SAI Global Corporate Law Bulletin No. 241>

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Bulletin No. 241

Legislation Hotline

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 ISS Announces Results of 2018 Benchmark Voting Policy Survey

25 September 2017 - Institutional Shareholder Services Inc. (ISS) has released the results of its annual global benchmark voting policy survey.

ISS received 602 total responses to this year's survey, of which 129 were from institutional investors and their organisations, representing an increase of 37% and 8%, respectively, compared with last year. ISS also received responses from 469 members of the corporate community (including companies, consultants/advisors to companies, corporate directors, and other trade organisations representing companies, with the remainder comprised of academics, non-profit organisations, and other governance stakeholders).

Key findings from this year's survey include:

- **Unequal Voting Rights**. ISS solicited respondents' views on multi-class capital structures that carry unequal voting rights. Among investors, a large minority (43%) indicated that unequal voting rights are never appropriate for a public company in any circumstances. An equal proportion of investors (43%) said unequal voting rights structures may be appropriate for newly public companies if they are subject to automatic sunset requirements or at companies more broadly if the capital structure is put up for periodic re-approval by the holders of the low-vote shares. Among non-investors, 50% responded that companies should be allowed to choose whatever capital structure they see fit, while 27% responded that a multi-class structure may be appropriate at a newly public company if subject to an automatic sunset provision or more broadly if reapproved on a periodic basis by the low-vote shareholders;
- **Board Gender Diversity**. ISS asked respondents if they would consider it problematic if there are zero female directors on a public company board. More than two-thirds (69%) of investor respondents said "yes." Many of these respondents (43%) said that the absence of women directors could indicate problems in the board recruitment process, while 26% of investor respondents said that although a lack of female directors would be problematic, their concerns may be mitigated if there is a disclosed policy/approach that describes the considerations taken into account by the board or the nominating committee to increase gender diversity on the board. A majority (54%) of the non-investor respondents answered "yes" when asked if the absence of a single woman director on a board is problematic although more than half of these respondents said their concerns might be mitigated by a company's disclosed policy or approach; and

- **Virtual Meetings**. Survey respondents were asked to provide their views on the use of online mechanisms to facilitate shareholder participation at general meetings, i.e., "hybrid" or "virtual-only" shareholder meetings. About one out of every five (19%) of the investors said that they would generally consider the practice of holding either "virtual-only" or "hybrid" shareholder meetings to be acceptable, without reservation. At the opposite extreme, 8% of the investors did not support either "hybrid" or "virtual-only" meetings. More than one-third (36%) of the investor respondents indicated that they generally consider the practice of holding "hybrid" shareholder meetings to be acceptable, but not "virtual-only" shareholder meetings. Another 32% of the investor respondents indicated that the practice of holding "hybrid" shareholder meetings is acceptable, and that they would also be comfortable with "virtual-only" shareholder meetings if they provided the same shareholder rights as a physical meeting.

Download a copy of this year's survey results here.

1.2 Making it easier to start a new business

22 September 2017 - The Australian Government recently commenced public testing of a new service to make registering a business easier and faster.

The new business registration service allows businesses to apply for multiple business and tax registrations at the same time online at the government Business website. This has reduced the average time taken to register for an Australian Business Number from over an hour to less than 15 minutes.

The Government is also making the code for the service publically available so the private sector can seamlessly connect their customers to business registration services.

Over 35,000 registrations have been submitted since BETA testing began in April 2017.

Further information is available on this here.

1.3 Exposure Draft - Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017

22 September 2017 - The Commonwealth Treasury has made available Exposure Draft Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017, and the accompanying Exposure Draft Explanatory Memorandum for public comment.

The Hon Scott Morrison MP, Commonwealth Treasurer, stated that the draft legislation, would provide "further clarity on the accountability obligations of banks and their directors and senior executives, and enhanced consequences for being in breach of these obligations".

Specifically, Mr Morrison stated that the draft legislation would empower the Australian Prudential Regulation Authority (APRA) to:

- "impose substantial fines on banks;

- more easily disqualify accountable persons; and
- ensure that banks' remuneration policies result in financial consequences for individuals".

The Treasury has also made available a Consultation Guide (September 2017), which identifies identifying relevant issues and sets out the key elements in the draft legislation.

Further information from the Treasury
Treasurer's media release (22 September 2017)

1.4 US: SEC adopts interpretive guidance on pay ratio rule

21 September 2017 - The US Securities and Exchange Commission has approved interpretive guidance to assist companies in their efforts to comply with the pay ratio disclosure requirement mandated by s. 953(b) of the *Dodd-Frank Wall Street Reform and Consumer Protection Ac*t. Under the Commission's rule implementing the pay ratio requirement, companies are required to begin making pay ratio disclosures in early 2018.

In particular, the guidance:

- states the Commission's views on the use of reasonable estimates, assumptions and methodologies, and statistical sampling permitted by the rule;
- clarifies that a company may use appropriate existing internal records, such as tax or payroll records, in determinations about the inclusion of non-US employees and in identifying the median employee; and
- provides guidance as to when a company may use widely recognised tests to determine whether its workers are employees for purposes of the rule.

The Commission's staff has also provided guidance separately about the pay ratio rule.

1.5 UK: Takeover Panel - consultation paper on statements of intention and related matters

19 September 2017 - The UK Takeover Panel Code Committee has published a consultation paper titled *Statements of intention and related matters*: see here (*pdf*). Amendments are proposed to rr. 2.7, 19.5, 19.6, 24 and 25 of the Takeover Code, the effect of would be, for example, to bring forward the requirement for an offerer to make statements of intention to the time at which the announcement of a firm intention to make an offer is made.

1.6 Extension of crowd sourced equity funding to private companies

14 September 2017 - The Australian Government has announced that it will extend the crowd sourced equity funding regime to private companies, introducing a Bill to the Parliament to enact this reform.

As part of the Bill, proprietary companies wanting to access equity crowdfunding will no longer have to convert to a public company entity. Instead founders will be able to crowdfund while retaining the greater flexibility of the proprietary model.

The extension will also increase the ability of retail investors to access early-stage investment opportunities. However, these companies will be required to comply with additional obligations to protect investors, including:

- a minimum of two directors;
- financial reporting in accordance with accounting standards;
- audited financial statements once the company raises more than $3 million from crowdfunding offers; and
- restrictions on related party transactions.

This extension to proprietary companies builds on the framework for public companies which commenced on 29 September 2017. Many features of the public company framework, such as the obligations of intermediaries, investor and company caps and the process for making crowdfunding offers, will be the same for proprietary companies.

The Australian Securities and Investments Commission (ASIC) released information on licensing arrangements for prospective platforms, which can be found here.

1.7 Improving dispute resolution in the financial system

14 September 2017 - The Australian Government has introduced into Parliament the Treasury Laws Amendment (Putting Consumers First - Establishment of the Australian Financial Complaints Authority) Bill 2017 (Cth) (the Bill), previously known as the *Treasury Laws Amendment (External Dispute Resolution) Bill 2017 (Cth).*

The Bill will establish a new one-stop shop dispute resolution scheme, the Australian Financial Complaints Authority (AFCA), which will significantly improve how financial disputes are dealt with in Australia. AFCA will replace the three existing schemes - the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT).

AFCA's monetary limit of $1 million and compensation cap of $500,000, which is almost double the existing limits, will significantly enhance access to redress for consumers and small businesses who wrongfully suffer losses.

In the case of small business credit facility disputes, a small business will be able to lodge a dispute where the credit facility is of an amount up to $5 million and will be able to receive compensation of up to $1 million. This is almost triple the existing monetary limit and compensation cap.

The transition team, being led by Dr Malcolm Edey, will undertake stakeholder consultation in order to develop AFCA's terms of reference, governance and funding arrangements.

1.8 Joint committee report on whistleblower protections

13 September 2017 - The Parliamentary Corporations and Financial Services Joint Committee (the Committee) has made available the report from its inquiry into whistleblower protections.

In its report, the Committee sets out 14 "[b]est practice criteria for [whistleblowing] legislation" and related recommendations, including:

- "[e]stablish[ing] a Whistleblower's Protection Authority (to be housed within a single body or an existing body) that has as its priority to support whistleblowers, that has the power to investigate reprisals, and that will [oversee] the implementation of the whistleblower regime";
- "[b]roaden[ing] to cover the private sector, and ensur[ing] consistency by bringing all private sector legislation into a single Act";
- "[b]roaden[ing] the private sector definition of disclosable conduct to a breach of any Commonwealth, state or territory law";
- "[p]rovid[ing] protections for both former and current staff that could make a disclosure, or are suspected of making a disclosure", and "[p]rovid[ing] appropriate protection for recipients of disclosures and those required to take action in relation to disclosures";
- "[a]llow[ing] for anonymous disclosures across the public and private sectors";
- providing for "[a]n appropriate body to set and promote standards for internal disclosure procedures in the private sector"; and
- in relation to retaliation, "[a]lign[ing] the public and private sector with the protections, remedies and sanctions for reprisals in the [Fair Work (Registered Organisations) Act (2009) 1988 No. 86 (Cth)]".

The submissions received by the Committee are available on the Committee's website

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1.9 Reforms to address illegal phoenixing

12 September 2017 - The Australian Government has announced proposed reforms to address illegal phoenixing activity that costs the economy up to $3.2 billion per year.

Illegal phoenixing - the stripping and transfer of assets from one company to another by individuals or entities to avoid paying liabilities - has been a problem for successive governments over many decades. It affects employees, creditors, competing businesses and taxpayers.

The Government's package of reforms will include the introduction of a Director Identification Number (DIN) and a range of other measures to both deter and penalise phoenix activity.

The DIN will identify directors with a unique number and interface with other government agencies and databases to allow regulators to map the relationships between individuals and entities and individuals and other people.

In addition to the DIN, the Government is consulting on implementing a range of other measures to deter and disrupt the core behaviours of phoenix operators, including non-directors such as facilitators and advisers. These include:

- specific phoenixing offences to better enable regulators to take decisive action against those who engage in this illegal activity;
- the establishment of a dedicated phoenix hotline to provide the public with a single point of contact for reporting illegal phoenix activity;
- the extension of the penalties that apply to those who promote tax avoidance schemes to capture advisers who assist phoenix operators;

- stronger powers for the ATO to recover a security deposit from suspected phoenix operators, which can be used to cover outstanding tax liabilities, should they arise;
- making directors personally liable for GST liabilities as part of extended director penalty provisions;
- preventing directors from backdating their resignations to avoid personal liability or from resigning and leaving a company with no directors; and
- prohibiting related entities to the phoenix operator from appointing a liquidator.

The Government is also consulting on how best to identify high risk individuals who will be subject to new preventative and early intervention tools, including:

- a next-cab-off-the-rank system for appointing liquidators;
- allowing the ATO to retain tax refunds; and
- allowing the ATO to commence immediate recovery action following the issuance of a Director Penalty Notice.

The Consultation Paper on the non-DIN measures is available on the Treasury website.

1.10 Insolvency law reform

18 September 2017 - The Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017 No. 112 (Cth) was assented to on 18 September 2017.

According to the explanatory memorandum, the amending Act:

- creates a safe harbour for company directors from personal liability for insolvent trading if the company is undertaking a restructure outside formal insolvency;
- makes certain types of specified contractual rights unenforceable while a company is restructuring under administration, a compromise or arrangement aimed at avoiding being wound up in insolvency or when a managing controller has been appointed over all or substantially all of the property of the company;
- reduces instances of a company proceeding to a formal insolvency process prematurely and where companies do enter into particular formal insolvency procedures, enables them to have a better chance of being turned around or of preserving value for creditors and shareholders;
- promotes the preservation of enterprise value for companies, their employees and creditors, reducing the stigma of failure associated with insolvency and encourages a culture of entrepreneurship and innovation; and
- provides that the relevant Minister must hold an independent review of certain matters relating to safe harbour two years after commencement.

The safe harbour provisions will commence on Royal Assent. The stay on the operation of ipso facto clauses will commence from 1 July 2018 to provide time for businesses to adapt to the new settings.

The Government will shortly consult with key stakeholders on the Regulations to support the operation of the stay on ipso facto clauses.

1.11 Regulation of fundraising by charities

12 September 2017 - Consumer affairs ministers have agreed to clarify that the Australian Consumer Law (ACL) applies to fundraising. The ministers met in Melbourne on 31 August 2017 and issued a statement that: "[r]egulators will issue guidance clarifying the current application of the ACL to the activities of charities, not-for-profit entities and fundraisers". The release also stated that the ministers would "assess the effectiveness of the proposed guidance on not-for-profit fundraising, further regulatory actions, and whether any amendment to the ACL is necessary during 2018-19".

According to the Governance Institute, "not-for-profits are forced to waste significant amounts of time and money to meet outdated and fragmented fundraising laws that differ considerably across Australia. Across Australia's seven different fundraising regimes, there is variation in the requirements at each stage: from when and if a fundraising licence is needed; to how long a licence is valid; right through to what must be reported and when. For smaller groups, it can be particularly difficult to navigate these complex laws. For larger ones (including many household names), resources are redirected from service delivery to compliance, with spending on fundraising 'admin' a significant deterrent to public giving."

For more detail on the Governance Institute's proposals see the *Joint Statement on Fundraising Reform*.

1.12 CFR policy statement on Australian cash equity settlement services

7 September 2017 - The Council of Financial Regulators, in collaboration with the Australian Competition and Consumer Commission (ACCC) has released a policy statement setting out the *Minimum Conditions for Safe and Effective Competition in Cash Equity Settlement in Australia* (Minimum Conditions (Settlement)).

The release of this policy statement follows the publication of the Council's consultation paper on *Safe and Effective Competition in Cash Equity Settlement in Australia* in March 2017. The purpose of the consultation was to explore the possible implications of competition in the settlement of cash equities in Australia for the functioning of markets, financial stability and access. The consultation paper also invited feedback on the development of policy guidance to ensure that any such

The policy controls set out in the Minimum Conditions (Settlement) include:

- adequate regulatory arrangements;
- access on transparent, non-discriminatory, and fair and reasonable terms;
- appropriate links between competing securities settlement facilities; and
- appropriate regulatory arrangements for oversight of Primary and Secondary Markets.

The Council's publication follows two policy statements published in October 2016: the *Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia* (Regulatory Expectations) and the *Minimum Conditions for Safe and Effective Competition in Cash Equity Clearing in Australia* (Minimum Conditions (Clearing)). The Minimum Conditions (Settlement) should be read in conjunction with these two earlier policy statements.

For further details, please see the following Council publications:

- Safe and Effective Competition in Cash Equity Settlement in Australia: Response to Consultation;
- Minimum Conditions for Safe and Effective Competition in Cash Equity Settlement in Australia;

- Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia; and
- Minimum Conditions for Safe and Effective Competition in Cash Equity Clearing in Australia.

1.13 Consultation on ASIC's power to ban senior officials in the financial sector

6 September 2017 - The ASIC Enforcement Review Taskforce position paper titled *"ASIC's power to ban senior officials in the financial sector"* has been released.

In its final report, the Financial System (Murray) Inquiry concluded that ASIC's banning powers against individuals needed to be enhanced to improve accountability of managers and the culture of firms in the financial services and credit sectors.

The position paper is available on the Treasury website.

1.14 Report on role of exchanges in fostering economic development

6 September 2017 - The World Federation of Exchanges (The WFE), which represents more than 200 market infrastructure providers including exchanges and CCPs, has published a report examining the role of stock exchanges in promoting economic growth and sustainable development, with the United Nations Conference on Trade and Development (UNCTAD).

The report identifies two primary mechanisms through which stock exchanges can contribute to development:

- **Mobilising resources, both domestic and foreign portfolio flows, for sustainable economic growth and development.** In addition to the core financing function of exchanges, the report also looks at what exchanges are doing to improve SME access to finance through dedicated markets, and to marshal funds to address sustainability challenges; and
- **Promoting good governance in business practices,** through the promotion of greater disclosure from their listed companies, including Environmental, Social & Governance (ESG) disclosure.

The ability of exchanges to perform these roles is dependent, however, on the existence of an enabling environment, comprising relevant policy, processes and institutional structures. The report has therefore developed a framework for stock exchanges and stakeholders that can be used as a preliminary guideline.

The full report is available here.

1.15 Not for profits governance and performance study

5 September 2017 - The annual NFP Governance & Performance Study provides a snapshot of how the sector is faring, as well as lessons for NFP leaders, governments and funders in how to strengthen Australia's NFP sector.

This year the study explored issues of organisational culture, along with risk and reputation management, and how NFPs are building foundations for long-term success.

Key Findings of the 2017 NFP Governance and Performance Study:

Culture:

- More than 70% said they would be very likely to recommend their organisation as a good place to work to family and friends;
- 45% of respondents said that culture is clearly recognised, defined and formally embedded in processes and decision-making;
- 52% said culture had not been formally on their board agenda in the past 12 months; and
- Only 36% of NFP directors said their board was actively overseeing culture.

Risk:

- On balance, more directors felt their organisation was taking on too little (36%), rather than too much risk (20%).
- Only 41% of respondents said their board had a formal risk appetite statement; and
- 71% of directors of NFPs with over $50 million in annual revenue said they had a fully developed risk management process, compared to 36% for those with less than $5 million in revenue.

Reputation:

- 86% of directors rated the importance of their reputation as highly important (8 or above);
- 41% of respondents said reputation is formally considered by the board and management when making all strategic and operational decisions; and
- Stakeholder surveys are the most used mechanism for evaluating reputation (70%), then CEO/staff feedback (54%), followed equally by media reports and growth in funding/support (46%).

1.16 Implications of fintech for banks and supervisors

31 August 2017 - The Basel Committee on Banking Supervision released a consultative document on the implications of fintech for the financial sector. *Sound Practices: Implications of fintech developments for banks and bank supervisors* assesses how technology-driven innovation in financial services, or "fintech", may affect the banking industry and the activities of supervisors in the near to medium term.

Various future potential scenarios are considered, with their specific risks and opportunities. In addition to the banking industry scenarios, three case studies focus on technology developments (big data, distributed ledger technology, and cloud computing) and three on fintech business models (innovative payment services, lending platforms and neo-banks).

Although fintech is only the latest wave of innovation to affect the banking industry, the rapid adoption of enabling technologies and emergence of new business models pose an increasing challenge to incumbent banks in almost all the scenarios considered.

Banking standards and supervisory expectations should be adaptive to new innovations, while maintaining appropriate prudential standards. Against this background, the Committee has identified ten key observations and related recommendations on supervisory issues for consideration by banks and bank supervisors.

1.17 UK: Government publishes corporate governance reform proposals

August 2017 - The UK Government has published the Government's response to the earlier green paper on corporate governance reform.

The aim of the green paper consultation was to consider what changes might be appropriate in the corporate governance regime to help ensure that business performance is improved and the economy works for everyone. The Government response sets out nine proposals for reform across the three specific aspects of corporate governance:

- Executive pay;
- Strengthening the employee, customer and supplier voice; and
- Corporate governance in large privately-held businesses.

Executive pay
The Government intends to:

Invite the Financial Reporting Council (FRC) to revise the UK Corporate Governance Code (the Code) to:

- be more specific about the steps that premium listed companies should take when they encounter significant shareholder opposition to executive pay policies and awards (and other matters);
- give remuneration committees a broader responsibility for overseeing pay and incentives across their company and require them to engage with the wider workforce to explain how executive remuneration aligns with wider company pay policy (using pay ratios to help explain the approach where appropriate); and
- extend the recommended minimum vesting and post-vesting holding period for executive share awards from 3 to 5 years to encourage companies to focus on longer-term outcomes in setting pay.

Introduce secondary legislation to require quoted companies to:

- report annually the ratio of CEO pay to the average pay of their UK workforce, along with a narrative explaining changes to that ratio from year to year and setting the ratio in the context of pay and conditions across the wider workforce; and
- provide a clearer explanation in remuneration policies of a range of potential outcomes from complex, share-based incentive schemes.

Invite the Investment Association to implement a proposal it made in its response to the green paper to maintain a public register of listed companies encountering shareholder opposition to pay awards of 20% or more, along with a record of what these companies say they are doing to address shareholder concerns.

In addition to these proposals, the Government will take forward its manifesto commitment to commission an examination of the use of share buybacks to ensure that they cannot be used artificially to hit performance targets and inflate executive pay. The review will also consider concerns that share buybacks may be crowding out the allocation of surplus capital to productive investment.

Strengthening the employee, customer and wider stakeholder voice

The Government intends to:

- introduce secondary legislation to require all companies of significant size (private as well as public) to explain how their directors comply with the requirements of s. 172 to have regard to employee and other interests;
- invite the FRC to consult on the development of a new Code principle establishing the importance of strengthening the voice of employees and other non-shareholder interests at board level as an important component of running a sustainable business. As a part of developing this new principle, the Government will invite the FRC to consider and consult on a specific Code provision requiring premium listed companies to adopt, on a "comply or explain" basis, one of three employee engagement mechanisms: a designated non-executive director; a formal employee advisory council; or a director from the workforce; and
- encourage industry-led solutions by asking ICSA (the Institute of Chartered Secretaries and Administrators: The Governance Institute) and the Investment Association to complete their joint guidance on practical ways in which companies can engage with their employees and other stakeholders. The Government will also invite the GC100 group of the largest listed companies (FTSE100 General Counsels) to complete and publish new advice and guidance on the practical interpretation of the directors' duties in s. 172 of the *Companies Act 2006.*

These proposals are in line with recommendations made by the House of Commons BEIS Committee and will drive change in how big businesses engage with their key stakeholders. Putting in place higher expectations for all the largest companies, and in particular for the leading, premium listed companies, should also encourage the development and uptake of good practice in the wider business community.

Corporate governance in large privately-held businesses

The Government intends to:

- nvite the FRC to work with the IoD, the CBI, the Institute for Family Businesses, the British Venture Capital Association and others to develop a voluntary set of corporate governance principles for large private companies under the chairmanship of a business figure with relevant experience; and
- introduce secondary legislation to require companies of a significant size to disclose their corporate governance arrangements in their Directors' Report and on their website, including whether they follow any formal code. This requirement will apply to all companies of a significant size unless they are subject to an existing corporate governance reporting requirement. The Government will also consider extending a similar requirement to Limited Liability Partnerships (LLPs) of equivalent scale.

Other issues

Consultation revealed questions over whether the FRC has the powers, resources and status to undertake its functions effectively.

To address this the Government will ask the FRC, the Financial Conduct Authority and the Insolvency Service to conclude new or, in some cases, revised letters of understanding with each other before the end of this year to ensure the most effective use of their existing powers to sanction directors and ensure the integrity of corporate governance reporting. The Government will also consider, in light of this work, whether further action is required.

Next steps

The current intention is to bring the reforms into effect by June 2018 to apply to company reporting years commencing on or after that date.

1.18 ASX100 CEO remuneration study

24 August 2017 - The Australian Council of Superannuation Investors' (ACSI) annual survey of CEO pay highlights that not only has average and median pay remained flat for most of the past decade; bonuses have not risen.

While remuneration levels have not risen significantly in the ASX100, the persistence of bonus payments remains a concern for investors. This year, it is found that:

- 86% of ASX100 CEOs received a bonus in FY16;
- where bonuses were paid, the median payout was 69% of maximum;
- only 18 CEOs in the ASX100 received less than half of their maximum potential; and
- the median realised pay (remuneration including equity awards and bonus outcomes) for ASX100 CEOs was $3.78m in 2016 (compared to $3.88mn in FY15 and $3.96mn in FY14).

In other results, it is found that although median and average fixed pay increased slightly for ASX100 CEOs for the first time since 2011, it remains well below its 2009 peak.

2. Recent ASIC Developments

2.1 Facilitation of crowd-sourced funding by public companies

21 September 2017 - ASIC has released guidance for public companies and crowd-funding platform operators to support them in using the new crowd-sourced funding (CSF) regime, which commenced on 29 September 2017.

Regulatory Guide 261 *Crowd-sourced funding: Guide for public companies* (RG 261) will assist companies seeking to raise funds through CSF to understand and comply with their obligations in the new regime, particularly as many of these companies will not have experience in making public offers of their shares. ASIC has also published a template CSF offer document to help companies prepare their CSF offers.

Regulatory Guide 262 *Crowd-sourced funding: Guide for intermediaries* (RG 262) will assist crowd funding platform operators (intermediaries) seeking to provide a crowd-funding service, particularly as this is a new type of financial service and there are unique gatekeeper obligations for operating platforms for CSF offers.

ASIC has also:

- updated ASIC Corporations (Consents to Statements) Instrument 2016/72 to reduce the compliance burden associated with obtaining consent for statements in CSF offer documents;
- issued ASIC Corporations (Financial Requirements for CSF Intermediaries) Instrument 2017/339, which outlines specific minimum requirements for CSF intermediaries; and

- amended ASIC class orders [CO 13/762], [CO 13/763] and ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156 (further information).

ASIC consulted on its guidance and relief in June 2017 and has published Report 544 *Response to submissions on CP 288 and CP 289 on crowd-sourced funding* (REP 544) detailing ASIC's response to that consultation (refer: 17-195MR).

See the ASIC website for further information on crowd-sourced funding, including information on applications:

- by intermediaries for an AFS licence with an authorisation to provide CSF services (refer: 17-312MR); and
- to register new public companies or convert existing proprietary companies to public companies, to be eligible to raise funds using CSF and to access the corporate governance concessions.

See ASIC's Moneysmart page on crowd-sourced funding for further information on how to invest through crowd-sourced funding.

2.2 Remaking of "sunsetting" class orders relating to mortgage offset accounts and factoring arrangements

19 September 2017 - ASIC has remade two class orders relating to mortgage offset accounts and factoring arrangements, which were due to expire (sunset) on 1 October 2017. Two new instruments have been made to continue the relief provided by these class orders:

- ASIC Corporations (Mortgage Offset Accounts) Instrument 2017/795, replacing Class Order [CO 03/1048] *Mortgage offset accounts;* and
- ASIC Corporations (Factoring Arrangements) Instrument 2017/794, replacing Class Order [CO 04/239] *Factoring arrangements: Licensing, hawking and disclosure relief*.

The relief was remade following public consultation through Consultation Paper 286 *Remaking ASIC class orders on mortgage offset accounts and factoring arrangements* (CP 286), issued in June 2017.

CP 286 sought feedback on ASIC's proposal to continue the relief in [CO 03/1048] and [CO 04/239] with minor changes to reflect market developments and ensure the relief applies in the intended way.

No submissions were received in response to the proposals outlined in CP 286.

2.3 Launch of 2017-20 data strategy

19 September 2017 - ASIC has launched its data strategy for 2017-20. The strategy, which outlines how ASIC will capture, share and use data, aims to transition ASIC into a more data-driven and intelligence-led organisation.

ASIC's data strategy outlines a number of data initiatives that have been completed or will be put in place over the next three years, including:

- creating a Chief Data Office;

- establishing a number of frameworks and bodies aimed at strengthening data governance;
- ensuring cyber resilience and privacy protection;
- establishing a data science laboratory; and
- engaging nationally and internationally to improve data management and analytics capabilities.

2.4 Response to feedback on REP 523 ASIC's Innovation Hub and approach to regulatory technology

15 September 2017 - ASIC has released its response to industry feedback on ASIC's Innovation Hub and its approach to regulatory technology.

In May, ASIC released for consultation Report 523 *ASIC's Innovation Hub and our approach to regulatory technology* (REP 523).

ASIC sought feedback on:

- its overall approach to innovation;
- setting up a new regtech liaison group;
- its continued use of technology trials; and
- the hosting of a problem-solving event.

Responses were generally very supportive of ASIC's Innovation Hub and its approach to regtech. However, there were differences of opinion on ASIC's proposed new initiatives, particularly the regtech liaison group and regtech problem-solving event.

Overarching themes from consultation are:

- respondents were in favour of ASIC being ambitious in the regtech area;
- there are complex questions of policy surrounding ASIC's role in regtech, and ASIC must consider how best to balance its role as both a regulator and as a technology user; and
- ASIC should consider where and how it might improve transparency across the board in its engagement with the regtech industry.

Report 543 *Response to feedback on REP 523* ASIC's Innovation Hub and our approach to regulatory technology

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2.5 Release of market integrity report

11 September 2017 - ASIC has released its latest report on market integrity for the period 1 January to 30 June 2017: Report 542 *Market integrity report: January to June 2017*.

The report covers ASIC's work to help ensure Australia's financial markets operate fairly and efficiently.

The report examines ASIC's focus on cyber resilience, sell-side research and listing standards, and also examines some of ASIC's key activities over the last six months in areas such as insider trading and the management of spot foreign exchange businesses.

Ongoing priorities and areas of focus for ASIC's market integrity work in 2017 include:

- technology and cyber resilience;

- conduct; and
- effective capital markets.

2.6 Corporate Plan 2017-18 to 2020-21 and focus for 2017-18

1 September 2017 - ASIC has published its Corporate Plan for 2017-18 to 2020-21. The Corporate Plan outlines ASIC's vision which is to allow markets to fund the economy and, in turn, economic growth.

The Corporate Plan explains:

- the long-term challenges to ASIC's vision and the risks that warrant its attention in 2017-18;
- ASIC's strategy for achieving its vision, including:
    - its "detect, understand and respond" approach for identifying and addressing misconduct;
    - how ASIC will continue to strengthen its capabilities; and
    - ASIC's actions to address long-term challenges and risks - that is, the areas to which ASIC will pay particular attention over the four years to 2020-21 and the areas on which ASIC will focus in 2017-18; and
- how ASIC will measure and evaluate its performance.

In this year's Corporate Plan, ASIC:

- highlights the need to keep building people's financial capability to support them in planning for their future; and
- outlines its vision of "what good looks like" for the sectors it regulates.

2.7 Report on how investors decide to invest in IPOs

31 August 2017 - Based on recent research, ASIC reports that prospectuses are important for investors in considering an investment in an IPO but there is scope for improvement in the usability and credibility of these documents.

REP 540 *Investors in initial public offerings* contains ASIC's analysis of findings from interviews ASIC conducted with institutional investors and qualitative research commissioned by ASIC on the information and factors that influence retail investors. The report explains how ASIC will use the findings to enhance ASIC's regulation of IPOs. It also explains how companies, their advisers and other market participants can help investors.

ASIC's inquiries with institutional investors found the most highly valued inputs in assessing whether to invest were:

- the prospectus, because it was the main source of information regarding an IPO, and was a regulated document for which directors and others involved in the offer have liability; and
- access to the IPO issuer's management, and the institution's own technical analysis of the offer, which was also very influential.

The qualitative research focusing on retail investors explored the impact that prospectuses, marketing practices and other sources of information have on their decision-making. The findings include that financial media, including mainstream media and subscription services, were influential in both alerting retail investors to potential IPO investments and in guiding the decision-making process.

The prospectus was seen as a key source of information, although many retail investors said the document was hard to read and could not be relied on to tell the whole truth about an IPO.

ASIC plays an active role in the IPO market and closely reviews a significant proportion of prospectuses. In 2016, this resulted in ASIC requiring corrective disclosure from issuers on 134 occasions, making 56 interim stop orders and 5 final stop orders (with most of this regulatory action relating to IPOs).

There are some additional areas that ASIC proposes to focus on to help better investor decision making, including:

- engaging with stakeholders to encourage them to provide greater accessibility to management for investors;
- increasing the review of online investor forums and social media;
- broadening the regular monitoring of the financial media to include investment magazines and online subscription services; and
- providing additional information about the IPO process to retail investors.

Download

- REP 540

2.8 Professional indemnity insurance review completed

29 August 2017 - A targeted review of professional indemnity (PI) insurance by ASIC has found that most small companies holding Australian financial services (AFS) licences had PI insurance that met regulatory requirements. ASIC found, generally, the small AFS licensees that ASIC reviewed had policies with an overall indemnity limit that complied with requirements.

The review focused on the adequacy of cover for defence (legal) costs, and fraud and dishonesty, in the policies offered by two insurance companies to small AFS licensees. It followed on from ASIC's Report 459 *Professional indemnity insurance market for AFS licensees providing financial product advice*, December 2015 (REP 459), which highlighted these as areas of concern.

The review found that three of the 56 AFS licensees reviewed did not have PI insurance that complied with the defence costs requirements in Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126). Following ASIC's intervention, these licensees have obtained improved PI insurance, or are in the process of doing so.

Following the conclusions in REP 459 which highlighted fraud and dishonesty cover as a particular risk, ASIC has worked with the two insurance companies to help them make changes to their standard policy terms to ensure that their fraud and dishonesty cover allows insured licensees to comply with RG 126.

Download

- Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees*.

2.9 Report on corporate finance regulation - January to June 2017

28 August 2017 - ASIC has published its seventh report on the regulation of corporate finance issues in Australia.

The report, which covers the period January to June 2017, provides companies and their advisers with insights into ASIC's regulatory approach in the corporate finance sector to assist them in carrying out their associated legal and compliance obligations.

Report 539 *ASIC regulation of corporate finance: January to June 2017* (REP 539) provides statistical data, highlights key focus areas, and includes relevant guidance about ASIC's regulation of:

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

It details the approach ASIC takes in these areas, including the types of issues that have caused ASIC to intervene and ASIC's response to novel issues seen in transactions during the period. The report also provides an overview of ASIC's current policy initiatives in this space.

This seventh report sets out information on the imminent implementation of the industry funding model for ASIC. It also provides information on the new regime for crowd-sourced funding by public companies and highlights ASIC's regulatory initiatives regarding emerging market issuers, initial public offerings and financial reporting for the year ended 30 June 2017.

Download

- REP 539

2.10 Super fees set to become more transparent and easier to understand

25 August 2017 - From 30 September 2017 there are significant changes to the way superannuation and managed investment funds disclose the fees and charges that affect consumers.

The new requirement follows ASIC identifying a significant amount of under-reporting of fees, as well as considerable inconsistency in the way fees and charges are listed by funds. ASIC found this made it very difficult for consumers to understand how much they were paying, what they were paying for, and to compare funds.

The changes will help bring industry-wide consistency to exactly what must be included in the product disclosure statement (PDS). And, from later in 2018, the changes will also ensure that the information in PDS and in periodic statements will match more clearly. As a result, consumers will be better able to understand the fees and costs. The consistency and more accurate disclosure of fees will also help ensure that funds are competing more fairly.

ASIC also noted that the fees consumers are being charged may reflect the type of investment, with some higher cost investments also bringing higher returns in the long term. This change to reporting will also make it easier for consumers to identify when this may be the case.

ASIC will make amendments to provide more certainty around the relevant requirements and undertake compliance checks throughout the industry, to ensure funds are meeting their obligations.

Following extensive consultation with industry on the introduction of these changes, ASIC has agreed to extend the deadline for disclosure of property operating costs in the investment fee or indirect costs to 30 September 2018. The extension on this component will help provide additional time for discussions between ASIC and industry about how to calculate these fees.

ASIC has also extended the deadline for certain disclosures in periodic statements that require changes to the internal systems of funds. This is to ensure the change can be made in a cost effective manner. Those requirements will have effect for annual statements for the year ending 30 June 2018.

Download

- Regulatory Guide 97

Further information on these changes can be found at:

- Summary of proposed changes to Class Order [CO 14/1252];
- Fees and costs disclosure requirements for superannuation trustees; and
- Super fees on the MoneySmart website.

3. Recent ASX Developments

3.1 ASX-listed company announcements: Processes for advising of changes to security status

On 6 September 2017 ASX released a consultation paper to seek feedback on the establishment of an independent FIX gateway to remove existing interdependencies between ASX's listing operations and ASX Trade in the dissemination of changes to individual security trading status, as well as other matters, including a proposal to simplify the different periods during which trading is not permitted after a price sensitive announcement.

The Consultation Paper is available here.

3.2 ASX OTC interest rate derivatives clearing

On 11 September 2017 ASX released a consultation paper to seek feedback from OTC Participants on proposed amendments to the ASX Clear (Futures) Operating Rules to support the clearing of NZD OTC Interest Rate Derivatives through ASX's OTC Clearing Service in the fourth quarter of 2017, subject to regulatory clearance.

The Consultation Paper is available here.

3.3 Monthly activity report

On 5 September 2017 ASX released the ASX Monthly Activity Report for August 2017.

4. Recent Research Papers

4.1 Convergence and Persistence in Corporate Law and Governance

This paper surveys the extent of convergence in corporate law and governance over the past 15 years. The paper assesses the efforts to measure convergence through the coding of national legal regimes and other comparative measures, finding "divergence in convergence." Among its conclusions: The decline in cross-listings on US stock markets reflects a "levelling up" of corporate governance standards in emerging market economies and financial globalization's development of credible substitutes for the US's disclosure regime. Much of convergence has resulted from the work of global governance institutions reacting to an assessment that poor corporate governance played a major role in the East Asian Financial Crisis and is otherwise implicated in financial stability. The relative lack of convergence within the EU is less because of the efficiencies of local regimes and more because of the desire of Member States to throw sand-in-the-gears of economic and political integration by impeding the growth of trans-EU firms. Finally, the latest turn in the "End of History" debate is less about the primacy of "shareholder value" and more about "which shareholders." The combination of long-standing family ownership and the reconcentration of public equity ownership in institutional investors has created a significant shareholder constituency that includes "stability" in its maximizing function, not just "efficiency."

Convergence and Persistence in Corporate Law and Governance

4.2 Good activist / bad activist: The rise of international stewardship codes

This paper focuses on recent trends in shareholder participation in corporate governance in a number of major developed countries. Conflicting attitudes toward shareholder participation, especially in the US, have colored the underlying debate about the effects of shareholder influence on corporate governance. While a distinctly negative view of shareholder participation and activism underpins much recent US debate on this topic, a powerful alternative narrative about the benefits of increased shareholder engagement in corporate governance has gained traction in many other jurisdictions.

Shareholder Stewardship Codes represent a particularly important manifestation of this positive view of shareholder engagement. These codes, which originated in the UK following the global financial crisis, are now proliferating throughout the world, especially in Asia. This paper examines similarities and differences in international Stewardship Codes, including the Investor Stewardship Group's Framework for US Stewardship and Governance, which was introduced in the United States in early 2017. As the paper shows, this recent US development has not occurred in a vacuum. Rather, it is part of a sustained international push for greater investor involvement in corporate governance and exemplifies the increasing globalization of corporate governance.

These developments and competing narratives concerning the role of shareholders in corporate governance have significant regulatory implications. In particular, they pose future challenges to regulators in seeking to differentiate between "good activists" and "bad activists".

Good Activist / Bad Activist: The Rise of International Stewardship Codes

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4.3 Opting out of fiduciary duties and liabilities in US and UK business entities

This paper explores the extent of contractual freedom to opt out of fiduciary duties and liabilities in US and UK business entities, including the US corporation, general partnership, limited partnership, limited liability partnership, and limited liability company, and the UK limited company, general partnership, limited partnership, and limited liability partnership.

Discernible commonalities emerge from this comparative analysis. Notably, corporate law readily permits reducing liability exposure for breaches of duty in each jurisdiction, yet provides only quite limited capacity to carve back at the substance of the duties themselves. Meanwhile, unincorporated entities in each jurisdiction offer substantially greater latitude to limit the duties themselves, in some cases resulting in purely contractual business relationships.

Yet substantial differences are also apparent. US corporate law permits greater insulation from liability exposure, and US unincorporated entities generally provide clearer and more extensive latitude to eliminate default duties of loyalty and care outright (particularly in Delaware). One cannot comprehensively declare that US law universally deviates further from the "fiduciary" governance paradigm, however, because the UK limited liability partnership has gone further by providing an entity form in which no such general default duties apply at all.

The analysis raises some complex comparative questions, and the chapter closes with brief reflections on why such trends, commonalities, and divergences may have arisen.

Opting Out of Fiduciary Duties and Liabilities in U.S. and U.K. Business Entities

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4.4 Is there hope for change? The evolution of conceptions of "good" corporate governance

This article is about the evolution of conceptions of good corporate governance that have influenced corporate decision-making. These conceptions are reasoned, if often flawed, responses to complex macroeconomic forces, competitive conditions, regulations or the lack thereof, and other environmental factors. More importantly, they are reflections of the culture and the thinking of the time, influenced by the views of successful business leaders, the business press, and academics. This article utilizes a broad definition of conceptions of "corporate governance." It refers to managers' views on proper corporate purposes, structures and strategies. It embraces managers' perceptions of their environment and their ideals regarding such matters as their firm's interactions with competitors, stakeholders, and the government. Thus, this approach broadens the use of the term "corporate governance" that arose in the context of agency theory in the late 1970s that centres on the relationship between managers and shareholders and focuses on managerial self-dealing. This narrow perception is reflected in the shareholder value maximization conception of corporate governance.

Most legal scholars take the current triumph of the shareholder value maximization conception as a given, so entrenched that it is unlikely to change. As this article shows, however, conceptions of "good" corporate governance change over time, and the beliefs and circumstances that produced the current round of corporate governance are waning, setting the state for far-reaching changes. This article includes a comprehensive examination of the forces that produced the current era of corporate governance. It explains why they are unlikely to determine the next round of corporate governance, and proposes a new, emerging model better suited to the era on the horizon.

Is There Hope for Change? The Evolution of Conceptions of "Good" Corporate Governance

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4.5 Regulating fintech

The financial crisis of 2008 has led to dramatic changes in the way that finance is regulated: the Dodd-Frank Act imposed broad and systemic regulation on the industry on a level not seen since the New Deal. But the financial regulatory reforms enacted since the crisis have been premised on an outdated idea of what financial services look like and how they are provided. Regulation has failed to take into account the rise of financial technology (or fintech) firms and the fundamental changes they have ushered in on a variety of fronts, from the way that banking works, to the way that capital is raised, even to the very form of money itself. These changes call for a wide-ranging re-conceptualisation of financial regulation in an era of technology-enabled finance. In particular, this article argues that regulators' focus on preventing the risks associated with "too big to fail" institutions overlooks the conceptually distinct risks associated with small, decentralized financial markets. In many ways, these risks can be greater than those presented by large institutions because decentralized fintech markets are more vulnerable to adverse economic shocks, are less transparent to regulators, and are more likely to encourage excessively risky behaviour by market participants. The article concludes by sketching out a variety of regulatory responses that better correspond to fintech's particular risks and rewards.

Regulating Fintech

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5. Recent Corporate Law Decisions

5.1 Court dismisses appeal against the approval of the Boart Longyear schemes of arrangement

(By Rodd Ashton Levy, Herbert Smith Freehills)

Snowside Pty Ltd as trustee for the Snowside Trust v Boart Longyear Ltd [2017] NSWCA 215, Supreme Court of New South Wales, Court of Appeal, Bathurst CJ, Beazley P, Leeming JA, 29 August 2017

Summary

The New South Wales Court of Appeal has dismissed an appeal by a shareholder of Boart Longyear Limited (BLY), Snowside Pty Limited (Snowside), seeking to prevent the company from implementing two creditors' schemes of arrangement, which were approved by Justice Black of the Supreme Court on 22 August 2017.

The Court confirmed that s. 411(6) of the [Corporations Act 2001 No.50 (Cth)] (the Corporations Act) confers a broad discretion on the Court which can be used to approve schemes with substantial and material alterations.

Facts

This appeal related to the restructuring of BLY, an Australian incorporated and ASX listed, but Utah headquartered, mineral exploration company, and comes as the latest instalment in this case.

As a result of financial difficulties, BLY had formulated a restructuring plan which involved, amongst other things, the implementation of two creditors' schemes of arrangement - the Unsecured Creditors' Scheme and the Secured Creditors' scheme.

Previously, on 10 May 2017, Justice Black of the Supreme Court of New South Wales granted orders to convene creditor meetings in respect of BLY's two schemes of arrangement. On 26 May 2017, the Court of Appeal unanimously dismissed an appeal against this decision by one of BLY's major creditors, First Pacific Advisors LLC (FPA). The schemes were subsequently approved at the creditor meetings.

Following creditor approval, BLY applied to the Supreme Court seeking orders approving the schemes of arrangement. FPA and the applicant in the current case, Snowside, objected to the approval of the schemes on a number of grounds.

After 4 days of hearing submissions and evidence, Justice Black ordered that the parties engage in mediation prior to the hearing recommencing. On 9 August 2017, the parties, following mediation, reached a settlement agreement which amended the terms of the schemes and wider restructuring according to a settlement deed between BLY, Centerbridge Partners LP (Centerbridge), Ares Management LP (Ares), Ascribe II Investments LLC (Ascribe) and FPA.

Following this agreement being reached, BLY asked the Supreme Court of New South Wales to approve the schemes of arrangement and to exercise its judicial discretion under s. 411(6) of the Corporations Act to consent to the (substantial) alterations to the schemes of arrangement.

On 22 August 2017, Justice Black approved the BLY creditor schemes of arrangement. Snowside appealed this decision to the Court of Appeal.

The original schemes

Under the original Unsecured Creditors' Scheme:

- US$196 million of the senior unsecured notes (SUNs) were to be exchanged for 42% of BLY's post restructuring equity (thus causing BLY's existing major shareholder, Centerbridge, to be diluted from 48.9% to 3.7%) - this would have resulted in Ares holding 18% of the equity and Ascribe holding 19% of the equity; and
- the remaining US$88 million of SUNs were to be reinstated with an interest rate of 1.5%.

Under the original Secured Creditors' Scheme the holders of the senior secured notes (SSNs), and the holder of the secured Term Loan A (TLA) and secured Term Loan B (TLB), would vote as a single class and (among other things):

- the maturity dates of the TLA, TLB and SSNs were all extended to 31 December 2022 (the expiry dates for the SSNs was 1 October 2018 and for the TLA and TLB was 3 January 2021);

- payment of interest on all facilities was converted to payable in kind (PIK) until December 2018 (the TLA/TLB interest was already PIK which would not change);
- the interest rate on the TLA and TLB was reduced from 12% to 10%, in exchange for the lender under those facilities (Centerbridge) receiving 56% of BLY's post restructuring equity. Centerbridge would also be granted the right to appoint five of the nine directors to the board of BLY (up from its pre-existing right to appoint 4 directors). The holders of the SSNs would not receive any equity; and
- the holders of those instruments waived their rights in relation to any change of control event occurring as a result of the restructuring (noting that Centerbridge would hold 56% of the shares post-restructuring).

Entities associated with Centerbridge held a significant percentage of the SSN debt and all of the TLA and TLB debt. FPA held 29% of the SSNs, Ares held 18.7% of the SSNs, Ascribe held 23.5% of the SSNs and Centerbridge held 8.5% of the SSNs. The SSNs did not receive any equity under the original schemes.

Amended schemes

Under the amended schemes:

- SSN holders will receive a total of 4% of equity in post-recapitalisation BLY;
- the shares issued to Centerbridge will be reduced by 2%, and the shares issued to Ares and Ascribe will be reduced by 1% respectively. The additional shares will be redistributed to the SSN holders;
- if an event of default occurs upon which the SSNs are accelerated, they will be repayable at par plus accrued but unpaid interest, without the payment of premium;
- PIK interest due on the SSNs accrues at 12% from 1 October 2016 instead of at 10% until 31 December 2016, with 12% thereafter; and
- the SSNs may be redeemed according to the prices set out in the new call schedule. These redemption prices specify the prices due if the SSNs are redeemed on an optional redemption, maturity date, or date of completion of an asset sale offer.

Importantly, the amended schemes had the support of all the voting SSN holders and Centerbridge (as the TLA and TLB holders) (which represented 99.63% of debt under the Secured Creditors' Scheme) and all the voting SUN holders (which represented 96.19% of debt under the Unsecured Creditors' Scheme) with one exception whose view was unknown.

Decision

The Court of Appeal unanimously granted leave to appeal, however dismissed the appeal.

(i) Section 411(6) issue

The first, and main, ground of appeal related to the Supreme Court's exercise of the discretion conferred by s. 411(6) of the Corporations Act.

Section 411(6) provides that:

"The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just."

In the Supreme Court decision, In the matter of *Boart Longyear Limited (No 2)* [2017] NSWSC 1105, Justice Black observed at [108] that, as the changes to the BLY schemes were of a material nature, the use of s. 411(6) would involve a "novel application of the section" which had previously been used only to approve changes of a minor or technical kind. His Honour found, however, that the Court was entitled to exercise the discretion under s. 411(6) to approve such changes, as the power was not confined by the manner in which it had previously been exercised.

In its appeal, Snowside argued that this was an incorrect use of s. 411(6), which may only be used by the Court to approve changes of a minor or technical kind.

The Court unanimously dismissed this point. Their Honours took the view that the exercise of the discretion conferred by s. 411(6) by Justice Black was correct. Relying on ordinary principles of statutory construction, the Court found at paragraph [22] that:

"the primary judge was correct to conclude that the power conferred by s. 411(6) was not confined in the way in which the applicants contend. There is no reason in the text, or context, or purpose of the section to confine the power to approve of "such alterations or conditions as it thinks just" to alterations or conditions which fall short of being material. The power to approve is conferred in broad terms."

The Court further confirmed Justice Black's finding that the power conferred under s. 411(6) was not confined by how the power had been exercised in previous cases. This case is an important precedent for the use of the power under s. 411(6), and reaffirms the broad discretion conferred by this section.

(ii) Resolution issue

The second ground of appeal related to the terms of the resolutions which were used at the creditors' meeting which approved the schemes in their original form. The resolution contained the following terms: "with or without alterations or conditions approved by the Court, provided that such alterations or conditions do not change the substance of the Scheme, including the Steps, in any material respect."

Snowside argued that the power conferred under the resolution was not available due to the material changes made to the scheme following mediation between the parties, and therefore the schemes should not be approved by the Court.

The Court found that the terms of the resolutions did not prevent the schemes being approved by the Court. Their Honours took into account the fact that almost all creditors had expressed their approval for the schemes in their amended form (one creditor had not expressed their view), and the fact that the power to approve the schemes under s. 411(6) should not be limited by the terms of the formal approval by creditors where they had otherwise expressed their approval to the Court.

5.2 Court dismisses appeal that flexible payment arrangement between related parties was sufficient to mitigate loss and damage due to insolvent trading

(By Alex Moores, DLA Piper)

Perrine v Carrello [2017] WASCA 151, Supreme Court of Western Australia, Court of Appeal, Martin CJ, Mitchell and Beech JJA, 17 August 2017

Summary

Mr and Mrs Perrine (the Appellants), in their capacity as directors of Perrinepod Pty Ltd (Perrinepod) and of Perrine Architecture Pty Ltd (Perrine) as the majority shareholder of Perrinepod, were found to be liable for debts of approximately $1.35 million due to loss and damage caused by trading while insolvent. The Appellants appealed this decision on the basis that the primary judge had incorrectly attributed book debts to the loss and damaged caused, and that agreed repayment arrangements between Perrinepod and Perrine as related parties were not considered adequately.

The Supreme Court of Western Australia (the Court) dismissed the appeal on the basis that a flexible payment arrangement whereby a related entity allows deferral of payment of debt is distinct from the debt not being "due and payable" as this test is relevant to solvency. Accordingly, the Perrinepod debts owing to Perrine, from the date that Perrinepod was found to be trading while insolvent, were the cause of loss and damage to the Perrine creditors.

Facts

The Appellants were directors and shareholders of Perrine, an architecture company. Perrine owned 39 million of the 49.5 million shares issued in Perrinepod, a company in the business of providing residential and commercial prefabricated buildings. The Appellants were also directors of Perrinepod. Mr Giovanni Carrello (the Liquidator) was appointed as the liquidator of Perrinepod.

The Liquidator, in proceedings before the primary judge, claimed that Perrine and the Appellants owed Perrinepod the amount of approximately $4.22 million for their failure to prevent debts being incurred while Perrinepod was insolvent and they were the holding company and directors respectively. There was an additional claim for approximately $1.48 million against Perrine for what was characterised as voidable transactions including unfair preferences, uncommercial transactions and unreasonable director-related transactions.

There was some argument over the date of insolvency before the primary judge. It was stated that Perrine charged Perrinepod for providing office equipment facilities and staff at rates that were within ordinary commercial rates. There was a flexible payment arrangement between Perrinepod and Perrine whereby payments owing were only made when Perrinepod had available funds, so as not to damage Perrinepod's cashflow.

The Liquidator submitted that Perrinepod was insolvent from 30 June 2009, but the primary judge held that there was no insolvent trading until an adjudicator appointed under the Construction Contracts Act 2004 No. 16 (WA) (the Act) determined that Perrinepod owed over $1.5 million to creditors on 16 July 2010. The grounds to suspect that Perrinepod was insolvent were present from that date until the appointment of the Liquidator, and the Appellants were aware of these grounds for that duration.

Therefore, the ultimate conclusion of the primary judge was that the Appellants owed Perrinepod approximately $1.35 million with interest under s. 588 of the Act, and under s. 588W of the Act in relation to Perrine as the Appellants were the directors and the controlling minds. Further, pursuant to s. 588Y(2) of the Act, the amount paid by the Appellants was not available to pay the debts of Perrinepod to Perrine unless all of Perrinepod's other unsecured debts have been paid in full.

The Appellants appealed against this decision, challenging the finding in relation to causation of loss or damage, submitting that the primary judge erred in law in:

- holding that the amounts recorded in the Perrinepod accounts as loans from or amounts invoiced by Perrine (the Debts) were, and were the quantum of, loss or damage suffered by Perrine in relation to a debt because of the insolvency of Perrinepod; and
- failing to hold that the Liquidator had not proved that Perrine had suffered, and had not proved quantum of, loss or damage in that the Debts were subject to agreed terms regarding repayment and the Liquidator did not adduce evidence to prove the value of the Debts.

Decision

(i) Distinction between "debt" and "loss or damaged caused by debt"

One of the main grounds for appeal was that the primary judge erred in equating the Debts in the Perrinepod accounts with "loss or damage in relation to debt because of the company's insolvency", which is the test pursuant to which the liability was apportioned to the Appellants. Section 588M(2) of the Act permits recovery by a liquidator of the loss or damage suffered by a creditor because of the company's insolvency in relation to a debt where a director contravened s 588G in incurring the debt. The liquidator can recover from the director an amount equal to the amount of the loss or damage referred to in s. 588M(1). That is the loss or damage suffered by the creditor "in relation to the debt because of the company's insolvency".

The Court held that the primary judge considered the question of defining the loss suffered by Perrine and correctly found that Perrine suffered a loss in the amount of the outstanding invoices existing at the relevant time, and that the primary judge finding reflected a conclusion and not an assumption that the loss suffered by Perrine because of Perrinepod's insolvency was an amount equal to the unpaid invoices. The loss and damage was accordingly confirmed by the Court.

Further, the Court analysed the causal requirement of "because of the company's insolvency", and to address the connection a comparison was drawn between the position of the creditors at the time of trial and their position if the company were not insolvent. The loss and damage will be the detriment to the creditor between those two scenarios. The Court reflected that the usual resulting analysis will be that, as at trial, the creditor of the insolvent company will get nothing. If the company were not insolvent, the creditor would be paid the amount of the debt, consequently, the loss is the amount of the debt. For the Appellants to be successful on appeal, they would have to establish that there was something distinguishing about their arrangement.

In response, the Appellants maintained that the characterisation of any "loss or damage in relation to the debt because of the company's insolvency" was affected by the agreement that the primary judge accepted had been made between Perrinepod and Perrine regarding repayment, with the result that the value of the Debts was not the nominal value of the amount shown as loans or invoiced amounts in the accounts of Perrinepod.

(ii) Related party flexible payment arrangements

The Appellants argued that the mechanics of the way that debt was incurred between Perrine and Perrinepod was such that debts in the accounts were not bad debts. Under the terms of the agreement between the two companies there was no set date for repayment, and an amount was to be paid only if Perrinepod had funds and payment was not detrimental to its cashflow. In addition, Perrine would not demand repayment unless it knew that Perrinepod had the funds, and therefore there would not be time when the debts owed between the companies were due and payable and Perrinepod was unable to pay those debts. It would follow that Perrine did not suffer any loss or damage as a result of these debts, and the debts were only due and payable at the time they were possible to satisfy, not at the time the invoices were issued.

The Court identified that the nature of the agreement had several important components that were not conducive to the Appellants' categorisation of the Debts, and that established it was not an indefinite deferral of the payment obligation, including that the agreement provided:

- that Perrinepod would make payments to Perrine "as and when" as opposed to "if and when" it had funds to do so;
- Perrinepod was to remain a debtor "until such time as payment could be made"; and
- it was an arrangement between Perrinepod and Perrine "as to the deferral of payments until cash flow permitted".

The Court took the view that the reference to demand for payment not being made is a reference to an arrangement not to enforce Perrine's right to payment, rather than an agreement that the debt is not yet "due and payable". On this categorisation, the Debts recorded in the Perrinepod accounts were due and payable from the date the relevant invoices were raised, therefore the loss and damage to Perrine was the amount of the invoices from the date of insolvency. Accordingly, the appeal was dismissed.

5.3 Liquidators failed to obtain an extension of time for service due to lack of good reason for the delay

(By Sophie Qu, MinterEllison)

In the matter of Convector Grain Pty Ltd (in liquidation) [2017] VSC 473, Supreme Court of Victoria, Randall AsJ, 16 August 2017

Summary

This case considers the power of the Court to grant an extension of the time for service in relation to an application made under s.88FF(1) of the Corporations Act 2001 No. 50 (Cth) (the Act). It was confirmed that failure to serve by the return date can be regularised by an order to amend the originating process and subsequent timely service. Nevertheless, the discretion to allow an extension of the return date would only be exercised if the Court is satisfied that there is good reason for the delay and there is no substantial injustice to the other party.

Facts

The liquidators of Convector Gain Pty Ltd applied to the Court for orders under s.588FF(1) of the Act in relation to voidable transactions. The originating process was filed one day within the three-year time limit imposed by s. 588FF(3)(a)(i) on 25 August 2016. Rule 2.7 of the Supreme Court (Corporations) Rules 2013 No. 112 (Vic) (the Corporations Rules) requires service to be effected as soon as practicable after filing, and in any case, at least five days before the date fixed for hearing. That is, at least five days before 16 September 2016 in this case. However, service was not affected and the return date was amended on 14 September 2016 by the Prothonotary. The originating process was served on the defendant on 3 November 2016 with the unsealed hand-written amendment of the later return date. However, no amendment was made to the original document retained on the court file and the basis for the amendment was unclear.

(i) Defendant's application

On 17 November 2016, the defendant filed an interlocutory application for the amendment to be wholly disallowed and for the originating process to be set aside. The defendant submitted that there was no evidence that the amendment actually took place, as a result, the plaintiffs were said to have breached their obligation to serve at least five days prior to the initial return date.

(ii) Plaintiffs' application

On 22 November 2016, the plaintiffs filed an interlocutory application seeking relief under the Act and the Supreme Court (General Civil Procedure) Rules 2015 No.103 (Vic) (GCP Rules) to regularise the irregularities in the originating process, mostly relying on ss. 1322(2), 1322(4) of the Act and r. 3.02 of the GCP Rules. The plaintiffs argued that the Court had sufficient power to amend the originating process and even if the previous amendment was not valid, the Court should grant an extension for the service for the following reasons:

- the length of the delay was relatively small;
- the neglect of service was excusable due to other work commitments of the plaintiffs' solicitor;
- the plaintiffs had proceeded on the basis that the steps taken by registry staff to alter the return date were valid;
- invalidation of the entire proceeding would have a detrimental effect on the creditors who would otherwise benefit from a recovery; and
- there was no evidence of any specific prejudice to the defendant and any presumptive prejudice should be outweighed by other considerations.

In response to the plaintiffs' submissions, the defendants argued that any amendment would have been improper due to the following reasons:

- s. 1322(4) was unavailable in this case as the s. only applies to an extension of a time under the Act, not a time fixed by the Corporation Rules; and
- discretion to grant an extension should not be exercised under r. 3.02 of the GPC Rules as the delay cannot be reasonably justified and the plaintiffs failed to establish that there was no substantial injustice to the defendant.

Decision

Randall AsJ was of the view that it did not matter whether or not the previous amendment to the originating process had in fact been made. The critical issues were whether or not the Court has power to make such amendment and whether the power should be employed to extend the time of the return date.

(i) Whether the Court has power to amend the originating process

Randall AsJ first considered the availability of an order made under r. 3.02 of the GCP Rules to extend the validity of the originating process. Rule 3.02 allows the Court to extend or abridge any time fixed by the GCP Rules or "by any order fixing, extending or abridging time". In light of the recent Court of Appeal decision in *Horne v Retirement Guide Management Pty Ltd* (2017) ACSR 509 (Horne), his Honour considered that the reasoning of Judd J in *Re Australian Property Custodian Holdings Ltd (in liq)* [2015] VSC 745 (Re APCH), which held that r. 3.02 cannot be relied upon to allow an extension of time under r. 2.7 of the Corporations Rules, was now of little relevance. Applying the reasoning in Horne, his Honour held that it was clear that r. 3.02 of the GCP Rules can be used to extend the time limit for service under r. 2.7 of the Corporations Rules because:

- nothing in r. 2.7 of the Corporations Rules suggests that the time for service cannot be altered, therefore, recourse to r. 3.02 of the GCP Rules is available by operation of r. 1.10 of the Corporation Rules; and
- contrary to Judd J's comments in Re APCH, r. 2.7 does "fix a time" which can be extended by setting the outer limit of the "as soon as practicable after filing" time requirement.

Randall AsJ refused to make orders under ss. 1322(2) and 1322(4)(a) of the Act as they were both considered to be inapplicable to the facts. His Honour then went on to consider whether an order can be made under s. 1322(4)(d) of the Act to extend the time of the return date. Section 1322(4)(d) provides that an order can be made extending the period "for doing any act, matter or thing or instituting or taking any proceeding under this Act". Although the time limits relating to the service of originating process are set under the Corporations Rules and not set by the Act, his Honour noted that s. 1322(4)(d) can extend to "stipulations of time made under some authority other than the Act itself".

It was held that the Court can make an order under s. 1322(4)(d) to extend a time fixed by the Corporations Rules, including r. 2.7.

(ii) Whether the power should be exercised to extend the time of the return date

While noting the availability of the Court's power to extend the time for service under r. 3.02 of the GCP Rules, Randall AsJ concluded that such power should not be exercised in this case. In relation to the plaintiffs' arguments, his Honour noted that:

- there was no particular difficulty in locating the defendant or effecting the service and the plaintiffs' reliance on other unrelated work pressures of the solicitors was not a good reason of "substance";
- even if the plaintiffs had relied on the validity of the actions of the registry staff, the Court was approached to extend time only after expiration of the time for service;
- any potential adverse impact on creditors was uncertain as there was no guarantee that the creditors would be entitled to a recovery even if an extension of time was granted; and
- no other evidence was provided to outweigh the presumptive prejudice to the defendant by virtue of the effluxion of time.

Similarly, his Honour found that there was no reason to exercise the discretion to extend the time under s. 1322(4)(d), especially because the factors to be considered in both s. 1322(4)(d) and r. 3.02 were relevantly the same.

In closing, Randall AsJ held that no amendment should be made to the originating process to extend the time of the return date and ordered that any such amendment be set aside under r. 36.03(3) of the GCP Rules. Accordingly, the plaintiffs had failed to effect service within the time specified under r. 2.7 of the Corporations Rules. His Honour invited parties to make submissions as to the disposition of the proceeding and proposed to make orders setting aside service and permanently staying the proceeding.

5.4 Practical deadlock between management of company may warrant winding up order

(By Josh Sukkar, Ashurst)

In the matter of AJ Roberts Removal & Storage Pty Ltd [2017] NSWSC 1054, Supreme Court of New South Wales, Black J, 11 August 2017

Summary

The First Plaintiff was a director and shareholder of a company which operated a removalist and storage business. Over a period of about 12 years, the First Plaintiff claimed that the Second Defendant, a shareholder of the Company, took up a de-facto director's role in the Company and effectively excluded the First Plaintiff from the Company's management. It was alleged that these actions were facilitated by the First Defendant, also a director of the Company.

The First Plaintiff and the Second Plaintiff (a shareholder in the company) claimed they were oppressed by the Defendants' conduct. Their primary claim was for an order that the Defendants indemnify them for certain personal guarantees they had entered into some years earlier to secure a loan for the Company. In the alternative, the Plaintiffs sought an order that the Company be wound up.

Facts

(i) Background

Mr Trent (First Plaintiff) and Mr Bolton (First Defendant) were directors and shareholders (each holding 25 shares) of a removalist and storage business, conducted under A J Roberts Removals & Storage Pty Ltd (the Company). Their respective spouses, Ms Trent (Second Plaintiff) and Ms Shumack (Second Defendant) also owned 25 shares each in the Company but held no official office.

Shortly before the Company's incorporation in 2001, it was agreed that the Second Plaintiff and Second Defendant "were not to be involved in the management of the Company or its business" (the Pre-contractual Agreement).

In July 2005, the Company entered a removalist and storage agreement with Toll Transport Pty Limited, under which the Company provided a bank guarantee from the National Australia Bank (NAB) for $55,000. In 2008, the Company also entered into an agreement with NAB for a loan facility of up to $100,000 secured by a guarantee and indemnity for $260,000 (the Personal Guarantee) given by each Plaintiff and each Defendant, supported by their registered mortgages over their respective residential properties.

(ii) The Dispute

The Plaintiffs claimed that from 2001 to 2009:

- the Second Defendant became "involved in the management" of the Company, to which the First Defendant made no attempts to prevent (contrary to the Pre-contractual Agreement) (Ground 1);
- the First Defendant and Second Defendant actively excluded the First Plaintiff from managing the business of the Company (Ground 2); and
- the First Defendant and Second Defendant refused the First Plaintiff access to the Company's financial information, including its accounting system (Ground 3).

In 2009, the First Plaintiff left the business (although he retained his position as director of the Company). From 2009 to 2013, the Plaintiffs unsuccessfully sought to negotiate their departure from the Company, including by offering to sell their shares in the Company to the Defendants.

In 2013, the Plaintiffs requested the Defendants to consent to the release of funds deposited by the Plaintiffs under the Personal Guarantee in favour of NAB. This request was denied (Ground 4).

(iii) Relief sought

By reason of Grounds 1-4 above, the Plaintiffs argued that the Defendants had acted oppressively under s. 232 of the Corporations Act 2001 No.50 (Cth) (the Act). Section 232 of the Act provides that the Court can make certain orders where the conduct of a company's affairs is (inter alia) "oppressive to. a member or members" of the company.

The Plaintiffs claimed that as a result of the Defendants' oppression, the Court should order that the Defendants indemnify the Plaintiffs against any claim made by NAB against the Plaintiffs' share of the Personal Guarantee (the Primary Claim). In the alternative, the Plaintiffs claimed that the Court should order the Company to be wound up (the Secondary Claim). Sections 233 and 461(k) of the Act provide that the Court may order the winding up of a company if it is "just and equitable" to do so.

Decision

The Court held that the Defendants had acted oppressively by reason only of Ground 3 above. As a result of such oppression, the Court accepted the Plaintiffs' alternative submission that the Company should be wound up.

(i) Oppression

The Court dealt with the Plaintiffs' Grounds 1-4 regarding oppression as follows:

Ground 1- the Second Defendant's involvement in the Company

The Court rejected the Plaintiffs' contention that the Second Defendant "took over" the administration of the Company's business during the relevant period. While the First Plaintiff and First Defendant had agreed that the Second Plaintiff and Second Defendant would not be involved in the management of the Company, they did not agree to exclude the Second Plaintiff and Second Defendant from any administration of the Company whatsoever.

Ground 2- the Defendants' exclusion of the First Plaintiff from the Company

While the First Plaintiff and First Defendant had reached a deadlock regarding the Second Defendant's involvement in the Company, the Court held there was no evidence that the First Plaintiff was actively excluded from managing the Company. The Court also accepted that the First Plaintiff's withdrawl from the Company in 2009 was prompted by his receiving less income than he required from the Company, rather than his active exclusion.

Ground 3- Refusal of access to financial information

The Court accepted that the First Plaintiff's denied access to the Company's financial information, including the password to access the Company's MYOB accounting system, amounted to oppression. This was reinforced by the Defendants' failure to provide continuing information to the First Plaintiff following the First Plaintiff's withdrawal from the business in 2009.

Ground 4- Refusal to release the Personal Guarantee given to NAB

The Court rejected that the Defendants' failure to consent to the release of funds deposited by the Plaintiffs under the Personal Guarantee amounted to oppression. It was held that there was no justifiable reason why the Defendants should assume full responsibility for the Personal Guarantee, and that even if the Defendants consented to NAB releasing the Personal Guarantee in respect of the Plaintiffs, there was no evidence that NAB would actually do so.

(ii) Relief

Having found oppression under Ground 3, the Court considered the Plaintiffs' claims for relief.

In regards to the Plaintiffs' Primary Claim, the Court held that the First Plaintiff's exclusion from access to the Company's financial information did not justify imposing an obligation on the Defendants to take on the Plaintiffs' liability under the Personal Guarantee.

In regards to the Plaintiffs' Secondary Claim, the Court accepted that the parties had reached a "deadlock" in respect of:

- the Second Defendant's involvement in the Company;
- the disposal of the parties' shares; and

- the Personal Guarantee given by the parties to NAB. On this basis, the Court accepted it was "just and equitable" under ss. 233 and 461(k) of the Act to wind up the Company.

5.5 Failure to make further enquiries results in liquidator breaching duty of care and diligence

(By Tom Gerrits, King & Wood Mallesons)

Asden Developments Pty Ltd (in liq) v Dinoris [2017] FCAFC 117, Federal Court of Australia, Full Court, Greenwood, Davies, and Markovic JJ, 10 August 2017

Summary

In *Asden Developments Pty Ltd (in liq) v Dinoris* [2017] FCAFC 117, the Full Court of the Federal Court (the Full Court) considered, among other issues, whether a liquidator had breached their duty of care and diligence under s. 180 of the Corporations Act 2001 No.50 (Cth) (the Act). This case is instructive for liquidators, and company officers more broadly, in relation to their duties to avail themselves of information and pursue inquiries related to their role. The case outlines the objective approach taken by the Full Court in considering conduct pursuant to a business or commercial judgment compared to conduct pursuant to the duty of liquidators in the course of their role.

The liquidator's alleged breach of s. 180 of the Act involved a failure to properly pursue a line of inquiry following the sole director's removal of funds from Asden Developments Pty Ltd's (Company) bank account. The funds were removed one day before the company went into liquidation, following a members' voluntary winding up.

The Full Court upheld the primary judge's ruling that the liquidator breached his duty of care and diligence under s. 180 of the Act, finding that he had "not displayed the care and diligence of a reasonably competent liquidator when he made the decision not to attempt to make direct personal contact with Ms Nichols (who at the time was the Company's sole director) about the withdrawal of the funds" from the Company's bank account. Going further, the primary judge found that the liquidator's conduct was "sufficiently deficit" to amount to a "breach of duty rather than a mistake or error of judgment". In upholding this ruling, the Full Court considered the factors associated with the liquidator's breach of his duty of care and diligence under s. 180 of the Act.

The Full Court also upheld the primary judge's finding that although the liquidator had breached his duty, loss flowing from this breach was not made out because causation could not be established. Therefore, no compensation was payable under s. 1317H of the Act and as such it was also not necessary to consider the statutory defences under ss. 1317S and 1318 of the Act, which may have relieved the liquidator from liability but not the statutory duty breach itself.

Facts

Ms Nichols was the sole director of the Company. The Company was involved in a property development for the family of Ms Nichols' then husband, Phillip Nichols. While Ms Nichols was the Company's sole director and shareholder, Ms Nichols managed the Company ostensibly under the direction of her father-in-law, George Nichols. The Company was largely funded by George Nichols. Ms Nichols and her husband provided no funds to the Company.

In early December 2010, when the Company was experiencing financial difficulty, George Nichols provided $270,000 via cheques to pay the Company's creditors. At this time, Ms Nichols consulted Mr

Levis, a "pre-insolvency expert" in relation to the use of the $270,000. Based on this advice, the following took place:

- Ms Nichols deposited the funds into the Company's bank account, then transferred the funds to a new bank account opened in the Company's name;
- Ms Nichols used $22,322.43 of the Funds to pay for a car she had previously ordered;
- Ms Nichols then deposited the remaining balance of the funds into a bank account in the name of Urban Property Consulting Pty Ltd, a company controlled by Mr Levis;
- Mr Levis deposited $180,000 of the funds into a bank account in the name of TJI Investments Pty Ltd, a company in which Ms Nichols was the sole director and shareholder; and
- a day later, Ms Nichols resolved to voluntarily wind up the Company.

Mr Dinoris was appointed to act as liquidator of the Company and immediately became aware that Ms Nichols had withdrawn the funds from the Company's bank account. The following took place:

- Mr Dinoris' office emailed Mr Levis inquiring about the withdrawal but did not receive a response;
- Mr Dinoris telephoned Mr Levis about the whereabouts of the funds that had been withdrawn. Mr Levis responded that Ms Nichols did not personally receive those funds and the Mr Dinoris should further investigate the withdrawal in his role as liquidator;
- Mr Dinoris wrote a letter to Ms Nichols seeking that she return "any money or property to which the company [was] prima facie entitled";
- Mr Dinoris did not contract Ms Nichols directly personally in relation to the funds; and
- while Mr Dinoris decided to seek to conduct a public examination of the Company, this never took place.

Decision

(i) Considering the test

In considering the primary judge's ruling that the liquidator breached his duty of care and diligence under s. 180 of the Act, the Full Court considered the context and content of the liquidator's duty:

". the test is an objective one. It requires an assessment as to whether [a liquidator's] conduct as a professional liquidator demonstrated the requisite degree of care and diligence that was reasonable in all the relevant circumstances. That assessment is to be made at the time of [the liquidator's] alleged breach and not with the benefit of hindsight. It is to have regard to the degree of care and diligence expected of a skilled and professional accountant performing the role of a liquidator. It also requires care to be taken to distinguish between conduct amounting to a breach of the statutory duty and that amounting to a mistake or error of judgment".

The test of breach for s. 180 of the Act is forward looking and must not be considered with the benefit of hindsight. The "circumstances as they existed at the time" must be what is considered.

The Full Court also considered the role of a liquidator in the circumstances. That the liquidator is practising a profession with "special qualifications, training and experience" and is paid for this work is material. Also relevant is the fact that many of the decisions that a liquidator is called upon to consider will be of a "business or commercial character". The Full Court recognised that liquidators acting within their duty of care and diligence may differ in opinion, but that they nonetheless "must meet high standards of skill and competence".

(ii) Breach of duty

The Full Court considered the general judicial approach of not interfering in the commercial decisions of liquidators where business judgments are necessarily made. However, any restrictions arising from this approach were found not to apply in this case as the Full Court considered that the obligation to pursue a line of inquiry of this type did not fall into the category of a "discretionary decision on a commercial matter of the kind considered in *Yeomans v Walker* [(1986) 5 NSWLR 378]".

The Full Court considered that a mere mistake or error of judgement would not be enough to offend the standard set in s. 180 of the Act. It was also found that the liquidator turning his mind to the issue and making a "conscious determination" was not enough to avoid breach of the duty in this case. Despite the liquidator forming the view that directly personally contacting the sole director and shareholder would be "fruitless", the Court found that not doing so and not pursuing this line of inquiry was "irrational". It was insufficient in discharging the duty that the liquidator did not believe he could obtain the funds through direct personal contact.

In finding this breach of statutory duty, the Court considered the knowledge of the liquidator at that time in the context of the role of recovering the Company's funds.

The liquidator:

- knew of the existence of the funds;
- knew of the transfer of the funds;
- knew that the transferor was the sole director and shareholder; and
- was suspicious of the advice received by the Company adviser Mr Lewis about the location of the funds.

Considering all the circumstances and the liquidator's duty "to collect the assets of the company", the failure to "pursue an obvious line of inquiry went beyond a mere error of judgment and . was sufficiently deficient to constitute a breach" of the duty. That is, in failing to directly personally contact the director who removed the funds from the Company's bank account, the liquidator fell short of the "care and diligence expected of a skilled and professional accountant performing the role of a liquidator".

Moreover, the Full Court considered that the application of ss. 1317S and 1318 did not excuse the breach of the statutory duty under s. 180 of the Act. Sections 1317S and 1318 only apply to excuse the liability flowing from the breach. As there was no loss established by the Company, there was no need to consider the application of these sections. The Full Court applied reasoning from *Commission v Healey (No 2)* (2011) 196 FCR 430 and *Deputy Commissioner of Taxation v Dick* (2007) 242 ALR 152 to clarify that ss. 1317S and 1318 do not "operate to remove the breach" itself.

Key takeaway

This decision makes it clear that it is incumbent on liquidators to make appropriate and timely inquiries in their role once they are aware that such avenues of inquiry are available. Moreover, as the test for breaching s. 180 of the Act is objective, it is necessary for a liquidator acting with care and diligence to take reasonable steps to make themselves aware of these avenues of inquiry to pursue. Liquidators are not entitled to assume decisions made by them in the conduct of their role will be regarded as being of a business or commercial character such that they are immune from judicial consideration. Liquidators must consider whether their acts objectively evidence the "care and diligence" expected of them.

5.6 Limitations on terminating partnerships by way of notice

(By Thomas Scott, Corrs Chambers Westgarth)

Cole v Lee [2017] NSWSC 1011, Supreme Court of New South Wales, Parker J, 2 August 2017

Summary

The Supreme Court of New South Wales dismissed an application by a pharmacist (Plaintiff) to extricate herself from a partnership with two other pharmacists (Defendants) by way of a declaration that she had served a valid notice of termination of the partnership under either s. 26(1) or s. 32(c) of the Partnership Act 1892 No.12 (NSW) (Partnership Act).

The Court held:

- s. 26(1) of the Partnership Act did not apply to the partnership because it was not one for "no fixed term" (not being a partnership terminable at will) and even if it did apply, the operation of s. 26(1) was impliedly confined to the termination of a single partner's interest in a partnership, rather than dissolution of that partnership as a whole; and
- s. 32(c) of the Partnership Act did not apply to the partnership as it was not entered into for an "for an undefined time", but instead "for a single adventure or undertaking", and even if it was for an undefined time, the Partnership Deed excluded unilateral termination by notice.

The Court did not decide on an alternative application by the Plaintiff that the partnership be wound up on the just and equitable ground, choosing to instead give the Plaintiff an opportunity to consider her position as she would have to overcome a "pre-emption" procedure mandated by the Partnership Deed.

Facts

The Plaintiff and the Defendants were pharmacists who had entered a partnership in about February 2000, when the Plaintiff sold a one-third interest in one of her pharmacies at Randwick to each of the Defendants. Sometime later, the pharmacy at Randwick was sold and three pharmacies were acquired at North Ryde and operated under the auspices of the partnership.

The partnership was the subject of the Partnership Deed. Management of the partnership business was carried out by the Defendants. The Partnership Deed provided for a "pre-emption" procedure at cl. 21 whereby a partner might offer to sell his or her interest in the partnership to the other partners (at a price to be determined by agreement or alternatively by valuation) and, if the offer is not accepted, the partner might then sell to a third party.

In October 2016, the Plaintiff served a "notice of determination" purporting to terminate the partnership pursuant to the Partnership Act. In December 2016, the Plaintiff commenced proceedings in the Supreme Court of NSW seeking a declaration that the partnership was validly terminated by service of the Plaintiff's notice of termination of October 2016, and further orders.

Decision

Under s. 26(1) of the Partnership Act, where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of the partner's intention to do so to all the other partners. Furthermore, under s. 32(c) of the Partnership Act, subject to any agreement between the partners, a partnership is dissolved, if entered into for an undefined time, by any partner giving notice to the other or others of the partner's intention to dissolve the partnership.

(i) Section 32(c) - dissolution if entered into for an undefined time

His Honour found it convenient to first deal with s. 32(c), under which the Plaintiff argued that she was entitled to terminate the partnership. This gave rise to two questions: first, whether the partnership was one "entered into for an undefined time" or was one for a "single adventure or undertaking" (the latter not being terminable by notice, as per s. 32(b)); and second, whether the Partnership Deed contained any agreement between the partners to the contrary.

His Honour noted the terms of the Partnership Deed made it clear there was no specific period of time over which the partnership was to continue. At the same time, the terms made it clear that the partnership was to continue, subject to specific exceptions, for the duration of the business. The Plaintiff's argument that the operation of the three pharmacies was not a "single adventure or undertaking" did not persuade his Honour, who was satisfied the business, albeit conducted at multiple locations, which differ from the location where it was originally conducted, remained a "single adventure or undertaking" (relying on the authority of *Sze Tu v Lowe* (2014) 89 NSWLR 317). The Plaintiff therefore had no right to dissolve the partnership under s. 32(c).

In addition, his Honour considered that even if wrong on the above, the Partnership Deed excluded termination by notice under s. 32(c). Clause 3.1 provided for the parties to carry on the Business "until the Partnership is determined as provided by this deed", and the Partnership Deed conferred no right on the partners to terminate it unilaterally. Instead, it could only be terminated by invoking a "pre-emption" procedure at cl. 21.

(ii) Section 26(1) - determination of partnership where no fixed term

His Honour recognised the "apparent" overlap between ss. 26(1) and 32(c), which raised the question of what purpose s. 26 was intended to have. The first question, however, was whether it applied on the present facts at all. Referring to English authority in *Moss v Elphick* [1910] 1 KB 846, his Honour observed their Lordships offered conflicting views on whether the partnership in question was one for "no fixed term". On the reasoning of Darling J in Moss v Elphick, the present case would be one of a partnership which was for "no fixed term" because there was no specified date on which the partnership was to terminate. However, on the reasoning of Fletcher Moulton and Farwell LJJ, a partnership for "no fixed term" means a partnership at will and does not include a partnership which is not terminable at will, even if the partnership has no definite date of conclusion, such as the partnership in question.

In light of these divergent views, his Honour went on to closely examine the language and immediate legislative context of s. 26(1). That s. 26(1) only applied to a partnership at will is supported by the heading "Retirement from a partnership at will") and, apparently, the antecedents, to s. 26(1). However, if it were to be construed this way, this would amount to saying that "no fixed term" in s. 26(1) means something different from the opposite of "fixed term" in s. 32(a). This runs up against a presumption that statutes are construed so that the same term is given the same meaning throughout the statute. Yet his Honour recognised this to be only a presumption, and one to be given less force on account of the lack of consistency in terminology in the Partnership Act (likely resulting from its difficult and lengthy passage to the statute book). In any event, in s. 32(a) the phrase "fixed term" is used in contradistinction not only to "undefined time" in sub-paragraph (c) but also to the period of "a single adventure or undertaking" in sub-paragraph (b). The same tripartite division does not occur in s. 26. There was, therefore, a sufficient basis for his Honour to conclude that the phrase "no fixed term" in s. 26(1) is not exactly the opposite of "fixed term" in s. 32(a). As a result, s. 26(1) did not apply.

Even if wrong on the above, his Honour was fortified that following Moss v Elphick, s. 26(1) did not permit the general dissolution of a partnership but only a determination as regards the retiring partner. This implicit limitation could arise from s. 32(c) of the Partnership Act. Alternatively, the structure and terminology used in the Partnership Act suggests that the purpose of s. 26(1) was to provide for the termination of the membership of the partnership by the partner giving notice, which would not necessarily, at least in a multi-party partnership, bring the partnership wholly to an end. His Honour did acknowledge, however, that such an interpretation raises difficult questions about how it would operate in the case of a two person partnership.

(iii) Wound up under the just and equitable ground

Having concluded that the Plaintiff's "notice of determination" was ineffective to result in the termination of the partnership, it remained for his Honour to consider the Plaintiff's application to have the partnership wound up on the just and equitable ground. However, while acknowledging that the Plaintiff was free to proceed with that aspect of the application, given the findings made in relation to the other grounds, the Plaintiff would have to overcome the argument that before it can be said to be just and equitable to wind the partnership up, the "pre-emption" procedure in cl. 21 should at least be tried. His Honour gave the Plaintiff an opportunity to consider her position in this regard in the light of the judgment.

5.7 No duty of care owed by banks when conducting customer complaint reviews pursuant to an agreement with regulator

(By Yannis Goutzamanis, King & Wood Mallesons)

[CGL Group Ltd v The Royal Bank of Scotland Plc & National Westminster Bank Plc [2017] EWCA Civ 1073](), England and Wales Court of Appeal (Civil Division), Lord Justice McFarlane, Lord Justice Lewison and Lord Justice Beaton, 24 July 2017

Summary

The England and Wales Court of Appeal recently delivered a judgment which is likely to make it difficult for some bank customers to pursue mis-selling claims with respect to financial products. The Court held that several banks did not owe a duty of care to participants in reviews they conducted into their sales of interest rate hedging products pursuant to agreements with their statutory regulator as part of a settlement to avoid enforcement proceedings. Whilst other high-profile cases have considered whether financial institutions and ratings agencies owe a duty of care in relation to the provision of financial services, this case considered whether a duty of care was owed in how an institution handles complaints about the provision of financial services where the complaints review process was required by a regulator.

Facts

This case concerned three linked appeals relating to various interest rate hedging products (e.g. vanilla interest rate swaps, collars or structured collars) that the appellants were required to buy as a condition of loans made to them by the respondent banks. The statutory regulator in the United Kingdom (the FCA) considered that there had been "serious failings" in the way the banks sold these products to small and medium sized businesses (such as the appellants) and was considering whether to exercise its enforcement powers. After negotiations, the FCA entered into an agreement (the Review Agreement) with the respondents that, under the supervision of an independent reviewer, each would review its sales of interest rate hedging products from 1 December 2001 to "non-sophisticated customers" and provide appropriate redress where mis-selling had occurred (the Review). On 29 June 2012, it announced the existence of the Review, but the terms of the Review Agreement remained confidential until February 2015.

After going through the Review process the appellants each commenced proceedings against the respondent banks. Each claim had its own procedural history but on appeal they all raised the principal question of whether the relevant bank owed the relevant claimant a duty of care in carrying out the Review.

The appellants argued that the duty of care arose because the banks had voluntarily assumed responsibility to their customers to perform the Review carefully. The two alleged sources of this assumption of duty were:

- the fact the banks entered into the Review Agreement with the FCA to make amends for past misconduct which caused the appellants and others to lose substantial sums; and
- the letters that the banks sent out to the appellants as non-sophisticated customers informing them of the Review and offering them an opportunity to opt in to the review process.

The respondent banks argued that no assumption of responsibility arose from the Review Agreement or the letters to the appellants because:

- the Review was being undertaken pursuant to an agreement with the FCA exercising its regulatory powers;
- the letters invited the appellants to rely on the FCA and the independent reviewer, and not the banks; and
- the terms of the Review Agreement and the scope of the obligations assumed by the banks to the FCA were unknown to the customers at the time they opted in to the Review.

Decision

(i) Discussion of the case law and applicable tests

Beatson LJ cited *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2016] EWCA Civ 457 per Longmore LJ who stated that it has become customary to consider three tests or approaches which usually lead to the same answer and can be used as cross-checks on each other.

These are:

- whether the defendant assumed responsibility to the claimant;
- the threefold test in *Caparo Industries plc v Dickman* [1990] 2 AC 605 which asks whether the loss was a foreseeable consequence of the defendant's actions or inactions, the relationship of the parties was sufficiently proximate, and it would be fair, just and reasonable to impose a duty of care on the defendant towards the claimant; and
- whether the addition to existing categories of duty would be incremental rather than indefinable.

Beatson LJ explained that these tests set a broad and relatively open-textured framework within which the detailed factual circumstances and context of the particular case could be assessed.

(ii) The regulatory context

The first major factor assessed by Beatson LJ was the regulatory context. His Lordship considered that this clearly weighed against the imposition of a duty of care. When one viewed the regulatory regime governing these Reviews as a whole it was clear that parliament intended that only the FCA was to have the power to enforce the Review Agreement.

This was particularly influenced by s. 404 of the *Financial Services and Markets Act 2000* (FSMA) which gave the FCA the power to require a firm to set up a consumer redress scheme. This could be contrasted to other sections of FSMA which gave certain private persons the ability to claim damages. Superimposing a duty of care on top of this regulatory regime would effectively give private persons a common law right to sue in relation to a redress determination under a Review and this would circumvent parliament's clear intention.

(iii) The communications between the parties and their context

Beatson LJ then turned to consider the dealings between the parties and the context of those dealings.

Whilst the appellants submitted that the letters they received from the banks constituted an assumption of responsibility to review the evidence to determine whether they were entitled to redress, Beatson LJ pointed to the context as militating against the imposition of the alleged duty of care.

Specially, his Lordship pointed to:

- the fact that the decision to undertake the Review was, in practical terms, thrust upon the banks by the FCA, as opposed to a truly voluntary decision; and
- the role of the independent reviewer appointed pursuant to s. 166 of FSMA, which was emphasised in the letters sent to the appellants informing them of the review process. This made it difficult for the appellants to argue that the banks had "assumed responsibility" when they had expressly indicated that an independent skilled person would be examining the decisions.

(iv) Other factors weighing against the imposition of a duty of care

Beatson LJ also considered other factors that weighed against the imposition of a duty of care, such as:

- the procedural history indicated that the appellants were framing these claims as common law actions for negligence to circumvent the limitation period for their original mis-selling claims;
- contrary to the submissions of the appellants, there was no "lacuna" that required rectification via a common law duty of care because the fact that private persons could not sue under a consumer redress scheme reflected the considered decision of parliament;
- imposing a duty would give rise to a conflict with the bank's duty to its shareholders as a commercial lender and it was because of this conflict that the FCA insisted upon the appointment of an independent reviewer;
- it was difficult to see how the appellants relied on the Review when its terms were generally unknown until February 2015; and
- the imposition of a duty of care in respect of a complaint system could have far-reaching consequences given how regularly businesses set up structured complaints schemes in the modern economy.

5.8 Advice provided by potential administrators prior to appointment can give rise to a reasonable apprehension of bias

(By Nicholas Josey, Clayton Utz)

Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed) [2017] FCA 914, Federal Court of Australia, O'Callaghan J, date of judgment 18 July 2017, date of publication of reasons 11 August 2017

Summary

The proceedings concerned applications for directions in respect of the administration of Ten Network Holdings Ltd (Ten Network).

Mark Korda, Jarrod Villani and Jennifer Nettleton of KordaMentha, the administrators (collectively, the Administrators) appointed to the Ten Network had applied to the Court for various directions as to the administration, including seeking to have a special purpose administrator appointed to supervise the administration. ASIC sought leave to appear on an amicus curiae basis, which was granted.

The Court granted the orders which included a direction that, pursuant to s. 447A(1) of the Corporations Act 2001 No.50 (th Act), Peter Gothard of Ferrier Hodgson, a liquidator, be directed to prepare a report to be given to the creditors of each of the companies within the Ten Network as to any voidable transactions that may result in a recovery for creditors in any liquidation of those companies.

The Court specifically noted that this report was to consider whether the remuneration received by KordaMentha for work undertaken for Ten Network prior to its appointment was a voidable preference. Mr Gothard was also to satisfy himself that the Administrators were acting consistently with their statutory duties and fiduciary obligations as administrators.

The decision provides a timely reminder of the importance of ensuring that any potential or putative administrator takes all reasonable steps to preserve their independence in providing assistance and advice prior to accepting an appointment as an administrator.

Facts

The Ten Network had been in financial difficulties for an extended period; as at February 2017, it had accumulated losses of $1.5 billion and owed $73.8 million to its financiers and $215 million to its creditors.

To assist in its management of the business, the Ten Network had retained a number of advisors, which included Gilbert + Tobin, a law firm (G+T). In late February 2017, G+T retained KordaMentha to provide assistance in assessing the Ten Network's financial position. The scope of work was limited to ensure that KordaMentha would be in a position to accept an appointment as administrators, should such a resolution be passed by the directors of the Ten Network.

The work performed by KordaMentha prior to the administration included:

- holding meetings with the Ten Network's management so as to understand its operations, financial position, legal and contractual obligations, and cash flows;
- attending meetings with the Ten Network's financiers and guarantors;
- advising as to whether the Ten Network would be able to continue to operate on an "as usual" basis in the event of an administration; and
- preparing an administration plan for the Ten Network in the event that it was not possible to successfully dispense with any need for an administration.

Of note was the fact that, of the Administrators, only Mr Korda was involved in the advice provided to G+T prior to the administration. It was also notable that, at no time did KordaMentha provide any advice to the Ten Network directly, nor to any of its creditors or stakeholders. The work performed for the Ten Network prior to the appointment did however, return for KordaMentha more than $1 million in fees.

The Administrators were appointed to the Ten Network on 14 June 2017 and, with the agreement of the secured creditors, continued to operate the business. Two weeks after that appointment, receivers and managers were appointed to various assets of the Ten Network and have assumed control of the sale process for the business of the Ten Network.

On the day after their appointment, the Administrators sent a circular to creditors and employees of the Ten Network which included a Declaration of Independence, Relevant Relationships and Indemnities (DIRRI).

On 19 June 2017, ASIC wrote to the Administrators querying whether the DIRRI was sufficient to allay potential concerns as to their independence. Evidence led in the proceeding also showed that there had been complaints made to the Australian Restructuring Insolvency & Turnaround Association as to KordaMentha's ability to accept the appointment.

After further exchanges with ASIC, an updated DIRRI was circulated that attached a list of all meetings and conference calls held in the pre-appointment period (which included details like attendees, dates, etc).

Soon afterwards, the Administrators applied to the Court for various directions as to the conduct of the second meeting of creditors, and for a direction that Mr Gothard be appointed as a pseudo special purpose administrator to supervise their conduct. ASIC sought leave to appear on an amicus curiae basis, which was granted.

Decision

The Court noted that there was no dispute between the parties as to the appointment of Mr Gothard as the party to supervise the administration, which would include the preparation of a report to be given to the creditors of each of the companies within the Ten Network as to any voidable transactions that may result in a recovery for creditors in any liquidation of those companies. The dispute was as to the proper basis for that appointment:

- ASIC argued that the appointment was necessary so as to cure any reasonable apprehension of bias; and
- the Administrators argued that there was no reasonable apprehension of bias, as the voluntary disclosures of meetings, fees earned and the like cured any such sentiment.

ASIC identified three potential grounds that could give rise to an apprehension of bias:

- the volume of work performed by KordaMentha for the Ten Network prior to its appointment, and the fees earned;
- the fact that KordaMentha was engaged by G+T, with whom it has a referral relationship. KordaMentha could be required, at a later date, to investigate the work that G+T had done for the Ten Network; and
- the fact that the Administrators would have to consider whether the pre-appointment fees in any subsequent liquidation might be "voidable preferences".

The Court noted that the correct test to be applied as to bias was the same as that to be applied to the judiciary and to administrative decision-makers; that is, whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question they are required to decide.

As to the first point, during the course of the proceeding ASIC accepted that, having regard to the extensive work that KordaMentha had done to prepare an administration contingency plan, and facilitate its execution in the event that it was required, this did not give rise to an apprehension of bias. ASIC agreed that directors should be encouraged to engage with appropriate professions early to develop restructuring plans that maximise the chance of rescuing a business or returning as much value as possible should an administration occur.

Regarding the second and third points however, the Court agreed with ASIC that it could allow for a fair-minded lay observer to reasonably apprehend that the Administrators might not bring an impartial mind to resolution of certain issues in any liquidation.

Relevantly, the Court held that voluntary disclosures as to meetings carried out, fees earned and similar, were not sufficient to cure any bias. The purpose of those disclosures were to provide parties the ability, if they chose to do so, to waive any apprehended bias.

As to how to move forward, the Court held that the circumstances did not warrant removal of the Administrators, and this was not sought by ASIC. Rather, the Court determined that it was appropriate to attempt to "quarantine" any potential conflict by appointing an independent party as proposed.

6. Contributions

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