26 April 2016 > Regulatory Newsfeed

SAI Global Corporate Law Bulletin No. 224>

Index info.regulatory@saiglobal.com

Bulletin No. 224

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

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

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

Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Additional Funding for ASIC

Treasurer Scott Morrison and Assistant Treasurer Kelly O'Dwyer have announced $127.2 million in additional funding for the Australian Securities and Investments Commission (ASIC) as well as other changes. The reform measures comprise the Australian Government's response to the *ASIC Capability Review* (the Review), commissioned in July 2015.

The five recommendations to government of the Review will be immediately implemented. These focus on governance, recruitment, annual performance discussions with the relevant Minister and removing ASIC from the Public Service Act 1999 No. 147 (Cth). This last measure will support ASIC to more effectively recruit and retain staff in positions requiring specialist skills and also implements a finding of the Financial System Inquiry (the FSI).

The Australian Government will invest $61.1 million to enhance ASIC's data analytics and surveillance capabilities as well as modernise ASIC's data management systems. An additional $9.2 million will also be made available to ASIC and the Treasury to ensure they can implement appropriate law and regulatory reform.

The Australian Government is also providing ASIC with $57 million to enable increased surveillance and enforcement on an ongoing basis in the areas of financial advice, responsible lending, life insurance and breach reporting.

As recommended by the FSI, the federal government will introduce an industry funding, or "user-pays" model for ASIC, to commence in the second half of 2017. From 2017-18, ASIC's costs will be recovered from all industry sectors regulated by ASIC. Industry funding ensures that the costs of regulation are borne by those entities that have created the need for it, rather than the Australian public.

The federal government also announced that it will commit an extra $9.2 million in funding for ASIC and the Treasury to accelerate implementation of the following measures recommended by the FSI:

- a product intervention power to enable ASIC to respond to market problems in a flexible, timely, effective, and targeted way;
- product distribution obligations for industry to foster a more customer-focussed culture;
- a review of ASIC's enforcement regime, including penalties, to ensure that it can effectively deter misconduct; and
- the strengthening of consumer protections in the ePayments Code, which regulates consumer electronic payments and includes a number of consumer protections, to ensure that it keeps pace with emerging technologies.

The federal government also announced that it:

- will extend ASIC chairperson Greg Medcraft's term for a further 18 months; and
- intends to appoint an additional ASIC Commissioner. This new Commissioner will have experience in the prosecution of crimes in the financial services industry.

Joint media release (20 April 2016)

On 20 April 2016, ASIC announced that it welcomed the additional funding and provided an official response (undated) to the Review, which sets out the actions ASIC is already taking or will take to develop its capabilities in areas such as governance, culture and communication.
Further information from ASIC

Related media item:
ASIC's media release (20 April 2016)
(Source: Treasurer; Assistant Treasurer; ASIC; Lawlex Legislative Alert & Premium Research)

1.2 SEC Adopts Business Conduct Standards for Security-based Swap Dealers and Major Security-based Swap Participants

The US Securities and Exchange Commission (SEC) has adopted final rules (14 April 2016) which implement a comprehensive set of business conduct standards and chief compliance officer requirements for security-based swap dealers and major security-based swap participants (security-based swap entities).

The final rules are adopted under Title VII of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, which authorises SEC to implement a framework for regulating the over-the-counter security-based swap markets.

The final rules require security-based swap entities to comply with a range of provisions designed to enhance transparency, facilitate informed customer decision-making, and heighten standards of professional conduct. For example, security-based swap entities are required to deal fairly with potential counterparties by communicating in a fair and balanced manner, disclosing material information about the security-based swap, including material risks, characteristics, incentives and conflicts of interest, and adhering to other professional standards of conduct. Additional requirements will apply for dealings with special entities, which include municipalities, pension plans, endowments, and similar entities. The rules also establish supervision and chief compliance officer requirements. In addition, the rules address the cross-border application of these requirements and the potential availability of substituted compliance.

SEC has also released a related fact sheet, which is available via the media release below.
SEC's media release (15 April 2016)
(Source: SEC)

1.3 Progress Report on Adoption of Basel III Standards Published by the Basel Committee

The Bank for International Settlements (BIS), on behalf of the Basel Committee on Banking Supervision (the BCBS), has made available Tenth progress report on adoption of the Basel regulatory framework (April 2016) (the Progress Report).

The Progress Report sets out the adoption status of Basel III standards for each BCBS member jurisdiction as of end-March 2016. It updates the BCBS's previous progress reports, which have been published on a semi-annual basis since October 2011 under the BCBS's Regulatory Consistency Assessment Program (RCAP).

As part of this program, the BCBS periodically monitors (since October 2011) the adoption status of the risk-based capital requirements and (since October 2013) the requirements for systemically important banks (SIBs), the liquidity coverage ratio (LCR) and the leverage ratio. In October 2015, the BCBS extended its monitoring of the adoption progress to all Basel III standards, which will become effective by 2019.

As of March 2016, all 27 BCBS member jurisdictions have final risk-based capital rules, LCR regulations and capital conservation buffers in force. Further, 24 member jurisdictions have issued final rules for the countercyclical capital buffer and 23 have issued final or draft rules for their domestic SIBs framework. With

regard to the global SIBs framework (G-SIBs), all BCBS members that are home jurisdictions to G-SIBs have the final framework in force. Member jurisdictions are now turning to the implementation of other Basel III standards, including the leverage ratio and the net stable funding ratio.
Further information from BIS
BIS's media release (11 April 2016)
(Source: BIS)

1.4 IOSCO Issues Study of Regulatory Approaches and Tools to Deal with Cyber Risk

The Board of the International Organization of Securities Commissions (IOSCO) has released Cyber Security in Securities Markets - An International Perspective (April 2016), a report that brings together insights and perspectives from IOSCO's various policy, stakeholder and regional committees on the topic of cyber resilience.

The cyber risk constitutes a growing and significant risk to the integrity, efficiency and soundness of financial markets worldwide. In fact, as the report indicates, the cyber risk is not "just another risk", but rather it is a unique, highly complex and rapidly evolving phenomenon. The human element of cyber risk, combined with rapidly evolving technologies in securities markets, suggests that this topic requires swift and sustained attention by regulators and market participants.

The report provides a review of the different regulatory approaches related to cyber security and the potential tools available to regulators to respond to the cyber risk. The report also describes some of the practices adopted by market participants.

The content of the report is organised around the following segments of securities markets: reporting issuers, trading venues, market intermediaries, asset managers and financial market infrastructures. The regulatory issues, challenges and approaches are highlighted in relation to these segments.
IOSCO's media release (6 April 2016)
(Source: IOSCO)

1.5 Revisions to the Basel III Leverage Ratio Framework - Consultative Document

The BIS, on behalf of the BCBS, has released Consultative Document - Revisions to the Basel III leverage ratio framework (April 2016) for public comment.

The Basel III framework introduced a simple, transparent, non-risk-based leverage ratio to act as a supplementary measure to the risk-based capital ratio. The consultative document proposes a set of changes to the standard released in January 2014.

The proposed revisions cover the following issues:

- "to measure derivative exposures, the [BCBS] is proposing to use a modified version of the standardised approach for measuring counterparty credit risk exposures ... instead of the Current Exposure Method";
- "to ensure consistency across accounting standards, two options are proposed for the treatment of regular-way purchases and sales of financial assets";
- "clarification of the treatment of provisions and prudential valuation adjustments for less liquid positions, so as to avoid double-counting"; and
- "alignment of the credit conversion factors for off-balance sheet items with those proposed for the standardised approach to credit risk under the risk-based framework".

The BCBS has also made available a third set of Frequently asked questions on the Basel III leverage ratio framework (April 2016).

The BCBS is also seeking comment on an additional leverage ratio requirement applicable to global systemically important banks.
Further information from the BIS
BIS's media release (6 April 2016)
(Source: BIS)

1.6 Principles to Boost Financial Inclusion

The Committee on Payments and Market Infrastructures (CPMI) and the World Bank Group have released Payment aspects of financial inclusion (April 2016) (the PAFI Report), which sets out seven guiding principles to help countries increase financial inclusion.

The PAFI Report builds on a document that underwent public consultation in late 2015 and seeks to tackle barriers to the adoption and usage of transaction accounts, which sit at the heart of retail payment services.

A transaction account is an essential financial service that can serve as a gateway to other financial services such as savings, credit and insurance. However, nearly

40% of the world's adult population - about two billion people - still have no account with a bank or authorised non-bank servicer provider.

In addition to outlining principles to help countries advance financial inclusion, the PAFI Report suggests possible key actions, including providing basic accounts at little or no cost, stepping up efforts to increase financial literacy, and leveraging large-volume payment programmes, such as government payments, by adopting electronic payment services. Financial inclusion efforts are beneficial not only for those who will become financially included, but also for the national payments infrastructure and, ultimately, the economy.

The seven guiding principles are:

- "commitment from public and private sector organisations";
- "a robust legal and regulatory framework underpinning financial inclusion";
- "safe, efficient and widely reachable financial and [information and communications technology] infrastructures";
- "transaction accounts and payment product offerings that effectively meet a broad range of transaction needs";
- "availability of a broad network of access points and interoperable access channels";
- "effective awareness and financial literacy efforts"; and
- "the leveraging of large-volume and recurrent payment streams, including remittances, to advance financial inclusion objectives".

Further information from the BIS
BIS's media release (5 April 2016)
(Source: BIS; World Bank Group)

1.7 IOSCO Updates Information Repository for Central Clearing Requirements for OTC Derivatives

IOSCO has released an update of its information repository for central clearing requirements for over-the-counter (OTC) derivatives (further information), which provides regulators and market participants with consolidated information on the clearing requirements of different jurisdictions.

By providing this information, IOSCO seeks to assist authorities in their rule making and help participants comply with the relevant regulations in the OTC derivatives market. The repository sets out central clearing requirements on a product-by-product level, and any exemptions from them. IOSCO first made the repository public in August 2014.

IOSCO's media release (1 April 2016)
(Source: IOSCO)

1.8 IMF Global Financial Stability Report

The International Monetary Fund (IMF) has released Global Financial Stability Report: Potent Policies for a Successful Normalization (April 2016).

The report finds that:

- global financial stability risks have risen since October 2015; and
- the outlook has deteriorated in advanced economies because of heightened uncertainty and setbacks to growth and confidence, while declines in oil and commodity prices and slower growth have kept risks elevated in emerging markets.

These developments have tightened financial conditions, reduced risk appetite, raised credit risks, and stymied balance sheet repair. A broad-based policy response is needed to secure financial stability. Advanced economies must deal with crisis legacy issues, emerging markets need to bolster their resilience to global headwinds, and the resilience of market liquidity should be enhanced.

The report also examines financial spillovers from emerging market economies and finds that they have risen substantially. This implies that when assessing macrofinancial conditions, policymakers may need to increasingly take into account economic developments in emerging market economies.

Finally, the report assesses changes in the systemic importance of insurers, finding that across advanced economies the contribution of life insurers to systemic risk has increased in recent years. The results suggest that supervisors and regulators should take a more macroprudential approach to the sector.

Related media item:
IMF's transcript (13 April 2016)
(Source: IMF)

1.9 Cross Border M&A Research

The International Institute for the Study of Cross-Border Investment and M&A (XBMA) has released its first quarterly review for 2016 (undated).

Key points from the review include that in the first quarter of 2016:

- the global mergers and acquisitions (M&A) volume exceeded US$700 billion, the second highest start to the year since 2011, but lower than the quarterly volume of the record-setting levels of 2015;
- Europe accounted for one quarter of deal activity, relative to a near-term historical average of only 15%;
- China was another strong performer, driving 22% of global deal activity (compared to a recent average of 14%);
- Europe and China together produced nearly half of the quarter's deal activity (compared to a recent average of 30%);
- cross-border M&A activity accounted for 43% of global deal volume, significantly higher than recent levels;
- six of the ten largest deals were cross-border transactions, accounting for half of the quarter's US$300 billion in cross-border deal volume;
- cross-border deals involving a Chinese acquiror jumped to over US$80 billion; more than 25% of all cross-border deal activity in the quarter;
- cross-border M&A in the Materials sector had its strongest quarter of the past year;
- cross-border activity also continued to build momentum in the Energy & Power and Retail sectors, with a second consecutive quarter of growth; and
- the Industrials sector produced the largest amount of cross-border volume, approaching US$60 billion.

(Source: XBMA)

1.10 PRA Releases Supervisory Statement on Corporate Governance

The UK Prudential Regulation Authority (PRA) has released Supervisory Statement SS5/16 - Corporate governance: Board responsibilities (March 2016).

The purpose of the supervisory statement is to identify, for the boards of firms regulated by the PRA, those aspects of governance to which the PRA attaches particular importance and to which the PRA may devote particular attention in the course of its supervision.

As set out in the PRA approach documents, the PRA expects the boards and management of regulated firms to run the business prudently, consistent with the firm's own safety and soundness and the continuing stability of the financial system.

The PRA's expectations of boards will also be influenced by the recovery and resolution strategies for the firm or the group, taking account of the extent to which the PRA would need to be satisfied that the board of a significant PRA-regulated subsidiary is constituted and performs in a way that shows that they are

capable of independent action.
(Source: Bank of England)

1.11 CFR Consultation: Financial Benchmarks Regulatory Reform

The Australian Council of Financial Regulators (CFR) has released Consultation Paper: Financial Benchmarks Regulatory Reform (March 2016).

Financial benchmarks are of critical importance to a wide range of users in financial markets and throughout the broader economy. Benchmarks affect the pricing of financial products such as credit facilities offered by financial institutions, corporate debt securities, exchange-traded funds, foreign exchange and interest rate derivatives, commodity derivatives, equity and bond index futures and other investments and risk management products. They also drive or influence asset allocation decisions within investment portfolios.

To ensure the robustness and reliability of financial benchmarks in the Australian economy and to promote continued confidence in Australia's financial markets, the CFR is consulting on regulatory reform proposals relating to the administration of significant benchmarks, submission to significant benchmarks and offences applying to benchmark misconduct.

The reforms proposed by the CFR have three aspects:

- "benchmark administration: making administration of a significant benchmark a financially regulated activity and imposing obligations on the administrator of a significant benchmark that are consistent with the *IOSCO Principles for Financial Benchmarks* of July 2013 (the IOSCO Principles), including audit, governance and conflicts management requirements;
- benchmark submission: imposing binding requirements, consistent with the IOSCO Principles, on submitters to a significant benchmark calculated based on submissions, and creating a legal power to compel submission to a significant benchmark; and
- benchmark misconduct: introducing a new specific offence of benchmark manipulation applicable to all financial benchmarks. Separately, expressly expanding the scope of financial products to bank accepted bills ... and negotiable certificates of deposit".

CFR's media release (31 March 2016)
(Source: CFR)

1.12 APRA Releases Consultation Package on Net Stable Funding Ratio

The Australian Prudential Regulation Authority (APRA) has released Discussion Paper: Basel III liquidity - the net stable funding ratio and the liquid assets requirement for foreign ADIs (31 March 2016) for public comment.

The discussion paper outlines APRA's proposed plans to implement the *Net Stable Funding Ratio* (NSFR). It is proposed that the new standard would come into effect from 1 January 2018, consistent with the international timetable agreed by the BCBS.

The discussion paper also proposes options for the future operation of a liquid assets requirement for foreign authorised deposit-taking institutions (ADIs), i.e. foreign bank branches, in Australia.

APRA's objective in implementing the NSFR in Australia, in combination with the LCR implemented in 2015, is to strengthen the resilience of ADIs. The NSFR encourages ADIs to fund their activities with more stable sources of funding on an ongoing basis, and thereby promotes greater balance sheet resilience. In particular, the NSFR should lead to reduced reliance on less-stable sources of funding - such as short-term wholesale funding - that proved problematic during the global financial crisis.

As with the earlier introduction of the LCR, APRA is proposing that the NSFR will only be applied to larger, more complex ADIs. Smaller ADIs with balance sheets that comprise predominantly mortgage lending portfolios funded by retail deposits are likely to have stable funding well in excess of that required by the NSFR, meaning there is limited value in applying the new standard to these entities.
Further information from APRA
APRA's media release (31 March 2016)
(Source: APRA)

1.13 Competition in Australian Share Clearance

Australian Treasurer Scott Morrison has announced a reform package that opens the door to competition in the clearing of cash equities, acting on the recommendations of the CFR *Review of Competition in Clearing Australian Cash Equities*.

Mr Morrison has also released Review of Competition in Clearing Australia Cash Equities: Conclusions (June 2015) and the federal government's response (undated).

The CFR Review recommended that:

- the federal government be open to competition in clearing of equities and implement legislative changes for safe and effective competition;
- the CFR set out regulatory expectations for Australian Stock Exchange (ASX) conduct while it remains a sole provider, and make legislative changes to allow regulators to enforce the expectations where necessary; and
- the Australian Competition and Consumer Commission be given power to arbitrate disputes about access to ASX clearing and settlement services.

Mr Morrison also announced a relaxing of ownership restrictions on the ASX, acting upon Recommendation 44 of the FSI. In response to this recommendation, the federal government will amend the ASX ownership restrictions in the Corporations Act 2001 No. 50 (Cth) to make them consistent with other financial sector companies, such as banks and insurance companies. This will allow the ASX more flexibility in raising capital.
Further information from the Treasury
Treasurer's media release (30 March 2016)
(Source: Treasurer; Treasury; Lawlex Legislative Alert & Premium Research)

1.14 Number of US Securities Class Action Settlements at Highest Level Since 2010

Cornerstone Research has released Securities Class Action Settlements - 2015 Review and Analysis (undated), a report which finds that there were 80 US securities class action settlements approved in 2015, the highest number since 2010. The report also shows that total settlement dollars rose to more than US$3 billion, an increase of 184% over the historic low in 2014.

According to Cornerstone Research senior advisor Laura Simmons, "[t]he surge in securities class action settlements in 2015 can be attributed in part to three consecutive year-over-year increases in the number of case filings".

According to Cornerstone Research, in 2015 there were eight mega settlements (US$100 million or greater), compared to only one in 2014. This increase was likely driven by a corresponding rise in cases with very high "estimated damages", a simplified calculation representing a proxy for damages. The median "estimated damages" for mega settlements in 2015 was the second highest in the last ten years.

While larger damages appear to have driven up settlement values for some cases in 2015, other factors associated with higher settlements were less prevalent. For example, the proportion of settlements of US$50 million or greater involving financial statement restatements, public pension plan lead plaintiffs, and/or SEC actions was lower than most years since the passage of the *Private Securities Litigation Reform Act of 1995*.

Highlights from the report include that:

- total settlement dollars in 2015 were 9% higher than the average for the prior five years;
- the average settlement size increased from US$17 million in 2014 to US$37.9 million in 2015 (an increase of 123%), while the median settlement amount (representing the typical case) remained relatively flat (US$6.0 million in 2014 and US$6.1 million in 2015);
- average "estimated damages" rose 151% from 2014. Since "estimated damages" is the most important factor in predicting settlement amounts, this increase contributed to the substantially higher average settlement amounts in 2015; and
- median settlements as a percentage of "estimated damages" decreased to historic low levels in 2015.

Cornerstone Research's media release (29 March 2016)
(Source: Cornerstone Research)

1.15 APRA Releases Non-capital Components of the Supervision of Conglomerate Groups

APRA has announced the release of clarifications to the governance and risk management components of the framework for supervision of conglomerate groups (Level 3 framework) (available via the further information link below) for public comment.

According to APRA, this includes clarifications to nine prudential standards, intended to become effective on 1 July 2017, and two prudential practice guides. These clarifications are not changes in policy position.

APRA released the Level 3 framework in August 2014, but considered it appropriate to wait until the findings of the FSI and the federal government's response to FSI recommendations before settling on the final form of the conglomerate framework.

APRA has also announced that it has deferred the implementation of conglomerate capital requirements until a number of other domestic and international policy initiatives are further progressed. These policy initiatives include:

- APRA's implementation of the FSI recommendation on unquestionably strong capital ratios for ADIs (FSI recommendation 1);

- consideration of proposals in relation to loss absorption and recapitalisation capacity (FSI recommendation 3); and
- proposed legislative changes to strengthen APRA's crisis management powers (FSI recommendation 5).

Further information from APRA
APRA's media release (29 March 2016)
(Source; APRA)

1.16 Inquiry into the Fairness, Transparency and Diversity of FTSE350 Board Appointments

The UK Equality and Human Rights Commission (EHRC) has released An inquiry into fairness, transparency and diversity in FTSE 350 board appointments (the Board Appointment Report) and a related executive summary (both dated March 2016).

The Board Appointment Report reveals that the headline progress of achieving 25% women across the boards of Britain's biggest companies is masking a reality in which more than 60% of individual FTSE 350 companies (213) failed to meet the target.

Fewer than half (47%) of companies actually increased their female board representation over the period covered by the inquiry, while 46% of boards either remained the same or even decreased the proportion of women. Of the companies that increased the proportion of women on their boards, almost one third's (31%) overall board size was reduced, rather than more women being appointed.

Nearly a third of companies (32%) reported largely relying on the personal networks of current and recent board members to identify new candidates. Almost a third of companies using personal networks did not use any other means of advertising the post.

The diversity of applicants is also potentially being limited by virtually no open advertising of board roles - just 2% of companies publicise non-executive roles on their websites, in newspapers or on social media. Advertising in a range of media can provide more opportunities for diverse applicants and could lead to the appointment of more women to boards.

The inquiry also found that job descriptions often rely on vague terms like "chemistry" and "fit" rather than clearly defined skills and experience, limiting the potential diversity of candidate pools and standing in the way of women's chances of appointment.

For executive roles, the position remains even more stark. Nearly three quarters of FTSE 100 companies and 90% of FTSE 250 companies had no female executive directors at all on their boards during the period surveyed by the EHRC.

The Board Appointment Report highlights examples of good practice, including:

- companies assessing diversity in their board evaluations;
- selecting candidates based on criteria set out in role descriptions;
- using interviews to assess candidates fairly, consistently and objectively;
- ensuring their processes encouraged diverse applications; and
- executive search firms setting objectives to increase the number of women in appointment exercises.

Further information from the EHRC
EHRC's media release (1 April 2016)
(Source: EHRC)

1.17 OECD Report on Whistleblowing

The Organisation for Economic Co-operation and Development (OECD) has published Committing to Effective Whistleblower Protection (16 March 2016), a report that provides an in-depth analysis of the evolution of standards in whistleblower protection.

The report takes stock of the progress made over recent years, and shows that, while OECD countries are increasingly adopting whistleblower protection legislation, there remains a long way to go before whistleblowers are effectively protected. The report provides a detailed analysis of whistleblower protection frameworks in OECD countries and identifies areas for reform. It also proposes next steps to strengthen effective and comprehensive whistleblower protection laws, and ensure protection in both the public and private sectors.
Further information from the OECD
(Source: OECD)

1.18 UK and Australian Financial Regulators Sign Agreement to Support Innovative Businesses

The UK Financial Conduct Authority (FCA) and the ASIC have jointly released Co-operation Agreement (23 March 2016) to provide innovative financial technology (fintech) companies in Australia and the UK with more support from financial regulators as they attempt to enter the others' market.

As a result of the agreement, the FCA and ASIC will refer to one another those innovative businesses seeking to enter the other's market. The regulators will provide support to innovative businesses before, during and after authorisation to help reduce regulatory uncertainty and time to market.

The agreement follows the creation of Innovation Hubs at the FCA and ASIC in October 2014 and April 2015, respectively. The hubs were set up to help businesses with innovative ideas navigate financial regulation, support them through the authorisation process and engage with the regulator. To date, the FCA's Innovation Hub has supported over 200 businesses and 18 of these businesses have now been authorised. Likewise, ASIC has dealt with over 75 innovative start-ups including the granting of ten licences.

To qualify for the support offered by the agreement, innovator businesses will need to meet the eligibility criteria of their home regulator's Innovation Hub. Once referred by the regulator, and ahead of applying for authorisation to operate in the new market, the business will have access to a dedicated team or contact person who will help them to understand the regulatory framework in the market they wish to join, and how it applies to them. These businesses will be given help during the authorisation processes with access to expert staff and, where appropriate, the implementation of a specialised authorisation process. Following authorisation, the businesses will have a dedicated contact to turn to for a year.
ASIC's media release (23 March 2016)
(Source: FCA; ASIC)

1.19 Investment Association productivity action plan to enhance long term investing

The UK Investment Association (UKIA) has released The Investment Associations Productivity Action Plan - Supporting UK Productivity with Long-Term Investment (March 2016) (the Action Plan), which sets out a number of principles and actions to help to reverse perceived issues with UK productivity by enhancing the focus on long-term investment and investor stewardship.

The Action Plan follows a review led by a steering committee made up of representatives from some of the largest investors in the UK. It comprises five principal objectives and a series of recommendations and actions to deliver each objective.

The five objectives are:

- **Enhancing company reporting** - The UKIA says it will publish a position paper calling for companies to cease quarterly reporting, which it says distorts management behaviour by focusing on short-term performance, and for them to focus instead on longer-term performance and strategic issues. The Action Plan notes that the annual report is a fundamental part of an investor's research process and that, although there has been an improvement in corporate reporting, disclosures of a company's strategy and business model fall short of investor expectations. The Action Plan also highlights a number of specific areas where disclosure could be improved, in particular around key performance indicators, capital management, human capital and culture. The UKIA will issue new *Longer-Term Reporting Guidance* later this year setting out investor expectations in these areas. The Action Plan also endorses the UK Financial Reporting Council's Financial Reporting Lab report on dividend disclosures and proposes that the Lab undertake a project to develop best practice guidelines on the disclosure of a company's cost of capital;
- **Enhancing investor stewardship and engagement** - The UKIA notes that most of the discussions between investors and companies focus on executive remuneration, at the expense of more fundamental factors which impact on the creation of value over the long term, such as corporate performance, board leadership and culture and strategy. To address this, the UKIA will seek wider support for the Investor Forum (which was established in October 2014) so that they can engage collectively with companies on specific issues. The Action Plan says that the Investor Forum has undertaken nine major collective engagements with different companies since it was formed, focusing on a range of topics including governance, reporting and capital management;
- **Simplifying behavioural incentives including executive remuneration** - There will be a continued focus on executive remuneration. The UKIA Working Group on executive remuneration, which was established in September 2015, will set out its proposals on the simplification of executive remuneration structures later this year;
- **Developing efficient and diverse capital markets** - The Action Plan sets out a number of recommendations aimed at improving the efficiency of equity capital markets, including encouraging earlier engagement between issuers and investors prior to a company floating, encouraging earlier publication of prospectuses, eliminating research black-out periods and promoting the publication of independent research; and
- **Overcoming tax and regulatory impediments to the provision of long term finance** - The UKIA says that the investment industry should contribute to the debate on tax and regulatory impediments to investment so as to ensure the right long-term outcomes for its clients.

Further information from UKIA
UKIA's media release (22 March 2016)
(Source: UKIA)

1.20 Government Statement on FinTech

The Australian Government has released a statement (undated) on Australia's fintech future. The Australian Government's actions to support the FinTech industry include:

- ensuring access to concessional tax treatment for venture capital investments in start-up fintech firms;
- commissioning the Productivity Commission to outline options to increase data availability and access to facilitate new products and better consumer outcomes; and
- taking action to address the 'double GST' treatment of digital currencies.

The Australian Government will also work with the fintech industry on further reforms to:

- allow all companies regardless of assets and turnover to be eligible for equity crowdfunding;
- remove cooling off periods and allow platforms to use their discretion to cancel a Crowdfunding investment for legitimate reasons; and
- review Australian Market Licence requirements for crowdfunding intermediaries.

In addition, the Australian Government has been working with ASIC on the development of a "regulatory sandbox" for Australian fintech. The Australian Government is keen to develop a world leading "regulatory sandbox" in Australia that will enable firms to manage regulatory risks during testing stages, reducing the cost and time to market products. At the same time, any "sandbox" will need to provide for important consumer outcomes such as fit and proper checks, dispute resolution and consumer redress arrangements.
(Source: Treasury)

1.21 Corporations Amendment (Financial Advice Measures) Act

The Corporations Amendment (Financial Advice Measures) Act 2016 No. 22 (Cth) received assent on 18 March 2016 and amends the Corporations Act 2001 No. 50 (Cth).

According to the explanatory memorandum, the Act:

- removes the need for clients to renew their ongoing fee arrangement with their adviser every two years (also known as the "opt-in" requirement);

- makes the requirement for advisers to provide a fee disclosure statement only applicable to clients who entered into their arrangement after 1 July 2013;
- removes the "catch-all" provision from the list of steps an advice provider may take in order to satisfy the "best interests" obligation, to remove legal uncertainty on how to satisfy the best interests duty;
- facilitates the provision of scaled advice by explicitly allowing clients and providers to agree on the scope of advice to be provided and limiting the best interest duty to this agreed scope and makes consequential amendments to the modified best interests duty;
- amends the exemptions from the client priority obligation to ensure consistency with the amendments to the modified best interests duty that flow on from the inclusion of consumer credit insurance in the basic banking exemption;
- provides a targeted general advice exemption from the ban on conflicted remuneration; and
- makes related and other amendments.

The Act commenced on 19 March 2016.
(Source: Lawlex Legislative Alert & Premium Research)

1.22 FSB Publishes Second Thematic Peer Review on Resolution Regimes

The Financial Stability Board (FSB) has released Peer Review Report - Second Thematic Review on Resolution Regimes (18 March 2016). This report forms part of a series of peer reviews to support timely and consistent implementation of the Key Attributes of Effective Resolution Regimes for Financial Institutions (15 October 2014) (the Key Attributes) (further information). The Key Attributes set out the core elements of effective resolution regimes that allow authorities to resolve financial institutions in an orderly manner without taxpayer exposure to loss, while maintaining continuity of their vital economic functions.

The report examines the range and nature of resolution powers available to authorities for the banking sector in FSB jurisdictions, as well as any requirements for recovery and resolution planning and resolvability assessments for domestically incorporated banks.

The main findings of the review are as follows:

- only a subset of the FSB membership - primarily home jurisdictions of global systemically important banks - currently have a bank resolution regime with a comprehensive set of powers broadly in line with the Key Attributes. The bank resolution powers that are most often lacking are explicit continuity powers, bail-in powers, and powers to impose a temporary stay on the exercise of early termination rights. The reforms underway in a number of FSB jurisdictions address some, but not all, of the gaps in bank resolution powers compared with the Key Attributes;

- while resolution regimes generally apply to all types of commercial banks, the coverage of holding companies of banks, branches of foreign banks and material non-regulated operational entities within a financial group is more variable across FSB jurisdictions;
- there is also significant variation across FSB jurisdictions in the conditions for the use of resolution powers and their level of detail; and
- more progress has been made in terms of putting in place processes for recovery planning compared to resolution planning or resolvability assessments. Only nine jurisdictions currently have explicit statutory powers to require banks to adopt appropriate measures to improve their resolvability.

Further information from the FSB
FSB's media release (18 March 2016)
(Source: FSB)

1.23 PRI Publishes Report Calling on Asset Owners to Reflect ESG Factors in Their Investment Decisions

The Principles for Responsible Investment initiative (PRI) has released How Asset Owners Can Drive Responsible Investment: Beliefs, Strategy and Mandates (undated), a report calling on asset owners to do more to reflect ESG risks and opportunities in their investment beliefs and mandates.

The report examines how asset owners can raise their responsible investment game by ensuring that the mandates they give to fund managers include requirements for analysing and reporting environmental, social and governance (ESG) factors.

The report provides suggestions of the types of clauses around ESG considerations that asset owners can include in their mandates to fund managers.
(Source: PRI)

1.24 CalPERS Revises Governance Policy

The California Public Employees' Retirement System (CalPERS) Board of Administration has adopted a revised version of their Global Governance Principles (14 March 2016) (the GG Principles), including a new provision that cautions that corporate board directors who serve more than 12 years on the same company board are at risk of compromising their independence.

In the event a director reaches 12 years of service on a board, CalPERS' revised GG Principles call for a company to carry out rigorous evaluations to either classify the director as non-independent or provide a detailed explanation as to why the director continues to be independent.

The GG Principles serve as the framework by which CalPERS executes its shareowner proxy voting responsibilities; engages public companies to achieve long-term, sustainable risk-adjusted returns; and works with internal and external investment managers to ensure their practices align with CalPERS' Investment Beliefs (May 2015).

Additional revisions to the GG Principles include:

- streamlined organisation, from numerous capital market issues to five core subjects areas:
    - investor rights;
    - board quality and diversity;
    - corporate reporting;
    - compensation; and
    - regulatory effectiveness.
- changes to Introduction and Purpose sections, including new references to the regulatory environment; financial markets; and environmental, social and governance issues; and
- inclusion of new principle concepts, such as regulatory effectiveness, which requires regulators to be properly funded.

CalPERS's media release (14 March 2016)
(Source: CalPERS)

1.25 Survey of Board Level Sustainability and Ethics Committees

The Institute of Business Ethics (IBE) has released Culture by Committee - the pros and cons (March 2016), a survey showing that a significant number of corporate boards have formed committees to focus on ethics and values as well as corporate responsibility and sustainability.

The survey found that 55 companies in the FTSE 350 have formed such committees with published terms of reference, and that over half of them were specially charged with advising the board on ethics and values.

The survey found that board sustainability and values committees tend to be more common in sectors with reputation and regulatory risk, such as banking, mining

and defence. By contrast they are rare in support services, household goods and home construction.
IBE's media release (9 March 2016)
(Source: IBE)

1.26 Latest Centre for Corporate Law and Securities Regulation Research Papers

The following are the latest research papers published by members of Melbourne Law School's Centre for Corporate Law and Securities Regulation:

- Cross-Border Cooperation in Bank Resolution: A Framework for Asia (1 March 2016), by Vivien Chen , Andrew Godwin and Ian Ramsay;
- An Empirical Analysis of Public Enforcement of Directors' Duties in Australia: Preliminary Findings (4 March 2016), by Jasper Hedges, Helen Bird, George Gilligan, Andrew Godwin and Ian Ramsay;
- An Empirical Analysis of the Use of Enforceable Undertakings by the Australian Securities and Investments Commission between 1 July 1998 and 31 December 2015 (4 April 2016), by Helen Bird, George Gilligan, Andrew Godwin, Jasper Hedges and Ian Ramsay; and
- Is Australia's 'Twin Peaks' System of Financial Regulation a Model for China? (11 April 2016), by Andrew Godwin, Li Guo and Ian Ramsay.

(Source: Social Science Research Network)

2. Recent ASIC Developments

2.1 Remaking "Sunsetting" Class Order on Securitisation

ASIC has released updated regulatory guidance on relief for securitisation special purpose vehicles in Section C of Regulatory Guide 167 Licensing: Discretionary powers (April 2016) (further information). On 29 March 2016, ASIC made a new legislative instrument to replace its class order on securitisation special purpose vehicles that was due to expire (or "sunset") on 1 April 2016. ASIC has remade the class order following public consultation.

The new legislative instrument is ASIC Corporations (Securitisation Special Purpose Vehicles) Instrument 2016/272 (29 March 2016). The instrument has the same effect as relief that ASIC had granted by *Class Order [CO 04/1526]*, with the omission of one condition on the grounds that it did not appear to be relied on.

This condition previously required an Australian financial services licensee to enter into an irrevocable deed poll agreeing to be liable for the securitisation entity's acts or omissions.

On 16 December 2015, ASIC issued Consultation Paper 246 - Remaking ASIC class order on securitisation special purpose vehicles: [CO 04/1526] (CP 246) (further information), which sought feedback on ASIC's proposals to continue the relief for certain securitisation entities without substantive changes.
ASIC's media release (21 April 2016)
(Source: ASIC; Federal Register of Legislation)

2.2 Remaking "Sunsetting" Class Order About Financial Calculators

ASIC has released updated regulatory guidance on relief for generic financial calculators in Section D of Regulatory Guide 167 Licensing: Discretionary powers (April 2016) (further information) and Report 477 Response to submissions on CP 249 Remaking ASIC class order on generic financial calculators: [CO 05/1122] (April 2016) (further information). On 30 March 2016, ASIC made a new legislative instrument to replace its class order on generic financial calculators that was due to expire (or "sunset") on 1 April 2016. ASIC has remade the class order with some changes following public consultation.

The new instrument is ASIC Corporations (Generic Calculators) Instrument 2016/207 (21 March 2016). This instrument continues the relief from the provisions in the Corporations Act 2001 No. 50 (Cth) that would apply to the provider of a financial calculator that provides financial product advice. A change under the new instrument is that if a financial calculator makes an estimate of a future return, it must be adjusted for inflation using an assumed rate of inflation of 2.5% (the mid-point of the Reserve Bank of Australia's (RBA) target range for inflation over the cycle).

On 22 December 2015, ASIC issued Consultation Paper 249: Remaking ASIC class order on generic financial calculators: [CO 05/1122] (CP 249) (further information).
ASIC's media release (21 April 2016)
(Source: ASIC; Federal Register of Legislation; Lawlex Legislative Alert & Premium Research)

2.3 Information Sheet on Mining and Resources, Forward-looking Statements

ASIC has released Information Sheet 214: Mining and resources: Forward-looking statements (INFO 214) (undated), which relates to forward looking statements commonly made in the mining and resources industry relating to production targets and forecast financial information.

The objective of Information Sheet 214 is to draw together and explain the existing rules and reference sources in a useful "one stop shop" reference guide and checklist with hypertext links to help reduce business costs and risk of litigation or regulatory action.

The information sheet covers:

- "the legal requirement that forward-looking statements must be based on reasonable grounds;
- the application of relevant industry codes, ASX Listing Rules and ASIC guidance;
- what constitutes a forward-looking statement, and how these are different from aspirational statements (which do not need to be based on reasonable grounds);
- that for reasonable grounds to be established, the [Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (the JORC Code)] mineral resource estimates used must be based on a sufficient level of geological knowledge and confidence, and all JORC Code modifying factors must be sufficiently progressed;
- how the legal requirement to have reasonable grounds applies to ore reserve and mineral resource estimations;
- how the reasonable grounds requirement applies to the JORC Code's "economic" modifying factor if secured funding is not in place;
- what the disclosure requirements are for forward-looking statements;
- what you can disclose if you do not have reasonable grounds for forward-looking statements;
- what the requirements are for updating forward-looking statements when your company's circumstances change or a project changes hands; and
- what areas ASIC focuses on when assessing forward-looking statements".

ASIC's media release (12 April 2016)
(Source: ASIC)

2.4 ASIC Commences Civil Penalty Proceedings Against Westpac for BBSW Conduct

ASIC has commenced legal proceedings in the Federal Court in Melbourne against Westpac Banking Corporation (Westpac) for unconscionable conduct and market manipulation in relation to Westpac's involvement in setting the bank bill swap reference rate (BBSW) in the period 6 April 2010 and 6 June 2012.

The BBSW is the primary interest rate benchmark used in Australian financial markets, administered by the Australian Financial Markets Association (AFMA). On 27 September 2013, AFMA changed the method by which the BBSW is calculated. The conduct that the proceedings relate to occurred before the change in methodology.

It is alleged that Westpac traded in a manner intended to create an artificial price for bank bills on 16 occasions during the period of 6 April 2010 and 6 June 2012.

ASIC alleges that on these days Westpac had a large number of products which were priced or valued off BBSW and that it traded in the bank bill market with the intention of moving the BBSW higher or lower. ASIC alleges that Westpac was seeking to maximise its profit or minimise its loss to the detriment of those holding opposite positions to Westpac's.

ASIC is seeking declarations that Westpac contravened ss. 12CA and 12CB and the former s. 12CC of the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) and ss. 912A(1) and 1041A of the Corporations Act 2001 No. 50 (Cth).

Further, ASIC has sought from the court pecuniary penalties against Westpac and an order requiring Westpac to implement a compliance program.
ASIC's media release (5 April 2016)
(Source: ASIC; Lawlex Legislative Alert & Premium Research)

2.5 Market Integrity Report

ASIC has released its six-monthly report on market integrity focusing on the three areas of deterrence, standards and education, and behavioural change.

In its new short form, Report 475 - Market Integrity Report: July to December 2015 (undated), covers the work of ASIC's Market Integrity Group. This is a group within ASIC that focuses on ensuring that Australia's licensed markets are fair, orderly, transparent and efficient.

There were 14 significant enforcement outcomes during the six months. Reviews of high-frequency trading (HFT) and dark liquidity were completed, revealing that current levels of HFT and dark liquidity trading have not adversely affected the function of the markets.
ASIC's media release (4 April 2016)
(Source: ASIC)

2.6 Instruments on Electronic and Dual Lodgement of Financial Reports

ASIC has released a revised legislative instrument dealing with dual lodgment and electronic lodgment of directors' reports, financial reports and auditor's reports. The instrument, ASIC Corporations (Electronic Lodgment of Financial Reports) Instrument 2016/181 (24 March 2016), replaces three class orders due to sunset under the Legislation Act 2003 No. 139 (Cth) in 2016 and 2017.

The class orders replaced are:

- *Class Order [CO 00/2451] Electronic lodgment of certain reports with the ASX: approval*;
- *Class Order [CO 06/6] Dual lodgment relief for NSX-listed disclosing entities*; and
- *Class Order [CO 98/104] Dual lodgment relief for ASX-listed entities*.

ASIC has remade these class orders as a single instrument. In addition, the approval to lodge the reports electronically has been extended to include entities listed on SIM Venture Securities Exchange and Sydney Stock Exchange.

The instrument relieves listed disclosing entities which are companies or registered schemes from the obligation to lodge the reports with both the market operator and ASIC. The reports can be lodged electronically with the market operator where the operator has been appointed as agent for ASIC.

The entity must keep a signed copy of the reports for a period of at least seven years following electronic lodgment.

The instrument may be subject to change in the future having regard to any developments in reporting, such as changes in the means of lodging and publishing financial reports.

ASIC consulted on the proposal to remake the instruments under Consultation Paper 243 - Remaking ASIC class orders on electronic lodgement of financial reports and dual lodgement relief (November 2015) (CP 243). Four submissions were received on CP 243 and the revised instrument reflects the main comments provided by respondents.
ASIC's media release (1 April 2016)
(Source: ASIC; Federal Register of Legislation; Lawlex Legislative Alert & Premium Research)

2.7 ASIC Remakes Instruments on Financial Reporting and Record Keeping by Foreign Licensees

Following public consultation, ASIC has continued the relief available to foreign companies which are Australian financial services licensees (foreign licensees) from certain financial reporting and record keeping obligations. ASIC has also continued relief available to foreign licensees which are ADIs.

The relief applies is set out in the new legislative instrument, ASIC Corporations (Foreign Licensees and ADIs) Instrument 2016/186 (24 March 2016).

The new instrument replaces Class Orders *[CO 03/823] Relief from licensing, accounting and audit requirements for foreign authorised deposit-taking institutions* and *[CO 06/68] Conditional relief for foreign licensees from financial reporting and record keeping obligations*. ASIC remade these instruments as a single instrument without significant changes before they were due to sunset over the next few years under the Legislation Act 2003 No. 139 (Cth).

The instrument:

- exempts a foreign licensee from certain record keeping obligations and the need to lodge financial statements and have them audited, provided it lodges with ASIC certified copies of a balance sheet, cash flow statement and profit and loss statement required in its place of origin together with the views of the auditor on those documents; and
- exempts foreign ADIs from the requirement to hold an Australian financial services licence in specified circumstances when dealing in derivatives and foreign exchange contracts on their own behalf.

ASIC received no submissions in response to its consultation on remaking this relief under Consultation Paper 241 - Remaking class orders on foreign licensees and ADIs: [CO 06/68] and [CO 03/823] (October 2015). Therefore ASIC remade the instruments substantially in the form consulted on. ASIC Corporations (Amendment and Repeal) Instrument 2016/182 (24 March 2016) revokes the previous instruments.
ASIC's media release (1 April 2016)
(Source: ASIC; Federal Register of Legislation; Lawlex Legislative Alert & Premium Research)

2.8 Enforcement Report Outlines Key Outcomes and Areas of Focus for the Future

ASIC has released Report 476 - ASIC enforcement outcomes: July to December 2015 (March 2016), its enforcement report for the period 1 July 2015 to 31 December 2015.

The report highlights ASIC's key areas of focus for the organisation and outcomes supporting those areas, including:

- poor organisational culture in the financial services industry;
- retail margin foreign exchange trading;
- illegal phoenix activity; and
- increasing volumes of electronic evidence and the associated technology.

The report also contains detail on ASIC's areas of focus for the rest of 2016. The integrity of financial market benchmarks remain a high enforcement priority, as do disclosure obligations and market abuse. ASIC's Wealth Management Project, which seeks to lift the standards of major financial advice providers, and ASIC's court proceedings aimed at winding up land banking schemes are also high priorities for the foreseeable future.

For the first time, the enforcement report also contains infographics and statistics about how an ASIC investigation operates. The report uses examples of recent ASIC investigations to communicate the processes and procedures that ASIC uses to achieve its enforcement outcomes.
Further information from ASIC
ASIC's media release (30 March 2016)
(Source: ASIC)

2.9 Easier Electronic Disclosure under the ePayments Code

ASIC has announced changes to the ePayments Code that will make it easier for businesses to give information to their customers in a digital form.

Under the changes, subscribers to the ePayments Code will be able to give information to their customers by making it available electronically and notifying the consumer. This follows similar changes ASIC made last year to the Corporations Act 2001 No. 50 (Cth) (Corporations Act).

A summary of amendments made to the ePayments Code (undated) is available on the ASIC website.

ASIC has also released an updated version of Regulatory Guide 221 - Facilitating digital financial services disclosure (RG 221) (March 2016) (further information) (RG 221).

ASIC has made minor changes to RG 221 that:

- refer to the modification of the ePayments Code;
- indicate that ASIC's general guidance on digital disclosure is also relevant to information given under the ePayments Code; and
- update ASIC's guidance to include recent technical amendments made to relief under the Corporations Act.

ASIC's media release (29 March 2016)
(Source: ASIC; Lawlex Legislative Alert & Premium Research)

2.10 Consultation on Addressing "Sunsetting" Trustee Company Common Fund Class Orders

ASIC has released Consultation Paper 256 - Remaking and repealing ASIC class orders on trustee company common funds (March 2016), which proposes to maintain relief previously provided under the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) concerning the entities to which client moneys can be deposited under s. 981B of the Corporations Act. The consultation paper also proposes to repeal a class order that ASIC believes is no longer required.

The instrument ASIC proposes to remake is *Class Order [CO 04/1063] Section 981B money in cash common funds*, which is due to sunset on 1 April 2017.

This instrument enables client money received by an Australian financial service licensee to be deposited into a cash common fund, provided the fund is also a registered scheme.

ASIC has reviewed this class order and considers that it is operating effectively and efficiently and continues to form a useful part of the legislative framework.

The consultation paper proposes to remake the class order with minor changes. A draft of the proposed legislative instrument is attached to the consultation paper.

ASIC proposes to repeal *Class Order [CO 00/199] Trustee companies' common funds* because ASIC has formed the preliminary view that this class order is no longer required and is not a useful part of the regulatory framework.
Further information from ASIC
ASIC's media release (24 March 2016)
(Source: ASIC; Lawlex Legislative Alert & Premium Research)

2.11 Rolls-over of Seven "Sunsetting" Payments Class Orders

ASIC has made a new legislative instrument to temporarily replace seven class orders relating to non-cash payment facilities that were due to expire (or "sunset") between 1 April 2016 and 1 April 2017.

The ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 (18 March 2016) (Instrument 2016/11) continues existing exemptions from the normal obligations for the following classes of payment products:

- travellers' cheques, which are exempt from the requirement to provide separate confirmation of transactions;
- loyalty schemes and road toll facilities, which are not subject to the financial services laws in the Corporations Act 2001 No. 50 (Cth) (the Corporations Act);
- prepaid mobile facilities and some non-reloadable gift facilities, which are exempt from the licensing, conduct and disclosure obligations in the Corporations Act; and
- low value payments products, which are exempt from the licensing, conduct and disclosure obligations in the Corporations Act but subject to alternative disclosure and dispute resolution obligations.

Instrument 2016/211 also preserves existing relief for financial services licensees from the need to hold a payment product authorisation in order to advise their clients on conventional payments products they may use to pay third parties for goods and services.

The Final Report of the FSI recommended that the current graduation of retail payments regulation be enhanced by clarifying the thresholds at which ASIC or APRA regulation may apply.

The Australian Government has agreed to this recommendation and indicated that APRA, ASIC and the RBA will review the framework for payments system regulation and develop clear guidance. This work is still ongoing.

In the context of this review, ASIC has decided to temporarily roll-over the seven sunsetting class orders that relate to payments products for a period of three years. This will provide certainty to industry that the current policy settings and regulatory approach will continue while the Government, ASIC, APRA and the RBA consider what changes are required to implement the FSI's recommendation.
ASIC's media release (23 March 2016)
(Source: ASIC; Federal Register of Legislation; Lawlex Legislative Alert & Premium Research)

2.12 Consultation on Remaking ASIC Class Orders on Financial Services Disclosure

ASIC has released Consultation Paper 255 - Remaking ASIC class orders on financial services disclosure requirements (March 2016), which proposes to remake four class orders that are due to expire (or "sunset") in 2017.

The class orders proposed to be remade are:

- *Class Order [CO 02/1072] Product Disclosure Statements - Top up relief for managed investment schemes*
- *Class Order [CO 07/10] Technical disclosure relief for reconstructions and capital reductions (paragraph 9)*;
- *Class Order [CO 03/237] Updated information in Product Disclosure Statements;* and
- *Class Order [CO 03/1092] Further relief for joint Product Disclosure Statements*.

ASIC proposes to remake these class orders because they are operating effectively and efficiently and continue to form a necessary and useful part of the legislative framework. No significant changes are proposed.

The consultation paper outlines the class orders proposed to be remade and the rationale for remaking them.
Further information from ASIC
ASIC's media release (23 March 2016)
(Source: ASIC)

3. Recent ASX Developments

3.1 Updated Guidance Note 20- ASX Online

On 14 March 2016, the ASX published an updated version of Annexure A to ASX Listing Rules - Guidance Note 20 (14 March 2016). Annexure A contains the form of the application and agreement by entities to use the electronic lodgment facility. The form has been updated to better cover the e-lodgment of documents by AQUA Product Issuers and Warrant-Issuers pursuant to obligations under the ASX Operating Rules.

The ASX has also made available a Compliance Update (18 March 2016).
(Source: ASX)

3.2 Equity Sector Futures Price Tick Change for Quarterly Roll Period Reminder

The ASX has made available a notice (7 March 2016), advising that the ASX 24 Operating Rule Procedures have been amended to allow for more efficient trading during the equity sector futures "roll" period.
(Source: ASX)

3.3 Sector Futures - 0.1 Amendments

Amendments have been made to provide clarity for customers regarding available expiries in the Australian Electricity Futures contracts and to allow for additional settlement months to be traded in the New Zealand Electricity Futures contracts.
Further information from the ASX
(Source: ASX)

3.4 Media release: T+2 Settlement Begins in Australia

Share market trades conducted from 7 March 2016 in Australia were settled one business day earlier - two days after the trading day, known as T+2.

Reducing the settlement period from the current T+3 cycle creates capital and margin savings for industry, and a faster settlement of transactions for investors, meaning they receive their cash or securities sooner. It also lowers systemic risk for the market as a whole by reducing counterparty risk for individual investors, participants and the clearing house. The move to T+2 keeps Australia aligned with global best practice.
ASX's media release (4 March 2016)
(Source: ASX)

3.5 Consultation Paper: ETO Cancellation Policy

Consultation - ETO Cancellation Policy
The ASX has released Consultation Paper - ETO Cancellation Policy (March 2016).

In response to requests from derivatives trading participants ASX is reviewing the existing regime for Exchange Traded Options (ETO) trade cancellations. ASX is seeking feedback from all ETO users on time limits participants have to notify ASX of errors and the possible introduction of a significant size threshold for an error to be considered as extreme.
(Source: ASX)

3.6 Reports

On 5 April 2016 ASX released the following reports (both dated 5 April 2016):

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

(Source: ASX)

4. Recent Takeovers Panel Developments

4.1 Investa Office Fund - Declaration of unacceptable circumstances and orders

The Takeovers Panel has made a declaration of unacceptable circumstances and final orders on an application dated 21 March 2016 in relation to the affairs of Investa Office Fund (IOF).

The application, by the responsible entity for DEXUS Property Group, arose out of the DEXUS proposal by trust scheme to acquire all the units in IOF.

The application concerned issues of conflict management by the manager of IOF, voting by Morgan Stanley of units in IOF, disclosure deficiencies in a document (the IOMH Document) issued by the holding company of the manager (Investa Office Management Holdings Pty Ltd (IOMH)), and incomplete substantial holder disclosure.

The Panel was satisfied that, by reason of the issue of the IOMH Document, the acquisition of control over voting interests in IOF was not taking place in an efficient, competitive and informed market and IOF unit holders were not given enough information to enable them to assess the merits of the proposal. The Panel was also satisfied that the substantial holder notices lodged by IOMH contravened s. 671B. Accordingly it made a declaration and orders.

The Panel considered that the IOMH Document did not disclose readily and reasonably the interests that the manager had when advocating the position adopted. The Panel ordered that further disclosure be published and sent to unit holders by express post and email (if available), making clear the role of the manager, the fees payable to it under the current arrangements, and the relevant effect of a Share Sale Agreement (under which a Morgan Stanley entity sold the "platform", including the manager, to Investa Commercial Property Fund) if the DEXUS proposal should succeed or fail. The Panel also made orders that IOMH must ensure that the proxy form attached to the IOMH document is no longer available (including website removal) and IOF releases the supplementary disclosure on ASX.

Additionally, the Panel considered that the proxy form attached to the IOMH Document, although valid, was likely to mislead or confuse IOF unit holders, given its similarity to the proxy form issued by IOF's responsible entity, and ordered that IOMH inform unit holders that the proxy form was from IOMH, and provide further information to assist unit holders who submitted the form and may feel misled on how to change their vote.

The Panel also found that IOMH's notice of ceasing to be a substantial holder of 8 March 2016, and its amended notice of 23 March 2016, did not comply with s. 671B in that the original notice was not accompanied by a document that contributed to the notice (namely a Share Sale Agreement), and the amended notice was accompanied by a redacted version of a Share Sale Agreement. The Panel ordered IOMH to lodge an amended notice of ceasing to be a substantial holder accompanied by an unredacted version of the Share Sale Agreement.

As to the submission in the application that Morgan Stanley should not be allowed to vote, the Panel was not satisfied that a sufficient basis had been established for it to interfere with the voting rights attaching to units in IOF in which Morgan Stanley has a relevant interest.

During consideration of the application by the Panel, concern was raised about whether other statements in the IOMH Document were misleading, in particular statements about the value of the proposal compared to the value of IOF. The Panel was not satisfied that these concerns properly formed part of the application, and indicated that they could be the subject of a fresh application or clarifying disclosure by a party if it wished.

The Panel has made available its reasons for decision (8 April 2016).
Takeovers Panel's media release (8 April 2016)
(Source: Takeovers Panel)

4.2 ABM Resources NL - Declaration of unacceptable circumstances and order

The Takeovers Panel has made a declaration of unacceptable circumstances and final order in relation to an application dated 10 March 2016 by APAC Resources Capital Ltd in relation to the affairs of ABM Resources NL.

On 9 March 2016, ABM announced:

- a 3 for 5 non-renounceable rights issue to raise a total of approximately $8.2 million, fully underwritten by Key Pacific Advisory Partners Pty Ltd and fully sub-underwritten by Pacific Road Capital Management Pty Ltd as trustee for Pacific Road Fund II Managed Investment Trust; and
- that it entered into a $3.8 million debt facility with Pacific Road. The debt facility included conditions that the rights issue occur with Pacific Road as a sole sub-underwriter and ABM granting a first ranking security interest over its assets in favour of Pacific Road.

Pacific Road currently holds 19.85% of ABM. If no other shareholder took up their rights, Pacific Road would have obtained voting power of up to 49.91% of ABM.

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

- all reasonable steps to minimise the likely control effect of the rights issue had not been taken - for example no attempt, or no genuine attempt, was made to find additional sub-underwriters or accommodate an institution that could do so;
- the linking of the debt facility with the rights issue, particularly given the sub-underwriting arrangement, had the potential to exacerbate the control effect; and
- the sub-underwriting fee was payable even on shares taken up by Pacific Road under the rights issue as a shareholder.

The Panel has made an order that ABM not proceed with the rights issue and make an announcement to that effect (in a form approved by the Panel). The Panel considered that an order ending the rights issue, and allowing ABM flexibility in structuring a new rights issue or other funding transaction, would be simpler and would likely be less confusing for shareholders.

The Panel will publish its reasons for the decision in due course on its website.
Takeovers Panel's media release (8 April 2016)
(Source: Takeovers Panel)

5. Recent Research Papers

5.1 The real effects of mandatory dissemination of non-financial information through financial reports

The authors examine the real effects of mandatory, non-financial disclosures, which require SEC-registered mine owners to disseminate their mine-safety records through their financial reports. These safety records are already publicly available elsewhere, which allows the authors to examine the incremental effects of disseminating information through financial reports. Comparing mines owned by SEC-registered issuers to those mines that are not, the authors document that including safety records in financial reports decreases mining-related citations and injuries by 11% and 13% respectively, and reduces labour productivity by approximately 0.9%. Additional evidence suggests that increased dissemination, rather than unobservable factors associated with regulatory intervention, drive these effects. The authors also provide evidence that feedback effects from equity markets are a potential mechanism through which the dissemination of information leads to real effects. Overall, the results illustrate that disseminating non-financial information through financial reports can have real effects - even if the content of that disclosure is already publicly available.
The paper is available on the Social Science Research Network (SSRN) website.
(Source: SSRN)

5.2 Board accountability and the entity maximisation and sustainability approach

Accountability operates expressly and implicitly in the field of corporate governance to the point where it is regarded as one of its most critical elements. The accountability of the board of directors is an important part of the accountability element of corporate governance and it has been said that good corporate governance is able to be best achieved by holding directors accountable for their behaviour and decisions. This paper examines how board accountability would work if an entity maximisation and sustainability approach to the company was taken. In essence this approach takes the view that the ultimate objective of the company should be that the overall long-run market value of the company as a whole is increased, taking into account the investment made by various people and groups, and that the company will be managed so that it has long-term survival. The paper focuses particularly on the following question: to whom is the board accountable?
The paper is available on the SSRN website.
(Source: SSRN)

5.3 Identifying ineffective monitors from securities class action lawsuits

The authors identify "ineffective" institutional monitors based on the prevalence of occurrences of securities class-action lawsuits in the investors' overall portfolio. They find that firms with a higher representation of such institutional investors among the firms' large shareholders have a greater likelihood of future litigation. These firms consistently exhibit other unfavourable governance outcomes including poorer acquisition outcomes and lower chief executive officer turnover-performance sensitivity. Moreover, these firms experience higher short interest, reflecting the market's anticipation of increased litigation risks. Overall, the results suggest that class-action lawsuits provide an opportunity to uncover the monitoring effectiveness of large institutional shareholders.
The paper is available on the SSRN website.
(Source: SSRN)

5.4 Comparative corporate governance: Old and new

The most fundamental comparative corporate governance debates have often focused on two issues. The first one concerns ownership structure: Why are large corporations in some corporate governance system owned by a multitude of disempowered shareholders, thus effectively giving management free rein? Why are corporations typically governed by a controlling shareholder or a coalition of controlling shareholders in other systems? The second issue is the role of other 'constituencies' of the corporation besides shareholders, of which labour is most central to the debate. Some jurisdictions explicitly give labour an influential voice in corporate affairs, whereas in others its influence is developed through factual power or unintended consequences of legislation.

This paper explores the interactions between firm ownership and labour, focusing on the United States on the one hand and Continental Europe, particularly Germany, on the other. It distinguishes between "old" and "new" comparative corporate governance, the former referring to the dichotomy studied by scholars of comparative corporate law up to the early 2000s. Recent changes, heralded by intermediated, but widespread share ownership are leading us to a new equilibrium whose contours have only begun to emerge. Over the past decades, outside investors have gained power both in the US and in Continental Europe. However, neither in the US nor in Continental Europe has the traditional corporate governance system been completely superseded by a new one. The US remains to a large extent manager-centric. Continental Europe retains powerful large shareholders, and labour as an independent force has remained more important than in the United States. Outside institutional investors - sometimes from the US - have become a player to be reckoned with, thus adding an additional layer of complexity to the system.

The paper is available on the SSRN website.
(Source: SSRN)

6. Recent Corporate Law Decisions

6.1 Directors contest ASIC's issuing of disqualification notices and request a non-publication order of their names

By Meagan Ryan, MinterEllison

ASE16 v Australian Securities and Investments Commission [2016] FCA 321 (1 April 2016), Federal Court of Australia, Markovic J.

(a) Summary

This case concerned an application under s. 6 of the Administrative Decisions (Judicial Review) Act 1977 No. 59 (Cth) (the ADJR Act) for review of a decision by ASIC to issue notices requiring officers to show cause why they should not be disqualified pursuant to s. 206F of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The applicants also sought a non-publication order of their names, the relevant company names and evidence they relied on in the proceedings. The non-publication order was granted on the basis that trade competitors should not get an advantage and the applicants should not be disadvantaged from the proceedings where the s. 206F process was still in process and ASIC had yet to make a determination disqualifying the applicants.

The application was otherwise dismissed.

(b) Facts

The applicants were directors of a number of companies supplying contingent workforce solutions in Australia and New Zealand. Both applicants resigned as directors on 10 May 2012. Nine and a half months later the companies were placed into voluntary administration and later, on 11 April 2013, the companies were placed into liquidation. The liquidators provided ASIC with reports pursuant to s. 533(1) of the Corporations Act.

Section 533(1) provides that if it appears to the liquidator of a company, in the course of winding up the company, that the company may be unable to pay its unsecured creditors more than 50 cents in the dollar, the liquidator must lodge a report with respect to the matter and give ASIC such information as ASIC requires.

ASIC issued the first and second applicant with s. 206F notices on 7 August 2015 and 2 August 2015 respectively. Section 206F of the Corporations Act permits ASIC to disqualify a person from managing corporations for up to five years if:

- (1)(a) within 7 years immediately before ASIC gives a notice under paragraph (b)(i);
    - (i) the person has been an officer of 2 or more corporations; and
    - (ii) while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under s. 533(1) about the corporation's inability to pay its debts; and
- (b) ASIC has given the person:
    - (i) a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and
    - (ii) an opportunity to be heard on the question; and
- (c) ASIC is satisfied that the disqualification is justified.

By application pursuant to s. 1337 of the Corporations Act and s. 6(1) of the ADJR Act, the applicants applied for review of certain conduct for the purposes of ASIC making a decision under s. 206F of the Corporations Act to disqualify them from managing companies. The applications sought a declaration that the statutory preconditions for s. 206F had not been met, an order setting aside the ASIC notices and restraining ASIC from conducting the show cause hearings and an order restraining ASIC from disqualifying the applications from managing corporations pursuant to s. 206F.

The applicants also sought an order pursuant to s. 37AF of the Federal Court of Australia Act 1976 No. 156 (Cth) (the Federal Court Act) restricting the publication of information which would reveal the identity of the applicants.

There were two issues for determination arising from the interpretation of the preconditions of s. 206F(1)(b)(i) notice. The first issue was to determine the meaning of the words "was wound up" and the second issue was to determine whether or not there was a temporal requirement to the lodgment by the liquidator of the report pursuant to s. 533(1) of the Corporations Act.

In respect of the non-publication order, s. 37AG of the Federal Court Act provides that the grounds for making an order include where the "order is necessary to prevent prejudice to the proper administration of justice".

(c) Decision

(i) Statutory interpretation of "was wound up"

The applicants submitted that the meaning of "was wound up" refers to a situation where the winding up process has been completed but before deregistration of the company.

However, Markovic J found the applicants' interpretation would result in the phrase "was wound up" being equated to "has been wound up" or "have been fully wound up". Her Honour noted other sections of the Corporations Act use phrases such as "has been wound up" or "have been fully wound up" and that in the case of s. 206F Parliament intentionally did not use either of those phrases. Her Honour contended that if the applicants' contention was correct, ASIC would only be able to pursue s. 206F action against officers who resigned within twelve months of a company being, in effect, fully wound up with the result that officers would rarely, if ever, be subject to s. 206F.

Markovic J had regard to the context of the text and the purpose of the legislation. Her Honour noted the Explanatory Memorandum of the Bill which implemented s. 206F did not provide an explanation about the policy intention behind the rewording of the previous s. 600 to the current wording of s. 206F.

Markovic J concluded the phrase "was wound up" in s. 206F(1)(a)(ii) means the date on which the company is placed into liquidation and the winding up begins.

(ii) The timing of the lodgement of a section 533(1) report

The applicants submitted that to meet the precondition of s. 206F(1)(a)(ii), the liquidator's s. 533(1) report was required to be lodged within 12 months of the person ceasing to be an officer of the relevant corporation. In support of this contention the applicants pointed to s. 206D(2)(h) which provides that a company fails where it is wound up and a liquidator lodges a report under s. 533(1) about the company's inability to pay its debts. The note to subsection (h) provides that "a corporation must begin to be wound up while the person is an officer or within 12 months after the person ceases to be an officer. However, the report under s. 533(1) may be lodged by the liquidator at a time that is more than 12 months after the person ceases to be an officer." Section 206F does not have a note like the note to s. 206D(2)(h) and the applicants suggested this meant the liquidator reports had to be lodged within twelve months of their resignations.

Markovic J disagreed with this interpretation for three reasons. First, because the timing constraint was inconsistent with the policy of s. 206F formed by prior judicial consideration. Second, the requirement of s. 533(1) is for a liquidator to prepare a report "as soon practicable or within six months of the circumstances which give rise for the need to report becoming apparent". Her Honour opined that a construction of s. 206F(1)(a)(ii) which imposed a time limit on s. 533(1) that is not in the section itself "would be inconsistent with that section which regulates the requirement and preparation of such reports".

Third, the applicants' reliance on the absence of a note similar to that in s. 206D(2)(h) to support their construction that the liquidator report had to be lodged within the 12 months that the directors ceased to be officers, was incorrect as the note to s. 206D(2)(h) was included for the purpose of promoting a consistent interpretation of ss. 206D(2)(h) and 206F(1)(a)(ii).

(iii) A non-publication order

Markovic J noted the applicants had to meet a high threshold for an order granting a non-publication order and, citing Foster J in *Australian Competition and Consumer Commission v Cascade Coal Pty Ltd (No 1)* [2015] FCA 607 (19 June 2016) [30], noted "mere embarrassment, inconvenience, annoyance or unreasonable or groundless fears will not suffice". Her Honour concluded the threshold for granting an order had been met as the applicants' evidence demonstrated a fear that their association with the proceedings would damage their commercial reputation, their competitors would gain a competitive advantage and their business would be affected.

Markovic J considered it was in the interests of the administration of justice to grant the non-publication order.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.2 An illustration of when damages for breach of a share sale agreement will be calculated differently

By Madeline Hall, Corrs Chambers Westgarth

Keeley v Horton [2016] QCA 68 (22 March 2016), Supreme Court of Queensland, Court of Appeal, Holmes CJ, Peter Lyons and Burns JJ.

(a) Summary

The Queensland Court of Appeal has considered the appropriate methodology for calculating damages for breach of a share sale agreement in a recent case between William Ian Keeley and Leanne Faye Keeley (the Keeleys) and Robert William Horton and Desley Margaret Horton (the Hortons). The Court found that the primary judge had erred in determining the amount of loss suffered by the Keeleys and accordingly increased the Keeleys' award from $100 to $96,367.00.

In calculating the damages to be awarded to the Keeleys the Court noted that customarily, in the case of a breach of a share sale agreement, an award of damages is calculated as the difference between the price paid for the shares and their true value at the time of the sale. The Court confirmed however, that when the price was calculated without an objective criteria (such as that established by a market or independent valuation) there may be a divergence between price and value. In those situations, it may be more reflective of the true loss suffered by the wronged party to compare the difference between the prices calculated using the parties' methodology with and without the effect of the relevant broken promise that gave rise to the breach.

(b) Facts

On 4 January 2005, the Keeleys entered into a share sale agreement to purchase the whole of the issued share capital of Marine Warehouse Pty Ltd (the Company) from the Hortons.

A chartered account, Mr Ham, provided a written valuation of the business that the parties accepted and relied upon in reaching agreement on the purchase price. Essentially, the sale was by way of a multi-faceted share sale agreement with an agreement to buy shares ex dividend. The purchase price was calculated by Mr Ham to comprise of $65,515 (to purchase the shares of the Company) and a loan to the company of $651,422 (to facilitate the payment of dividends to existing shareholders). Adjustments were then meant to be made for debtors, prepayments, creditors and taxation, however no adjustment at the time of settlement was actually made. An overall price of $716,937 was therefore paid.

Within the share sale agreement there were warranties that:

- the Company Records gave and reflected a true and fair view of the financial, contractual and trading position of the Company (the earnings warranty); and
- the Company did not have any actual, pending or threatened criminal or civil proceedings against it, and is not engaged in or threatened with litigation of any kind (the claims warranty).

Despite the earnings and claims warranties, the Hortons knew, prior to entering into the share sale agreement, that one of the Company's key distributorships would be cancelled. The Company had also been served with a claim for compensation from one of the Company's employees. Despite this, at the time of valuing the business Mr Ham was not aware of the loss of distributorship.

The Keeleys subsequently commenced proceedings in the Queensland District Court claiming damages for breach of both the earnings and claims warranties in the share sale agreement. The primary judge held that the warranties had been breached but only made an award for nominal damages.

The Keeleys appealed the assessment of damages to the Queensland Court of Appeal.
(Source: Supreme Court of Queensland)

(c) Decision

Burns J delivered the main judgment with Holmes CJ agreeing and Peter Lyons J delivering separate reasons.

Burns J noted that the ruling principle in assessing damages is to ensure that the award puts the promisee in the same situation as they would have been had the broken promise been performed. Whilst this customarily requires a calculation of the difference between the price paid for the shares and their true value at the time of sale, this is subject to the commercial context.

Burns J elaborated that price will not always equate with value. For example, when the parties have not used objective criteria to calculate the price, calculating the loss in terms of the actual value will not always accurately represent the full worth of the benefit secured by the wronged party. Instead, in those situations, the methodology used by the parties should be adopted and a comparison made between the price calculated by that methodology with and without the effect of the relevant broken promise giving rise to the breach.

Accordingly, the Court considered that the correct methodology to assess the Keeleys' loss was to compare the difference between the price paid and what price Mr Ham, using the same methodology, would have advised if he had known about the loss of the distributorship.

Importantly the Court noted that the primary judge had reached this same conclusion but had failed to apply this approach to the facts of the matter. The Court considered the valuation evidence before the primary judge and found that if Mr Ham's methodology was conducted in light of the loss of the distributorship both the earnings of the business and the business as a whole would have been affected. The Court calculated the relevant difference in price to be $96,367 and awarded that amount be paid to the Keeleys.

The Court did not disturb the finding regarding the claims warranties as it considered there was insufficient evidence to support an inference that due to the claim being made, loss had been suffered by the Company by way of an increase in insurance premiums.
(Source: Supreme Court of Queensland)

6.3 No shock for secured creditors: rights absolutely assigned to a company will be treated as "property of a company" under s. 501 of the Corporations Act
By James Byrnes and Caitlin Oxley, Clayton Utz

In the matter of Bamboo Direct Pty Limited (in liq) [2016] FCA 264 (22 March 2016), Federal Court of Australia, Gleeson J.

(a) Summary

This judgment provides guidance as to whether a transferred chose in action is "property of a company" for the purpose of s. 501 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) or is trust property held by the company (and therefore exempt from a liquidator's control). Gleeson J decided that certain customers had absolutely transferred their right to create "Small-scale Technology Certificates" (STCs) to the first plaintiff (Bamboo Direct), rather than creating a trust, based on the clear language used in the assignment documentation. Accordingly, the proceeds of sale of the STCs in question were property of

Bamboo Direct and would be available for distribution by the liquidator to a secured creditor (in this case, ANZ Banking Group Ltd (ANZ)).

The decision reflects the importance of the wording in assignment documentation to determine whether the parties intended to create a trustee and beneficiary relationship or absolutely assign ownership in property.

(b) Facts

Bamboo Direct, along with three related entities, was a company engaged in the business of purchasing, importing and installing solar hot water heaters and solar panels in New South Wales.

As part of its business, Bamboo Direct was involved in the creation and sale of STCs, which are regulated by the Renewable Energy (Electricity) Act 2000 No. 174 (Cth) (the Renewable Energy Act). Under the Small-scale Renewable Energy Scheme, customers of Bamboo Direct and its related entities who purchased certain solar hot water heaters and solar panels obtained the right to create STCs upon the installation of the purchased products. In return for the assignment of a customer's right to create STCs, Bamboo Direct would either provide a point of sale discount off the price of the relevant product or agree to pay the customer a set amount of money at a later time.

On 23 December 2011, the second plaintiff (Mr Morgan) was appointed as the administrator of Bamboo Direct pursuant to s. 436A of the Corporations Act. On the same day he was appointed as the liquidator of Bamboo Direct's three related entities. On 11 July 2012, Mr Morgan was appointed as liquidator of Bamboo Direct.

In the process of winding up the companies, Mr Morgan came across various books and records of Bamboo Direct relating to the creation and assignment of STCs. An audit by the Office of the Renewable Energy Regulator determined that 25,838 STCs had been correctly created under the Renewable Energy Act and assigned to Bamboo Direct (Category 1 STCs). The net proceeds from the sale of the Category 1 STCs was $739,428.73. Mr Morgan applied to the Court under ss. 479(3) and 511 of the Corporations Act to determine how he should deal with the proceeds of sale of the Category 1 STCs.

After notification to interested parties, ANZ, a secured creditor of Bamboo Direct, and Mr Carroll, a potential claimant customer, were given leave to appear.

In the ordinary course of winding up Bamboo Direct, Mr Morgan would have made priority payments pursuant to s. 556 of the Corporations Act and paid ANZ, as the secured creditor, from the property of the company. If this course of action were taken, it would be unlikely that any funds would be available to pay a distribution to Bamboo Direct's unpaid customers for the value of their STCs.

(c) Decision

Counsel for the liquidator and Mr Carroll made opposing submissions as to the appropriate treatment of the proceeds of the Category 1 STCs. Ultimately, Gleeson J agreed with the submissions made on behalf of the liquidator for the reasons below. Counsel for ANZ submitted that the Court should make the orders proposed by the liquidator.

(i) Submissions for the liquidator: The intention had been to absolutely assign the right to create STCs to Bamboo Direct and the proceeds of sale should be distributed as "property of the company" under s. 501 of the Corporations Act

Counsel for Mr Morgan submitted that it was clear from the books and records of Bamboo Direct that the 25,838 Category 1 STCs were validly assigned to the company pursuant to ss. 23(2) and 23C(2) of the Renewable Energy Act. The assignment documents evidenced an unequivocal expression of intention to immediately assign, so the documents had to be understood as an effective absolute legal assignment. The proceeds of sale of the Category 1 STCs were therefore the property of Bamboo Direct.

It would not be correct to characterise the proceeds of sale of the Category 1 STCs as being trust property over which potential claimant customers held some form of proprietary interest. The potential claimant customers, by the executed assignment documents, had validly assigned their rights to create STCs to Bamboo Direct and accordingly, no proprietary interest arose from the transfer. If claimant customers had not received payment, that would give rise to a personal breach of contract against Bamboo Direct sounding in damages that could be admissible to proof against the company.

(ii) Submissions for Mr Carroll: The intention had been to assign the right to create STCs to Bamboo Direct, with the proceeds to be held on trust for, and ultimately remitted to, customers.

Counsel for Mr Carroll submitted that, because Mr Carroll was not registered under the Renewable Energy Act, the assignment of the right to create the relevant STCs was merely an intermediate step to give Mr Carroll the benefit of the bargain. The tax invoices issued to Mr Carroll and other customers demonstrated that the contract with Bamboo Direct was entered into with the mutual intention that the right to create the STCs would be assigned, the STCs would be created and sold by Bamboo Direct and the proceeds would then be paid back to the customer.

In *Coolbrew Pty Ltd v Westpac Banking Corporation* [2014] NSWSC 1108 (18 August 2014) at [57], Darke J found that the mere fact that money was provided to a company for a specific purpose was not sufficient to establish a resultant trust. There needed to also be evidence that the parties intended that the beneficial interest in the relevant property would always remain the property of the transferor and not become the property of the transferee.

In this case, Gleeson J held that the assignment of the STCs by each customer was for the express purpose of obtaining a right to a fixed dollar amount. There was no language in the assignment documents to the effect that the assignment was made for the purpose of obtaining a right to the "proceeds of sale" of the STCs, which would indicate an intention to create a trust. There was also no evidence to suggest an agreement that the proceeds of sale would not be mixed in with the general funds of the company or any references made in the documents to the parties' relationship as one of "trustee" and "beneficiary".

In the alternative, Counsel for Mr Carroll submitted that a trust arose on the basis that the transfers of the STCs had been invalid. Gleeson J dismissed this argument as her Honour considered that the STCs had been validly transferred.

(iii) Orders

Gleeson J directed that the liquidator:

- was justified in deciding that Bamboo Direct held the proceeds from the sale of Category 1 STCs in its own right and that the proceeds comprised part of the "property of the company" within the meaning of s. 501 of the Corporations Act; and
- would be justified in distributing the proceeds of sale as "property of the company" in the winding up of Bamboo Direct.

Gleeson J also ordered that the liquidator was entitled to recover his costs and expenses of the proceeding in the winding up of Bamboo Direct.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.4 Factual reality trumps legal consequences in appointment of trustee
By Emily Zylstra, Herbert Smith Freehills

Thorne Developments Pty Ltd v Thorne [2016] QCA 63 (18 March 2016), Supreme Court of Queensland, Court of Appeal, Gotterson, Morrison and Philippides JJA

(a) Summary

The Queensland Court of Appeal dismissed an appeal against a decision by the primary judge, finding that:

- the factual circumstance of a company holding the office of trustee of a trust satisfied the preconditions of the exercise of power to nominate a replacement trustee that arises under the Trusts Act 1973 No. 24 (Qld) (the Trusts Act) and the Deed of Trust, despite the legal consequence of deregistration not resulting in a vacancy in that office; and

- the issuing of a bankruptcy notice against the respondent does not result in the respondent's activity being regulated by bankruptcy law, nor being required to comply with a provision of such law, and the respondent is not required to vacate the office of trustee.

(b) Facts

Pursuant to a Deed of Trust, the appellant, Thorne Developments Pty Ltd, was trustee of a family discretionary trust. The appellant was deregistered on 4 December 2011. Under a Deed of Appointment dated 22 August 2012, Mr Thorne, the nominator under the Deed of Trust, appointed the respondent and another person (who later relinquished the position) as trustees of the trust. On 4 September 2013, the appellant's registration was administratively reinstated by ASIC.

The appellant sought declarations that the appointment of the respondent as trustee while the appellant was deregistered was invalid. The primary judge dismissed the application, and held that:

- the Deed of Appointment validly appointed the respondent as trustee, despite identifying the source of power as the Deed of Trust, and not the Trusts Act;
- the contention that the appointment of the respondent as trustee was not a bona fide exercise of power of appointment was without substance; and
- the respondent was not required by cl 17.1 of the Deed of Trust to vacate the office of trustee.

In the first instance, the appellant was also unsuccessful on a constitutional issue regarding the proper construction of Chapter 5A of the Corporations Act, particularly whether s. 601, which provides for the effect of deregistration of a company, constituted an exclusive code inconsistent with s.12 of the Trusts Act. The appellant conceded the issue at the appeal hearing.

The remaining issues on appeal were:

1. whether, on a proper construction of the Deed of Appointment, or pursuant to the Trusts Act, the power of appointment under the Deed of Appointment was triggered by the factual circumstance of deregistration; and
2. whether, on a proper construction of clause 17.1 of the Deed of Trustee, the respondent was required to vacate the office of trustee.

(c) Decision

Philippides JA, Gotterson and Morrison JJA agreeing, dismissed the appeal on both grounds.

(i) Power of appointment under the Deed of Appointment

The Deed of Appointment recited that upon the deregistration of the appellant, the office of trustee was vacant. The Deed then indicated that the nomination of the respondent as the new trustee was pursuant to the powers of appointment under the Deed of Trust. However s. 10 of the Trusts Act provides that the provisions of this part, which deals with the appointment of trustees, shall apply whether or not there is a contrary intention expressed in the instrument creating the trust.

The primary judge found that as the Deed of Appointment had correctly identified the factual circumstance of deregistration of the appellant as the trigger for exercising the power of appointment, it was irrelevant that the Deed of Appointment had incorrectly contemplated the source of the power of appointment as the Deed of Trust, rather than the Trusts Act. This conclusion was based on the primary judge's consideration that "deregistration" is the same as "dissolution" for the purposes of s. 12(1)(h) of the Trusts Act.

The appellant's principal submission on appeal was that the factual basis of the exercise of the power was not the deregistration of the company, but the erroneous belief of the appointor that deregistration had brought about a vacancy in the office of trustee. The appellant contended that this belief is incorrect, as s. 601AD of the Corporations Act operated so that the Commonwealth automatically took the office of trustee upon deregistration of the company, so that there was no vacancy and therefore no power of appointment could be exercised. The appellant did not raise any issue with the primary judge's determination that "dissolution" includes "deregistration".

Section 12(1)(h) of the Trusts Act provides, relevantly, that where a trustee that is a corporation has ceased to carry on business or has been dissolved, the person nominated to appoint new trustees may in writing appoint a new trustee.

Phillipides JA concluded that although the legal consequence of deregistration was that there is no vacancy in the office of trustee, this was irrelevant for the purposes of s. 12(1)(h). It was sufficient to give rise to the exercise of power of appointment set out in the Trusts Act that the corporate trustee had been dissolved. The nominated person then became entitled to appoint a trustee in writing, whether or not there was a vacancy.

Despite the appellant's submissions not contemplating the issue, Philippides JA considered the appointment could also have been validly made under cl. 16.3 of the Deed of Trust. That clause provided, relevantly, that if a trustee is a corporation, and that corporation is dissolved, the nominated person may appoint a new trustee in writing if the corporation trustee did not appoint a replacement. The preconditions for the exercise of the power of appointment were:

- the sole trustee had been dissolved; and
- that trustee had not appointed a new trustee under cl. 16.1,

and these two preconditions had been satisfied. Similarly to the conclusion as to the validity of the appointment under the Trusts Act, the lack of vacancy in the office of trustee by virtue of s. 601AD is irrelevant for the purposes of the power of the nominated person under cl. 16.3 of the Deed of Trust.

Finally, the appellant's submission that, because the Deed of Appointment did not expressly invoke the Trusts Act, that Act is inapplicable, was dismissed as there was no such requirement to expressly invoke the Trusts Act.

(ii) The respondent was not subject to any bankruptcy law

The second ground of appeal contemplated the proper construction of cl. 17.3 of the Deed of Trust. This clause provides, relevantly, that a trustee who is an individual must vacate the office of trustee and cease to act as such if that person becomes subject to any bankruptcy law.

The appellant submitted that the proper construction of cl.17.3 of the Deed of Trust required the respondent to vacate the office of trustee if the Bankruptcy Act 1966 No. 33 (Cth) (the Bankruptcy Act) effected a change in the status of the respondent. As a notice of bankruptcy had been issued against the respondent since the respondent's appointment as trustee, the appellant submitted the respondent was "subject to" the Bankruptcy Act and so was disqualified from holding the office of trustee.

The primary judge concluded that receiving a bankruptcy notice does not amount to being "subject to" bankruptcy law. Her Honour stated "[t]he trustee's affairs are not subject to the regulation of the Bankruptcy Act until the sequestration order or other assignment for the benefit of creditors is made". As a result, the respondent is not subject to the Bankruptcy Act, and was not required to vacate the office of trustee.

Philippides JA stated that the expression "subject to law" requires that a person must to comply with a provision of the law or that the law regulates the activity of the person subject to it. The issue and service of a bankruptcy notice does not cause a person to be "subject to" the Bankruptcy Act as it does not regulate the activity of the person. The respondent was therefore not required to vacate the office of trustee.

The appeal was dismissed with costs.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.5 Unreasonable director-related transactions - Who bears the onus of proof?

By Michael Wells, Corrs Chambers Westgarth

Crowe-Maxwell v Frost [2016] NSWCA 46 (16 March 2016), Supreme Court of New South Wales, Court of Appeal, Beazley P, Macfarlan and Gleeson JJA

(a) Summary

In this case, the New South Wales Court of Appeal considered whether payments made by a company to its directors were unreasonable director-related transactions under s. 588FDA(1) of the Corporations Act 2001 No. 50 (Cth). In deciding that the payments were not unreasonable director-related transactions, the Court of Appeal emphasised that liquidators bear the onus of proving that a transaction is an unreasonable director-related transaction under s. 588FDA(1).

(b) Facts

A company conducted a childcare business at the directors' residential premises. The directors failed to keep the company's expenses and their personal finances separate and the company paid various personal expenses the directors incurred, including personal expenditures and personal loan repayments.

The company's liquidator commenced proceedings against directors to recover the monies paid by the company to the directors, primarily on the basis that the payments were unreasonable director-related transactions within the meaning of s. 588FDA.

Section 588FF provides that, on application of a company's liquidator, the court can make orders, including an order that monies be paid to the company, if it is satisfied that a transaction of the company is voidable because of section 588FE. Section 588FE provides, relevantly, that a transaction is voidable if the transaction is an "unreasonable director-related transaction" of a company. An "unreasonable director-related transactions" is defined in s. 588FDA(1), as follows:

- "(1) A transaction of a company is an unreasonable director-related transaction of the company if, and only if:
    - (a) the transaction is:
        - (i) a payment made by the company; or
        - (ii) a conveyance, transfer or other disposition by the company of property of the company; or
        - (iii) the issue of securities by the company; or
        - (iv) the incurring by the company of an obligation to make such a payment, disposition or issue; and
    - (b) the payment, disposition or issue is, or is to be, made to:
        - (i) a director of the company; or
        - (ii) a close associate of a director of the company; or
        - (iii) a person on behalf of, or for the benefit of, a person mentioned in subparagraph (i) or (ii); and
    - (c) it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:

- (i) the benefits (if any) to the company of entering into the transaction; and
- (ii) the detriment to the company of entering into the transaction; and
- (iii) the respective benefits to other parties to the transaction of entering into it; and
- (iv) any other relevant matter.

The obligation referred to in subparagraph (a)(iv) may be a contingent obligation."

It was not disputed that s. 588FDA(1)(a) and (1)(b) were made out; the liquidator's entitlement to relief turned on s. 588FDA(1)(c).

The primary judge decided that the liquidator was not entitled to recover the monies and dismissed the liquidator's claim.

On appeal, the central question was whether the payments were unreasonable director-related transactions within the meaning of s. 588FDA.

(c) Decision

The Court of Appeal (Beazley P, Macfarlan and Gleeson JJA agreeing), dismissed the appeal and decided that the payments were not unreasonable director-related transactions because the payments were not unreasonable and the company did not suffer a detriment without a corresponding benefit. In reaching its decision, the Court of Appeal emphasised that, in an inquiry under s. 588FDA(1), the only question is whether a transaction is an unreasonable director-related transaction determined by reference to all of the relevant circumstances, and that liquidators bear the onus of proving that the transaction was an unreasonable director-related transaction.

The court drew upon the judgment of Gleeson J as it related to s. 588FDA in *Smith (in his capacity as liquidator of Action Paintball Games Pty Ltd) v Starke (No 2)* [2015] FCA 1119 (22 October 2016) where her Honour identified the following principles:

- impropriety or breach of director's duty is not necessary to establish an unreasonable director-related transaction;
- inquiry under s. 588FDA(1)(c) is concerned with the reasonableness of the company's conduct, objectively assessed;
- the inquiry under s. 588FDA(1)(c) is conducted by reference to the company's circumstances, encompassing all relevant matters;
- normal commercial practice is a relevant but not determinative matter in conducting the s 588FDA(1)(c) inquiry; and
- a transaction of derivative benefit only can still be for the benefit of the company.

The Court of Appeal agreed with the trial judge who found that one of the directors worked full time in the business and the other worked occasionally in the

business and there was no record of them receiving any wages from the company. Payment by the Company of personal expenses was "a very reasonable amount for their services and an amount that [was] favourable to the Company" according to the trial judge. The trial judge considered that the directors were entitled to payment for services provided to the company. The payments did not provide a benefit to the directors beyond their entitlement to be paid for their services. These findings were supported by the Court of Appeal which held that the payments were not unreasonable director-related transactions.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.6 Court grants orders to pay redundancy payments plus interest and a pecuniary penalty to a former bid manager despite administration
By Alexander Purcell, DLA Piper

Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2) [2016] FCA 244 (16 March 2016), Federal Court of Australia, Mortimer J

(a) Summary

In this case the Federal Court of Australia made orders for Vemco Services Pty Ltd (Verco) to pay to the applicant, Mr Milardovic (Applicant), the sum of $30,024.60, comprising a redundancy payment plus interest. This order was subject to a stay of 30 days. In addition, the Court ordered Vemco to pay a penalty of $10,000 in respect of the contravention of s. 44(1) of the Fair Work Act 2009 No. 28 (Cth) (the Fair Work Act) by failing to pay the Applicant redundancy pay under s. 119(1) of the Fair Work Act. The order was made even though Vemco was in administration. All monies payable by Vemco were prima facie recoverable by the Applicant as debts.

(b) Facts

Vemco ran a sizeable business in the preparation and conduct of bid management and tender projects. The subject of the proceedings occurred in the context of long running difficulties in relation to the Applicant's ongoing employment, including as to the conditions under which he was expected to work, the security of the position he occupied, and the attitude of the second respondent, Mr Barry, towards him. The difficulties began not long after the Applicant commenced in his bid manager position in November 2012 and continued until he went on sick leave in May 2014.

In the previous case in these proceedings, the Applicant's claim was quantified by him at in excess of $1.5 million, primarily on the basis that he would never work again. Mr Barry was wholly successful in his defence. Although Vemco was successful on the claim by the Applicant which occupied the greater amount of hearing and preparation time the Court found that Vemco had contravened s. 44(1) of the Fair Work Act by failing to pay the Applicant redundancy pay under s. 119(1) of the Fair Work Act.

Having resolved these matters, the current case was concerned with:

- the effect that Vemco being under administration had on the pecuniary penalty;
- whether a penalty should be imposed and, if so, what amount; and
- what costs orders should be made pursuant to s. 570 of the Fair Work Act.

(c) Decision

(i) The effect that Vemco being under administration had on the pecuniary penalty

Vemco submitted that in imposing any penalty, the Court should take into account that the penalty is unlikely to be provable as a debt in the liquidation of the company pursuant to s. 553B of the Corporations Act 2001 No. 50 (Cth) (Corporations Act), and that the capacity to satisfy any penalty order is a permissible consideration in imposing a penalty. Mortimer J rejected both these submissions.

First, Mortimer J found that Vemco, although in administration, was not an "insolvent company" for the purpose of s. 553B of the Corporations Act, which states:

- (1) Subject to subsection (2), penalties or fines imposed by a court in respect of an offence against a law are not admissible to proof against an insolvent company.
- (2) An amount payable under a pecuniary penalty order, or an interstate pecuniary penalty order, within the meaning of the Proceeds of Crime Act 1987, is admissible to proof against an insolvent company.

In coming to this finding, Mortimer J relied on Finkelstein J's judgment in *Commonwealth of Australia, in the matter of Leahy Petroleum * Retail Pty Ltd (Subject to Deed of Company Arrangemen t) v Leahy Petroleum * Retail Pty Ltd (Subject to Deed of Company Arrangement)* [2005] FCA 1422 (7 October 2005), in which it is stated that s. 553B does not apply to the Part of the Corporations Act dealing with administrations.

Second, Mortimer J found that the general thrust of the authorities was that the objects of general deterrence are still served by the imposition of a penalty. To support this conclusion Mortimer J cited the cases *Australian Competition and Consumer Commission v High Adventure Pty Ltd [2005] ATPR 42-091*; and *Australian Communications and Media Authority v Clarity1 Pty Ltd* [2006] FCA 1399 (27 October 2006). Mortimer J found that it is a matter for the Court's discretion how to take into account the fact (if it be proven) that a corporation is, or may be placed, in liquidation in determining whether to impose a penalty for contraventions that the court has found proven. His Honour found that the critical issue is whether in a given case the court is satisfied the imposition of a penalty is still capable of having a deterrent effect, whether specific or general. Mortimer J found that, in current case, it was appropriate to impose a penalty for reasons of both specific and general deterrence.

(ii) Whether a penalty should be imposed and, if so, what amount

The maximum applicable penalty for a breach of . 119 of the Fair Work Act, read with s. 44(1) is, relevantly, $51,000 in respect of Vemco. Mortimer J found that Vemco looked to its own business needs without any particular attention being given to the Applicant's interests, including his right to be told, clearly and at an appropriate time, what had happened to his position at Vemco. This circumstance was found to warrant some meaningful general deterrence. In taking all the circumstances into account, Mortimer J found an appropriate penalty to be $10,000. His Honour stated that this sum was to be payable to the Applicant rather than the Commonwealth given the Full Court's decision in *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4 (22 January 2016) which requires the Court to award any penalty to the successful applicant.

(iii) Costs

Although both parties had applied for an award of costs, Mortimer J refused to order costs under s. 570(1) of the Fair Work Act. Citing the Full Court's statement in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd (No 2)* [2015] FCAFC 166 (20 November 2015) at [12], his Honour noted that the explanatory memorandum commentary relating to s. 570(1) states that the provision "confirms that the [Fair Work] Act is generally a 'no costs' jurisdiction". It was not found to be relevant to costs that the Applicant rejected an offer of settlement of $80,000 "gross of taxation" approximately two months before the trial was scheduled to commence. Mortimer J was not prepared to state that the Applicant should have been on notice that his case was hopeless, nor that he should have acted to accept the offer made late in the trial process in August 2015.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.7 The possibility of a conflict of duty amounts to an abuse of the statutory demand procedure under Part 5.4 of the Corporations Act
By Simon Brown, King & Wood Mallesons

Rinfort Pty Limited v Arianna Holdings Pty Limited [2016] NSWSC 251, Supreme Court of New South Wales, Black J, 16 March 2016

(a) Summary

This case concerned an application to set aside a creditor's statutory demand under s. 459G of the Corporations Act 2001 No. 50 (Cth) (Corporations Act). The Court made the following important observations:

- a Court may retrospectively grant authority to a shareholder of a company to bring proceedings on behalf of that company to set aside a creditor's statutory demand where proper corporate authority to commence the proceedings cannot be attained, provided the application to set aside the demand has been made within the 21 day period specified by s. 459G of the Act;
- the real and sensible possibility of a director having conflicting duties to the opposing party to a creditor's statutory demand is grounds for a Court to set aside that demand under s. 459J(1)(b) of the Act; and
- a Court may set a creditor's statutory demand aside under s. 459J(1)(b) of the Act even where there is no genuine dispute as to the debt the subject of the demand or no substantial injustice would be caused by the demand being enforced.

(b) Facts

This dispute involved two family companies. The first company, Rinfort Pty Limited (Rinfort), owned residential units in eastern Sydney with an estimated value of $20 million and derived income from rent paid on those units. Mr Dana Mekler (Mr Mekler) was a shareholder and director of Rinfort. The other director of Rinfort was Mr Mekler's mother, Mrs Fernanda Mekler (Mrs Mekler). During the period of time relating to this dispute, Mrs Mekler appointed her grandson, Mr Brent Maksimovich (Mr Maksimovic), as an alternate director of Rinfort.

The second company, Arianna Holdings Pty Limited (Arianna) was directed by Mrs Mekler and Mr Maksimovich. Mr Mekler had previously been a director of Arianna but had been removed due to a dispute.

Mr Maksimovich authorised Arianna to issue a creditor's statutory demand (Demand) to Rinfort demanding $2,220,763.48 be repaid for loans issued to Rinfort in connection with two property developments (the Debt). Mr Mekler disputed the existence, terms and amount of the Debt. The description of the Debt in the Demand did not specify the interest rate on the Debt or explain and particularise the terms of the Debt in any detail.

On Mr Mekler's instructions, Rinfort made application to set aside the Demand even though it did not have the corporate authority to do so as neither Mrs Mekler nor Mr Maksimovich would authorise it. As a result, leave was also granted for Mr Mekler to make the application on behalf of Rinfort under ss. 236 and 237 of the Act.

(c) Issues

- Whether Mr Mekler should be granted leave to seek an order to set aside the Demand on behalf of Rinfort; and

- If Mr Mekler is granted leave, whether an order should be given to set aside the Demand on the basis that:
    - there is a genuine dispute as to the existence or amount of the Debt;
    - the Demand is defective and that substantial injustice would be caused to Rinfort unless the Demand is set aside; or
    - the issuing of the Demand was an abuse of the statutory demand process.

(d) Decision

(i) Whether Mr Mekler should be granted leave under section 236 and 237 of the Act to seek an order to set aside the Demand on behalf of Rinfort

The Court granted Mr Mekler leave to seek an order to set aside the Demand on behalf of Rinfort.

Black J held that the key requirements necessary for leave to be granted under s. 237 of the Act were satisfied by Rinfort and Mr Mekler, including that

- Rinfort would not itself bring the proceedings;
- Mr Mekler was acting in good faith;
- it was in the best interests of Rinfort that the proceedings be brought; and
- there was a serious question to be tried on whether the Demand was an abuse of the statutory demand procedure.

Therefore, the main issue was whether the application to set aside the Demand was filed within the time limit specified in s. 459G of the Act.

Black J found that the time limit in s. 459G of the Act is complied with if the application is filed within the specified period even if there is an issue as to whether the application was properly authorised, provided this issue is subsequently resolved by ratification or by the grant of leave under ss. 236 and 237 of the Act. In other words, the proceedings commenced by Mr Mekler on behalf of Rinfort were not a nullity due to the lack of proper corporate authority - they were merely irregular, the material point being that they had been commenced within the time limit required. Black J also found that there is no underlying policy expressed in ss. 236 and 237 of the Act which prevents a Court granting retrospective authority to a shareholder to bring proceedings in the name of a company where the board or shareholders are deadlocked and the company cannot ratify the commencement of the proceedings, provided the original application was made within the time limit required.

(ii) Whether there was a genuine dispute as to the existence or the amount of the Debt for the purposes of section 459H(1)(a) of the Act

Mr Mekler and Rinfort did not dispute any element of the Debt other than the quantum of interest charged. Black J found that this was not sufficient to establish a genuine dispute for the purposes of s. 459H of the Act, in the absence of any articulation of a challenge to the existence of the Debt or its amount. It was not enough that Mr Mekler had expressed uncertainty or lack of satisfaction as to how the amount had been calculated as the financial records of both companies to which Mr Mekler had access contained details of the Debt.

(iii) Whether there was a defect in the Demand causing substantial injustice for the purposes of s. 459J(1)(a) of the Act

Black J held that there was no substantial injustice caused by Arianna's failure to specify the interest rate on the Debt (as there was contemporaneous correspondence stating Arianna's claimed interest), or by the failure to particularise or explain the terms of the Debt.

(iv) Whether there was some other reason for the Demand to be set aside under s. 459(1)(b) of the Act

Black J reinforced the fact that the Court's power to set aside a creditor's statutory demand under s. 459(1)(b) of the Act does not involve reference to subjective notions of fairness but may be used where the demand involves conduct which is unconscionable or an abuse of process. Relevant in these circumstances, was the conflict between Mr Maksimovich's duties as an alternate director of Rinfort and his duties as a director of Arianna, with the interests of those companies being in conflict as Arianna sought to use the creditor's statutory demand procedure to have Rinfort wound-up.

Black J found that Mr Maksimovich was subject to a real and sensible possibility of conflict of duties, because he was both the decision-maker at Arianna in respect of the issue of the Demand, whilst owing duties to Rinfort as an alternate director in respect of its response to the Demand. He could not have complied with both duties where Arianna's perceived interest was to wind up Rinfort and Rinfort's interest was to the contrary. This possibility of conflict was central and not incidental to the issue of the Demand and the Demand would not have been issued without Maksimovich's actions. Black J decided that he did not have to decide whether there was an actual conflict of duties in this case - the possibility of conflict was enough to enliven the power to set aside the Demand.

(v) Outcome

Black J held that Mr Maksimovich's real and sensible possibility of conflict was enough to amount to an abuse of the statutory demand procedure under Part 5.4 of the Act and therefore enliven the Court's power to set aside the Demand under s. 459(1)(b). The Demand was set aside with costs.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.8 Third party liability for wrongful release of goods in insolvency circumstances
By Victoria Ngomba and Jason Mok, King & Wood Mallesons

Toll Holdings Ltd v Stewart [2016] FCA 256 (15 March 2016), Federal Court of Australia, Rares J

(**a) Summary**

Shenzen MTC Co Ltd (MTC) and Dick Smith Electronic Pty Ltd (Dick Smith) entered into an agreement to supply electronic goods to Dick Smith. Toll Holdings Ltd (THL) and its subsidiaries, including Toll Global Forwarding (Hong Kong) Limited (TGF) were contracted by Dick Smith to provide freight forwarding services (THL and TGF together referred to as "Toll"). ACFS Port Logistics Pty Ltd ("ACFS") was separately contracted by Dick Smith as a cartage and container unpacker, to receive goods from Toll and carry them to its Australian Custom's bonded warehouses. On 4 January 2016, administrators and receivers were appointed to Dick Smith. In light of these events, MTC, via emails sent on 5 and 7 January 2016, sought to hold off delivery of certain cargo in transit to Dick Smith.

The Court held, among other things, that while MTC had given effective notice to Toll that it was exercising its right of stoppage in transitu under the Sale of Goods Act 1923 No. 1 (NSW) (the Sale of Goods Act), Toll converted the cargoes and they ceased to be in transit when ACFS took possession of the cargos.

The Court also rejected Toll's application to interplead in the proceedings under rule 18.01 of the Federal Court Rules 2011 No. 134 (Cth) (Federal Court Rules) as Toll did not maintain a strictly neutral position in that, among other things, Toll became open to an action for conversion when, despite MTC's instructions, it released the cargoes to ACFS as agent of Dick Smith.

(b) Facts

In March 2015, Dick Smith entered into an overseas vendor trading agreement with MTC for the supply of electronic goods. From 1 June 2015, it was agreed that MTC would procure "telex release" bills of lading to be sent to Dick Smith by email in lieu of MTC requiring original bills of lading to be presented in order to obtain delivery of the goods at their destination.

On 30 March 2015, Dick Smith also entered into an agreement with Toll to provide freight forwarding services to Dick Smith. In November and December 2015, Dick Smith placed 10 purchase orders with MTC for seven cargoes, consisting of 17 containers loaded with television sets. MTC shipped the seven cargoes to various Australian ports between 21 and 30 December 2015, causing Dick Smith to receive seven "telex release" bills for those seven cargoes between 28 December 2015 and 4 January 2016.

On 4 January 2016, Dick Smith went into voluntary administration and receivers and managers were also appointed. On 5 January 2016, MTC emailed Toll instructing Toll to "hold" delivery of the cargoes and to help "recall" the cargoes. Toll responded that the cargo under one bill of lading had been released (the "1795 bill") but the cargoes covered by the other six bills were "on hold" (the "six bills").

On 7 January 2016, MTC took further action to seek the return of the goods by instructing Toll to change the telex release bills issued in respect of these cargoes into original bills of lading and to change the consignee from Dick Smith to "to order". On the same day Toll issued original "to order" bills in respect of the unreleased six bills.

Between 7 and 18 January 2016, Toll issued electronic delivery orders to ACFS to enable it to pick up the six bills and the 1795 bill before the expiry of the 72 hours' free storage offered by the Australian stevedores. ACFS then carried the containers into its Australian Customs' bonded warehouses.

After the receivers announced on 25 February 2016 that Dick Smith stores would close in about eight weeks, on 26 February 2016, Toll sought to interplead under rule 18.01 of the Federal Court Rules in what Toll characterised was a dispute between Dick Smith and MTC as to which party was entitled to take delivery of the 14 containers carried under the six bills held by ACFS in Customs bond. Dick Smith cross claimed for orders that it was entitled to delivery of the cargoes carried under the six bills. MTC cross claimed for orders that it had the right to stop those cargoes in transitu and the cargoes be delivered up to it and, if it did not have that right, MTC sought damages against Toll for conversion of those six cargoes. MTC also sought damages for conversion of cargo carried under the 1795 bill.

(c) Decision

(i) Whether Toll and MTC should have leave to proceed

During the administration of a company:

- section 440B of the Corporations Act 2001 (Cth) (Corporations Act), among other things, restricts a third party's ability to enforce a security interest; and
- section 440D of the Corporations Act imposes a stay on proceedings,

except with the administrator's consent or with leave of the Court. Rares J held that it was in the interests of justice that Toll and MTC have leave to proceed pursuant to these provisions.

Rares J rejected Dick Smith's argument that granting such leave would give some undue preference to either Toll or MTC or subvert the object of Pt 5.3A of the Corporations Act 2001 No. 50 (Cth). Rares J also affirmed that the Court's statutory power to grant leave to proceed under ss. 440B and 440D is unqualified.

His Honour noted, among other things, that each of Toll and MTC was a proper and necessary party to the controversy with Dick Smith over the rights in, and to, the disputed cargoes. The controversy required urgent resolution to allow the parties to know their rights in respect of the cargoes. The outcome of the matter was also unlikely, on the evidence and having regard to the commercial decision of the receivers to close down Dick Smith's business, to affect any return that unsecured creditors may be able to consider when evaluating whether an administration should occur.

(ii) Whether MTC gave effectual notice to Toll of stoppage in transitu

The Court held that MTC gave effectual notice to Toll of stoppage in transitu for the purposes of ss. 42(1), 46, 47 and 48 of the Sale of Goods Act. These provisions, among other things, give the seller of goods the right to stop goods in transit ("stoppage in transitu") if the buyer becomes insolvent. This right ceases upon the goods being delivered to the buyer or if the buyer's agent take delivery of them. In order to give effect to its right to stoppage in transit, the seller can either take possession of the goods or give notice to the carrier or other bailee in possession of the goods. Upon receiving notice, the carrier or the bailee must redeliver the goods to, or according to the directions of, the seller.

The Court found that MTC's email of 5 January 2016 to Toll was a clear instruction by MTC (as vendor) to the bailee of the goods (being Toll as the issuer of the bills of lading) to hold the goods at MTC's direction. Significantly, both MTC and Toll were by then aware of Dick Smith's changed financial circumstances, demonstrated by the appointments of the administrators and receivers on 4 January 2016.

The Court also held that s. 48(1) of the Sale of Goods Act only required a communication to be "in time to prevent a delivery to the buyer" and MTC's instruction to "hold" the cargoes, if acted on by Toll, would have prevented delivery of the goods to Dick Smith. Secondly, the Court held that MTC's right, as vendor, to effect a stoppage in transitu was a right to retake possession of the goods from whoever who then had possession of the goods, including from Toll, as the bailee for delivery to the purchaser. That is, the goods may be stopped in transitu even though the carrier was the purchaser's agent to accept delivery and pass the property in the goods. The Court also rejected Dick Smith's argument that MTC's notice of stoppage through the emails was ineffectual because it did not direct Toll that it wished to retake possession of the goods, but merely directed Toll to "hold" them. The Court noted that the email exchange on 5 January conveyed that MTC had requested, and Toll had understood, that MTC would take possession of the cargoes for MTC and the email exchange on 7 January to issue bills of lading instead of telex release bills could have no other meaning other than evidencing MTC's intention to retake the cargoes.

(iii) Whether Toll lost possession of the cargoes and converted the cargoes

The Court rejected MTC's argument that transit for the purposes of the Sale of Goods Act continued after ACFS took the cargoes from the wharves between 8 and 18 January 2016. The Court noted, among other things, that Toll did not communicate to ACFS that ACFS was to hold the cargoes for MTC or anyone other than Dick Smith and releasing the cargoes to ACFS was a violation of MTC's instruction that Toll "hold" them. By issuing an unqualified, unconditional delivery order to ACFS after 5 January 2016, Toll converted the cargoes by giving up possession of the cargoes to Dick Smith or to ACFS as Dick Smith's agent. The Court also found that MTC had also established that Toll had converted the cargo the subject of the 1795 bill as Toll issued electronic delivery orders for that cargo on 7 January, notwithstanding that Toll had informed MTC on 5 January 2016, that this cargo had already been released.

(iv) Whether Toll could interplead

Rares J held that Toll was not entitled to interplead in the proceedings under rule 18.01 of the Federal Court Rules as Toll did not maintain a strictly neutral position and had become an active party to the dispute by, among other things, issuing the order bills of lading at MTC's request and delivering or releasing the cargoes to ACFS as agent of Dick Smith and becoming open to being sued for an action of conversion.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.9 Termination for wilful misconduct: a genuine dispute under section 479H
By James Maguire, Ashurst

Valleyarm Digital Ltd v Shanaaz Peake [2016] VSC 98, Supreme Court of Victoria, Randall AsJ, 15 March 2016

(a) Summary

The plaintiff, Valleyarm, had terminated its consultancy agreement (Agreement) with the defendant Peake, who provided bookkeeping and other services. The scope of the Agreement was also in dispute. Peake served a statutory demand on the company for outstanding invoices payable under the Agreement. Valleyarm made an application to set aside the statutory demand pursuant to s. 479G of the Corporations Act 2001 No. 50 (Cth) (the Act).

Randall AsJ held that the matter was to be considered in much the same way as an interlocutory proceeding. In other words, whether there was a serious question to be tried.

His Honour was satisfied that there was a genuine dispute because Peake may have breached duties under the Agreement. There was no need for the court to resolve conflicts in evidence. It was enough to identify that if relevant evidence was accepted by a Court, the contended for conduct would be established.

Ultimately Randall AsJ did not find sufficient causation to offset losses alleged to be attributable to Peakes' conduct. However, a payment Valleyarm had already made to Peake was offset.

(b) Facts

Valleyarm Digital Ltd ('Valley Arm') operates a digital music distribution business. In 2010 it engaged Shanaaz Peake ('Peake'). The Agreement:

- described the position as bookkeeper; and
- contained an "exclusion clause" which protected Peake from liability for losses arising from any acts or omissions in services provided by Peake except where there was wilful misconduct or gross negligence.

A further agreement was made on 1 April 2013 which, according to Valleyarm, expanded the role performed by Peake. The agreement provided that:

- the agreement could be terminated with 30 days notice;
- invoices were to be rendered monthly for compensation of $4167; and
- reimbursement for out of pocket expenses would be made on the 5th day of the following month.

In February 2014 Valleyarm terminated Peake's services. The grounds for termination included that Peake had:

- failed to upload royalty information to client accounts;
- blocked users from their accounts;
- failed to resolve outstanding royalty payments to clients;
- removed invoice entries from Valleyarm's accounts, including for $89,452.19 payable to priority client Smartartists; and
- failed to provide accurate information to the board of Valleyarm.

After termination Peake maintains that she was asked to, and did, continue with some work on a special project. Peake later served a statutory demand on Valleyarm for the sum of $38,542.59 in unpaid consultancy fees.

(**i) Relevant law**

Where a company has a statutory demand served on it, it may apply to a court for an order to have the demand set aside under the process outlined in s. 479G of the Act. To make such an application, a company must show either that:

- there is a genuine dispute as to the amount due; and/or
- the company has an offsetting claim.

(ii) Breach of duty

Valleyarm claimed that Peake's acts and omissions had breached the terms of their agreement and amounted to gross negligence and wilful misconduct. Valleyarm maintained that, as well as removing invoices, Peake also failed to provide a full and detailed schedule of company creditors as requested by the Company Secretary (Georgiou) in July 2013. Accordingly Peake was not entitled to the amounts in the statutory demand.

Peake argued that she had been instructed to remove the invoices from the company records by a former director, McKenzie, who was a director from May 2012 to December 2013. Peake also maintained that the removal of the Smartartists invoice was in fact brought to the attention of company officers after McKenzie had gone.

(iii) Causation of loss

Valleyarm submitted that Peake's conduct had caused clients to discontinue their relationships with Valleyarm, occasioning losses of approximately $200,000. In particular, Georgiou deposed that, but for the failure to pay the Smartartists tax invoice, Smartartists would have renewed their royalty agreement with Valleyarm beyond 2016.

(iv) Evidence

Valleyarm was able to produce evidence from IT personnel that user accounts had been blocked. Further, a company audit conducted after Peake had left Valleyarm showed that royalties due to several artists had been removed from records and books of account in late 2012, November and December 2013.

Peake produced correspondence from Smartartists' solicitor independently corroborating her position that she had not caused their termination of the royalties agreement.

(c) Decision

(i) What is a "genuine dispute"?

Randall AsJ held that the meaning of "genuine dispute" raises much the same considerations as the interlocutory standard of "a serious question to be tried". It is not the role of the court to embark on an extended inquiry as to the merits of the dispute or the likely result of it. Rather, "once...even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow" (Barrett J, *Solarite Airconditioning Pty Ltd v York International Australia Pty Ltd* [2002] NSWSC 411 (14 May 2002)). Not surprisingly, the onus of establishing whether this threshold has been crossed falls on the party bringing the offsetting claim.

(ii) Breach of duty

The scope and discharge of Peake's duties was "hotly contested". In the circumstances Randall AsJ was satisfied that the exclusion clause could operate to impose liability on Parke for losses arising out of Peake's removal of the

Smartartists accounting file. It was enough to identify that if Valleyarm's evidence was ultimately accepted by a court, after the parties had an opportunity to examine and cross-examine, then breach of duty could be established.

(iii) Causation

It was accepted that Smartartists terminated their agreement after serving a statutory demand on Valleyarm for unpaid invoices, but Randall AsJ was still tempted to dismiss Valleyarm's evidence as fanciful and their estimation of loss as "bluster". Nevertheless, there was sufficient corroborating evidence as to the scope of Peake's duties to raise issues of responsibility for monitoring invoice entries and payments.

(iv) Standard of proof

The fact that there were conflicts in the evidence of the parties and possible issues of credibility was of limited import. Randall AsJ held that it was not the court's role "to prefer evidence from one party over the other. It is sufficient, in the absence of a determination that any such evidence is fanciful or futile, to note that there is a conflict of evidence."

(v) Liability

Randall AsJ awarded Peake $30,208.59 plus costs on a standard basis. An offset of $9,935 was allowed on the basis of invoices already paid by Valleyarm. No offset for breach of duty was allowed.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.10 Statutory deadline for admission of securities for quotation by ASX extended by the Court
By Susian Teh, ClaytonUtz

In the matter of G8 Communications Ltd [2016] FCA 297, Federal Court of Australia, Barker J, 11 March 2016

(a) Summary

ASX-listed Leopard Resources NL was the vehicle for a backdoor listing of a business called G8 International Connect. Leopard Resources NL changed its name to G8 Communications Ltd ("G8"). Due to miscommunication, ASX failed to admit for quotation the new securities which were to be issued by G8 as part of the backdoor listing before the expiry of the statutory deadline imposed by ss. 723(3)(b) and 724(1)(b)(ii) of the Corporations Act 2001 No. 50 (Cth) ("the Act"). G8 sought orders from the Court extending the date by which the securities must be listed. The Court made declaratory orders extending the deadline, to prevent substantial injustice to G8 and its shareholders which would have occurred had the statutory deadline rendered the issue of the new securities void.

(b) Facts

Formerly known as Leopard Resources NL, the plaintiff, ASX-listed G8 Communications Ltd ("G8"), was a mineral exploration company which was in the process of effecting a backdoor listing for G8 International Connect Inc, a wireless technology business. The backdoor listing was conditional on G8 completing a $4.5m capital-raising to fund the acquisition of G8 International Connect Inc. The capital-raising involved the issue of new shares in G8 pursuant to a prospectus, with those shares to be quoted on ASX.

According to Barker J, correspondence between ASX and G8's corporate advisors and solicitors demonstrated a "lack of understanding" of the statutory significance of the last date for the new securities to be quoted by ASX. On the final date for quoting the securities, ASX indicated to G8 that although the conditions for admission were satisfied, the securities would not be quoted until approximately one week after the statutory deadline. This prompted G8 to seek a declaration from the court for relief from ss. 723(3)(b) and 724(1)(b)(ii) of the Act.

(i) Issues

ASX's failure to quote the securities before the statutory deadline rendered the issue of the securities void, and required G8 to refund subscription monies under s. 723(3)(b) of the Act. G8 therefore sought a declaration from the Court to exercise its powers under:

- section 1322(4)(a) of the Act, to declare that ASX's failure to admit the securities to quotation did not void the issue of securities; and
- section 1322(4)(d) of the Act, to extend the period for admitting the securities to quotation.

Barker J also considered G8's use of the subscription money that G8 was holding on trust under s. 722(1) of the Act, and whether this gave rise to a breach of G8's trust obligations if that trust was "resurrected" in circumstances where the new securities were invalidated by ASX's failure to quote those securities before the statutory deadline.

(c) Decision

(i) Statutory deadline for quotation of new securities by ASX

The Court exercised its powers under ss. 1322(4)(a) and (d) and declared that the issue of securities was not rendered void because the securities were not admitted to quotation before the statutory deadline. The court also declared that the statutory deadline was extended.

The statutory deadline was imposed by s. 723(3)(b) of the Act:

Section 723(3): "If a disclosure document for an offer of securities states or implies that the securities are to be quoted on a financial market (whether in Australia or elsewhere) and:

- (a) an application for the admission of the securities to quotation is not made within 7 days after the date of the disclosure document; or
- (b) the securities are not admitted to quotation within 3 months after the date of the disclosure document;

then

- (c) an issue or transfer of securities in response to an application made under the disclosure document is void; and
- (d) the person offering the securities must return the money received by the person from the applicants as soon as practicable."

To exercise its powers under ss. 1322(4)(a) and (d), the Court must first be satisfied of s. 1322(6)(c) which provides that those powers cannot be exercised unless the court is satisfied that "no substantial injustice has been or is likely to be caused to any person."

The Court concluded that without the granting of this "curative order" there would be a substantial injustice to the parties on the basis of the:

- significant corporate and legal expense to G8 in having to refund capital raised under s. 723(3)(d) of the Act;
- disadvantage to the existing shareholders of G8 should their shares not be reinstated;
- inability of new G8 shareholders to access funds that should be repaid to them or used to purchase the shares that had been admitted for quotation.

The wider circumstances favoured granting an extension of time under s.1322(4)(c) because:

- the extension sought was for a relatively short period of time (11 to 18 days);
- there was a "genuine and good reason" for the extension, being confusion by both ASX and G8's advisors as to the last day for quotation;
- there was an absence of "disentitling behaviour" by G8, which had complied with all ASX's requirements; and
- neither ASIC or ASX opposed an extension.

Despite the Court granting relief, ASIC nonetheless issued a $225 fine for G8's failure to notify ASIC of its change of name and company type within the 14-day statutory deadline (G8 had missed this deadline because it was waiting for the new securities to be quoted on ASX). The Court indicated that this fine showed that "the plaintiff's contravention has already been addressed by a fine and, further, ASIC has obviously not considered this to be a reason to oppose this application."

(ii) Subscription monies held on trust under section 722(1)

The Court concluded that there had not been any breach of the statutory trust under s. 722(1) of the Act, and that the trust created was "expressly limited in time and application".

Section 722(1) provides: "If a person offers securities for issue or sale under a disclosure document, the person must hold:

- (a) all application money received from people applying for securities under the disclosure document; and
- (b) all other money paid by them on account of the securities before they are issued or transferred;

in trust under this section for the applicants until:

- (c) the securities are issued or transferred; or
- (d) the money is returned to the applicants."

The Court held that the funds ceased to be trust funds upon the issue of the new shares "even if [the new shares] later become invalid." Section 722(1) does not require securities be admitted to quotation nor is it concerned with whether issue of those securities is voided under s. 723(3)(c).

Further, even if the issue of securities was rendered void, the Court held that this does not cause any trust to resurrect around the funds. Rather, s. 723(3)(d) only creates a debt obligation on the holder of the subscription money to return the money to each applicant for shares, rather than to continue to be bound by trust obligations.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.11 Whether a liquidator of a former corporate trustee can be appointed receiver and manager of trust property where there is no trustee
By Elly Phelan, MinterEllison

QBE Insurance (Australia) Limited v WA Metal Recycling Pty Ltd [2016] FCA 238, Federal Court of Australia, Farrell J, 10 March 2016

(a) Summary

In this case Farrell J appointed a liquidator of a former corporate trustee as receiver and manager of the business and property of the trust. In doing so, Farrell

J had to weigh up whether it would be just or convenient to make such an order pursuant to s. 57(1) of the Federal Court of Australia Act 1976 No. 156 (Cth) (the Act).

(b) Facts

(i) Background

WA Metal Recycling Pty Ltd (WA Metal) was incorporated on 26 June 2008. WA Metal operated a metal recycling business as the corporate trustee of the Scoby-Smith Family Trust (the Trust). Mr Cameron Scoby-Smith (Mr Scoby-Smith) was the director of WA Metal.

On 27 June 2008, WA Metal and Ms Cara Scoby-Smith (Ms Scoby-Smith) were appointed as trustees of the Trust pursuant to a trust deed dated 27 June 2008 (Trust Deed). On 8 December 2015, WA Metal (expressly in its capacity as trustee of the Trust) entered into a document entitled "Binding Heads of Agreement" with Auricom Pty Limited (Auricom), Aurigen Group Limited (Aurigen), and Mr Scoby-Smith (Sale Agreement).

(ii) The Trust

The Trust was a discretionary trust. The named income beneficiaries were Mr and Ms Scoby-Smith and their children. The Trust Deed stated that "if the Trustee being a corporation has a . liquidator appointed . to it then in each such case the office of Trustee shall ipso facto become vacant." As a result, WA Metal no longer held the office of trustee but did retain a right of indemnity in relation to liabilities incurred as trustee.

Mr Hurst, the official liquidator, believed that there was no longer a current trustee of the Trust as there was some evidence suggesting that Ms Scoby-Smith had retired as trustee of the Trust and had renounced her rights as beneficiary.

(iii) Sale Agreement

Pursuant to the Sale Agreement, WA Metal agreed to sell the scrap metal recycling business which it conducted under the business name "WA Metal Recycling" and associated assets for:

- a non-refundable cash deposit of $100,000 (GST inclusive);
- the issue of 684,931 fully paid ordinary shares in Aurigen to WA Metal at a deemed issue price of 25 cents per share;
- a cash payment of $500,000 (including GST) to be paid on the date of the settlement of the sale; and
- the issue of certain "Milestone Shares", being shares in Aurigen.

Mr Hurst deposed that he had been advised by the financial controller of the purchaser that the cash deposit had been paid and he was awaiting further information in respect of whether the shares had been issued.

The Sale Agreement also included a term that Mr Scoby-Smith and Auricom were to negotiate in good faith the terms upon which Mr Scoby-Smith would be employed by Auricom to assist with the site and running of the business.

(iv) Proceedings

On 17 February 2016 the Federal Court ordered that WA Metal be wound up in insolvency and appointed Mr Hurst as liquidator. Although settlement of the Sale Agreement was not scheduled until 31 March 2016, Auricom was already in possession of the WA Metal recycling business. Given this, Mr Hurst was concerned that he was unable, in his capacity as liquidator, to protect and preserve those assets effectively and they may become unaccounted for, especially if there was no trustee of the Trust.

On 25 February 2016, Mr Hurst applied to the Federal Court for orders appointing him as receiver and manager without security of the business and property of the Trust.

Mr Hurst also sought orders that, as receiver of the Trust business and property, he have the powers that a liquidator has in respect of the business and property of a company, including the power to effect the sale of the business and assets of the Trust and the power to pay dividends to the creditors of WA Metal. He also sought an order that the receiver be paid remuneration on a time basis together with reasonable out of pocket expenses.

(c) Decision

Section 57(1) of the the Act empowers the Court to appoint a receiver "...on such terms and conditions as the Court thinks fit ... in any case in which it appears to the Court to be just or convenient so to do".

Farrell J noted that both Mr and Ms Scoby-Smith consented to Mr Hurst being appointed as receiver and that Mr Hurst viewed the sale contemplated by the Sale Agreement as appropriate and in the best interests of the creditors and beneficiaries of the Trust.

Farrell J subsequently found that it was just and convenient to appoint Mr Hurst as receiver of the Trust business and property, ultimately ordering that:

- Mr Hurst (Receiver) be appointed without security as receiver and manager of the business and property of the Trust (Trust Business);
- the Receiver be given the powers that a liquidator has in respect of the business and property of a company under the Corporations Act 2001 No. 50 (Cth), including the power to do all things necessary or convenient to effect the sale of the Trust Business and the power to pay dividends to the

creditors of WA Metal incurred in its capacity as trustee of the Trust including the proceeds of the sale of the Trust Business;
- the Receiver provide any surplus proceeds or remaining assets of the Trust to any incoming trustee or beneficiaries and retire as Receiver following the sale of the Trust Business, and the distribution of the sale proceeds be given to the creditors of WA Metal;
- the Receiver be paid remuneration on a time basis together with reasonable out of pocket expenses capped at $55,000 (exclusive of GST) (and the Receiver be given liberty to apply for further orders if that cap is reached);
- the Receiver's cost of the Court application be costs and expenses in the liquidation of WA Metal; and
- the Receiver not distribute the assets of the Trust to beneficiaries without further direction of the Court.

Farrell J also considered that there was no conflict of duty which would prevent Mr Hurst acting in the capacity of both liquidator of WA Metal and Receiver of the Trust Business as Mr Scoby-Smith as appointer had the power to appoint a new trustee and in lieu of doing so consented to Mr Hurst's appointment as Receiver. Farrell J relied upon the decision of *Bastion v Gideon Investment Pty Limited* [2000] NSWSC 939 (6 October 2000) where Austin J found that it was appropriate to appoint a liquidator of a corporate trustee as receiver and manager where there was sufficient doubt as to the liquidator's capacity to confer good title on a purchaser.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.12 Court dismisses application to set aside a statutory demand
By Elliott Cook, Ashurst

Palmer Petroleum Pty Ltd v BGP Geoexplorer Pte Ltd [2016] QSC 33, Supreme Court of Queensland, Boddice J, 4 March 2016

(a) Summary

Palmer Petroleum Pty Ltd (Palmer Petroleum) made an application pursuant to s. 459G of the Corporations Act 2001 No. 50 (Cth) (the Act) to set aside a statutory demand issued to it by BGP Geoexplorer Pte Ltd (BGP) for payment of a debt in the sum of USD$16,726,575.03.

Palmer Petroleum argued that, for the purposes of s. 459H of the Act, there was a genuine dispute between the parties in relation to the performance by BGP of its contractual obligations which could form the basis of a future offsetting claim by Palmer Petroleum against BGP. Further and alternatively, it was argued that the arbitration clause contained in the contract between the parties provided "some other reason" why the statutory demand should be set aside under s. 459J(1)(b) of the Act.

Boddice J of the Queensland Supreme Court dismissed Palmer Petroleum's application. His Honour found that the material before the Court did not support the contention that there was a "genuine dispute" over BGP's contractual performance. Rather, his Honour found that Palmer Petroleum's failure to pay BGP was due to its own financial issues and that its assertions regarding BGP's performance of its contractual obligations were a "cynical attempt to deflect responsibility for a debt due and owing" to BGP. Accordingly, any alleged dispute was not "genuine". In addition, his Honour held that the arbitration clause in the contract did not provide a reason for setting aside the statutory demand. Palmer Petroleum had not established that there was a dispute between the parties that should properly be the subject of arbitration in accordance with the provision.

(b) Facts

In July 2010, Palmer Petroleum and BGP entered into a written agreement under which BGP agreed to survey petroleum resources within three tenements held by Palmer Petroleum in the Gulf of Papua and provide Palmer Petroleum with survey data and a comprehensive leads and prospects inventory in respect of each tenement. The agreement also contained a clause which entitled Palmer Petroleum to withhold payment from BGP on account of unsatisfactory performance of the agreement and failure to remedy defects. A replacement deed was entered into in September 2011 under which BGP unconditionally and irrevocably agreed that the total price payable by Palmer Petroleum would not exceed USD$35 million.

Between March 2011 and March 2012, BGP issued Palmer Petroleum with multiple invoices for work done. Palmer Petroleum made partial payment of the total amount of these invoices. In May 2012, BGP delivered its report to Palmer Petroleum who hired a third party to examine and assess the report. In October 2012, an updated payment schedule was agreed between the parties. Palmer Petroleum made one payment under this updated schedule in November 2012 but missed its second payment in March 2013. Palmer Petroleum apologised to BGP by email for missing this payment. The email stated that Palmer Petroleum was intending to pay BGP from funds it had expected to be made available from Mineralogy Pty Ltd (Mineralogy) (an affiliated company). Mineralogy was, in turn, expecting those funds to come from CITIC Pacific Ltd (Citic Pacific) under unrelated contractual arrangements. Those funds had not become available.

In April 2013, the parties entered into an amended payment plan under which Palmer Petroleum agreed to pay all outstanding amounts by the end of May 2013. Palmer Petroleum failed to pay the outstanding amounts by the due date. After being asked by BGP for payment, Palmer Petroleum again apologised by email on 8 June 2013 and cited its cash flow problems as caused by CITIC Pacific's failure to pay Mineralogy.

On 18 June 2013, Palmer Petroleum's legal representatives wrote to BGP complaining of the services rendered by BGP under the agreement and rejecting

BGP's claim for all outstanding amounts under the amended payment plan. By further email dated 1 August 2013, Palmer Petroleum stated that the work undertaken by BGP was not solely for the benefit of Palmer Petroleum, and BGP's report had understated the true position to the detriment of Palmer Petroleum and to the benefit of BGP and/or third parties.

On 15 December 2015, BGP sent Palmer Petroleum a statutory demand for the amount of USD$16,726,575.03. Palmer Petroleum did not pay and applied to have the demand set aside.

(c) Decision

Boddice J dismissed Palmer Petroleum's application to set aside BGP's statutory demand. In doing so, his Honour rejected Palmer Petroleum's claim that there was a "genuine dispute" as to whether Palmer Petroleum had an offsetting claim against BGP for failing to perform its contractual obligations. His Honour also rejected the contention that the arbitration clause provided a reason to set aside the demand.

(i) Genuine dispute and offsetting claim

This aspect of Palmer Petroleum's argument fell to be considered under s. 459H of the Act. That section provides that the Court must set aside a statutory demand if the "substantiated amount" is less than the statutory minimum and it is satisfied that there is:

- a genuine dispute between the parties about the existence or amount of a debt to which the demand relates; or
- that the company (i.e. Palmer Petroleum) has a genuine offsetting claim.

The "substantiated amount" is any amount admitted by the company minus any alleged offsetting amount.

Boddice J had to determine whether Palmer Petroleum's contention that BGP had failed to perform its contractual obligations gave rise to a "genuine" dispute between the parties or a potential offsetting claim. Palmer Petroleum's director, Mr Palmer, deposed that he was disappointed with the results and interpretation provided by BGP in its report and, after reviewing the report given by the third party assessor, had decided not to make the payments to BGP. Palmer Petroleum submitted that the disparity between the two reports gave rise to a suspicion that BGP had not properly performed its contractual obligations.

Boddice J reviewed the authorities on when there will be a "genuine dispute" or an offsetting claim under s. 459H of the Act, with particular reference to Dodds-Streeton JA's decision in *Rhagodia Pty Ltd v National Australia Bank Ltd* [2008] VSC 295 (14 August 2008). These authorities refer to the need for an applicant to show that the alleged dispute or offsetting claim has "sufficient objective existence and prima facie plausibility to distinguish it from a merely spurious claim, bluster or assertion, and sufficient factual particularity to exclude the merely fanciful or futile". It involves a plausible contention requiring investigation akin to the "serious question to be tried" question in interlocutory injunction applications. It is, however, inappropriate for a court to engage in an in-depth examination or determination of the merits of the alleged dispute and there is no need to embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied upon.

Ultimately his Honour held that there was no genuine dispute between the parties as to the existence or amount of the debt, nor was there a genuine offsetting claim. Far from disputing the obligation to pay the amounts, Palmer Petroleum had entered into replacement deeds and repayment plans, and had twice apologised for failing to make payments citing cash flow problems. Against this background, a belated attempt to avoid those payments by claiming that BGP had failed to perform its contractual obligations was a "cynical attempt by Palmer Petroleum to deflect responsibility" for payment. The correspondence sent by Palmer Petroleum to BGP was entirely inconsistent with Mr Palmer's assertion that he was disappointed with BGP's report.

Whilst the timing of raising genuine contractual rights does not deny an applicant the right to raise those rights, the circumstances in which such a claim is first raised are relevant to the question of "genuineness". The dispute and offsetting claim in this case did not have sufficient objective existence and lacked sufficient actual particularity.

(ii) The arbitration clause

This aspect of Palmer Petroleum's argument invoked s. 459J(1)(b) of the Act, which provides that the Court can set aside a statutory demand if it is satisfied that there "is some other reason why the demand should be set aside". Palmer Petroleum argued that the arbitration clause contained in the agreement between the parties provided such a reason.

Boddice J identified two cases which had previously considered this argument: *SMEC International Pty Ltd v CEMS Engineering Inc* [2001] NSWSC 459 (5 June 2001), and *Arris Investments Pty Ltd v Fahd* [2010] NSWSC 309 (1 April 2010). In the former, Austin J observed that the question was a 'little artificial' because the application of the arbitration clause will likely arise for consideration only if there is a dispute, and once there is a genuine dispute the Court will set aside the statutory demand on that ground. In Arris, Palmer J noted Austin J's observation but went on to say that "where a dispute is not resolvable at a glance. or where there is no conduct making it unconscionable for one party to invoke an arbitration", these are factors which "should carry great discretionary weight in considering whether the Statutory Demand should be set aside under s. 459J(1)(b)".

Having noted these authorities, Boddice J held that the existence of the arbitration clause in the agreement between Palmer Petroleum and BGP did not provide "some other reason" to set aside the statutory demand. If the arbitration clause was to be properly engaged "there must be shown to exist a dispute between the parties

in relation to a matter properly the subject of the arbitration clause". Section 459J(1)(b) of the Act provides a discretion to prevent abuses of process and to ensure the statutory demand process is not itself improperly used by parties to escape an arbitration clause. That was not the case here. There was no dispute between the parties that properly enlivened the arbitration clause and Palmer Petroleum's argument was merely an attempt to avoid the effects of the statutory demand in circumstances where Palmer Petroleum's failure to pay BGP was due to its own financial issues.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.13 Court grants leave under section 236 of the Corporations Act for a director to bring an action in the name of the company against another director
By Neil Joubert, Herbert Smith Freehills

In the matter of Head Quarters (WA) Pty Ltd v Head Quarters (WA) Pty Ltd as trustee for the Three Flights Up Unit Trust [2016] FCA 171, Federal Court of Australia, Edelman J, 1 March 2016

(a) Summary

Edelman J in the Federal Court found in favour of an applicant wishing to bring proceedings in the name of the company against his fellow director and shareholder under s. 236 of the Corporations Act 2001 No. 50 (Cth) (the Act). The key question turned on whether, under s. 237(2)(c) of the Act, it was in the best interests of the company for the action to be brought. In this particular case, an important consideration to answer this question was whether the company would have a reasonable chance of success in an action against the director.

His Honour found that the company did have a reasonable chance of success, and in doing so reinforced the continued veracity of the rule in Keech v Sanford whereby the principal in a fiduciary relationship is the only person in the world not able to take the benefit of the property held for the benefit of the fiduciary. Justice Edelman also noted that the likely remedy available to the company in the possible future action would be a stripping of the profits made by the future respondent as a result of the diversion of the opportunity and the actual profit from the company.

(b) Facts

Mr Mali is a co-director and shareholder of Head Quarters (WA) Pty Ltd (Head Quarters) with Ms Mubarakai. Mr Mubarakai, the husband of Ms Mubarakai, is the sole shareholder and director of Victoria Ventures Pty Ltd (Victoria Ventures).

Head Quarters is the trustee for the Three Flights Up Unit Trust. Mr Mali and Ms Mubarakai held shares in Head Quarters at a ratio of 49:51 respectively.

In June 2015 Head Quarters, in its role as trustee, acquired the rights to operate a temporary Sumo Salad franchise store at the Lady Cilento Children's Hospital in Queensland (Hospital). The temporary store was very profitable.

The temporary store agreement provided that Head Quarters had a first right of refusal to purchase the franchise to operate any permanent Sumo Salad store in the Hospital. Ms Mubarakai withdrew $28,000 from the bank account of Head Quarters in order to secure the lease for the permanent Sumo Salad store in the Hospital.

Ms Mubarakai then informed Victoria Ventures that Head Quarters would not exercise its right of first refusal under the temporary store agreement, and also advised Sumo Salad of this decision and that Victoria Ventures would instead purchase the franchise for the permanent store. Victoria Ventures then used the $28,000 withdrawn by Ms Mubarakai to secure the lease.

Only after this process did Ms Mubarakai inform Mr Mali that the permanent store would no longer be part of the Three Flights Up Unit Trust. Mr Mali requested from Ms Mubarakai that Head Quarters purchase the permanent franchise, however she refused the request.

In his application to the Federal Court, Mr Mali sought an order granting him leave under s. 237 of the Act to bring an action against Ms Mubarakai on behalf of Head Quarters under s. 236 for various breaches of her duties to Head Quarters considering she had diverted an opportunity and profit from Head Quarters to Victoria Ventures.

(c) Decision

Edelman J considered the application on the papers. The application was not contested by Ms Mubarakai or her husband.

Section 236 of the Act allows a person to bring proceedings on behalf of a company where that person is, relevantly, a member of that company (subsection (1(a)), and the person has been granted leave by the Court under s. 237 of the Act (subsection1(b)).

His Honour noted there is no question as to Mr Mali's satisfaction of subsection 1(a) as he is both a shareholder and director of Head Quarters. That means the Court must determine whether to grant leave under s. 237 of the Act.

The relevant part of s. 237 of the Act provides:

Applying for and granting leave

- (1) A person referred to in paragraph 236(1)(a) may apply to the Court for leave to bring, or to intervene in, proceedings.
- (2) The Court must grant the application if it is satisfied that:
  - (a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and
  - (b) the applicant is acting in good faith; and
  - (c) it is in the best interests of the company that the applicant be granted leave; and
  - (d) if the applicant is applying for leave to bring proceedings - there is a serious question to be tried; and
  - (e) either:
    - (i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
    - (ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

Edelman J stepped through the requirements, and found the following:

- As to s. 237(2)(a), that Mr Mali has a minority share in the company, and so it is unlikely that Ms Mubarakai will authorise the company to take action against her and her husband, and further that the relationship between Mr Mali and Ms Mubarakai has broken down to a level where they, as directors, cannot make a decision as to whether to bring an action. Therefore, the first criterion is met.
- As to s. 237(2)(b), Edelman J considered "(1) Mr Mali's honest belief that [a] good cause of action exists and has reasonable prospects of success; and (2) whether Mr Mali is seeking to bring the proceedings for a collateral purpose" (at [8], citing *Chahwan v Euphoric Pty Ltd t/as Clay & Michel* [2008] NSWCA 52 (8 April 2008); *Robash Pty Ltd v Gladstone Pacific Nickel Ltd* [2011] NSWSC 1235 (4 November 2011) *(Robash)*). His Honour found in favour of Mr Mali on both considerations.
- As to s. 237(2)(c), his Honour found that it would be in the interests of the company for the proceeding to be brought. His Honour considered whether the rebuttable presumption that granting leave is not in the best interests of the company set out in s. 237(3) arose in the circumstances, and found that it did not. His Honour then stated: "The critical matters in an assessment of whether an action is in the best interests of the company include the prospects of success of the proceedings, the likely costs, and any likely recovery if the proceedings are successful and the likely consequences if they are not: see [Robash]" (at [12]). His Honour considered the facts as stated above, and found that Head Quarters would have a reasonable prospect of success against Ms Mubarakai for breaches of her duty to the company by diverting both the opportunity and the profit from the permanent Sumo Salad store in the Hospital to her husband's company. As part of his consideration, Edelman J also noted in detail the heavy burden placed on a principal as the only person in the world not entitled take the

benefit that belongs to their fiduciary (quoting at [25] from Keech v Sanford [1729] EngR 954, 62).
- As to s. 237(2)(d) of the Act, his Honour found, on the same grounds as above, that there was a serious question to be tried, and finally, that the requirements of s. 237(2)(e) were also satisfied.

In an interesting discussion at [25] - [28], his Honour was clear and succinct about the continued forcefulness of the rule in Keech v Sanford, noting that the rule has brought about the ability for a fiduciary to claim lost profits from the principal as a remedy. His Honour noted that it is likely this would be a possible remedy for Head Quarters against Ms Mubaraki.

Edelman J ruled in favour of Mr Mali and granted leave under s. 237 for him to bring proceedings against Ms Mubaraki on behalf of Head Quarters under s. 236 of the Act.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.14 Court holds new investment proposal to be illegal
By Jason Choi, DLA Piper

Australian Securities and Investments Commission v Macro Realty Developments Pty Ltd [2016] FCA 292, Federal Court of Australia, Beach J, 23 March 2016

(a) Summary

In September 2015 the Australian Securities and Investments Commission (ASIC) commenced proceedings against Macro Realty Developments Pty Ltd (Macro), Property Tuition Pty Ltd (and Education Holdings Pty Ltd (together, 21st Century) in respect of an investment proposal associated with Macro and 21st Century.

On 23 March 2016, Beach J made orders restraining the promotion and marketing of the investment proposal, the receipt and disposal of funds in connection with the investment proposal, entering into any arrangement or agreement in relation to the investment proposal and doing any act in furtherance of or in connection with the investment proposal.

(b) Facts

In September 2015, ASIC became aware of a new "investment opportunity" associated with Macro and 21st Century. The "investment opportunity" was described in and promoted under a document titled "Do you know how to buy Australian property, no money down?" (Brochure) and a Memorandum of

Understanding (MOU) to be entered into by an individual investor and Macro (together, the Investment Proposal).

The effect of the MOU was that an investor entering into it agreed to become a sole director and shareholder in a company, over which the investor (as director) had no real or effective control and which had an obligation to finance the acquisition of properties where the legal liability for that finance largely fell on the company.

ASIC commenced proceedings against Macro and 21st Century, claiming that Macro and 21st Century had:

- engaged in conduct that constituted counselling or procuring investors under s. 1324 of the Act in contravention of s. 181(1) of the Corporations Act 2001 No. 50 (Cth) (the Act); and
- engaged in misleading or deceptive conduct in contravention of s. 1041H of the Act and s. 12DA of the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) (the ASIC Act).

Section 1324 of the Act empowers a court to make orders restraining a person from engaging or proposing to engage in conduct that constitutes or would constitute counselling or procuring a person to contravene the Act. Section 181(1) of the Act requires directors and other officers to exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose. Section 1041H of the Act prohibits the engaging in of misleading or deceptive conduct, within Australia, in relation to a financial service or a financial product. Section 12DA of the ASIC Act prohibits misleading and deceptive conduct in relation to financial services.

In addition, ASIC claimed that 21st Century had carried on an unlicensed financial services business in contravention of s. 911A of the Act. Section 911A of the Act sets out the circumstances in which a person must hold an Australian financial services licence (AFSL) and lists the circumstances in which a person who provides a financial service will be exempt from having to hold an AFSL.

(c) Decision

(i) Counselling and procuring contraventions of section 181(1) of the Act

Beach J held that Macro and 21st Century contravened s. 181(1) of the Act.

His Honour cited *Davidson v Smith* (1989) 15 ACLR 732, and stated that the general rule is that directors "must not fetter their powers by contract with or promises to other persons". Because the discretionary powers of directors are fiduciary, in the sense that their exercise is required to be in good faith for the benefit of the company as a whole, Beach J stated that an agreement may be void and in breach of s. 181(1), if the directors of a company have purported to fetter wholesale their discretions in advance in relation to the general control and management of the company.

Beach J noted that the Investment Proposal required an investor to become a director of a company in respect of which Macro: (a) was the sole decision maker for all activities of the company; (b) retained control of the company; and (c) remained the sole decision maker for all business associated with the company in circumstances where the investor agreed to do all things that Macro required to run the business of the company "as [Macro saw] fit". As such, under the terms of the MOU, an investor's general and specific powers and discretions as a director were to be fettered in an absolute way upon establishment of the company.

Given 21st Century drafted the MOU and the Brochure, both Macro and 21st Century were involved in the promotion and marketing of the Investment Proposal and the MOU described the essential facts by which investors would contravene s. 181(1), his Honour was of the view that Macro and 21st Century plainly had the requisite state of mind for the purpose of s. 1324 in terms of counselling or procuring.

(ii) Misleading or deceptive conduct

Beach J held that, in promoting and marketing the Investment Proposal, Macro and 21st Century contravened s. 1041H of the Act and s. 12DA of the ASIC Act.

Beach J noted that the applicable legal principles were uncontroversial. His Honour said that the relevant class of recipients to take into consideration in determining whether Macro and 21st Century had engaged in misleading or deceptive conduct consisted of potential investors including inexperienced and new investors who were not sophisticated or well resourced. His Honour held that the Investment Proposal was misleading or deceptive, because it represented to prospective investors that:

- an investor's duties as a company director could be fulfilled by simply signing an annual return;
- the Investment Proposal was essentially risk free; and
- the Investment Proposal required no money down, no capital and that there were no fees involved.

(iii) Unlicensed provision of financial services

Beach J held that 21st Century carried on an unlicensed financial services business in contravention of s. 911A. His Honour held that the Investment Proposal constituted a "financial product" in accordance with the definition of that term in s. 763A of the Act, because it was a facility through which investors could make a financial investment. This was because the investor:

- agreed to give money by agreeing to establish a company and to commit the company to the purchase of properties through institutional finance arranged by or through an entity related to Macro;

- intended that the money was to be used by Macro to generate a financial return or other benefit for the investor in the form of "guaranteed returns" and "rental income", promised in the Brochure and MOU; and
- had no day-to-day control over the use of the contribution in circumstances where control of the company had, in effect, been ceded to Macro.

Beach J then considered whether 21st Century had provided a "financial service". Section 766A states that a person provides a "financial service" if they provide financial product advice. Section 766B defines "financial product advice" as a recommendation or a statement of opinion that is intended to influence a person in making a decision in relation to a particular financial product, or an interest in a particular financial product.

His Honour held that, by marketing and promoting the Investment Proposal, 21st Century had made recommendations that could reasonably be regarded as being intended to influence investors to decide to enter into the Investment Proposal. Accordingly, as 21st Century had provided "financial product advice", it had provided "financial services".

Finally, Beach J found that 21st Century did not hold an AFSL nor was it an authorised representative of any AFSL holder.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

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.
