforce the bank's operating and risk culture.

Further information is available on the BIS website.

1.6 FCA publishes final rules to make those in the banking sector more accountable

On 7 July 2015, the UK Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) published the final rules *CP15/22 Strengthening accountability in banking*, confirming the approach to improving individual accountability in the banking sector. The final rules cover the Senior Managers Regime; the Certification Regime; and new Conduct Rules.

The publication follows joint FCA-PRA final rules on variable remuneration (e.g. bonuses) in banks, building societies, and PRA-designated investment firms, which were released in June 2015.

While the Senior Managers Regime will ensure that senior managers can be held accountable for any misconduct that falls within their areas of responsibilities, the new Certification Regime and Conduct Rules aim to hold individuals working at all levels in banking to appropriate standards of conduct.

The final rules are available on the FCA website.

1.7 FSB launches Peer Review on implementation of the FSB policy framework for shadow banking entities

On 2 July 2015, the Financial Stability Board (FSB) launched a peer review on the implementation of its policy framework for financial stability risks posed by non-bank financial entities other than money market funds (other shadow banking entities). The objective of the review is to evaluate the progress made by FSB jurisdictions in implementing the overarching principles set out in the framework - in particular, to assess shadow banking entities based on economic functions, to adopt policy tools if necessary to mitigate any identified financial stability risks, and to participate in the FSB information-sharing process.

The summarised terms of reference are available on the FSB website.

1.8 Report on the impact and accountability of banking supervision issued by the Basel Committee

On 2 July 2015, the Basel Committee published *Report on the impact and accountability of banking supervision*. The report is a range-of-practice study on how supervisors around the world define and evaluate the impact of their policies and actions, manage against that impact and then account for it to their external stakeholders, including the government, parliament and the general public.

In response to the global financial crisis, standard-setting bodies and national authorities initiated a broad overhaul of the regulatory framework. The implementation of Basel III makes a necessary and important contribution to strengthening regulation and increasing banks' resilience. However, enhanced regulation alone is not sufficient to make financial institutions and financial systems more sound and stable. Regulatory reforms must be supported by effective supervision.

The Committee's report shows that, in recent years, supervisors have revised and strengthened their strategy and practices. Supervision has become more

comprehensive and intrusive, and takes into account additional dimensions of a bank's business. Supervisors have also taken steps to gain more insight into the impact of their activities. Many jurisdictions have developed practices to show how their activities contribute to the soundness and stability of financial institutions and the financial system. Finally, the report elaborates on what constitutes a well-designed system of accountability and how it can support operational independence and enhance transparency, while safeguarding confidential, institution-specific information.

The report is available on the BIS website.

1.9 SEC proposes rules requiring companies to adopt clawback policies on executive compensation

On 1 July 2015, the US Securities and Exchange Commission (SEC) proposed rules directing national securities exchanges and associations to establish listing standards requiring companies to adopt policies that require executive officers to pay back incentive-based compensation that they were awarded erroneously. With this proposal, the SEC has completed proposals on all executive compensation rules required by the *Dodd-Frank Wall Street Reform and Consumer Protection Act*.

Under the proposed new Rule 10D-1, listed companies would be required to develop and enforce recovery policies that in the event of an accounting restatement, "claw back" from current and former executive officers incentive-based compensation they would not have received based on the restatement. Recovery would be required without regard to fault. The proposed rules would also require disclosure of listed companies' recovery policies, and their actions under those policies.

Under the proposed rules, the listing standards would apply to incentive-based compensation that is tied to accounting-related metrics, stock price or total shareholder return. Recovery would apply to excess incentive-based compensation received by executive officers in the three fiscal years preceding the date a listed company is required to prepare an accounting restatement.

More information is available on the SEC website.

1.10 SEC solicits public comment on audit committee disclosures

On 1 July 2015, the US Securities and Exchange Commission (SEC) voted to publish a concept release seeking public comment on current audit committee disclosure requirements, focusing on the committee's oversight of independent auditors. The SEC is interested in receiving information about the audit committee and auditor relationship and whether improvements can be made to enhance the information provided to investors about the audit committee's responsibilities and activities.

In addition to seeking views about audit committee disclosures, the concept release invites comment on whether SEC disclosure requirements should be refined to provide more insight into the information the audit committee uses and

the factors it considers in overseeing the independent auditor. This includes considerations related to the process for appointing or retaining the auditor and the qualifications of the auditor and certain members of the engagement team, among others.

The concept release is available on the SEC website.

1.11 PCAOB seeks public comment on indicators that may improve understanding of audit quality

On 30 June 2015, the US Public Company Accounting Oversight Board issued a concept release seeking comment on the content and possible uses of audit quality.

The concept release seeks comment on 28 potential audit quality indicators, covering three broad categories:

- **audit professionals** - measures dealing with the availability, competence, and focus of those performing the audit;
- **audit process** - measures concerning an audit firm's tone at the top and leadership, incentives, independence, investment in infrastructure needed to support quality auditing, and monitoring and remediation activities; and
- **audit results** - measures relating to financial statements (such as the number and impact of restatements, and measures of financial reporting quality), internal control over financial reporting, going concern reporting, communications between auditors and audit committees, and enforcement and litigation.

The concept release is available on the PCAOB website.

1.12 Report on the future of financial services

On 30 June 2015, the World Economic Forum released the report *The Future of Financial Services: How Disruptive Innovations Are Reshaping the Way Financial Services Are Structured, Provisioned and Consumed*. The main finding of the report is that the world's largest finance-sector companies are reviewing their business models following the rapid growth of financial technology or "fintech" entrants in the sector. It opens the door to industry scenarios not dissimilar to those of AirBnb in accommodation, Uber in transport or Amazon in retail.

With global investments of US$12.2 billion in 2014 in the fintech sector—more than threefold compared with 2013—disruption in the financial sector is not a one-off, but rather a continuous pressure to innovate as new entrants lay claim to more and more of the estimated US$6.6 trillion on revenues at stake in global retail financial services.

The report is available on the World Economic Forum website.

1.13 Draft reforms to superannuation governance released for consultation

On 26 June 2015, exposure draft legislation to improve governance arrangements in Australian superannuation was released for public consultation.

The amendments in the exposure draft legislation propose that:

- all Australian Prudential Regulation Authority-regulated superannuation funds be required to have a minimum of one-third independent directors on their trustee board, and an independent chair;
- the definition of "independent" is to include persons who do not have a substantial holding in the trustee or do not have (or have not had within the last three years) a material relationship with the trustee, including through their employer;
- trustees of funds that do not have a majority of independent directors be required to report on an "if not, why not basis"; and
- a three-year transition period to apply for existing funds.

The exposure draft legislation takes into account feedback received on the governance reforms in response to the discussion paper *Better regulation and governance, enhanced transparency and improved competition in superannuation* that the government released in November 2013, and in relation to the final report of the Financial System Inquiry.

The draft legislation is available on the Treasury website.

1.14 Hong Kong: SFC statement on draft proposal on weighted voting rights

On 25 June 2015, the Hong Kong Securities and Futures Commission (SFC) issued a statement in relation to the Stock Exchange of Hong Kong Ltd's (SEHK) draft proposal on weighted voting rights (WVR). The issue of WVR was highlighted last year when Alibaba, the Chinese ecommerce company, decided to make its initial public offering in New York after the Hong Kong authorities rejected its proposed partnership structure. This was the largest IPO in history.

The SEHK's Consultation Conclusions on WVR published on 19 June 2015 outlined some of the relevant features of the draft proposal for a second stage consultation on WVR.

The board of the SFC has unanimously concluded that it does not support the draft proposal for primary listings with WVR structures.

The statement is available on the SFC website.

1.15 Finalising the Future of Financial Advice laws

On 25 June 2015, the Australian Government agreed with the parliamentary opposition to progress minor and technical refinements to the Future of Financial Advice reform (FOFA) laws contained in the Corporations Act 2001 (Cth) (the Corporations Act).

FOFA was introduced in 2012 following a bipartisan parliamentary inquiry. The laws provide important consumer protections by imposing a statutory best interests duty on financial advisers, banning conflicted remuneration, and strengthening disclosure.

The agreed refinements will improve the operation of FOFA, and alleviate a number of unintended consequences, most of which have arisen since the laws were legislated.

The agreed refinements, progressed through a new regulation,

- clarify that advice provided to an employer about default superannuation funds is considered to be providing a financial service to a retail client;
- make FOFA consistent with other parts of the Corporations Act by including a wholesale and retail client distinction;
- update FOFA to treat non-cash payments, such as travel money cards, consistently with other simple financial products;
- ensure that the modified best interests duty applies in respect of advice on basic banking products and/or general insurance even where provided at the same time as advice on the provision of consumer credit insurance (which attracts the full best interests duty);
- make the conflicted remuneration exemption that applies to basic banking products and general insurance applicable to benefits relating to consumer credit insurance where an employee or agent of an authorised deposit-taking institution provides advice on any or a combination of these three products; and
- ensure that benefits provided by a retail client to their financial adviser are exempt from conflicted remuneration provisions.

The government is also consulting on further refinements to be progressed by legislation in the second half of the year to:

- ensure the existing "mixed benefits" and "intra-fund advice" provisions operate as intended;
- ensure that future governments can specify in regulations that certain benefits are caught by the ban on conflicted remuneration; and
- extend and align the periods of time that an adviser has to send an opt-in renewal notice and a fee disclosure statement to their client to 60 days, to facilitate adviser compliance.

Further information is available on the Assistant Treasurer's website.

1.16 IOSCO consults on international standards on fees and expenses of investment funds

On 24 June 2015, the International Organization of Securities Commissions (IOSCO) published the consultation report on *Elements of International Regulatory Standards on Fees and Expenses of Investment Funds*, which proposes an updated set of common international standards of best practice for the operators of collective investment schemes (CIS) and regulators to consider.

The report examines and consults on issues identified as being key across jurisdictions.

Such issues concern, *inter alia*, the following:

- types of permitted fees and expenses;
- performance-related fees;
- disclosure of fees and expenses;
- transaction costs; and
- hard and soft commissions on transactions.

The consultation report is available on the IOSCO website.

1.17 Prudential Regulation Authority and Financial Conduct Authority announce new rules on remuneration

On 23 June 2015, the UK Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) published new remuneration rules, which include changes to deferral and clawback of variable remuneration (e.g. bonuses).

The new framework aims to further align risk and individual reward in the banking sector to discourage irresponsible risk-taking and short-termism, and to encourage more effective risk management.

The new rules apply to banks, building societies, and PRA-designated investment firms, including UK branches of non-EEA headquartered firms.

The primary changes are as follows:

- Extending deferral (the period during which variable remuneration is withheld following the end of the accrual period) to seven years for senior managers, five years for PRA designated risk managers with senior, managerial or supervisory roles, and three to five years for all other staff whose actions could have a material impact on a firm (material risk takers).
- The FCA is introducing clawback rules (where staff members return part or all of variable remuneration that has already been paid to the institution under certain circumstances) for periods of seven years from award of variable remuneration for all material risk takers, which were already applied by the PRA. Both the PRA and the FCA clawback rules will be strengthened by a requirement for a possible three additional years for senior managers (ten years in total) at the end of the seven year period where a firm or regulatory authorities have commenced inquiries into potential material failures.
- Prohibiting variable pay for Non-Executive Directors.
- Making explicit that no variable pay including all discretionary payments should be paid to the management of a firm in receipt of taxpayer support.
- Strengthening the PRA requirements on PRA dual-regulated firms to apply more effective risk adjustment to variable remuneration.

The clawback and deferral will apply to variable remuneration awarded for performance periods beginning on or after 1 January 2016, while other requirements will apply from 1 July 2015.

The new rules are available on the FCA website.

1.18 Study of financial literacy of not for profit board members

On 23 June 2015, Pro Bono Australia and Grant Thornton published findings of a financial literacy survey of not for profit board members. The survey found that a majority of Australian not for profit board directors do not have the financial literacy skills to meet the changing challenges of the future, including the impact of new funding models.

The survey found that only 59% of not for profit board members feel their board has the right level of financial literacy skills to meet the needs of their organisation today and even less, 40%, believe they have the skills to handle the financial challenges in the future.

The report found that percentages were very similar for board evaluations, with 62% performing evaluations but only 25% including an evaluation of financial literacy. These results vary with the size of the organisation; however, the highest percentage of organisations conducting financial literacy evaluations was only 38%.

The survey is available on the [Pro Bono Australia website](#).

1.19 Net Stable Funding Ratio disclosure requirements finalised by the Basel Committee

On 22 June 2015, the Basel Committee on Banking Supervision issued the final *Net Stable Funding Ratio disclosure standards*, following the publication of the net stable funding ratio (NSFR) standard in October 2014.

Similar to the LCR disclosure framework, this requirement will improve the transparency of regulatory funding requirements, reinforce the *Principles for sound liquidity risk management and supervision*, strengthen market discipline, and reduce uncertainty in the markets as the NSFR is implemented.

It is important that banks adopt a common public disclosure framework to help market participants consistently assess banks' funding risk. To promote the consistency and usability of disclosures related to the NSFR, the committee has agreed that internationally active banks in all Basel Committee member jurisdictions will be required to publish their NSFRs according to a common template.

The NSFR disclosure standards are available from the [BIS website](#).

1.20 Industry Associations endorse ISDA data reporting principles

On 15 June 2015, a group of 11 industry associations published a letter supporting a set of principles developed by the International Swaps and Derivatives Association Inc (ISDA) aimed at improving consistency in regulatory reporting standards for derivatives.

The ISDA principles call for derivatives reporting requirements to be harmonized

across borders, and for the further development and adoption of global data standards, among other things.

Significant progress has been made in meeting a G-20 requirement for all derivatives to be reported to trade repositories to increase regulatory transparency, an objective the associations fully support. A lack, however, of standardization and consistency in reporting requirements within and across jurisdictions has led to concerns about the quality of the data being reported. Poor data quality reduces the value of the data for regulators and limits their ability to fulfill supervisory responsibilities. Differences in reporting requirements also increase the cost and complexity for firms that have reporting obligations in multiple jurisdictions.

The principles are as follows:

- Regulatory reporting requirements for derivatives transactions should be harmonized within and across borders.
- Policy-makers should embrace and adopt the use of open standards.
- Where global standards do not yet exist, market participants and regulators can collaborate and secure agreement on common solutions to improve consistency and cross-border harmonization.
- Laws or regulations that prevent policy-makers from appropriately accessing and sharing data across borders must be amended or repealed.
- Reporting progress should be benchmarked.

The letter is available on the ISDA website.

2. Recent ASIC Developments

2.1 ASIC reports on financial benchmarks

On 8 July 2015, the Australian Securities and Investments Commission (ASIC) released a report on financial benchmarks. *Report 440 Financial benchmarks* (REP 440) highlights the importance of key indices to Australia's markets and the broader economy.

ASIC's report describes the regulatory reforms and other responses that have occurred internationally and in Australia in response to concerns about poor conduct in connection with financial benchmarks.

ASIC's report makes a number of recommendations for market participants, including measures they should adopt to avoid conduct issues.

The report confirms ASIC is investigating financial institutions to test for conduct and other issues relating to financial benchmarks, such as key interest rate and foreign exchange (FX) benchmarks. ASIC's inquiries are informed by the types of benchmark-related conduct and oversight issues that have been observed overseas. ASIC's investigations are ongoing and no conclusions have been drawn yet.

The report is available on the ASIC website.

2.2 Findings from 31 December 2014 financial reports

On 2 July 2015, ASIC announced the results from a review of the 31 December 2014 financial reports of 100 listed and other public interest entities.

Following a review, ASIC has made enquiries of 23 entities on thirty six matters seeking explanations of accounting treatments.

ASIC continues to identify concerns regarding assessments of the recoverability of the carrying values of assets, including goodwill, other intangibles, exploration and evaluation expenditure, and property, plant and equipment. The largest number of ASIC's enquiries at 30 June 2014 relate to assets in the mining and renewable energy industries.

More information about the findings from ASIC's review is available on the ASIC website.

2.3 ASIC releases hedge funds report

On 1 July 2015, ASIC released *Report 439 Snapshot of the Australian hedge funds sector*.

The 2014 hedge funds survey was representative of the state of the larger hedge funds, with the assets of the 27 surveyed qualifying funds representing approximately 44% of the assets held by single-manager funds in Australia.

This survey adds to a survey conducted in 2012 which found that there was not any strong evidence that hedge funds pose significant systemic risk. While that remains the case, there have been some interesting developments in the hedge funds sector.

Key points:

- Hedge funds manage only a small share of Australia's $2,407 billion managed funds industry. Single-manager hedge funds ($83.7 billion) and funds of hedge funds ($12.2 billion) managed 3.5% and 0.5% of all Australian managed fund assets respectively. More than half of these hedge funds hold less than $50 million each.
- The gross leverage ratio (gross notional exposure to NAV) for hedge funds has increased since 2012. The median gross leverage ratio in 2014 was two times NAV, compared to 1.7 times NAV in 2012. The level of leverage for surveyed hedge funds is relatively low compared to other jurisdictions.
- Retail direct investors accounted for 17% of the investors by NAV in the surveyed hedge funds. Surveyed hedge funds reported that nearly 49% of investors by NAV accessed hedge funds through an IDPS. This change in IDPS participation since ASIC's 2012 survey was attributed to a range of factors including managers' lack of detailed information about the investor types and changes to how managers classify investors.
- The surveyed hedge funds reported large exposures to interest rate derivatives, with a gross notional exposure of more than $64 billion as at 30 September 2014.
- The largest geographic exposure was to North America with 29% of NAV invested there. Australia and Asia (ex-Australia) were also significant

regions for the funds' investments with each receiving 26% of the total NAV.

By asset class, listed equities were the surveyed fund managers' greatest exposures with net investments valued at more than $26.3 billion. This exposure was substantially higher than the second largest asset class (cash, at $5.7 billion). Listed equities and cash were also the two largest asset classes reported in the 2012 survey.

The hedge funds had positive net applications of $5.1 billion over the 12 months to 30 September 2014. This was composed of $10 billion in applications and $4.9 billion in redemptions. The median net applications were positive in every month of the year to 30 September 2014.

The report is available on the ASIC website.

3. Recent ASX Developments

3.1 Reducing Red Tape rule changes and Guidance Note changes

Following consultation papers on proposed amendments to standardise and streamline admission and notification requirements for ASX and ASX 24 Markets and the ASX Clear, ASX Clear (Futures) and ASX Settlement facilities that service those markets, relevant rule changes are now effective. The "Reducing Red Tape" changes affect the ASX, ASX 24, ASX Clear, ASX Clear (Futures) and ASX Settlement Operating rulebooks.

Additional Guidance Notes have been issued to reflect the rule changes implemented. *Guidance Note 1 - Admission as a Participant*, and *Guidance Note 9 - Offshoring and Outsourcing*, have been added. New ASX participant application forms have come into force for each ASX market and facility.

The relevant amendments and Guidance Note changes and additions are available on the ASX website.

3.2 Revised Guidance Note 8 'Continuous Disclosure: Listing Rules 3.1 - 3.1B'

Earlier in 2015, ASX issued a consultation paper on proposed changes to Guidance Note 8, which related to expanding guidance on earnings surprises, publication of analyst forecasts and consensus estimates, and investor briefings. This was followed by a consultation response, which ASX issued on 22 June 2015. The final form of Guidance Note 8 is now available as well as ASX's Abridged Guide to Continuous Disclosure.

The updated version of Guidance Note 8 and Abridged Guide to Continuous Disclosure are available on the ASX website.

3.3 Update to ASX online forms for announcing corporate actions

ASX has implemented various improvements to online forms. The changes seek to improve: wording of the forms, appearance of the PDF announcement generated by the submission of the online form and the function of the forms (particularly, improved validations). A new ASX Online training environment has also been simulated to reproduce ASX Online for Companies, but is not connected to the ASX market announcements platform or any other system. The forms are mandatory for the first announcement of corporate actions on or after 29 June 2015. The changes to improve the forms are embodied in amendments to ASX Listing Rule Appendices 3A.1–3A.5. An announcement summary has also been added to the dividend online forms.

A summary of the changes to the ASX Listing Rule Appendices 3A.1–3A.5 is available on the ASX website.

3.4 Reports

On 3 July 2015 ASX released:

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

for June 2015.

4. Recent Takeovers Panel Development

4.1 Panel publishes consultation paper on shareholder intention statements

On 7 July 2015, the Takeovers Panel released a consultation paper seeking public comment in relation to a new draft guidance note on shareholder intention statements.

Where shareholder intention statements do not give rise to unacceptable circumstances, their use can facilitate the takeover process. The panel is therefore proposing to issue guidance around their use to address ambiguities that can cause shareholder intention statements to mislead or confuse.

The consultation paper is available on the Takeover Panel's website.

5. Recent Research Papers

5.1 Myths and facts about female directors

Women in the workforce are key to healthy economies, but this does not mean that having more of them on the board will necessarily increase shareholder value or that the financial crisis would not have happened if Lehman Brothers had been Lehman Sisters. Negative stereotypes may be one reason women are underrepresented in management and on the boards. But are women better served

if we promote them on the basis of positive stereotypes? In this paper, the author draws on current research to debunk popular myths about boardroom gender diversity.

The paper is available on the SSRN website.

5.2 Corporate governance since the managerial capitalism era

Today's public company executives face a considerably different set of opportunities and constraints than did their counterparts of the managerial capitalism era, which reached its apex in the 1950s and 1960s. The growing prominence of corporate governance played a significant role in this process. This paper explores these developments, taking into account in so doing prominent corporate scandals that occurred in the first half of the 1970s and early 2000s, the 1980s "Deal Decade", the "imperial" chief executive phenomenon and changes to the roles played by directors and shareholders of public companies.

The paper is available on the SSRN website.

5.3 The modern business judgment rule

For over 150 years, the business judgment rule performed a relatively straightforward task in the corporate governance system of the United States, namely, protecting corporate directors from liability for honest mistakes. Under the traditional version of the business judgment rule, when the board of directors is careful, loyal, and acting in good faith, courts refuse to second-guess the merits of the board's decisions, even if the corporation and its shareholders are harmed by those decisions.

While modern courts continue to insulate directors from liability for honest mistakes according to this traditional formula, in the 1980s Delaware courts began assigning the business judgment rule a more expansive role. The modern business judgment rule is not a one-size-fits-all doctrine, but rather a movable boundary, marking the shifting line between judicial scrutiny and judicial deference. In describing the transformation of the business judgment rule, this chapter focuses on Delaware judicial opinions, with special attention to cases involving mergers and acquisitions, where the most important changes in the business judgment rule have been forged. The scripting of the business judgment rule's new role by the Delaware courts is a work in progress, and the current law is inconsistent and confusing. Nevertheless, the author traces the development of the modern business judgment rule and attempts to rationalise that development around the simple idea that the rule guides courts through the review of director conduct and marks the point at which judicial evaluation of a decision ends.

This paper is available on the SSRN website.

5.4 What's so bad about insider trading law?

The US law of insider trading has been called everything from a "theoretical mess" to "astonishingly dysfunctional," with calls for change from Congress and the Securities and Exchange Commission to clarify the scope of the prohibition. But is the law really so bad? The elements are now well established, despite grey areas around the edges—which is not all that different for other white collar crimes. Congress and the general public have embraced insider trading as something clearly wrongful. If the law needs to be changed, the most likely push would be to expand it by adopting the possession theory of liability used in Rule 14e-3 for tender offers and by the European Union that makes trading on almost any confidential information subject to prosecution.

This paper is available on the SSRN website.

6. Recent Corporate Law Decisions

6.1 Refusal to grant injunction which would result in contravention of continuous disclosure obligations

(By Katrina Sleiman, Corrs Chambers Westgarth)

Moran v Atrum Coal NL (No 4) [2015] WASC 241, Supreme Court of Western Australia, Mitchell J, 3 July 2015

The full text of this judgment is available here.

(a) Summary

This case involved an application for an extension of an injunction restraining the defendant from disclosing certain information concerning loan agreements and securities entered into by the plaintiffs, secured by securities in the defendant.

The Court refused the extension of the injunction as it was not satisfied the injunction sought by the plaintiffs would not require the defendant to contravene s. 674 of the Corporations Act 2001 (Cth) (the Act).

(b) Facts

On 8 June 2015, the term of the plaintiffs' finance agreements which they had with their existing lenders was to expire on 11 June 2015. They were in the process of negotiating refinancing of the loans provided for by those agreements, and the defendant was about to disclose information to the Australian Securities Exchange (ASX) which would have given rise to an apprehension that the lenders were about to sell the shares pursuant to the securities. The Court granted an injunction until 2:15 pm the following day. That injunction was extended by consent to 12 June 2015, at which time its continuation was opposed.

On 12 June 2015, the refinancing negotiations were still on foot and the plaintiffs were granted a short extension of their existing loan agreement to enable negotiations to be completed. The Court concluded there was a serious question to be tried as to whether disclosure of the information would constitute a breach of confidence and concluded the balance of convenience favoured the extension of the injunction to 19 June 2015, by which time the extended loan agreement would have expired.

As at 19 June 2015, the efforts to renegotiate finance before the conclusion of the extended term of the loan agreement were not successful. The plaintiffs entered into further agreements with their lenders by letters dated 18 June 2015. There were, however, some significant differences between the form of the first and second loan extension agreements. First, the term of the extended loan was significantly greater than the few days contemplated by the first extension agreement. Secondly, the agreement was entered into on the basis that the plaintiffs were proposing to sell their shares, or do a partial sell down in combination with refinancing, sufficient to pay all amounts owing. Importantly, there was a capacity for the facility agent to treat a failure to diligently pursue the sell down and, if applicable, refinancing, as an immediate event of default, which would entitle the lenders immediately to exercise their rights to enforce their securities.

(c) Decision

(i) Is disclosure required?

The Court made a number of observations. First, the letter agreements of 18 June 2015 were not in the course of negotiation, rather, they are completed agreements, such that disclosure of the relevant features of those agreements does not concern an incomplete proposal or negotiation.

Secondly, the fact that directors of the defendant, who hold a significant proportion of the shares of the defendant, have entered into the extended loan agreement is information of significance for the market, given the amounts of the loans.

Thirdly, given the manner in which the agreements contemplate sale of shares held by the plaintiffs, it could no longer be said that the possible sale of those shares is a matter of supposition or insufficiently definite to warrant disclosure.

This took the information, the disclosure of which would be restrained by the injunction, out of the exceptions to ASX Listing Rule 3.1, on which the Court relied in the previous injunction decisions. The Court's provisional view was that the point had now been reached where Listing Rule 3.1, read with Listing Rule 3.1A, required the defendant to immediately notify the ASX of that information pursuant to s. 674 of the Act.

Counsel for the plaintiffs accepted that if the plaintiffs told the defendant under its securities trading policy that they intended to sell shares in the defendant, that would be information which the defendant would be required by s. 674 to disclose. Given the significant number of shares held by the plaintiffs and the fact that the plaintiffs are directors of the defendant, the Court agreed with that view. The Court, however, considered that information that the plaintiffs entered into agreements contemplating and providing for the sale of their shares is to be treated equivalently.

As an extension to the injunction would prevent the defendant from disclosing information it was required by s. 674 to give to the ASX, the Court considered it inappropriate to extend the term of the injunction. In reaching that conclusion, the Court did not form any view about whether the exception in Listing Rule 3.1A relating to information that concerns an incomplete proposal or negotiation is confined to a proposal made by or to, or a negotiation with, the company bound by the disclosure obligation. Counsel for the defendant contended that it was so

confined, while counsel for the plaintiffs advanced a strong argument to the contrary. The Court proceeded on the assumption (favourable to the plaintiffs) that the exception is not confined in the manner for which the defendant contended.

(ii) Evidence as to the likelihood of a share sale

In reaching the above conclusion, the Court had regard to affidavit evidence which indicated that one of the plaintiffs was still attempting to refinance and believed that a mandate would be signed with a new facility agent. The Court had very few details of this refinancing proposal, which will not alter the terms of the agreement which has been entered into with the existing financier.

The possibility, however, that some further financing arrangements might be made which would avoid the sale of shares contemplated by the existing loan agreement did not mean that there was no existing obligation to disclose pursuant to s. 674 of the Act. A finance agreement can always be varied or superseded by subsequent events, and the market can be informed of those subsequent events if they transpire.

(iii) Balance of convenience

In relation to the balance of convenience, counsel for the defendant raised a number of detrimental effects which the continuation of an injunction would have on persons participating in the market and contended that the difficulties which the continuation of the injunction would create for those participants would create grounds for the refusal of injunctive relief.

The Court accepted there was considerable force in that submission, but noted it must also be recognised that refusing to continue the injunction would result in a disclosure which would destroy the confidentiality of the information which the proceeding was commenced in order to protect.

The fact that the defendant has previously indicated a willingness to suspend trading in its shares to 30 June 2015, including in consent orders which it had proposed on 9 June 2015, suggested that the inconvenience caused, at least to the defendant, was not so great as to justify allowing the release of the information to occur with the consequences that would have for the rights which the plaintiffs sought to assert in the proceeding.

The Court would therefore have been inclined to continue the injunction if it had been satisfied that doing so would not require the defendant to contravene s. 674 of the Act. However, the Court was so satisfied, which meant that it was inappropriate for the Court to grant the injunction and it was therefore not necessary to consider the balance of convenience.

6.2 Court distinguishes fees paid for loan application assistance from fees under a credit contract - rejects anti-avoidance approach

(By Chantelle Brott, Herbert Smith Freehills)

Australian Securities and Investments Commission v Teleloans Pty Ltd [2015] FCA 648, Federal Court of Australia, Logan J, 30 June 2015

The full text of this judgment is available here.

(a) Summary

The Federal Court has found that fees charged by Teleloans Pty Ltd (Teleloans) for providing credit application and account management services in respect of loans provided by Finance and Loans Direct Pty Ltd (FLD) are not fees under the credit contract with FLD. As a result, Logan J found against the Australian Securities and Investments Commission (ASIC) in holding that a credit contract with FLD falls under the short term credit exemption under s. 6 of Schedule 1 (National Credit Code) to the National Consumer Credit Protection Act 2009 (Cth) (the NCC), and is therefore not regulated by the NCC. In particular, Justice Logan denied the existence of an "arrangement" that would group the fees paid to Teleloans under the credit contract with FLD. Emphasising the need to apply the terms of the statute, Logan J found that a general anti-avoidance doctrine cannot easily be imported into the NCC due to the specific anti-avoidance mechanisms in s. 6. On this basis, the plain words do not evince an intention of Parliament to extend the application of the NCC to "helpers".

(b) Facts

Teleloans' business involves assisting customers to complete loan applications for financing with FLD, assessing customers' eligibility for financing with FLD, recommending qualifying customers to FLD for financing and providing ongoing account management services to customers. FLD provides credit, and in the present case granted personal loans at a fixed rate of 5% for personal domestic or household purposes with a number of individuals. Rather than engage Teleloans' full suite of services, Teleloans offers clients the option to be referred at no charge to deal directly with FLD. No referral fees or commissions are paid or received between FLD and Teleloans for this arrangement, however the loan approval process is slower. If customers choose to engage Teleloans' services, they then enter into a Loan Agreement with FLD and a separate Services Agreement with Teleloans, under which the customer is charged various fees for Teleloans' services.

ASIC brought proceedings alleging that the NCC applies to credit provided under both Teleloans' Services Agreement and FLD's Loan Agreement. ASIC's motive was to prove that the fees charged under the agreements are part of the one credit contract, rendering Teleloans and FLD in breach of the maximum fee cap under s. 6 of the NCC. This argument rests on the interpretation that these contracts are an "arrangement" that falls within the meaning of "credit contract" under s. 5 of the NCC. Teleloans countered that they are merely a "helper," a provider of a service, and the NCC is not directed to helpers. Therefore, the contracts between Teleloans and the borrowers are not credit contracts, but service contracts, and the fees charged by Teleloans are fees for their services, not a fee under a credit contract.

The relevant statutory matrix is as follows:

- "Credit contract" is defined in s. 4 of the NCC as a contract under which credit is or may be provided. The definition of "contract", however, is extended by s. 204 to include a series or combination of contracts, or contracts and arrangements.
- Section 3(1) of the NCC states that "credit" is provided if under a contract:
    a. payment of a debt owed by one person (the debtor) to another (the

credit provider) is deferred; or
b. one person (the debtor) incurs a deferred debt to another (the credit provider).

- Section 5 of the NCC stipulates that the NCC applies to a provision of credit if certain criteria are met when a credit contract is entered into or proposed to be entered into. The criteria includes where the debtor is a natural person and credit is provided wholly or predominantly for personal, domestic or household purposes, and the credit provider is in the course or business of providing credit. Importantly, s. (1)(c) requires that "a charge is or may be made for providing the credit".
- Section 6 of the NCC stipulates that the NCC does not apply to the provision of credit if it is limited to a period not exceeding 62 days and, relevantly to the present facts, the maximum amount of credit fees and charges imposed does not exceed 5% of the amount of credit. Additionally, for the NCC to not apply, the maximum amount of interest charges must not exceed an amount equal to the amount payable if the annual percentage rate were 24% per annum.

(c) Decision

ASIC relied on two key cases, *Bahadori v Permanent Mortgages Pty Ltd* (2008) 72 NSWLR 44 (*Bahadori*) and *Walker v Consumer, Trader and Tenancy Tribunal (NSW)* [2013] NSWSC 1432 (*Walker*), both of which were distinguished by Logan J.

In *Bahadori*, Tobias JA at [160] to [162] stated that, although the credit provider against whom relief is sought must be a party to the credit contract, where there is a series or combination of contracts with closely connected parties, it does not matter that each contract must involve the ultimate credit provider.

In *Walker* at [188], Hall J, when reviewing the NSW equivalent to s. 5(1)(c), gave weight to the absence of words restricting a charge to being made under a credit contract. The words "for providing" were read as denoting merely a causal connection between the fee and the provision of credit. Further, at [154] Hall J found that in the scenario where the parties are closely connected and the arrangement is contemporaneous and part of a "deal" then it can be said that the string of contracts together form a "series" or "combination". Central to ASIC's argument in the present case is that the term "arrangement" in the definition of "contract" at s. 204 broadens the reach of the legislation beyond legally enforceable contracts. ASIC contended that there was an "arrangement" between FLD and Teleloans, and the amounts payable to each were charges for the provision of credit.

Logan J rejected the notion that the structure of contracts in this case was an "arrangement" constituting a credit contract. Contra to *Bahadori* and *Walker*, here there is only one credit contract with FLD, the fee payable under the Teleloans contract has no direct relationship with the amount loaned and there is nothing payable directly to FLD from the fee for Teleloans services. Instead, Logan J accepted the respondents' view that Teleloans is a "helper" that provided a service as opposed to credit, and the fees were linked directly to their role as a helper. Therefore, the Teleloans fees are not fees under a credit contract. The court left open the possibility for an argument based on the fee arrangement and business model being a "sham". This was not, however, an argument mounted by ASIC in the present case.

Logan J's judgment reflects the principles articulated by Gleeson CJ, Gummow, Hayne and Crennan JJ in the High Court decision of *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* (2007) 234 CLR 96 at [21]. Logan J viewed ASIC's argument as a variant of the economic equivalence reasoning rejected by the High Court in that instance. Accordingly, Logan J rejected the notion that the NCC should apply simply because the respondent companies could have adopted an alternative model which was economically equivalent, to which the NCC would have applied. Logan J's analysis reflects the High Court's emphasis on the need to apply the terms of the statute, stating at [42] that if Parliament had intended the definition of "contract" to extend to "helpers" such as Teleloans, then it could have done so.

6.3 Failure to meet statutory time period cured by the exercise of the Court's discretion on commercial grounds

(By Stephen Neale, Thomas Parker and Grace Gentilli, Clayton Utz)

Solco Ltd, in the matter of Solco Ltd [2015] FCA 635, Federal Court of Australia, McKerracher J, 24 June 2015

The full text of this judgment is available here.

(a) Summary

The decision of the Federal Court of Australia in *Solco Ltd* concerned an application by Solco Ltd (Solco) to cure a failure to observe the three month time period under s. 723 of the Corporations Act 2001 (Cth) (the Act) for admission to quotation on the Australian Securities Exchange (ASX) of shares issued pursuant to a prospectus.

Solco applied under ss. 1322(4)(d) and 254E of the Act for the Court to exercise its discretion to extend the period for the admission to quotation of the shares and to validate the issue of shares pursuant to the Prospectus, respectively.

McKerracher J granted the application and, in doing so, placed emphasis on the fact that making the orders would not cause or be likely to cause any substantial injustice to any person, but rather fulfil the expectations and commercial interest of all parties concerned.

(b) Facts

ASX-listed Solco proposed to acquire the unlisted companies, assets and businesses comprising the "Go Group" from Urban Energy Holdings Pty Ltd (Urban Group) for scrip consideration. The intention was for Go Group to be listed on ASX by way of a "back door" listing, which required Solco to comply with the ASX requirements to re-list on the ASX, which included re-complying with Chapters 1 and 2 of the ASX Listing Rules. The proposed acquisition was accompanied by a one-for-one rights issue share offer to existing shareholders of Solco, with an associated shortfall offer that was partially underwritten by Urban Group.

On 25 November 2014, Solco issued the prospectus (the Prospectus) pursuant to which it made an offer of shares to effect the backdoor listing of Go Group. The

acquisition of Go Group was approved at Solco's annual general meeting on 28 November 2014.

On 20 February 2015, ASX sent Solco's then solicitors (replaced by Solco's current solicitors on 12 March 2015) a conditional re-instatement letter. Solco's then solicitors advised the company they considered that ASX would admit the shares to be issued under the Prospectus to quotation by 25 February 2015, being the last day of the statutorily prescribed three month period for admission to quotation.

On 23–24 February 2015, in anticipation of re-admission of Solco's securities to quotation, Solco completed the acquisition of Go Group. Solco issued consideration shares to Urban Group, appointed three nominees of Urban Group as Solco directors and issued 153 million shares to subscribers under the Prospectus.

On 25 February 2015 at 1:02pm (WST), Solco's then solicitors were advised by ASX that it would not be reinstating Solco's shares to quotation. ASX was concerned by the set-off of funds due to Urban Group in relation to the acquisition, against funds due from Urban Group to meet its underwriting obligations.

At around 5:00pm (WST) on 25 February 2015, Solco made an urgent application to the Australian Securities and Investments Commission (ASIC) to extend the three month period for admission to quotation under ss. 723 and 724 of the Act. ASIC refused the application on 16 March 2015 and, on 20 March 2015, ASIC advised of its concerns with disclosures in the Prospectus and disclosures relating to events subsequent to the date of the Prospectus.

Following a four-week period of negotiations on required disclosures, ASIC advised Solco on 28 April 2015 that a one-month withdrawal right by way of a supplementary Prospectus should be offered before the Court hearing, allowing subscribers who had submitted an application for shares under the Prospectus to withdraw their application. ASIC expected that a further one-month withdrawal right would be required following the Court hearing upon Solco lodging a second supplementary Prospectus providing all disclosures necessary to resolve ASIC's concerns.

On 12 May 2015, a first supplementary Prospectus was lodged by Solco with ASIC which contained a number of disclosures requested by ASIC and provided for a one-month withdrawal right. At the time of the decision, Solco had drafted a second supplementary Prospectus which contained additional disclosures and provided for a further one-month withdrawal right from its date.

Solco applied to the Court to cure the failure to observe the statutory three-month time period for quotation of its shares and to validate the issue of shares pursuant to the Prospectus. The time from expiry of the three-month period for admission to quotation, being 25 February 2015 to the date sought by the application and two months after lodgement of the supplementary Prospectus, would be approximately five months.

Notification of the originating process was given to both ASX and ASIC who provided "no objection" letters, with ASX advising, on 24 April 2014, that it did not oppose the orders proposed in Solco's application and did not intend to appear at the final hearing.

Solco's application was heard by the Court on 2 June 2015. The judgment was handed down by the Court on 24 June 2015.

(c) Decision

(i) Consideration of the law

Pursuant to s. 723(3)(b) of the Act, securities offered under a disclosure document must be admitted to quotation within three months after the date of the relevant disclosure document.

The consequences of a failure to meet the three-month time period are set out in ss. 723 and 724 of the Act. Under s. 723(3) the issue or transfer of the securities is void and the offeror must return the application moneys. Under s. 724(2) the offeror must either repay the application moneys, or give a supplementary prospectus and allow applicants one month to withdraw their application and be repaid.

Section 254E of the Act allows the Court to validate an otherwise invalid issue of shares. In addition, s. 1322 of the Act confers a discretion on the Court to cure irregularities by declaring an act, matter or thing not invalid by reason of a contravention of the Act, or extending the period for doing any act, matter or thing. This discretion is, however, confined to the conditions set out in s. 1322(6).

McKerracher J noted the intention of ss. 723 and 724 of the Act is that investors who expect to be issued securities admitted to quotation on a financial market should receive such securities within the prescribed time frame so they are able to take advantage of the quotation.

His Honour referred to French J's observations in *Re Wave Capital Ltd* (2003) 47 ACSR 418 that the law should not invalidate transactions because of non-compliance with its requirements where such non-compliance is the product of honest error or inadvertence and where the Court can avoid its effects without prejudice to third parties or the public interest in compliance with the law.

McKerracher J had regard to *Re Golden Gate Petroleum Ltd* (2004) 50 ACSR 659 (*Re Golden Gate Petroleum*) in which Lee J emphasised that s. 1322 of the Act is to be given a liberal construction, allowing appropriate orders to be made that facilitate the conduct of commerce and serve the interests of the parties concerned where it is just and equitable that such orders be made.

His Honour also noted Nicholson J's comments in *Re Tony Barlow Australia Ltd* (2005) 53 ACSR 1 where he referred to the materially adverse impact on the company, its shareholders and creditors if the orders sought under s. 1322 were not granted.

McKerracher J also referred to the decision in *Re NuSep Ltd* (2007) 62 ACSR 301 in which Lindgren J held that the Court's orders to remedy non-compliance with s. 723(b) of the Act did not interfere with the contractual relationship between a company and its members, and in particular, with the legal consequences of the company's failure to perform its contractual promise expressed in the Prospectus. The members' right of action would be unaffected with respect to any loss or damage sustained by reason of its securities not having being quoted as early as noted in the Prospectus.

(ii) Conclusion

McKerracher J decided to grant the application to extend the statutory three-month time period to a date which was two months after the date of the second supplementary Prospectus and, subject to Solco's securities being admitted to quotation by ASX within that two-month period, to validate and confirm the issue of shares by Solco pursuant to the Prospectus.

McKerracher J concluded that the making of the orders sought would not cause or be likely to cause any substantial injustice to any person, but rather fulfil the expectations and commercial interests of all persons concerned in the following ways:

- subscribers wishing to withdraw would be able to withdraw, and their rights of action to recover for any loss or damage would not be affected;
- subscribers wishing to proceed would be able to do so with the benefit of further disclosures;
- Solco's existing shareholders would have their shares re-admitted to quotation and would be able to trade on ASX;
- Urban Group would have shares that could be traded on ASX (subject to an ASX imposed escrow);
- Solco would be able to use the funds raised by the issue of shares pursuant to the Prospectus for the purposes outlined in the Prospectus, including by payment of its creditors; and
- Solco would be more readily able to raise capital by further issues of shares or other securities if its shares are admitted to quotation by ASX.

McKerracher J considered that the making of the orders sought was consistent with facilitating the conduct of commerce generally, including by maintaining market confidence that technical difficulties would not necessarily prevent or unduly hinder the raising of capital by the issue of securities to be admitted to quotation.

McKerracher J took into account the evidence which showed that all persons, including Solco's former solicitors, acted honestly.

McKerracher J did not consider that the length of time between the lodgement of the second supplementary Prospectus and admission to official quotation adversely affected the discretion of the Court to make the orders as Solco had acted as promptly as possible given ASIC's further review and ASIC's first raising of disclosure concerns on 20 March 2015.

McKerracher J noted that in *Re Golden Gate Petroleum*, the period of time between lodgement of a second Prospectus and admission to quotation following the making of the orders by the Court was ten months, whereas the anticipated time in Solco was approximately eight months.

(iii) Significance of decision

This case demonstrates the Court's ability to cure failures to observe statutory time periods under the Act and validate the issue of shares pursuant to disclosure documents where it would not be likely to cause any substantial injustice to any person, but would fulfil the expectations and commercial interests of all persons concerned, and the evidence shows that all persons have acted honestly.

The case also serves as a warning that the contractual relationship still applies between a company and persons who have applied for shares under a Prospectus

and that any persons who have suffered loss or damage by reason of a company's failure to observe the statutory time period will retain their rights of action to recover from the company for any loss or damage suffered as a result of the company's actions.

6.4 Mariner decision gives directors of bidders greater latitude when announcing takeover bids

(By Fred Prickett and Xuelin Teo, Clayton Utz)

Australian Securities and Investments Commission v Mariner Corporation Ltd [2015] FCA 589, Federal Court of Australia, Beach J, 19 June 2015

The full text of this judgment is available here.

(a) Summary

The Federal Court has made clear that a bidder need not have certain, guaranteed, binding or unconditional arrangements in place at the time a takeover bid is announced, at least in order to satisfy the requirement in s. 631 of the Corporations Act 2001 (Cth) (the Corporations Act).

Bidders and their directors can be more confident they will not breach the Corporations Act by announcing proposed takeover bids even if they have not arranged firm funding, following the Court decision.

The case is a significant decision on both takeovers and directors' duties. It also serves as a forceful reminder that the approach taken by the Takeovers Panel, expressed in its Guidance Notes and decisions, as well as by ASIC in its Regulatory Guides, are not binding on a Court when determining the legal meaning of specific provisions of the Act.

The decision is the first on the Act's prohibition on bluffing bids in s. 621(2). In essence, the Court held that the requirement of recklessness in the section. sets a high bar so that a contravention will only occur in egregious circumstances, such as where there is no genuine intention to follow through with the bid. The Court rejected the proposition that the prohibition means that a bidder must have reasonable grounds to believe that it will be able to perform its obligations if a substantial proportion of offers under the bid were accepted.

At the same time, the Court made a number of significant points in relation to directors' duties, including their ability to invoke the business judgment rule.

(b) Facts

Mariner is a listed company which targets and engages in mergers and acquisitions in the small cap sector. It had set its sights on Austock, based on an assessment that Austock's market cap did not reflect its true value, which would be unlocked if its separate parts (a property business and a life insurance business) were sold off.

On 25 June 2012, Mariner announced a proposed off-market bid for Austock. At that time, Mariner did not have enough resources of its own to satisfy its obligations under the bid. It would need external resources, which would only be

available if the arbitrage opportunity was attractive enough. It had had discussions with a keen prospective purchaser of Austock's property business and other potential sources of finance, but had not confirmed anything as at 25 June 2012.

The bid was announced at a price which was not much higher than the then current market price and around half the value for which Mariner considered the assets of Austock could be realised. It was also highly conditional, including a minimum acceptance condition of 50%. In these circumstances, it was likely that the directors (who controlled approximately 35% of the shares) would strongly recommend rejection of the bid. Accordingly, the likelihood of the minimum acceptance condition being satisfied at the initial bid price was low.

With this in mind, the bid was described as "a low-risk bid ... a toe in the water to put Austock in play". It was simply intended to "shake the tree".

(c) Decision

ASIC's view was that the bid breached s. 631(2)(b) of the Act, which says:

> A person must not publicly propose, either alone or with other persons, to make a takeover bid if the person is reckless as to whether they will be able to perform their obligations relating to the takeover bid if a substantial proportion of the offers under the bid are accepted.

Justice Beach of the Federal Court disagreed.

(i) Recklessness of a bid is in the mind of the director

The first question was whether ASIC only had to prove Mariner ought to have been aware of a substantial risk that it could not perform its obligations under the bid (an objective question)—or whether ASIC had the harder task of proving Mariner was actually aware of that risk (a subjective question).

Justice Beach said the test is subjective. In doing so, he noted that a contravention of s. 631(2) is a criminal offence, for which some of the more severe sanctions in the Act are provided, which is a further indication that the legislature intended that the provision would apply only in egregious circumstances.

So, in this case, the real questions for the Court were:

- whether Mariner, by its directing mind(s), was actually aware of a substantial risk that Mariner would not be able to perform its obligations if a substantial proportion of offers under the bid were accepted; and
- whether, having regard to the circumstances known to Mariner, it was unjustifiable to take that risk.

This meant looking at:

- what Mariner's obligations were going to be if a substantial proportion of the offers were accepted;
- when those obligations were likely to arise;
- what was Mariner's actual and anticipated ability to meet those obligations at the relevant time;
- what others had told Mariner about their willingness to provide funding for the bid;
- whether Mariner could have obtained or readily been able to obtain

sufficient funding for the bid from other sources;

- generally, whether there was a risk that Mariner would be unable to perform its obligations relating to the takeover bid if a substantial proportion of the offers under the bid were accepted; and
- whether Mariner was actually aware of that risk.

On the facts of the case, Mariner was not reckless—its directors subjectively thought that, at most, there would only be 65% acceptances of its off-market bid. They also thought that the bid could be easily funded if and when required in light of the significant arbitrage involved (Mariner estimated the break-up value of Austock at nearly twice Austock's market capitalisation). Even if the test were objective, said Justice Beach, ASIC had not shown Mariner did not have reasonable grounds to believe it could perform its obligations under the bid.

(ii) A substantial proportion of the offers is not less than 50% of the shares in play

"A substantial proportion of the offers" is one of those concepts that seems clear at first blush, but becomes increasingly unclear upon reflection. Does it mean more than 50%? Less than 50%? And 50% of what—shares or shareholders?

Justice Beach said that "whatever 'substantial proportion' means, it ought not to embrace less than 50% of the shares that are anticipated to be the subject of the offers to be dispatched".

(iii) No misleading or deceptive conduct

ASIC also alleged that Mariner had breached s. 1041H of the Act, on the basis that its announcement of the proposed bid constituted a misleading statement that it had a reasonable expectation about being able to buy Austock. The Court dismissed this claim as well, finding that there was no basis to say that an announcement that a person proposes to make a bid conveys a representation that the person has reasonable grounds to believe that it will be able to pay the bid consideration for all of the shares in the target company.

(iv) Impact of the Mariner decision on future bids

The Mariner decision goes against the weight of rulings by the Takeovers Panel, which has tended toward reading the s. as requiring firm funding arrangements in place when announcing takeover bids, albeit in the different context of deciding whether there are unacceptable circumstances.

The Federal Court has made clear that a bidder need not have certain, guaranteed, binding or unconditional arrangements in place at the time a takeover bid is announced, at least in order to satisfy the requirement in s. 631. All of the surrounding circumstances of the announcement must be taken into account. In this case, the Court accepted the view of the directors that a "drover's dog could have funded the bid" in light of the significant arbitrage involved.

(v) The Court backs the judgment of the directors

The prohibition in s. 631 applies to Mariner as the bidder, not its directors. ASIC sought penalties and banning orders against the directors on the basis that they breached their duty to Mariner under s. 180 to exercise reasonable care and diligence, by causing Mariner to contravene s. 631 or putting Mariner at risk of such a contravention. The Court dismissed the claim against the directors under s.

180, irrespective of whether or not Mariner had contravened s. 631.

In doing so, Justice Beach relied on earlier authority which rejects the proposition that if a director causes a company to contravene a provision of the Act, then necessarily the director has contravened s. 180. The role of the director is to balance risk and reward.

In this regard, Justice Beach said:

> [448] No contravention of s. 180 would flow from such circumstances unless there was actual damage caused to the company by reason of that other contravention or it was reasonably foreseeable that the relevant conduct might harm the interests of the company, its shareholders and its creditors (if the company was in a precarious financial position). ...
>
> [450] Further, relevant to the question of breach of duty is the balance between, on the one hand, the foreseeable risk of harm to the company flowing from the contravention and, on the other hand, the potential benefits that could reasonably be expected to have accrued to the company from that conduct.
>
> ... [452] After all, one expects management including the directors to take calculated risks. The very nature of commercial activity necessarily involves uncertainty and risk taking. The pursuit of an activity that might entail a foreseeable risk of harm does not of itself establish a contravention of s. 180. Moreover, a failed activity pursued by the directors which causes loss to the company does not of itself establish a contravention of s. 180.

In this case, the potential rewards outweighed the potential risk of harm to Mariner:

> [457] Even if one or more of the alleged risks of harm to Mariner were reasonably foreseeable, the actual jeopardy that those risks posed to Mariner's interests were, in context, minimal. Further, and in any event the potential countervailing benefits to Mariner of pursuing the proposed takeover bid were significant and outweighed such risks.

On this basis and applying the business judgment rule in s. 180(2), the Court could not fault the directors. Justice Beach said:

> [13] ... [T]he directors had extensive backgrounds and expertise in mergers, acquisitions and finance. Such backgrounds no doubt informed their judgment calls, assessments of risk and the strategies they pursued in relation to the transaction the subject of this proceeding. It is necessary to bear this in mind when assessing the case of a regulator second guessing such judgment calls with the benefit of hindsight, using a largely paper based analysis and viewing the events from a timeframe perspective divorced from the reality of the speed at which the events occurred in real time ... [I]n looking at the transaction in question, it is important to adopt an *ex ante* perspective where one is not just looking at potential risks and downsides but also the potential benefits. That was the directors' framework at the relevant time. And that is necessarily the

> framework within which s. 180 must be analysed. A retrospective analysis of a transaction which did not proceed has the tendency to overlook that latter dimension.

In other words, it was entirely proper for the directors to view the cup as half full, rather than half empty, and make a balanced commercial judgment call accordingly.

6.5 Financial Services Ombudsman Service given wide discretion to exclude disputes by Court

(By Daniel Kornberg, DLA Piper)

Goldie Marketing Pty Ltd v Financial Ombudsman Services Ltd [2015] VSC 292, Supreme Court of Victoria, Cameron J, 19 June 2015

The full text of this judgment is available here.

(a) Summary

The Supreme Court of Victoria has validated a decision made by the Financial Ombudsman Service (FOS) to exclude a dispute between Goldie Marketing Pty Ltd (Goldie) and Australia and New Zealand Banking Group Ltd (ANZ) on the basis that a Court was a more appropriate forum for the dispute to be heard.

The decision of Justice Cameron confirms that FOS has broad discretion to exclude disputes under its Terms of Reference and can take into account a wide variety of factors when doing so.

(b) Facts

Goldie designs, manufactures and distributes toys in Australia and overseas. During the period from July 2006 to October 2013, ANZ provided over $8 million in facilities to Goldie, secured by various properties and guarantees from Goldie's directors.

By November 2013, Goldie had defaulted under the terms of the facilities and in December, ANZ cancelled all facilities and served on Goldie a notice that no further drawings would be permitted. Goldie subsequently lodged a dispute with FOS.

FOS operates a dispute resolution scheme established pursuant to s. 912A(2) of the Corporations Act 2001 (Cth) and ANZ, as a holder of an Australian financial services licence, is a compulsory member. FOS considers disputes put before it in accordance with its Terms of Reference.

On 24 December 2013, FOS provided a preliminary assessment of the dispute, finding that Goldie was not a "small business", and therefore fell outside of the scope of the Terms of Reference. A review of the assessment was sought and on 7 April 2014 a decision was made by FOS confirming its earlier assessment.

On 30 April 2014, Goldie sought urgent interlocutory relief to prevent ANZ from enforcing its securities. The matter was subsequently resolved by consent on 7 May 2014 and the dispute was remitted back to FOS for determination.

Further, in September 2014, FOS issued yet another assessment, this time on the basis that the dispute was more appropriately dealt with by a court. Goldie sought a review of this decision as well.

Following submissions by Goldie and ANZ, in November 2014, FOS issued a further written decision excluding the dispute on the same basis that it had done so previously, being that a court was the appropriate forum for the dispute.

Goldie argued that the November determination was invalid. Its basis for doing so was a conversation between FOS and an agent of Goldie. Goldie contends that the conversation alluded to a shortage of staff at FOS. It was further asserted that the discussion revealed that the "materially operative reason" for the November determination was the staff shortage, rather the given reason being that a court was a more appropriate forum for the dispute.

On the basis that Goldie contends that a staff shortage is not a valid reason to exclude a dispute under the Terms of Reference, it sought declaratory relief to deem the November decision invalid.

(c) Decision

Cameron J concluded that FOS had, in fact, exercised its discretion in excluding the dispute in accordance with its terms of reference. Her Honour set out her judgment as follows:

(i) What constitutes the contract between the parties?

FOS's Terms of Reference constitute a tripartite contract; this was not an issue in dispute between the parties. On this basis, FOS must act in accordance with its contractual obligations. This case centres around what is actually included in those obligations and whether the November decision was made in accordance with them.

The plaintiffs argued that the supporting document to the Terms of Reference, the Operational Guidelines also form a part of that contract, and as such FOS is contractually bound to act consistently with the Operational Guidelines as well.

The rationale behind this argument was that the Operational Guidelines require that there be a "compelling reason" to conclude that FOS is not the appropriate forum for a dispute when excluding it.

This argument was staunchly opposed by FOS and by ANZ, both of whom contended that the Operational Guidelines were for guidance only, and as a matter of plain contractual construction, not to be incorporated into the Terms of Reference.

Her Honour, in determining that the Operation Guidelines did not form part of the Terms of Reference, dismissed the previous Federal Court decision of *Wealthsure Pty Ltd v Financial Ombudsman Services Ltd*. Her Honour instead deemed the Operational Guidelines to merely be an adjunct or additional guide rather than forming part of the binding contract.

(ii) Sources of FOS's discretion

Stemming from its Terms of Reference, FOS has a wide discretion to exclude

disputes. Examples of where discretion can be exercised include frivolous or vexatious disputes, the commencement of legal proceedings and there being a more appropriate forum for the dispute.

(iii) FOS's decision-making process in this case

There is a two-pronged approach to FOS excluding a dispute under its Terms of Reference. First, FOS can exclude a dispute, and then if an objection is received, FOS will review the matter and make a final decision that gives reasons.

The aforementioned conversation between FOS and an agent of Goldie occurred after the original September decision. In the conversation, FOS revealed that it was "agonising" over how they would make their final decision. FOS alluded to the recent departures of staff members who were adequately equipped to deal with matters such as the Goldie dispute, however, in the absence of those employees, FOS was no longer the appropriate forum.

On this basis, Cameron J had to determine whether or not, as Goldie contended, a staff shortage was the "materially operative reason" for the decision. In the written decision, three principal issues were considered; whether Goldie was a small business; whether the quantum of the claim was within FOS's jurisdictional limit; and whether a court was a more appropriate forum.

On the first issue, FOS found that Goldie was a small business, and despite it being unclear whether the quantum would fall within the limit of FOS's jurisdiction, it had not been proven otherwise. On the third issue, given the current in-house skills at FOS, the complexity of the facilities, the need for information from third parties and the litigious nature of the plaintiffs and that the quantum could still potentially exceed its $500,000 cap, FOS confirmed that a court was better suited for the dispute.

(iv) Did FOS exercise its discretion in accordance with the Terms of Reference?

The plaintiffs stated that FOS acted unreasonably and in breach of its obligations pursuant to its Terms of Reference, and in doing so made five separate errors. They were that FOS erred in treating its temporary staff shortage as justifying its refusal to consider the dispute; FOS did not take into account the advantages of dealing with the dispute in-house; FOS's decision was so unreasonable that no decision maker acting reasonably could have arrived at it; FOS acted for an improper purpose, being the avoidance of the need to address its staff shortage; and they did not provide a "compelling reason" for concluding that it was not the appropriate forum.

On these errors, Cameron J opined that FOS was entitled to take into account a wide variety of issues including staff resourcing, capability and availability in determining whether to exclude a dispute and as such, the November decision was in accordance with the contract between the parties. Further, her Honour found no basis for a court to look behind the decision made.

Her Honour's judgment can be summarised as follows:

- The Terms of Reference constitute the entire contract between the parties and the Operational Guidelines to the Terms of Reference do not form part of that contract;
- FOS has a broad discretion to exclude disputes under its Terms of

Reference;

- the November decision provides sound and comprehensive reasoning as to why FOS should exercise its discretion to exclude the dispute; and
- even if the Operational Guidelines do form part of the Terms of Reference, the reasons set out in the November decision still accorded with that contract.

6.6 High Court finds corporations can be compelled to produce documents in contempt proceedings brought against them

(By Emma Newnham, King & Wood Mallesons)

Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd, [2015] HCA 21, High Court of Australia, French CJ, Kiefel, Bell, Gageler, Keane and Nettle JJ, 17 June 2015

The full text of this judgment is available here.

(a) Summary

The issue in this appeal was whether the appellant corporation, the Construction, Forestry, Mining and Energy Union (CFMEU), could be required to make discovery of documents in contempt proceedings brought against it. The High Court unanimously held that it could.

(b) Facts

On 5 April 2013, the CFMEU was ordered to restrain from interfering with the first respondent's (Boral's) supply or possible supply of goods or services at any building or construction site in Victoria.

The first to sixth respondents (the Boral Parties) alleged that, on 16 May 2013, the CFMEU disobeyed the orders by establishing and maintaining, through an official, a construction site blockade which prevented Boral supplying concrete to that site. On 22 August 2013, the Boral Parties filed a summons seeking orders that the CFMEU be punished for contempt of court.

Boral sought discovery of documents that went to the issue of the CFMEU official's authority to act as he did. Rule 29.07(2) of the Supreme Court (General Civil Procedure) Rules 2005 (Vic) (the Rules) provides that, in a proceeding commenced otherwise than by writ, the Court may order any party to make discovery of documents.

The summons for discovery was initially dismissed on the basis the contempt proceeding was a criminal proceeding and, as such, the rules of civil procedure did not apply. In subsequent appeals, it was held that rl. 29.07(2) did apply to the contempt proceeding.

On appeal to the High Court, the CFMEU argued:

- that inherent in the standard of proof for proceedings for contempt of court (proof beyond reasonable doubt) is a requirement that the party bringing the proceedings cannot compel the party charged to testify or produce documents to assist it in making its case (the Companion Principle

Argument); and

- that the proper interpretation of the Rules was that rl. 29.07(2) did not apply to order 75 of the Rules, which contains the rules relating to proceedings for contempt of court (the Interpretation Argument).

(c) Decision

The High Court unanimously dismissed the appeal.

(i) Companion Principle Argument

The Court rejected the Companion Principle Argument.

The Court relied on the description of the companion principle in *Lee v The Queen* (2014) 88 ALJR 656.

In that case, the Court said that:

- it is a principle of the common law that the prosecution proves guilt;
- this principle is an aspect of the "accusatorial nature of a criminal trial in our system of criminal justice";
- the "companion rule" to that fundamental principle is that an accused person cannot be required to testify - "[t]he prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof".

The majority (French CJ, Kiefel, Bell, Gageler and Keane JJ) found that:

- the CFMEU was not, in this case, being required to testify against itself. Concerns about unreliable confessions and that oppressive conduct may be used to extract admissions therefore did not arise; and
- the companion principle is a "companion" of criminal trials, not of the standard of proof applicable in criminal trials. The contempt proceeding had proceeded through the courts regulated by the laws relating to civil proceedings, and the CFMEU's arguments did not explain how the contempt proceeding could be a criminal proceeding. Accordingly, the companion principle did not apply.

In separate reasons, Justice Nettle observed that the contempt alleged in this case was criminal contempt. But, his Honour said, even a proceeding for criminal contempt is not a criminal proceeding. It is a civil proceeding, tried by judge alone and governed by the rules of procedure applying to civil proceedings, subject to some qualifications. Those qualifications (such as the privilege against self-incrimination, for an individual) do not prevent the CFMEU being ordered to make discovery and produce certain documents.

(ii) Interpretation Argument

The majority also rejected the Interpretation Argument, finding that:

- a proceeding for contempt of court under order 75 is within the scope of rl. 29.07(2) because it is a proceeding commenced otherwise than by writ;
- rl. 29.07(2) is not confined to proceedings involving the delivery of pleadings;
- the provisions of order 75 are not self-contained, and do not stand outside the Rules;
- the Civil Procedure Act 2010 (Vic) does not confine the operation of the

Rules insofar as they facilitate discovery, because the Act expressly provides that the powers in relation to discovery are in addition to, and do not derogate from, any powers a court has under the rules in relation to discovery (s. 59).

Justice Nettle noted that the Interpretation Argument had been abandoned in the course of argument. He also noted that order 75 is clearly not an exclusive code as it contains a procedure which necessarily relies on processes in other parts of the Rules.

6.7 Court grants relief for oppression arising from the misappropriation of funds by a director

(By Sue Soueid, Corrs Chambers Westgarth)

Cowling v Mekken [2015] VSC 196, Supreme Court of Victoria, Randall AsJ, 17 June 2015

The full text of this judgment is available here.

(a) Summary

The proceeding was commenced by the second plaintiff, Mr Cowling, a director of the first plaintiff, Southern Phoenix Pty Ltd (the Company), against Mr Mekken, the Company's other director, and Mrs Mekken, a shareholder in the Company. Mr Cowling sought relief as a member of the Company pursuant to ss. 232 and 233 of the Corporations Act 2001 (Cth) (the Corporations Act) in respect of conduct that was alleged to be oppressive.

Mr Cowling alleged that the defendants appropriated Company funds, being (1) proceeds of the sale of equipment which should have been paid to the Company; and (2) a substantial portion of a tax refund payable to the company (the Appropriated Monies). In response, Mr Mekken alleged that he was owed deferred wages, and that after the Company ceased to trade, he caused the Company to pay him a portion of the deferred wages. He filed a writ against the company and Mr Cowling seeking payment of the balance of the wages said to be owed to him.

Randall AsJ first considered whether Mr Mekken's contention that he was owed deferred wages was credible, and secondly, whether the impugned conduct was, in fact, oppressive.

Following an exhaustive evaluation of the credibility of the witnesses, his Honour held that the evidence given by Mr Mekken and the witnesses called in his support were generally not trustworthy. In focusing his analysis on the credibility of the witnesses rather than the evidence of any oral agreement in relation to the payment of wages that was agreed between the parties, his Honour avoided engaging in a complicated process of construction. His Honour also held that the misappropriation of funds by a director in circumstances where a director had been delegated responsibility for those funds was a *prima facie* case of oppression.

(b) Facts

Mr Cowling had been a director of the Company since its registration in 2005, and Mr Mekken became director in 2007, the same year that Mrs Mekken acquired the majority of the issued capital (102 shares) in the Company (with the balance of 98 shares held by Mr Cowling). At the time Mr Mekken joined the Company, there was no written record of any agreement between the Mr Cowling and Mr Mekken in relation to the payment of wages.

In 2011, Mr Cowling and Mr Mekken resolved that the Company would cease trading, and that its equipment would be sold. No particular sale process was agreed or implemented. Valuations were obtained for eight items, including the two items subject of the proceeding and a third party was engaged to assist in the sale of equipment. A company of which Mr Mekken was a sole director and shareholder purchased the items for a reduced sum.

It was common ground that a tax refund payable to the Company was appropriated by Mr Mekken without consultation with Mr Cowling.

Mr Cowling sought relief pursuant to s. 232 of the Corporations Act, which provides that the Court may make orders under s. 233 if (among other things) the "conduct of a company's affairs ... [is] oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity". The orders sought under s. 233 included an order for the sale of Mrs Mekken's shares in the Company and the distribution of equity in the Company to compensate Mr Cowling for Mr Mekken's oppression.

In the alternative, the plaintiffs sought an order for the winding up of the Company. Finally, leave was sought to bring proceedings on behalf of the Company against the defendants pursuant to s. 237 of the Corporations Act (which provides that a member of a company may commence proceedings if (among other things) (i) it is in the best interests of the company; and (ii) there is a serious question to be tried).

In response, Mr Mekken alleged that he was owed deferred wages, and that after the Company ceased to trade, he Caused the company to pay him a portion of the deferred wages. The defendants filed a writ against the Company and Mr Cowling seeking payment of the balance of the deferred wages.

Five issues arose for determination by the Court. The first two issues concerned whether Mr Mekken's conduct in relation to the Appropriated Monies constituted oppressive conduct. The remaining three issues concerned whether Mr Mekken was owed wages and if so, whether he was entitled to deduct those wages from the appropriated sums, and whether Mr Mekken was owed any further sums.

(c) Decision

(i) Construction of the oral agreements

The credibility of the parties and witnesses called by them was crucial to the resolution of the proceeding. Randall AsJ characterised his task as being to "determine if the parties reached an oral agreement as contended for by Mr Mekken based upon the credibility of the germane witnesses" as distinct from implying the existence of the agreement from the conduct of the parties, or considering the meaning of any term by reference to extrinsic evidence.

Accordingly, the defendants' submission that the Court was entitled to look to the surrounding circumstances at the time the agreement was allegedly entered into,

subject only to the requirement for relevance imposed by s. 55 of the Evidence Act 2008 (Vic), was rejected. His Honour declined to speculate on what "might" have been agreed and confined his analysis in the first instance to consideration of the surrounding circumstances only insofar as those circumstances were relevant to the credibility of Mr Mekken.

His Honour was unconvinced by the version of events provided by both the defendants and the first plaintiff. In particular, his Honour noted a number of inconsistencies in the oral testimony, and between the oral testimony and contemporaneous records. It was the held that Mr Mekken's claim had "all the hallmarks of a reconstruction" after being confronted by the allegations. Consequently, the first defendant's evidence as to the existence of an oral agreement regarding the payment of wages was rejected, and Mr Mekken failed in his claim.

Having resolved the issue in this way, his Honour (assuming that the defendants' submission was correct) then considered the surrounding circumstances to determine whether an agreement had been agreed in the form contended by Mr Mekken. It was held that, in the circumstances, it was unlikely that an agreement in the form contended by Mr Mekken would have been reached.

(ii) Oppression

As a starting point, his Honour accepted that the misappropriation of funds constituted a breach of fiduciary and statutory duty, and that this conduct could constitute oppression. It was held that Mr Mekken's conduct in preferring his own financial interests over that of the Company was a clear breach of fiduciary duty. This was particularly the case in circumstances were Mr Mekken was delegated certain responsibilities (including the sale of the equipment) by Mr Cowling.

Further, it was held that it was unnecessary for Mr Cowling to prove that Mr Mekken was not a creditor of the Company to establish a *prima facie* case of oppression, and that it was sufficient that the Court could not be satisfied that any amount was owing to Mr Mekken.

(iii) Orders

Mr Cowling was given leave to institute proceedings on behalf of the Company pursuant to s. 237 of the Corporations Act. His Honour declined to order the winding up of the Company, which had met (or could meet) all its outstanding liabilities.

His Honour proposed two alternative orders:

- an order for payment pursuant to the claim for which leave had been granted pursuant to s. 237, with the balance of any amount paid (after the company's liabilities had been met) distributed to Mr Cowling in the percentage representing his shareholding; or
- an order requiring Mrs Mekken to purchase Mr Cowling's shareholding for an amount equivalent to any distribution.

The parties were directed to consult with a view to reaching agreement on the orders.

6.8 Rectification of the share register under the Corporations Act - "gentlemen's agreement" not enough

(By Eric Kosack, King & Wood Mallesons)

In the matter of Civil & Civic Infrastructure Pty Ltd [2015] NSWSC 770, Supreme Court of New South Wales, Black J, 17 June 2015

The full text of this judgment is available here.

(a) Summary

The defendant and the plaintiff had together been involved in the establishment of a construction company called Civil & Civic Infrastructure Pty Ltd (the Company). The defendant was the sole director and sole registered shareholder of the Company.

The plaintiff sought an order under s. 175 of the Corporations Act 2001 (Cth) (the Act) or, alternatively, the equitable jurisdiction of the Court, that the Company rectify its share register by entering that plaintiff's name in that register in lieu of the defendant's name as a member of the Company in respect of 50% of the Company's shares.

The Court declined to make the order, on the basis that the evidence did not reveal an intention of the parties to enter into a legally binding relationship on those terms.

(b) Facts

The plaintiff and the defendant met while they were both in prison on remand. Following their release, they set about discussing arrangements for the incorporation and management of the Company.

The plaintiff's evidence was that, over the course of a number of meetings, the parties reached an agreement for an arrangement where:

- the defendant would handle the administrative aspects of the Company;
- the plaintiff would handle the works of the Company;
- 100% of the shares would be held in the name of the defendant;
- 50% of those shares would be held by the defendant on behalf of the plaintiff; and
- the plaintiff and the defendant would share equally in pay and the profits of the Company.

The motivation for the defendant's holding of shares on behalf of the plaintiff appears to be, at least in part, a feeling that full legal ownership would not be appropriate given the criminal proceedings against the plaintiff at that time.

The aspects of the arrangement regarding the holding of shares and sharing of monies were described by the plaintiff as a "gentlemen's agreement". That language—"gentlemen's agreement"—was used consistently between the parties during the events leading up to the litigation, as well as by the plaintiff's accountant in giving evidence. In fact, at one point there was a series of emails between the parties in which the plaintiff made reference to his 50% interest in the business, to which the defendant responded, "WE HAVE A GENTLEMEN'S AGREEMENT AS TO WHAT IS TO BE DONE", before outlining the legal

responsibilities of the parties.

(c) Decision

The Court was asked to exercise its discretion to make an order under s. 175 of the Act, which relevantly provides that "a person aggrieved may apply to the Court to have a register kept by the company ... under this Part corrected". That s. operates in parallel to the court's equitable jurisdiction to rectify a register.

Black J noted that the relevant authorities recognise that the applicant for rectification must show a "personal equity" that the court will protect and that, *prima facie*, such an equity is shown if the person's name is wrongly omitted from the register. In this case, whether the plaintiff had been wrongly omitted depended on whether he should be treated as the sole beneficial owner of 50% of the Company's issued shares. In seeking to establish that the plaintiff should be treated as the beneficial owner, the plaintiff referred to the discussions and correspondence that had previously taken place between the parties, as outlined above.

Black J was satisfied that the parties had contemplated that half of the Company's shares would be held by the defendant for the plaintiff, that arrangement being the "gentlemen's agreement" to which they had repeatedly referred. Notwithstanding that finding, Black J also found that this arrangement could not support the orders sought by the plaintiff, as it was not intended to be legally binding (whether as an agreement, a trust or some other relationship). The parties were at pains to emphasise that the arrangement between them was a "gentlemen's agreement". The use of this language made it clear that, whatever the underlying motivations of the parties in describing the arrangement in this way, the intention was to create an informal arrangement that was not binding in law. In coming to this conclusion, Black J had regard to various legal dictionaries, as well as the previous decision in *More v Lam* [1981] VR, in which Gobbo J described the term "gentlemen's agreement" as referring to an "informal or voluntary arrangement" where "no legal contract for transfer of property or arrangement enforceable in law is intended". It was noted that the parties could have instead used the more general and common terminology such as "agreement" or "deal". Accordingly, the plaintiff failed to discharge the onus upon him to establish a personal equity, and the proceedings were dismissed.

6.9 AAT overrules ASIC on exercise of discretion in securities buy back

(By Tom Gerrits, Ashurst)

Lantern Hotel Group v Australian Securities and Investments Commission [2015] AATA 428, Administrative Appeals Tribunal of Australia, Senior Member P W Taylor SC, 17 June 2015

The full text of this judgment is available here.

(a) Summary

The Administrative Appeals Tribunal (AAT) decided to exempt Lantern from Corporations Act 2001 (Cth) (Corporations Act) provisions effectively preventing the selective buy back of managed investment scheme units, setting aside a

decision by ASIC refusing to do so.

The AAT found that ASIC must properly exercise its discretion by considering the circumstances when deciding whether to provide relief from Corporations Act provisions. ASIC cannot strictly rely on its published regulatory policy.

(b) Facts

Lantern Hotel Group (Lantern) comprises a managed investment scheme registered under Chapter 5C of the Corporations Act 2001 (Cth) (Corporations Act) and, a company, Lantern Hotel Group Limited. Each Lantern security comprises a unit stapled to a share. While the Corporations Act permits selective buy backs of shares, ASIC relief is effectively required to undertake a selective buy back of units in a managed investment scheme under the Corporations Act.

At a 31 July 2014 meeting, Lantern security holders voted to approve a selective buy back of 24.31% of its securities, being all of the securities held by Millinium Asset Services Pty Ltd as trustee for the Borg Fund in Lantern (the buy back).

The buy back was conditional on ASIC relief. On 18 July 2014, ASIC communicated a conditional "in principle" decision to grant the relief sought. However, following some further correspondence, ASIC formally refused to grant the relief sought on 29 July 2014. Lantern subsequently made an application to the AAT seeking review of ASIC's decision.

(c) Decision

(i) ASIC's refusal to provide relief

ASIC's specific grounds for refusing the relief included concern that:

- the buy back price would "have an impact on the assets of the scheme for remaining security holders";
- the buy back price was more than 5% above the market price, comparatively disadvantaging remaining security holders;
- security holders had inadequate time to consider the buy back before the 31 July 2014 meeting; and
- Lantern had not adequately disclosed the interests of certain directors in the transaction.

ASIC argued that granting relief to "reverse the usual and intended effect" of the Corporations Act would be "unacceptably similar to law reform". ASIC contended that the absence of a process for selective buy backs of units in managed investment schemes was a deliberate legislative choice. ASIC found that facilitating the buy back did not offer a "net regulatory benefit", despite the "commercial benefits" that would flow.

(ii) AAT's decision

The AAT found that ASIC overemphasised its published policy in refusing to grant the relief and that existing policy cannot be allowed to "obscure the true nature and purpose" of ASIC's specific discretion granted under the Corporations Act. ASIC must "not abdicate its function of determining whether the decision under review was, on the material before it, the correct or preferable one".

Moreover, the AAT found that ASIC's argument that the buy back represented

"regulatory detriment" lacked clarity, particularly as the exemption sought applied only to a specific transaction.

The AAT highlighted the following significant considerations in this decision:

- the tiny proportion of shares voted against the proposed buy back;
- that security holders were properly informed of material considerations;
- the significant commercial benefit—the buy back resulted in an increase in the net asset value per security;
- the independent assessment of the transaction as "fair and reasonable";
- the buy back price being consistent with both the VWAP for Lantern's prior on market buy backs and ASX trading prices; and
- the exemptions from identified Corporations Act provisions sought related only to the specific transaction approved by Lantern securityholders on 31 July 2014.

The AAT was critical of the first three grounds of refusal because they were clear to ASIC before it gave its "in principle" approval.

More substantively, the AAT found the net asset value per security proportionally increased following the buy back, and therefore the remaining securityholders were not disadvantaged. The market price of securities had varied over time and the buy back price was deemed "fair and reasonable" by an independent expert, and was not markedly above the historical ASX trading average. Finally, Lantern gave securityholders the notice of meeting material in accordance with the period required under the Corporations Act and the AAT considered that this was a sufficient period to consider the buy back.

The AAT agreed with ASIC that certain directors' involvement with a shareholder whose proportionate interest would have materially increased in Lantern following the buy back was not disclosed. The AAT determined, however, that had this information been disclosed, it would not have "reasonably have affected the mind of a hypothetical security holder in determining whether they would support or oppose the transaction".

In addition, the failure to disclose the ultimate ownership of Lantern by Pyne Gould was found to be immaterial. Specifically, the AAT found that the potential implications of the buy back, including the increase in the percentage holding of significant securityholders, were clearly stated in the Explanatory Booklet.

(iii) Decision

The AAT set aside ASIC's decision and proposed to exempt Lantern from the Corporations Act provisions that would preclude Lantern from completing the buy back approved by securityholders on 31 July 2014.

6.10 Supplementary disclosure and adjournment of court-ordered meeting permitted in relation to acquisition by scheme of arrangement

(By James Siemon, Minter Ellison)

Re Amcom Telecommunications Ltd (No 3) [2015] FCA 596, Federal Court of Australia, McKerracher J, 16 June 2015

The full text of this judgment is available here.

(a) Summary

Vocus Communication Ltd (Vocus) proposed to acquire all the shares in Amcom Telecommunications Ltd (Amcom) by scheme of arrangement. When Vocus subsequently divested its interest in Amcom, allowing the shares to be voted in relation to the scheme, Amcom sought orders permitting it to announce the divestment to scheme participants in a supplementary disclosure. Blue Call Pty Ltd (Blue Call) opposed the application.

Noting that there was a second court hearing yet to take place, the Court found that there was no amendment to the scheme as a result of the divestment, there was no prejudice to scheme participants, and there was insufficient evidence of other concerns raised by Blue Call. The Court therefore granted the orders sought.

(b) Facts

Under the Scheme Implementation Agreement (SIA) it was proposed that Vocus would acquire all the shares in Amcom by scheme of arrangement. Initial orders were made by the Federal Court convening a scheme meeting for 6 May 2015 and approving the despatch of supplementary material. A second scheme hearing was set down for 26 May 2015.

On 15 May 2015, Vocus announced that it had terminated an equity swap transaction and disposed of its 10% interest in Amcom to third parties (the Vocus Divestment). Amcom consented to that announcement under the SIA. In its announcement to the Australian Securities Exchange (ASX), Vocus stated that the Vocus Divestment "would give the merger the best chance of success". Amcom wanted to bring the Vocus Divestment to the attention of its Shareholders by a supplementary disclosure to scheme participants. Amcom believed that scheme participants would receive that disclosure at least ten days before the adjourned scheme meeting. ASIC had no comments in relation to the proposed disclosure.

On 20 May 2015, Amcom therefore filed an application seeking various court orders, including orders for the despatch of the supplementary material to scheme participants. McKerracher J accepted that the supervisory jurisdiction of the Court under s. 411 of the Corporations Act 2001 (Cth) (the Corporations Act), which deals with the administration of compromises, etc., enabled the Court to order the despatch of supplementary material between the original and second hearing dates.

The scheme meeting, originally convened on 6 May 2015, had been adjourned, first to 18 May 2015 and then to a future date to be determined. Amcom also sought court orders that the meeting be reconvened on 15 June 2015 pursuant to s. 1319 of the Corporations Act. Section 1319 provides that:

> ... [w]here, under this Act, the Court orders a meeting to be convened, the Court may, subject to this Act, give such directions with respect to the convening, holding or conduct of the meeting, and such ancillary or consequential directions in relation to the meeting, as it thinks fit.

By reference to previous decisions, McKerracher J found that the Court's powers under that s. extended to reconvening the scheme meeting.

As the scheme meeting had been adjourned for more than one month, it was required under the Federal Court (Corporations) Rules (2000) 1999 (Cth) and Amcom's Constitution that shareholders be given at least 28 days' notice of the adjourned meeting. Amcom submitted that there was no requirement to issue a new notice of meeting, as there was no change to the proposed scheme as a result of the Vocus Divestment. Amcom therefore sought orders that the notice of the scheme meeting already given remain valid, despite those requirements, and suggested that the date for eligibility to vote at the meeting be changed by referring to the new date in the supplementary disclosure letter. It suggested that the scheme meeting was a meeting convened by the Court pursuant to s. 411 of the Corporations Act for a specific, statutory purpose and not a meeting convened pursuant to Amcom's Constitution. On that basis, the Court had the power under s. 1319 to make the orders sought by Amcom. Amcom also sought orders that the online votes and proxy forms lodged by shareholders for the scheme meeting be deemed to remain valid unless revoked.

Blue Call, a subsidiary of TPG Telecom Ltd (TPG), was a holder and beneficial owner of shares in Amcom. Blue Call raised three topics of concern about the orders sought by Amcom. It suggest that these issues were important, as any vote at the scheme meeting would only be able to pass by a slim margin (if at all).

First, Blue Call submitted that the votes of the following shareholders should be tagged for consideration at the second court hearing, as they may receive benefits from the scheme which are not available to all of the shareholders:

- Tony Grist (or related entities), who had been promised an appointment as deputy chairman of the Vocus board post-merger;
- the entities to whom Vocus had divested its interest;
- shareholders of both Amcom and Vocus; and
- Commonwealth Bank of Australia (and its related bodies corporate), which held shares in both Vocus and Amcom and was a creditor of Vocus.

Secondly, Blue Call raised its concern that shareholders who wished to change their votes needed to take a positive step to do so and suggested that shareholders should vote again and resubmit their proxies, given the change of circumstance.

Finally, Blue Call objected to changing the date for eligibility to vote at the scheme meeting to a later date without amending the existing notice of meeting or issuing a new notice. It objected on a number of grounds, including that it was unclear what information had been sent to shareholders who had come onto the register since the meetings were originally convened.

(c) Decision

(i) Adjourning the scheme meeting and validity of notice

After reviewing previous decisions, McKerracher J agreed with Amcom's characterisation of the scheme meeting as a meeting convened by the Court pursuant to s. 411 of the Corporations Act and agreed that the Court had the power under s. 1319 to make the orders sought by Amcom to adjourn the meeting and reduce the required notice period.

His Honour noted that ASIC had considered the supplementary materials, without comment, and that there was no amendment to the proposed Scheme as a result of the Vocus Divestment. He also noted the evidence given by Amcom of its belief that scheme participants would be provided with the supplementary material at

least ten days prior to the adjourned scheme meeting. Due to the lack of prejudice to scheme participants in reducing the notice requirement, his Honour adjourned the meeting as requested by Amcom.

(ii) Tagging of votes and material non-disclosure to vote

His Honour stated that tagging of votes of board members of the target company (who are also shareholders) may be appropriate where they have a potential additional commercial interest in the outcome of the scheme, and considered prior examples. Mr Grist, however, had already given an undertaking to tag his votes and identify them to the Court at the second hearing.

His Honour was not persuaded that the votes of other categories of shareholders should be tagged, noting that no authority had been cited in support of that proposition. In particular, his Honour highlighted that to do so would have the practical effect of putting off the shareholder vote on the scheme and noted that further arguments could be brought at the second court hearing.

Noting again that ASIC had not raised any concerns, his Honour noted that there was also insufficient evidence to suggest that Vocus had improperly stated the nature of the sell down of its holding or to warrant a finding as to the transferees' voting intentions.

(iii) Positive step of changing a vote or proxy

As there was no material change to the scheme or the scheme consideration as a result of the Vocus Divestment, his Honour found that there was no (or little) reason to doubt that all proxy forms submitted by shareholders were still deemed to be valid. McKerracher J noted that requiring Amcom to require new proxy forms from shareholders would have the unusual (and, on the evidence, unnecessary) effect of requiring shareholders to vote again even though they may have no intention of changing their vote.

The Court therefore granted the orders sought by Amcom.

6.11 Court appoint public interest test in appointing a provisional liquidator

(By David Douglas, DLA Piper)

Australian Securities and Investments Commission v Planet Platinum Ltd [2015] VSC 273, Supreme Court of Victoria, Efthim AsJ, 12 June 2015

The full text of this judgment is available here.

(a) Summary

Efthim AsJ of the Supreme Court of Victoria granted an application by the Australian Securities and Investments Commission (ASIC) that a provisional liquidator should be appointed to Planet Platinum Ltd (Planet Platinum) as part of an ongoing proceeding to have Planet Platinum liquidated. The application was opposed by the voluntary administrator whose application that the court validate his appointment was rejected. The court granted ASIC's application after considering a number of factors regarding the state of the company and the impact on creditors and ultimately decided that the public interest was best served by the

removal of the voluntary administrator and appointment of a provisional liquidator. In doing so, the Court reached the conclusion that creditors would be no better off under the existing deeds of company arrangement (DOCA) as the voluntary administrator's ability to enforce security arrangements was dubious and that the company would be best served by the removal of the directors whose mismanagement resulted in the voluntary administration.

(b) Facts

Planet Platinum, a public company which operated a prominent adult entertainment venue and held multiple assets in the Melbourne CBD, was placed into voluntary administration at the recommendation of its directors. The voluntary administrator was appointed after a unanimous decision by the company's two directors. The legitimacy of this decision was an issue at trial as under s. 201A(2) of the Corporations Act 2001 (Cth) (the Corporations Act), public companies require at least three directors.

Undisputed evidence indicated that Planet Platinum had been subject to maladministration and there were numerous examples of the directors' and company's conduct contravening the Act. At a meeting of creditors regarding the appointment of a voluntary administrator, the directors misled creditors by informing them the appointment was not related to the solvency of the company, but rather due to compliance issues raised by ASIC. The directors also strongly advised creditors to stick with the voluntary administrator the directors recommended as he had a strong plan to get the company back on track. A vote put to the creditors to have two new independent administrators appointed in place of the one the directors recommended was defeated, but primarily due to the existing directors acting as proxies for the majority of votes.

ASIC sought a winding-up order against Plant Platinum under ss. 461(1)(k) and 464 of the Act on the ground that it would be just and equitable to do so. ASIC also applied for the appointment of a provisional liquidator under s. 472(2) of the Act. The voluntary administrator of Planet Platinum also applied under ss. 477C and 477A(1) of the Act to have the court declare their appointment valid, and under s. 439(6) and 447A(1) of the Act to extend the time allowed to convene a meeting under s. 439A. In this decision the court dealt with the s. 474(2) application for a provisional liquidator to be appointed. The application was opposed by the voluntary administrator.

(c) Decision

(i) DOCA

The voluntary administrator argued that creditors would be paid earlier, and thus be better off under the existing DOCA. ASIC argued, however, that creditors would be better off with the appointment of a provisional liquidator than under the DOCA. The voluntary administrator also indicated that there was a strong possibility that someone had been diverting cash from the business's bank account, further highlighting that a provisional liquidator would be better suited to manage the affairs of the company.

Importantly, the voluntary administrator when cross-examined provided contradictory responses as to his belief in the recoverability of a twelve-year-old security interest for which no written records existed and the judge found his evidence to be "concerning". The ambiguity surrounding the recoverability of the interest was an important factor considered by the judge in determining whether

creditors would be better served by the appointment of a provisional liquidator. Ultimately the court decided that creditors would be no better off under the DOCA as there was no specified amount due to creditors, there was no specific amount that would make up the fund and the Deed Proponents provided no sworn evidence as to whether they were willing and had the means to pay the amount required.

(ii) Considerations for appointing a provisional liquidator

Efthim AsJ accepted Tamberlin J's principles for appointing a provisional liquidator as stated in *Australian Securities Commission v Solomon* [1996] 19 ACSR 73 which are as follows:

a. the court should only appoint a provisional liquidator where it is satisfied that there is a valid and duly authorised winding up application and that there is a reasonable prospect that a winding up order will be made;
b. the fact that the assets of the company may be at risk is a relevant consideration;
c. the provisional liquidator's primary duty is to preserve the status quo to ensure the least possible harm to all concerned and to enable the court to decide, after a further examination, whether the company should be wound up;
d. the court should consider the degree of urgency, the need established by the applicant creditor and the balance of convenience;
e. it may be appropriate to appoint a provisional liquidator in the public interest where there is a need for an independent examination of the state of accounts of the company by someone other than the directors; and
f. where the affairs of the company have been carried on casually and without due regard to legal requirements so as to leave the court with no confidence that the company's affairs would be properly conducted with due regard for the interests of shareholders, it may be appropriate to appoint a provisional liquidator.

Efthim AsJ found factors (a), (e) and (f) were in favour of a provisional liquidator being appointed but (b) and (c) supported retention of the administrator with (d) being neutral.

With regard to factor (f), his Honour thought it significant that under a continued voluntary administrator, the current directors who had mismanaged the company would remain in their positions.

Factor (e) seems to have been the most significant factor in the decision and a substantial part of the reasoning relating to the factors focused on the public interest.

(iii) The public interest

Efthim AsJ cited Logan J in *Deputy Commissioner of Taxation v WPS Motorsport Pty Ltd* [2009] FCA 476 as authority for the proposition that the public interest is a factor to take into account as to whether a company should remain in administration. His Honour then expanded this proposition to include the public interest as a relevant consideration as to whether a provisional liquidator should be appointed, noting that the public interest is an important consideration for many other parts of the Act.

Efthim AsJ then proceeded to examine the public interest. The judge's concern that

one of the existing directors would continue in their role while the administrator remained in place, and previous inaction by the administrator in not correcting untrue statements made to creditors provided sufficient concern to believe it was in the public interest to appoint a provisional liquidator. His Honour also noted that in the previous members' vote to appoint a provisional liquidator, the motion was defeated almost solely by the existing directors' proxy votes. It was not in the public interest for the company to continue to be run by the same party who put it in its adverse state of affairs.

6.12 Varying and seeking payment under contracts without board approval - Directors' fiduciary and statutory duties

(By Elysia Longo and Mark Tyndall, Herbert Smith Freehills)

Jones v Invion Ltd [2015] QCA 100, Queensland Court of Appeal, McMurdo P, Lyons J and Philippides JA, 12 June 2015

The full text of this judgment is available here.

(a) Summary

Invion Ltd (Invion) successfully claimed compensation against three former directors of the company for breaches of their fiduciary duty and statutory directors' duties under ss. 180, 181 and 182 of the Corporations Act 2001 (Cth) (the Act). The three directors purported to act on behalf of Invion in amending the termination provisions in their employment contracts without informing the board or obtaining board approval. As a result of the amended provisions the directors received payments equivalent to 12 months' remuneration after they terminated their respective contracts with Invion.

The former directors appealed in the Court of Appeal of the Supreme Court of Queensland. McMurdo P, Lyons J and Philippides JA dismissed the appeal with costs, leaving undisturbed the trial judge's findings that the directors acted dishonestly and in breach of their duties, that their breaches caused the relevant loss to the company and that their conduct could not be excused under ss. 1317S and 1318 of the Act.

(b) Facts

Stephen Jones, Jason Yeates and James Greig (the Directors) acted as chairperson, chief executive officer and chief financial officer of Invion respectively. On 25 March 2011 the full board resolved to vary the Directors' contracts by extending the termination notice period to 12 months. The Directors refrained from voting on this resolution. Dissatisfied by the protection afforded by the board's proposed variations, the Directors in April 2011 purported to amend their contracts beyond what was resolved by the board on 25 March 2011. Mr Greig purported to bind the company when offering to amend both Mr Yeates's employment contract and Invion's contract with Mr Jones's company. Mr Yeates similarly purported to bind the company by amending Mr Greig's employment contract. The amendments provided that if either the Directors or Invion gave notice of termination the Directors would be paid the equivalent of 12 months remuneration and the Directors could elect to work or not work through the 12 month notice period. These amendments were not approved by the board nor were they disclosed to the

board when they were made. The amendments were also not discussed at the following board meeting on 12 May 2011.

In October 2011 the Directors resigned and sought payment of the sums purportedly due to them under the amended contracts. Notice of these payments was sent to the full board, but the process by which the contracts were amended and the departure from the terms approved in the 25 March 2011 board meeting were not disclosed. Invion challenged the payments on the basis that the Directors had no authority to bind the company, and even if they had such authority they had breached their duties to the company.

The lack of disclosure supported a finding at trial that the Directors acted dishonestly and in breach of their duties in amending the termination provisions. The trial judge inferred that the proposed variations were not submitted to the board because the Directors believed they would not win approval. The Directors were ordered to pay compensation for their breaches.

The Directors appealed on the basis that the trial judge erred in:

- inferring that the Directors wanted to establish and realise the contractual entitlement without notice to the full board, and in knowing that they should have provided notice they acted dishonestly;
- concluding that the breaches by the Directors caused loss to the company, because there was no evidence that Invion made the payments in reliance on a misunderstanding that it was bound to make them; and
- concluding that the Directors' conduct could not be excused under ss. 1317S and 1318 of the Act.

(c) Decision

The appeal was dismissed with costs. Each ground of review was separately considered in the judgment of Philippides JA, with whom McMurdo P and Lyons J agreed.

Philippides JA concluded that:

- the trial judge was justified in finding that the Directors acted dishonestly and in dereliction of their duties as directors;
- in not having pleaded issues of causation at trial the Directors were precluded from arguing them on appeal, and that in any case submissions about the board "acquiescing" to the payments were unmaintainable; and
- the Directors' conduct could not be excused under ss. 1317S and 1318 of the Act. The findings as to dishonesty at trial meant that the finding of honesty necessary to satisfy the statutory excuse was simply not available.

(i) Findings of dishonesty

The Directors contended that their conduct could not be judged as dishonest because the varied contracts remained with the company's papers for several months, at risk of discovery by the company's auditors or other parties. The Directors suggested that if they had been attempting to conceal their conduct they would have been unlikely to wait six months before terminating the contracts and seeking the payments.

The Directors also contended on appeal that dishonesty was only one of, and indeed the less appropriate inference to draw about their conduct and that the trial

judge should have inferred that the Directors were mistaken about their authority to vary the contracts and their obligation to disclose them to the full board.

These arguments were rejected by Philippides JA and Lyons J, who concluded that waiting six months before terminating and claiming payment did not impeach the trial judge's conclusion as to dishonesty and simply underlined the imprudent nature of the Directors' conduct. Their Honours also rejected the argument that an inference of mistake (as opposed to dishonesty) could have been made by the trial judge. At trial the Directors maintained that they had actual authority to enter into the contracts and were not obliged to disclose to the full board what they had done.

This was rejected by the trial judge, having regard to seven matters including:

- shareholder concern about directors' remuneration at the time the contract variations were made;
- the close connection between the contract variations and ongoing board discussions about director performance rights;
- the fact that the Directors (presumably on ethical grounds) had recused themselves from the board meeting in which the extension of the notice period for company termination was approved;
- the Directors' limited disclosure of the contractual rights they had secured;
- an annual report signed by Mr Jones which did not record what amounted to a "termination benefit" flowing from the revised contracts;
- the same annual report asserting that members of the board were fully informed on relevant issues in a timely manner; and
- the Directors not informing the board of a potential liability of more than $1 million when they themselves stood to benefit and where the solvency of the company was doubtful.

At trial the Directors did not seek to explain their conduct as a product of some kind of misunderstanding about their authority or obligations. The Court of Appeal concluded that there was no basis from which to infer that any of the Directors acted mistakenly as to their authority to vary the contracts or their obligations to disclose the variations to the full board.

(ii) Causation

The Directors argued that any purported breach of duty did not cause the company's losses. They contended that in the five days after the full board was alerted to the payments being sought under the varied contracts, none of the other directors asked to see the contracts nor intervened to suspend the payments.

The Court of Appeal concluded that the Directors were precluded from litigating issues of causation. They identified that the Directors at trial made no alternative plea as to their conduct not causing any loss. Their Honours also rejected submissions suggesting that the board acquiesced to the payments, on the basis of findings at trial that the Directors consciously concealed what they had done, that a reasonable person would not have made or accepted payment under such contracts, and that there was no evidence that the board knowingly endorsed the contract variations.

(iii) Excuse

Philippides JA concluded that the Directors' conduct could not be excused under ss. 1317S and 1318 of the Act. These provisions require the satisfaction of two

limbs. The first limb would require that the Directors acted honestly. The second would require that they ought fairly to be excused having regard to all the circumstances of the case. The findings as to dishonesty at trial naturally precluded the finding of honesty necessary to satisfy the first limb of the statutory test. The Directors' submission that the contravention was an honest one because the board acquiesced to the payments was rejected for reasons similar to those given in the rejection of submissions on causation. The Directors sought to demonstrate that the circumstances otherwise justified a release from liability (in satisfaction of the second limb) by their suggestion that the fully informed board did nothing about the payments in the five days before they were made, and also did nothing afterward until having a change of heart. This submission was rejected because the board could not be said to have been fully informed in the circumstances.

6.13 Court declares that a party's appointment as trustee of a trust while the initial corporate trustee was deregistered was valid

(By Melanie Wong, Ashurst)

Thorne Developments Pty Ltd v Thorne [2015] QSC 156, Supreme Court of Queensland, Mullins J, 11 June 2015

The full text of this judgment is available here.

(a) Summary

The applicant (Thorne Developments Pty Ltd) was the trustee of a family discretionary trust. In the two years between the applicant's deregistration and reinstatement, the respondent had been appointed as trustee of the trust. The applicant sought a declaration regarding the invalidity of the appointment of the respondent as trustee of the trust. The Supreme Court of Queensland dismissed the application, holding that the applicant failed to show that the appointment was invalid.

(b) Facts

Sections 601AD and 601AE of the Corporations Act 2001 (Cth) (the Corporations Act) deal with the vesting of trust property after a trustee has been deregistered.

They relevantly state:

> 601AD ... (1A) On deregistration, all property that the company held on trust immediately before deregistration vests in the Commonwealth ...
>
> (3A) The Commonwealth has, subject to its obligations as trustee of the trust, all the powers of an owner over property vested in it under subsection (1A).
>
> 601AE ... (1) If property vests in the Commonwealth under subsection 601AD(1A), the Commonwealth may:
>
> a. continue to act as trustee; or
> b. apply to a court for the appointment of a new trustee.

Section 10 of the Trusts Act 1973 (Qld) (the Trusts Act) states that the Trusts Act will apply to any trust, regardless of any contrary intention expressed in the instrument creating the trust. Section 12(1)(h) provides that, where a corporate trustee has "ceased to carry on business, is under official management, is in liquidation or has been dissolved", then a new trustee may be appointed in its place.

The relevant clauses of the trust deed are set out below.

> 16.1 The Trustee may by instrument in writing appoint a new Trustee in addition to or in place of the Trustee at any time
>
> 16.3 If the Trustee is a sole trustee and has resigned or vacated its office under clauses 17 or 18 or (being a corporate trustee) has been dissolved and the Trustee has not appointed a new Trustee under clause 16.1, the Nominated Person may by instrument in writing appoint a new Trustee.
>
> 17.1 A trustee who is an individual must vacate that office and cease to act as such if that person is found to be of unsound mind or becomes subject to any bankruptcy law.

The nominated person for the purposes of clause 16.3 is Brett Thorne.

Following the deregistration of the applicant on 4 December 2011, Brett Thorne entered into a deed of appointment with his wife, Suzanne Thorne (the respondent), and his brother, Craig Thorne (who relinquished his office as trustee before the applicant was reinstated). The deed of appointment purported to appoint the two parties as trustees pursuant to clause 16.3 of the trust deed.

Following these events, the applicant relied on four issues to invalidate the appointment of the respondent as trustee, as outlined in the discussion below. The Court held that the applicant failed on each of the four arguments presented, and dismissed the application.

(c) Decision

(i) Consent of the Commonwealth

The applicant argued that the effect of ss. 601AD(1A) and (3A) was to vest the property in the Commonwealth as a full trustee and the effect of s. 601AE(1) was that the Commonwealth, and no other, had the right to decide whether it would remain as the full trustee or not.

Mullins J held that the Commonwealth became a full trustee and not just a bare trustee, and that it did not have to positively exercise its power in order to become trustee. Her Honour held that the idea of the scheme set up by ss. 601AD and AE is to ensure that there is an entity to deal with the property owned by a deregistered company upon it ceasing to exist.

Mullins J held that the note to s. 601AE(1) implied that the Commonwealth's rights as holder of the trust property may be affected or divested by the application of other laws. As such, if the trust deed or a statutory provision, such as s. 12(1) of the Trusts Act, regulates the appointment of a new trustee when a corporate trustee has been deregistered, there is nothing in the Corporations Act

that mandates the consent of the Commonwealth before such an appointment can take effect.

(ii) Deed of appointment

The applicant argued that no occasion arose for the exercise by Brett Thorne of the power to nominate a new trustee, since there was no vacancy in the office of trustee due to the operation of ss. 601AD and AE of the Corporations Act.

Mullins J acknowledged that, although the trust deed referred to the appointment of the parties as trustees being made pursuant to clause 16.3 of the deed, the application of s. 10 of the Trusts Act meant that the source of the power of appointment was s. 12(1). The issue here was that s. 12(1)(h) allows a person to appoint a new trustee where a corporation has dissolved, but not where it has been deregistered.

Mullins J held that the concepts of dissolution and deregistration are not different. Since s. 12(1)(h) identifies circumstances that affect the capacity of a corporate trustee to act as trustee and which warrant the exercise of the power of the appointer, deregistration fist within this description. Further, the Corporations Act specifies that a company ceases to exist upon deregistration. As such, "dissolved" in s. 12(1)(h) of the Trusts Act should be construed as covering deregistration of a company under Part 5A of the Corporations Act.

(iii) Appointment not *bona fide*

The applicant argued that the appointment of the respondent as a trustee was not a *bona fide* exercise of the power. The applicant submitted that Mrs Thorne would be influenced by Brett Thorne. As such, it was, in effect, an appointment of Brett Thorne himself, who could not be trustee since he was declared bankrupt in March 2012.

Mullins J considered that, apart from relying on the respondent's relationship to Brett Thorne, the applicant had not put on evidence to support its assertion that the appointment of the respondent as trustee was not a *bona fide* exercise of the power. Mullins J held that the mere fact that the respondent was Brett Thorne's wife did not provide a sufficient factual basis to support an inference that the respondent was appointed as trustee so that Brett Thorne would be able to influence her decisions.

(iv) Respondent subject to bankruptcy law

The applicant relied on the fact that the respondent was served with a bankruptcy notice in February 2015. This meant, as argued by the applicant, that she was subject to bankruptcy law within the meaning of clause 17.1 of the trust deed, and therefore should have vacated the office of trustee. The respondent had applied, however, to set aside the notice, with no outcome having been heard at the time of this hearing.

Mullins J held that the trustee's affairs are not subject to the regulation of the Bankruptcy Act 1966 (Cth) (the Bankruptcy Act) until the sequestration order or other assignment for the benefit of creditors is made. Her Honour acknowledged that the service of a bankruptcy notice may lead nowhere. Mullins J did not consider that clause 17.1 should be construed as requiring the respondent to vacate office as a trustee under the trust deed, unless the Bankruptcy Act had effected a change in the status of the respondent.

6.14 Guarantee held to be enforceable against one guarantor when the other guarantor's signature was forged

(By Alexandria Hammerton, Minter Ellison)

C.A.R.S. Pty Ltd v Brent [2015] TASSC 23, Supreme Court of Tasmania, Blow CJ, 4 June 2015

The full text of this judgment is available here.

(a) Summary

This case considered the enforceability of a directors' guarantee in circumstances where one of the two directors' signatures on the deed was forged. The plaintiff C.A.R.S. Pty Ltd (CARS) attempted to rely on a directors' guarantee given to it by the defendants, John and Peter Brent, for debts owed by their company, Bunjurgen Pty Ltd (Bunjurgen), when Bunjurgen went into liquidation. The first defendant claimed that he was not liable as guarantor because his signature on the deed was forged. The second defendant contended that, as the other director's signature was forged, he must also not be liable. CARS brought an action against the directors claiming that they were liable to pay the sums owed to it under the guarantee.

(b) Facts

CARS has a well-established business that involves growing, buying and selling vegetables. Bunjurgen was a longstanding customer of that business. The defendants, John Brent (the First Defendant) and Peter Brent (the Second Defendant) are the directors and shareholders of Bunjurgen. Sally Brent, the daughter of the First Defendant, has managed Bunjurgen's business since 2004 or 2005.

In late 2010, Bunjurgen owed money to CARS for a substantial amount of vegetables that had been sold and delivered to it. As a result of discussions held between Mr Moore, a director and shareholder of CARS, and Sally Brent, an agreement was reached whereupon the First and Second Defendants would provide a directors' guarantee. On 21 February 2011, Sally Brent emailed a signed version of the agreed deed (the Guarantee) to Mr Moore. The deed appeared to have been signed by each of the defendants in the presence of a witness. Mr Moore printed the document, countersigned it on behalf of the plaintiff, and sent it back to Sally Brent.

On 15 July 2013 Bunjurgen went into liquidation. At that time it owed CARS over $680,000 plus interest for vegetables that had been sold and delivered to it. Further to this amount owed for payment for goods sold and delivered and interest, CARS claimed for reimbursement of certain legal costs, accountants' fees, and expenses relating to Mr Moore's attendance at meetings of the creditors of Bunjurgen and meetings with CARS's own solicitors. The deed of guarantee provided that the plaintiff would be entitled to recover an indemnity against "all losses damages expenses and costs" incurred by it by reason of Bunjurgen's default. It was questioned whether all of the claimed expenses were recoverable even if CARS was entitled to enforce the deed of guarantee against the

defendants.

(c) Decision

(i) The forgery issue

The Second Defendant gave evidence that the First Defendant's signature was on the Guarantee before he signed it. He said that he trusted the First Defendant in financial matters and was in the habit of signing things on a glance if his brother had signed it already. He said he would have glanced at the document, seen his brother's signature and then signed it. He did not recall any discussion with his brother regarding signing the Guarantee.

John Brent, the First Defendant, gave evidence that the signature on the Guarantee that purported to be his was not his signature. He said that the signature was not remotely like his signature, and that he did not see the Guarantee until after CARS had demanded payment from him and his brother.

Blow CJ found the First Defendant to be a dishonest witness and did not place any reliance on his testimony in relation to any contested matters. However, the defendants called an experienced handwriting expert who gave evidence that the signature on the deed was not in John Brent's handwriting. Blow CJ (at [11]) found that evidence to be "thorough, unshaken and uncontradicted" and accepted it. In the absence of any evidence that the First Defendant authorised the forging of his signature on the deed, his Honour determined that the plaintiff's claim against him must fail.

(ii) The liability of the Second Defendant

Counsel for the defendants argued (at [15]) that authorities supported the proposition that, at common law, the agreement was avoided against the Second Defendant if the First Defendant had not executed it. They also argued that equity would intervene to discharge any liability in any case.

Blow CJ considered a number of authorities put forward by the defendants that suggested a principle in which guarantees were held to be unenforceable when individual guarantors had given guarantees expecting that one or more co-guarantors would guarantee the same liabilities and those expectations were not fulfilled.

His Honour ultimately stated, however, that (at [17]):

> ... there is no absolute rule that a guarantor will never have any liability on a guarantee if it was intended that one or more co-guarantors would execute guarantees and that has not occurred. That will commonly be the case, but whether it will be the case or not depends first of all on the terms of the contract of guarantee, and the ordinary principles of contract law must be applied in determining any dispute as to those terms.

The significant term of the Guarantee was clause (iv) which read, "[e]ach Guarantor executing this Deed agrees that the liability of such Guarantor is not contingent upon the execution of this or any other guarantee by any other Guarantor ...". After considering the authorities put forward by the defendants, his Honour held that in this case there was no reason not to give clause (iv) its ordinary literal meaning and that there was no reason not to give it full force and

effect. Accordingly, the Second Defendant was liable under the common law.

A number of cases were considered by Blow CJ when determining if an equitable principle existed to relieve the Second Defendant from liability under the Guarantee. Although relief in equity may be available in circumstances where one party executes a document on the faith of other parties also executing the document and the other parties fail to do so, relief was not held to be available in this case. Once again his Honour thought it significant that the deed included an express provision stating that the liability of any guarantor who executed the deed was not contingent on any other guarantor executing the deed.

He stated at [36] that:

> If one "looks to the intent, rather than to the form", it is clear that the parties' intent was that, in the event that only one guarantor executed the deed, that guarantor would be bound. It must follow that the executing guarantor does not have an equity to be relieved from his deed. There is no room for equity to make a presumption ... that the obligation as a sole guarantor was one which it was not intended that the executing guarantor should assume.

As such, the Second Defendant is liable as guarantor under the Guarantee.

(iii) The miscellaneous expenses

The final issue was whether all of the expenses claimed could be recovered under the terms of the deed. The deed provided that the Guarantors would indemnify CARS against "all losses damages expenses and costs" which CARS had incurred by reason of any default by Bunjurgen. The defendants submitted that the accountants' fees, the solicitors' costs in relation to the creditors' meetings and air fares, accommodation and meal expenses for Mr Moore to attend the meetings did not fall within the wording of the Guarantee.

Blow CJ accepted that the words of the deed "must of course be interpreted in accordance with the hypothetical reasonable person's understanding of the words in their context" (at [43]), but stated that the words in this case appear to be deliberately wide reaching. He found that the parties to the deed had chosen not to confine the operation of the Guarantee simply to monies payable for vegetables, interest and legal costs and disbursements as they would have been entitled to do. He concluded (at [44]) that any reasonable person would regard the amounts claimed as having been incurred as a result of Bunjurgen's default.

Accordingly, Blow CJ held that the plaintiff was entitled to judgment against the Second Defendant for the full amount claimed and that judgment would be entered for the First Defendant against the plaintiff. He deferred the making of final orders to allow the parties to undertake interest calculations.

6.15 Point in time and cause, not effect, critical for Takeovers Panel declarations

(By Sam Hall, Herbert Smith Freehills)

Queensland North Australia Pty Ltd v Takeovers Panel [2015] FCAFC 68, Full

Court of the Federal Court of Australia, Dowsett, Middleton and Gilmour JJ, 22 May 2015

The full text of this judgment is available here.

(a) Summary

This decision of the Full Court of the Federal Court of Australia concerned whether an application made to the Takeovers Panel (the Panel) was made out of time. This appeal focused on whether the judge at first instance was correct in finding that circumstances included "ongoing" circumstances, for the purpose of s. 657A of the Corporations Act 2001 (Cth) (the Act).

The Full Court held that there is a divergence between circumstances and the effects of circumstances, for the purposes of s. 657A(2) of the Act.

The Full Court also found that, for circumstances to be declared unacceptable circumstances, they must relate to a specific event at a point in time. They cannot be ongoing or continuing.

(b) Facts

The President's Club Ltd (TPC) is an unlisted public company. Coeur de Lion Investments Pty Ltd (CDLI) owned 41.4% of shares in TPC. Coeur de Lion Holdings Pty Ltd (CDLH) was the sole shareholder of CDLI.

Queensland North Australia Pty Ltd (QNA) acquired 98% of the shares in CDLH in July 2011 and, subsequently, acquired an additional 2.9% of the shares in TPC in March 2012 (the Acquisitions). QNA then had a relevant interest in approximately 44.3% of TPC's shares.

On 26 June 2012, TPC applied to the Panel for a declaration of unacceptable circumstances in accordance with ss. 657A and 657C(2) of the Act. On 24 July 2012, the Panel made orders and a declaration of unacceptable circumstances in relation to the affairs of TPC. The Panel considered the Acquisitions to have been made in contravention of s. 606 of the Act.

(i) Application for review

QNA applied for judicial review of the Panel's decision in the Federal Court. Among the grounds of review was the contention that the application to the Panel by TPC had not been made in time.

The Panel is empowered to make a declaration of unacceptable circumstances in accordance with s. 657A of the Act. Sections 657B and 657C(3) of the Act impose certain time limits on the Panel's power to make declarations under s. 657A of the Act.

Section 657C(3) provides that an Applicant has two months "after the circumstances occurred" to make an application to the Panel, though the Panel may decide on a longer period.

The Application in this case was made almost 12 months after the first of the Acquisitions. In finding, however, that the Acquisitions did amount to unacceptable circumstances, the Panel held that the application had not been made out of time because the contravention of the Act that gave rise to the unacceptable

circumstances were ongoing. Therefore, no issue of time limitations arose. This finding was made on the basis that QNA maintained a relevant interest in TPC shares at the time of the application to the Panel. Nonetheless, the Panel also decided to extend the time for the application to be made by TPC under s. 657C(3)(b) of the Act.

In the Federal Court, Collier J found the Panel's decision to extend time was contrary to the rules of natural justice. This was because of the prejudice suffered by QNA as a result of the Panel's lack of consultation with QNA about the extension. On this basis, the action before the Panel should have been considered out of time and no proceeding should have taken place. However, on the question of whether the circumstances giving rise to the finding of unacceptable circumstances were ongoing, Collier J found that they were. Therefore, an extension of time was not required and the application was made within time.

The appeal to the Full Federal Court focused on whether Collier J had erred in finding that the application made to the Panel, and the Panel's declaration of unacceptable circumstances, were made within time. The key issue was therefore whether Collier J was correct in upholding the Panel's finding that the unacceptable circumstances were ongoing. This raised two questions for the Full Court.

(c) Decision

(i) Can unacceptable circumstances include the effect caused by those circumstances?

The Panel may declare circumstances to be unacceptable under s. 657A(2)(a) of the Act. This may occur where the Panel is satisfied that those circumstances are unacceptable having regard to the effect that they have had, are having, will or may be likely to have, on the control or acquisition of a company.

TPC argued that the expression "unacceptable circumstances" can include more than the facts of a contravention and might include the circumstances created by a contravention. The Full Court disagreed, stating that there is a clear difference between circumstances and the effect that those circumstances may have on the control of a company. In this instance, it was the effect of the circumstances that rendered them unacceptable circumstances. The effect or likely effect therefore does not constitute part of the circumstances capable of being declared unacceptable.

(ii) Can unacceptable circumstances be ongoing?

Collier J found that "circumstances" included ongoing circumstances for the purposes of s. 657A of the Act. Her Honour then found the application to the Panel to be within the prescribed time period because QNA still controlled the relevant shares in TPC. The Full Court disagreed, stating that the Acquisitions contravening s. 606 of the Act occurred on identifiable dates. The Full Court stated that these Acquisitions were the relevant circumstances for the purposes of s. 657A of the Act.

Section 657B(a) provides that the Panel can make a declaration within three months "after the circumstances occur". Similarly, the time limit to make an application under s. 657C(3)(a) is two months "after the circumstances occurred". The relevant circumstances in this case are those that are the subject of the declaration of unacceptable circumstances, being the Acquisitions. For the time

limits under ss. 657B and 657C to operate effectively, the relevant circumstances must be capable of being identified at a particular point in time.

The fact that the effects of the circumstances, being the ability of QNA to maintain a relevant interest in the TPC shares and exercise effective control over the company, were continuing does not mean the circumstances themselves were also continuing. This interpretation would not accord with the commercial imperatives and timely disposition of applications found in Chapter 6 of the Act.

(d) Conclusions and orders

The Full Court held that the decisions of the primary judge and the Panel both be set aside. The Court ordered the matter to be remitted to the Panel to be heard and determined according to law. The Court stated that the Panel should consider whether to grant an extension of time, given the conclusions regarding s. 606 of the Act.

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.

Correction Notice

On Thursday 25 June 2015, SAI Global distributed an edition of the Corporate Law Bulletin with the incorrect title "Bulletin No. 216". That edition should have been titled Bulletin No. 214; you will receive *Bulletin No. 216* in August 2015.

Please accept our apologies for any confusion caused by this production error.
—*SAI Global*

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