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Bulletin No. 251

Legislation Hotline

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Revised UK Corporate Governance Code

16 July 2018 - The UK Financial Reporting Council (the FRC) has released the revised UK Corporate Governance Code (the Code).

The main changes include those to:

- workforce and stakeholders:
  - there is a new Provision to enable greater board engagement with the workforce to understand their views; and
  - the Code asks boards to describe how they have considered the interests of stakeholders when performing their duty under s. 172 of the *Companies Act 2006* (UK)
- culture:
  - boards are asked to create a culture which aligns company values with strategy and to assess how they preserve value over the long-term
- succession and diversity:
  - to ensure that the boards have the right mix of skills and experience, constructive challenge and to promote diversity, the new Code emphasises the need to refresh boards and undertake succession planning;
  - boards should consider the length of term that chairs remain in post beyond nine years;
  - the new Code strengthens the role of the nomination committee on succession planning and establishing a diverse board;
  - the new Code identifies the importance of external board evaluation for all companies; and
  - nomination committee reports should include details of the contact the external board evaluator has had with the board and individual directors
- remuneration:
  - to address public concern over executive remuneration, the new Code emphasises that remuneration committees should take into account workforce remuneration and related policies when setting director remuneration;
  - importantly formulaic calculations of performance-related pay should be rejected; and
  - remuneration committees should apply discretion when the resulting outcome is not justified.

View:

- Guidance on Board Effectiveness - July 2018
- Feedback statement: UK Corporate Governance Code
- Feedback statement annex: UK Corporate Governance Code
- Key highlights of the Code

1.2 Modernising business registers

13 July 2018 - The Australian Government has released new Discussion Paper: Modernising Business Registers Program which follows a discussion paper released in August 2017 to seek feedback from a broad range of stakeholder groups on their experience in using business registry services. The Treasury received 30 submissions from a range of stakeholder groups during the consultation process.

In the 2018-2019 Budget, the Australian Government considered the stakeholder feedback and advice from the relevant agencies and directed the Department of Treasury, the Australian Taxation Office (the ATO), the Department of Industry, Innovation and Science and the Australian Securities and Investment Commission (ASIC) to develop a detailed business case for modernising the Australian Government's business registers.

Following on from the previous feedback, this subsequent discussion paper has been released for consultation focusing on four areas:

- legislation - what legislative changes are required to allow for the modernising of business registers?
- registry service enhancements - how to enhance the services offered and improve the user experience?
- funding registry infrastructure - how to fund the business registers in the future?
- Director Identification Numbers (DIN) - what is the best way to implement a DIN?

The discussion paper provides more information and a list of questions that may assist with making a submission.

1.3 Building the UK financial sector's operational resilience discussion paper

5 July 2018 - The Bank of England, Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) have published joint Discussion Paper 18/4: Building the UK finanical sector's operational resilience (DP 18/4) on an approach to improve the operational resilience of firms and financial market infrastructures (FMIs).

It envisages that boards and senior management can achieve better standards of operational resilience through increased focus on setting, monitoring and testing specific impact tolerances for key business services, which define the amount of disruption that could be tolerated. The challenges for operational resilience have become even more demanding given a hostile cyber-environment and large scale technological changes.

DP 18/4 focuses on how the provision of products and services can be maintained within reasonable tolerances regardless of the cause of disruption. It reinforces the need for firms and FMIs to develop and improve response capabilities so that any wider impact of disruptive events is contained.

Motivating the approach are a number of important concepts, which include:

- focusing on the continuity of the most important business services as an essential component of managing operational resilience;
- setting board-approved impact tolerances which quantify the level of disruption that could be tolerated; and
- planning on the assumption that disruption will occur as well as seeking to prevent it.

1.4 EBA assesses risks and opportunities from FinTech and its impact on business models

3 July 2018 - The European Banking Authority (EBA) has published the first products of its FinTech Roadmap:

- the EBA report on the impact of FinTech on incumbent credit institutions' business models; and
- the EBA report on the prudential risks and opportunities arising for institutions from FinTech.

Both reports fall under the wider context of the newly established EBA FinTech Knowledge Hub and aim to raise awareness within the supervisory community and the industry on potential prudential risks and opportunities from current and potential FinTech applications and understand the main trends that could impact incumbents' business models and pose potential challenges to their sustainability.

Report on the impact of FinTech on incumbent credit institutions' business models

The report sets out five factors that might significantly affect incumbents' business models from a sustainability perspective:

- digitalisation/innovation strategies pursued to keep up with the fast-changing environment;
- challenges arising from legacy Information and Communication Technology systems;
- operational capacity to implement the necessary changes;
- concerns over retaining and attracting staff; and
- increasing risk of competition from peers and other entities.

Report on the prudential risks and opportunities arising for institutions from FinTech

The report assesses seven cases where new technologies are applied or considered to be applied to existing financial processes, procedures and services. The report aims to provide both competent authorities and institutions with useful guidance on such applications. It focuses on micro-prudential aspects, setting out potential prudential risks and opportunities that may arise from:

- biometric authentication using fingerprint recognition;
- use of robo-advisors for investment advice;
- use of big data and machine learning for credit scoring;
- use of distributed ledger technology and smart contracts for trade finance;
- use of distributed ledger technology to streamline customer due diligence processes;
- mobile wallet with the use of near-field communication; and
- outsourcing core banking/payment system to the public cloud.

1.5 APRA proposes updates to related parties framework for ADIs

2 July 2018 - The Australian Prudential Regulation Authority (APRA) has proposed changes to requirements for authorised deposit-taking institutions (ADIs) in managing risks from associations with related parties.

In Discussion Paper: Revisions to the related entities framework for ADIs, APRA outlines revisions to *Prudential Standard 222: Associations with Related Entities* (APS 222), and associated *Reporting Standard 222.0: Exposures to Related Entities* (ARS 222.0).

The prospective changes seek to update and, where possible, streamline longstanding requirements and ensure APS 222 aligns with last year's changes to *Prudential Standard 2221: Large Exposures* (APS 221) (for exposures to unrelated parties of an ADI) and the changed operating environment.

APRA's proposals to modernise the framework include:

- broadening the definition of related entities to include substantial shareholders, individual board directors and other related individuals;
- explicitly addressing "step-in risk" by incorporating guidance from the Basel Committee on Banking Supervision;
- tightening certain limits on exposure to related entities in line with limits on exposures to unrelated entities in the revised APS 221 (which deals with exposures to unrelated parties);
- removing the ability for certain overseas subsidiaries to be consolidated with the standalone ADI for prudential purposes; and
- updating existing reporting requirements to align with the changes to the framework.

A three-month consultation period on the proposed revisions to APS 222 and ARS 222.0 has now commenced, with APRA accepting submissions until 28 September 2018. Subject to feedback received during the consultation period, it is envisaged the finalised framework will be implemented from 1 January 2020.

1.6 Royal Commission update - Background papers and recent developments

July 2018 - The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission) has made available the following publications:

- Background Paper 19: Aboriginal and Torres Strait Islander consumers of financial products;
- Background Paper 20: Natural Disaster Insurance; and
- Background Paper 21: Aboriginal and Torres Strait Islander consumers' interactions with financial services.

1.7 Canadian whistleblower program contributing to a stronger culture of compliance

29 June 2018 - Marking two years since the launch of its Whistleblower Program, the Ontario Securities Commission (the OSC) has released an update on the progress of the program, which is the first of its kind by a Canadian securities regulator. The program accepts tips on possible violations of Ontario securities law, offers protections for individuals who come forward, as well as compensation of up to CAD$5 million for tips that lead to enforcement action.

Highlights of the OSC Whistleblower Program include:

- the program was launched in July 2016 and, as of the end of June 2018, has generated approximately 200 tips, an average of about two per week;
- timely, specific and credible tips about securities-related misconduct can be submitted by one or more individuals, and can be submitted anonymously through counsel, with the OSC making all reasonable efforts to protect whistleblowers' identities;
- all tips undergo a review process to determine the appropriate course of action, currently, 22% of the total number of tips received (45) are under review;
- 10% of tips (19) warranting further action by the OSC were referred to Enforcement, of which 15 (or 7%) are associated with active investigations and 35% of tips (68) were or are in the process of being shared with another OSC operating branch or another regulator for further action; and
- awards are paid after cases are concluded and all rights to appeal have expired, however investigations and proceedings involving securities-related misconduct can be complex, and may take several years to complete before an award can be made.

Under specific circumstances, the OSC offers market participants the opportunity to efficiently address compliance issues that they discover and self-report via a no-contest settlement. The use of no-contest settlements has helped recover significant amounts for investors and resolve cases more quickly and efficiently. To date, the OSC has approved 11 no-contest settlements, resulting in over CAD$368 million in compensation to investors.

1.8 Passage of ASIC's industry funding fees-for-service Bill

28 June 2018 - The Corporations (Fees) Amendment (ASIC Fees) Bill 2018 (Cth) and related bills have successfully passed through Parliament. Under the new fees-for-service regime, fees for activities such as processing licence applications or variations and applications for registration will reflect ASIC's actual costs. The introduction of the ASIC industry funding model was a key recommendation of the Financial System Inquiry.

Regulations that provide additional detail on the operation of the industry funding fees-for-service bill will be made shortly, ahead of the commencement of the regime. Further information on the fees-for-service commencement can be obtained from ASIC's website.

View:

- Corporations (Fees) Amendment (ASIC Fees) Act 2018 No. 55 (Cth).

1.9 World Federation of Exchanges publishes revised ESG guidance & metrics

27 June 2018 - The World Federation of Exchanges (the WFE), the global industry group for exchanges and CCPs, has published a revised edition of its *Environmental, Social & Governance Guidance and Metrics* (the ESG Guidance and Metrics).

Developed by the WFE's Sustainability Working Group and first published at the end of 2015, the WFE's ESG Guidance and Metrics are designed to provide a reference point for exchanges looking to introduce, improve or require ESG reporting in their markets. Since its publication, over 35 stock exchanges around the world have issued or committed to issuing ESG reporting guidance for their listed companies.

The revised version seeks to update the 2015 document by:

- recognising intervening sustainability developments, such as the UN Sustainable Development Goals and the Task Force on Climate Related Financial Disclosures (TCFD) Recommendations;
- incorporating feedback received from investor groups on the initial Guidance and Metrics document; and
- adjusting the metrics based on implementation experience in certain markets:
    - there are now 30 baseline metrics (33 in 2015) that form the revised guidance, covering indicators across a range of ESG categories, such as:
        - emissions intensity;
        - climate risk mitigation;
        - gender pay ratio;
        - human rights;
        - ethics and anti-corruption; and
        - disclosure practices.

Other notable revisions include:

- specifying that investors are the target audience for listed company ESG disclosures:
    - exchanges should therefore focus on ensuring the availability of investor-relevant, decision-useful information
- providing greater guidance around ESG report preparation, across four key areas:
    - governance/responsibility and oversight;
    - reporting issuers could include a board statement outlining how the company determines ESG issues;
    - how they are embedded in the firm's strategic direction; and
    - how progress is reviewed and measured
- clarity of purpose/clear link to business value:
    - issuers should articulate how the ESG issues they have identified link back to value creation/destruction
- materiality:
    - issuers should provide investors with information about their materiality determination process
- quality/frequency of reporting:
    - issuers should ensure reporting is accurate, aligns to one of the internationally recognised reporting standards is timely.

1.10 ASX 200 corporate sustainability disclosure

26 June 2018 - The Australian Council of Superannuation Investors (ACSI) has published its analysis of corporate sustainability reporting by ASX200 companies, Corporate Sustainability Reporting in Australia.

ACSI has highlighted the strong role that corporate reporting can play in establishing trust with investors and the community. ACSI observed an improvement in sustainability reporting over the 12-month period. Thirty-five companies, in particular, have consistently outperformed the index over the past four years.

Twenty ASX200 companies did not report on sustainability risks at all in 2017. Nine companies have not undertaken any sustainability reporting for two years in a row and are identified as laggards in this report.

In an emerging trend, ACSI has observed an increase in Australian companies adopting international frameworks such as Integrated Reporting (IR), and the metrics defined by the TCFD and the Global Reporting Initiative.

ACSI found that investors favour companies with high disclosure standards. Eighty-three cents in every dollar invested in the ASX200 is invested in entities that report to a "Leading" or "Detailed" rating.

1.11 World Economic Forum report: The global financial and monetary system in 2030

25 June 2018 - The World Economic Forum Global Future Council on Financial and Monetary Systems has published a report on its outlook for 2030, The Global Financial and Monetary System in 2030.

The report singles out three key aspects of the risks and challenges associated with the two seemingly opposed forces of decentralization and integration, to which the international financial architecture will need to adapt:

- regulatory challenges;
- the transformation of the financial system through digitization; and
- current macroeconomic risks.

Some of the key points are:

- digital money issued privately or by central banks, and decentralized ledgers proliferate with implications for monetary and financial policy-making - in countries where changes are rapid, the growing FinTech industry is providing specialized financial services using a range of digital innovations, including those that supply credit and payments services to households and businesses through online platforms; and
- acceptance and adoption of cryptocurrencies will continue to spread and these developments will bring together markets, institutions and infrastructure in a multi-polar, complex and interconnected world, which will challenge the conduct of monetary policy and have implications for financial stability.

FinTech will transform traditional banks and insurance companies, with the emergence of newly decentralized entities providing liquidity and new financial services in a disintermediated way. The development of new technologies will create new asset classes that directly match savers and borrowers and foster risk mitigation through the commoditization of financial data but also lead to more fragmentation and dislocations.

A key challenge is that a more decentralized but interconnected system could be the source of increased risks. Managing these will require developing an agile supportive overall infrastructure, notably powerful and nimble backstops, effective regulation and new crisis management tools, while facilitating the implementation of new technologies and not stifling the system's healthy expansion.

1.12 Investor perspectives on the reporting of performance metrics

22 June 2018 - Investors are calling on companies to reassess how they report their performance metrics, according to a new report from the UK Financial Reporting Lab (the Lab). The metrics chosen by companies to report their performance should be clearly aligned to the company's strategic goals, be transparent on how they are calculated and provide sufficient information that allows comparisons to be made to previous years' performance. The report, Performance metrics: an investor perspective, sets out investors' views on the reporting of performance metrics. It includes a framework and set of questions for companies and their boards to consider when deciding on how they report their performance.

1.13 FSB publishes guidance on bail-in execution and resolution funding to promote G-SIB resolvability

21 June 2018 -The Financial Stability Board (the FSB) has published two guidance documents to assist authorities in implementing its Key Attributes of Effective Resolution Regimes for global systemically important banks (G-SIBs).

(a) Principles on Bail-in Execution

Bail-in within resolution is at the core of resolution strategies of G-SIBs. It helps achieve a creditor-financed recapitalisation by way of a write-down and conversion of liabilities into equity that minimises impacts on financial stability, ensures the continuity of critical functions, and avoids exposing taxpayers to loss.

The first guidance document sets out principles to assist authorities as they make bail-in resolution strategies operational. The principles cover:

- disclosures on the instruments and liabilities within the scope of bail-in;
- valuations to inform and support the application of bail-in;
- processes to suspend or cancel the listing of securities, to notify creditors, and to deliver new securities or tradeable certificates following entry into resolution;
- securities law and securities exchange requirements during the bail-in;
- processes for transferring governance and control rights to a new board and management for the firm emerging from resolution; and
- communications to creditors and the market at large.

(b) Funding Strategy Elements of an Implementable Resolution Plan

This second guidance document covers the development of a resolution funding plan for G-SIBs. It builds on the FSB's August 2016 Guiding Principles on the temporary funding needed to support the orderly resolution of a global systemically important bank (G-SIB) and existing supervisory and resolution guidance on liquidity risk management and resolution planning. The guidance covers:

- firms' capabilities to support monitoring, reporting and estimating funding needs in resolution and executing the funding strategy;
- the development of resolution funding plans by authorities;
- the reliance on firm assets and private funding as preferred sources of funding in resolution;

- access to temporary public sector backstop funding mechanisms and ordinary central bank facilities; and
- information sharing and coordination between authorities.

1.14 OECD 2018 global forum on responsible business conduct

20 June 2018 - The Organisation for the Economic Co-operation and Development (the OECD) has launched its sixth Global Forum on Responsible Business Conduct, an annual forum to strengthen international dialogue on responsible business conduct, that brings together government officials, business leaders and civil society representatives.

The OECD released the following publications during the forum:

- OECD Guidelines for Multinational Enterprises: A Glass Half Full
    - offers a wide-ranging message to governments, business, trade unions, civil society organisations and other stakeholders to collectively widen and deepen the adherence and practice of the OECD Guidelines worldwide; and
    - themes addressed include linkage with the sustainable development goals and the Paris Agreement on climate change, as well increasing the effectiveness of the Guidelines
- Facilitating social dialogue under the OECD Guidelines for Multinational Enterprises
    - this study explores the role of the National Contact Points in dealing with cases relating to the implementation of the OECD Guidelines with a particular focus on labour issues and social dialogue; and
    - four case studies showcase the role played by the National Contact Points in promoting social dialogue and improving the enabling rights for collective bargaining in the context of global supply chains
- Annual report on the OECD Guidelines for Multinational Enterprises
    - the 2017 Annual Report covers the activities undertaken to promote the effective implementation of the OECD Guidelines for Multinational Enterprises by the OECD secretariat, adhering governments and their National Contact Points from January to December 2017.

1.15 Report on climate related disclosures

31 May 2018 - The University of Cambridge Institute for Sustainability Leadership, through its Centre for Sustainable Finance, has conducted an analysis on the various approaches G20 members are taking towards TCFD implementation in their national contexts during 2017 and 2018.

The analysis, published in the report Sailing from Different Harbours: G20 approaches to implementing the recommendations of the Task Force on Climate-related Financial Disclosures, considers actions taken by national and European Union (the EU) regulatory authorities, central banks and governments to support the implementation of the TCFD recommendations by companies and the financial sector.

Key findings of the report include:

- two-thirds of G20 countries have engaged with the TCFD;

- Australia, Canada, the EU, Italy, Japan, South Africa, Turkey and the United Kingdom have conducted (or are in the process of conducting) consultations with the private sector on sustainable finance generally and on disclosure requirements as an important building block of sustainable finance more specifically;
- based on these consultations, Japan has issued voluntary disclosure guidelines and the EU has put together a firm action plan on how to incorporate the recommendations into existing disclosure frameworks; and
- France's Article 173, while predating the TCFD, is broadly aligned with the TCFD requirements and provides a mandatory disclosure framework.

1.16 Report on responsible investment by superannuation funds

30 May 2018 - Australia's largest superannuation funds are increasing their engagement in responsible investing to drive superior financial performance, reduce risk, and better meet their members' and beneficiaries' expectations, a new report from the Responsible Investment Association Australasia (the RIAA) has found.

The RIAA Super Fund Responsible Investment Benchmark Report 2018 (the Report) finds that 81% of Australia's largest super funds are committed to responsible investment (up from 70% in 2016), and 62% report annually on activity. The Report presents the results of a survey of Australia's 53 largest superannuation funds, accounting for $1.4 trillion in assets under management.

Key findings include:

- 70% of super funds have their full board, or board committees, overseeing environmental, social and corporate governance risks and opportunities;
- up to a third of trustee boards are still not actively considering climate risk, in the face of increasing materiality;
- 60% of super funds have a least one negative screen across the whole fund, up from 34% in 2016;
- the most popular fund-wide exclusions are tobacco and armaments. Fossil fuels and human rights violations are the equal third most cited exclusionary screens;
- nearly half of super funds offer a total of 75 responsible investment options (compared to 24 funds offering 54 options in 2016);
- 94% of super funds have a formal voting policy, and all but one of these funds make their policy public (up from 58% in 2016); and
- responsible investment employee numbers have doubled since 2016.

The Report highlights the growing commitment of leading super funds to taking a stronger stewardship approach with the assets they're managing on behalf of Australians. This is driven by both a desire to manage critical investment risks that don't sit on financial statements, and also to respond to the growing demand for responsible and ethical investments by Australians. 2017 research from the RIAA shows nine in 10 Australians expect their super or other investments to be invested responsibly and ethically.

1.17 New Centre for Corporate Law research publications

2018 - Members of the Centre for Corporate Law and Securities Regulation at Melbourne Law School have recently published the following research:

- An Analysis of the Business Objectives of the Largest Listed Companies in Australia, the United Kingdom and the United States, by Ian Ramsay and Belinda Sandonato;
- Cross-Border Cooperation in Financial Regulation: Crossing the Fintech Bridge, by Lev Bromberg, Andrew Godwin and Ian Ramsay; and
- Equity Crowdfunding in Malaysia, by Steve Kourabas and Ian Ramsay.

2. Recent ASIC Developments

2.1 Findings from 31 December 2017 financial reports

5 July 2018 - ASIC has announced the results from a review of the 31 December 2017 financial reports of 90 listed and other public interest entities. Arising from that review, ASIC has made enquiries of 17 entities on 20 matters, seeking explanations of accounting treatments.

ASIC's risk-based surveillance of the financial reports of public interest entities for reporting periods ended 30 June 2010 to 30 June 2017 has led to material changes to 4% of the financial reports of public interest entities reviewed by ASIC. The main changes related to impairment of assets, revenue recognition and expense deferral.

More information about the findings from ASIC's recent reviews of the financial reports of listed entities and of unlisted entities with larger numbers of users is provided here.

2.2 Consultation on proposed changes to the capital requirements for market participants

4 July 2018 - ASIC has released a consultation paper proposing changes to the capital requirements for market participants, which prescribe the minimum amount of capital a participant must hold.

Consultation Paper 302: Proposed changes to ASIC's capital requirements for market participants (CP 302) sets out the proposals to improve and simplify the capital requirements, including further consolidating the two market integrity capital rulebooks into a single capital rulebook (the *ASIC Market Integrity Rules (Capital) 2018*).

ASIC proposes that market participants of futures markets will be required to comply with a risk-based capital regime instead of a net tangible asset requirement, and must hold core capital of at least $1,000,000 at all times.

Another proposal would increase the minimum core capital requirement for securities market participants to $500,000, as well as introducing new rules such as an underwriting risk requirement. At the same time, ASIC proposes to remove redundant rules and forms and more closely align the capital requirements with the financial requirements of the Australian financial services licensing regime.

These proposals follow ASIC's review of the adequacy of its capital regime. The review identified elements of the capital requirements that were outdated and not able to adequately address the risks of operating a market participant business today.

2.3 Review of credit cards reveals more than one in six consumers struggling with credit card debt

4 July 2018 - ASIC's review into credit card lending in Australia has found that 18.5% of consumers are struggling with credit card debt. ASIC reviewed 21.4 million credit card accounts open between July 2012 and June 2017.

ASIC's Report 580: Credit card lending in Australia finds that while credit cards offer flexibility, they can present a debt trap for more than one in six consumers. In June 2017 there were almost 550,000 people in arrears, an additional 930,000 with persistent debt and an additional 435,000 people repeatedly repaying small amounts.

Consumers are also being provided with credit cards that don't meet their needs. For instance, many consumers carry balances over time on high interest rate products, when lower-rate products would save them money. ASIC estimates that these consumers could have saved approximately $621 million in interest in 2016-2017 if they had carried their balance on a card with a lower interest rate.

ASIC also looked at balance transfers and their effect on debt outcomes. The data shows that while many consumers reduce their credit card debt during the promotional period of transfer to a new card, a concerning number of consumers increase their debt, over 30% of consumers increase their debt by 10% or more after transferring a balance.

ASIC found that rules introduced in 2012 that require lenders to apply repayments against amounts accruing the highest interest first have helped reduce the interest charged on credit card debt. However, four lenders, Citigroup Pty Ltd (Citi), Latitude Personal Finance Pty Ltd (Latitude), American Express Australia Limited (American Express) and Macquarie Bank Limited (Macquarie), have retained old rules for grandfathered credit cards opened before June 2012. ASIC estimates that almost 525,000 consumers have paid more interest as a result.

ASIC found that while these four credit providers are not breaking the law, they are charging their longstanding customers more interest than they should have been, and their conduct is out of step with the rest of the industry.

In anticipation of a new Banking Code of Practice, from 2019 Citi and Macquarie will no longer retain the older repayment allocation methodology for grandfathered credit cards. American Express has also indicated that it will make this change in 2019. Lattitude is considering its position.

2.4 Consultation on credit card responsible lending assessments

4 July 2018 - ASIC has issued Consultation Paper 303: Credit Cards - Responsible lending assessments which proposes responsible lending assessments for credit cards be based on whether the consumer can afford to repay the credit limit within three years.

This proposal follows recent reforms to the regulation of credit card lending. Under the revised responsible lending obligations, a credit card contract or credit limit increase must be assessed as unsuitable if it is likely that the consumer would be unable to repay the credit limit within a period prescribed by ASIC.

The purpose of this new reform is to make sure that consumers can afford to repay their credit card debts within a reasonable period. Consumers will still retain the flexibility to make low minimum repayments on credit cards.

ASIC is proposing a three-year period to strike an appropriate balance between:

- preventing consumers from being in unsuitable credit card contracts; and
- ensuring that consumers continue to have reasonable access to credit through credit card contracts.

The new reform will apply to credit licensees providing credit or credit assistance in relation to both new and existing credit card contracts from 1 January 2019. ASIC will make a decision about the period to prescribe following the consultation process.

2.5 SMSF advice needs significant improvement

28 June 2018 - A review by ASIC has found that approximately 90% of financial advice pertaining to the setting up a self-managed super fund (SMSF) did not comply with relevant laws.

ASIC has released:

- Report 575: SMSFs - Improving the quality of advice and member experiences; and
- Report 576: Member experiences with self-managed superannuation funds.

ASIC reviewed 250 client files randomly selected based on ATO data and assessed compliance with the "best interests" duty and related obligations under the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

In 91% of files reviewed the adviser did not comply with these obligations. The non-compliant advice ranged from record-keeping and process failures to failures likely to result in significant financial detriment.

This included:

- in 10% of files reviewed, the client was likely to be significantly worse off in retirement due to the advice; and
- in 19% of cases, clients were at an increased risk of financial detriment due to a lack of diversification.

ASIC also conducted market research which included interviews with 28 consumers who had set up an SMSF and an online survey of 457 consumers who had set up an SMSF. Through this work ASIC found a lot of people do not understand fully the risks of SMSFs, or their legal obligations as trustees.

In the online survey:

- 38% of respondents found running an SMSF more time consuming than expected;
- 32% found it to more expensive than expected;
- 33% did not know the law required an SMSF to have an investment strategy; and
- 29% mistakenly believed that SMSFs had the same level of protection as prudentially regulated superannuation funds in the event of fraud.

ASIC also found that some people had moved to SMSFs as a way to get into the property market, and were using it solely for this purpose without a wider investment strategy.

The interviews also identified a growing use of "one-stop-shops" where the adviser has a relationship with a developer or a real estate agent whose products the person is encouraged to invest in. This put people at increased risk of getting poor advice that did not take account of their personal circumstances or is not given in their best interests.

ASIC's findings are supported by the recent Productivity Commission super report which found smaller SMSFs (with balances under $1 million) delivered on average returns below larger funds, and that the costs for low-balance SMSFs are higher than for funds regulated by APRA.

2.6 ASIC calls on retail OTC derivatives sector to improve practices

28 June 2018 - ASIC has called on participants in the retail over-the-counter (OTC) derivatives sector to improve their practices after recent ASIC activities showed their conduct fell short of expectations. The products offered by retail OTC derivatives issuers in Australia include binary options, margin foreign exchange and contracts for difference.

A recent review of 57 retail derivative issuers identified a number of risks associated with the products offered to retail investors by OTC derivatives issuers. The review found that client losses in retail OTC derivatives trades seemed high, with the percentage of unprofitable traders being up to 80% for binary options, 72% for contract for difference (CFD) traders and 63% for Margin FX traders. ASIC will examine this area further as part of its ongoing focus on the sector.

ASIC's recent supervisory activities have also revealed sector-wide concerns about certain practices. The most concerning practices ASIC has identified during its supervision of the sector and highlighted in recent reviews include:

- actual client profits being inconsistent with marketing materials;
- a lack of transparency around pricing;
- risk management practices that relied on the use of client money were outdated and needed to be reviewed;
- some referral arrangements that may be in breach of conflicted remuneration requirements and referral selling prohibitions; and
- some issuers that were providing wholesale services or allowing third parties to "white label" their products did not have adequate risk management practices and operational capital to supervise counterparties and support their exposures.

Binary options may be the least transparent in terms of underlying pricing, strike prices and payout structures.

To address these risks, ASIC has called on issuers to:

- review and update their risk management and client money practices; and
- assess whether their arrangements with counterparties and referrers meet their AFS licence obligations.

View:

- REP 579: Improving practices in the retail OTC derivatives sector.

2.7 Report on proxy adviser engagement practices

27 June 2018 - ASIC has published a report on proxy adviser engagement practices during the 2017 annual general meeting season. The report covers conduct observed and suggests practices that can be adopted by companies and proxy advisers to improve the way they engage.

Report 578: ASIC review of proxy adviser engagement practices provides an overview of ASIC's observations on:

- the engagement policies of the major proxy advisers in Australia
- 80 proxy adviser reports where an "against" recommendation was made in relation to one or more resolutions considered at a meeting held during the 2017 annual general meeting season, and
- other information voluntarily provided by the proxy advisers on their engagement practices and activities during the 2017 annual general meeting season.

In the report, ASIC encourages proxy advisers to:

- clearly explain and make available their engagement policies and voting guidelines;
- endeavour to provide sufficient time for companies to respond to requests for clarification or fact-checking of reports'
- be transparent in their reports about engagement with companies; and
- promptly consider feedback in relation to factual errors in their reports.

In the report, ASIC encourages companies to:

- actively seek out information about the engagement practices of proxy advisers;
- engage proactively with proxy advisers outside of peak periods;
- release notices of meeting to the market as early as possible;
- ensure disclosure is clear and not overly complex; and
- continue engaging directly with investors regarding voting decisions.

2.8 ASIC enhances its enforcement toolkit beyond Australia's borders

22 June 2018 - ASIC has become one of the first signatories to an enhanced standard for cross-border enforcement cooperation, the International Organization of Securities Commission (IOSCO) Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (the EMMoU).

By signing the EMMoU, ASIC has highlighted its power to assist foreign regulators by compelling physical attendance for testimony, obtaining and sharing audit work papers, communications and other information relating to the audit and review of financial statements, and provide guidance on freezing of assets. The EMMoU also provides the framework for ASIC to request reciprocal assistance of this nature from fellow EMMoU signatories.

The IOSCO EMMoU builds upon the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU), the global benchmark for international cooperation in the enforcement of securities and derivatives laws and regulations which ASIC has been a signatory to since its inception in 2002. There are currently 118 signatories to the MMoU from across the world, six of which have also successfully attained EMMoU signatory status to date.

3. Recent ASX Developments

3.1 Change in annual reporting requirements for non-ADI ASX Clear (Futures) Participants that are also ASX Clear Participants

13 July 2018 - The Australian Securities Exchange (the ASX) has published a notice about a change in annual reporting requirements for non-ADI ASX Clear (Futures) Participants that are also ASX Clear Participants. Such participants no longer required to:

- submit an Annual Audited Net Tangible Assets Return under ASX Clear (Futures) Rule 8.5(b) and/or OTC Rule 3.3(b)(ii); and
- submit Form 2 of the annual audit certificate set out in ASX Clear (Futures) Operating Rules Procedure 4.14(a) but are still required to submit Form 1.

The notice is available on the ASX website.

3.2 Consultation paper on transfers to the CHESS subregister

13 July 2018 - ASX has released the Consultation Paper: Transfers to the CHESS Sub-register which outlines potential changes to the documentary requirements for transfers from issuer holdings to CHESS holdings by ASX settlement participants that are not also ASX trading participants.

3.3 Reports

5 July 2018 - ASX released the ASX Monthly Activity Report for June 2018.

4. Recent Takeovers Panel Developments

4.1 Panel publishes revisions to Guidance Note 1 on unacceptable circumstances - Last and final Statements

11 July 2018 - The Takeovers Panel (the Panel) has published a revised *Guidance Note 1: Unacceptable Circumstances* (GN 1).

The Panel issued a consultation paper in relation to proposed revisions to GN 1 on 14 March 2018 to give an example of unacceptable circumstances following a last and final statement in relation to a takeover bid.

The final revised Guidance Note, and the *Public Consultation Response Statement* detailing the material comments received and the Panel's response, are available on the Panel's website.

4.2 Atlas Iron Limited - Panel declines to conduct proceedings

2 July 2018 - The Panel has declined to conduct proceedings on an application dated 25 June 2018 from NCZ Investments Pty Ltd in relation to the affairs of Atlas Iron Limited (Atlas) (see TP18/43).

Atlas is currently the subject of an off-market takeover bid from Redstone Corporation Pty Ltd (Redstone) (a subsidiary of Hancock Prospecting Pty Ltd). Following discussions with the Panel and ASIC, Redstone has agreed to incorporate disclosures from its supplementary bidder's statement in a replacement bidder's statement (including further information in relation to its intentions) and clarify the operation of the bid's conditions.

Given these developments the Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings.

The reasons for the decision are available on the Panel's website.

4.3 Realm Resources Limited - Declaration of unacceptable circumstances, orders and undertaking

3 July 2018 - The Panel has made a declaration of unacceptable circumstances in relation to an application dated 29 May 2018 by Realm Resources Limited (Realm) in relation to its affairs (see TP18/37).

Realm Resources Limited (Realm) is an ASX listed company (ASX code: RRP). On 30 August 2016, Realm acquired a 70% interest in the Foxleigh mine in Queensland's Bowen Basin from Anglo American Metallurgical Coal Assets Pty Ltd (Foxleigh Acquisition).

ASX decided that the Foxleigh Acquisition triggered the application of Chapter 11 of the Listing Rules and required Realm to comply with Chapters 1 and 2 of the Listing Rules as if it were applying for admission to the official list. ASX required, among other things, that Realm have a free float of not less than 20% of the shares on issue. Realm's shares were to remain suspended from trading until the above requirements could be satisfied.

At all relevant times, Taurus Funds Management Pty Limited as manager of Taurus Resources No. 2 LP and Taurus Resources No. 2 Trust (together, T2), held over 85% of Realm's ordinary shares. Messrs Gordon Galt and Michael Davies, nominees of T2, were directors of Realm.

In order to satisfy the 20% free float requirement, Realm decided to undertake a capital raising in which T2 would not participate. On 8 June 2017, T2 signed a statement confirming its intention to support the capital raising. The capital raising and Foxleigh Acquisition were approved by Realm shareholders on 14 July 2017.

There were delays in undertaking the capital raising for various reasons. Realm updated the market from time to time on the status of the re-listing.

On 15 December 2017, T2 made a non-binding indicative proposal to acquire all the Realm shares it did not own for $0.90 per share.

Prior to the date of the proposal, the nominees of T2 on the Realm board were supportive of the capital raising. At various times after the date of the proposal, the T2 nominees indicated that they would not support the capital raising or the re-listing of Realm on ASX.

On 9 February 2018, T2 announced its intention make an off-market takeover bid to acquire all the Realm shares it did not own for $0.90 per share. On 23 February 2018, T2 released a bidder's statement which included statements to the effect that:

- there was no certainty when re-listing of Realm shares might occur and the offer provided shareholders with certainty by comparison;
- T2 intended to compulsorily acquire the outstanding Realm shares if it became entitled to; and if not would seek to replace some or all of the current directors with its nominees; and
- T2 did not support Realm's continued listing, would not support the capital raising, and would cause Realm to apply for de-listing and as a consequence, if T2 does not proceed with compulsory acquisition shareholders may not be able to readily sell their shareholding.

The Realm board established an independent subcommittee who recommended that Realm shareholders should reject T2's bid. On 15 May 2018, T2 increased its offer price to $1.00 per share. The independent Realm directors continued to recommend that shareholders reject T2's bid.

On 31 May 3018, two additional nominees of T2 were appointed to the Realm board.

The Panel considered the following:

- continuing suspension of Realm, which denied shareholders a market and a readily observable value for Realm shares in light of market developments;
- recognition by T2 of the improved financial and operational position of Realm since the Foxleigh Acquisition which likely increased the value of Realm;
- T2 changing its position from actively supporting the re-listing to actively opposing it;
- intention of T2 to remove Realm from the official list whether or not its takeover bid results in it reaching the threshold for achieving compulsory acquisition;
- active steps taken by the nominees of T2 on the Realm board to stop the re-listing;
- statements in the bidder's statement referred to in paragraphs 25 and 26 of the declaration; and
- nomination of the additional directors of Realm which would ensure the intentions of T2 could be given effect to, had the potential to coerce Realm shareholders to accept the T2 bid.

The Panel considered that the circumstances were unacceptable and made a declaration of unacceptable circumstances. The Panel made orders providing withdrawal rights to shareholders who have accepted T2's bid before 7pm (Sydney time) on 2 July 2018 and extending the bid period until 7pm (Sydney time) on 3 August 2018.

Subsequently, on 3 July 2018, the Panel accepted undertakings. In broad terms:

- T2 Resources Fund Pty Ltd has undertaken to pay, or procure the payment of, an extra $0.35 per share to Realm shareholders accepting its takeover bid within 4 months from the end of the offer period (which ends on 3 August 2018) and to ensure that any subsequent proposal to acquire

100% of Realm (including compulsory acquisition) on or before 31 December 2018 will deliver Realm shareholders at least $1.35 per share in value;

- T2's nominee directors have provided undertakings in effect to provide Realm's board committee with the ability to pursue a capital raising proposal (subject to some qualifications) for a period of three months following the close of the bid or one month after the capital raising is launched (provided it is launched within that three month period); and
- T2 and Taurus Resources Limited No. 2 GP LLC have provided undertakings that (for the period the undertakings described in paragraph two are in force) they will not exercise any right or take any steps to nominate additional directors to the board of Realm and will exercise their rights and take all reasonable steps to ensure that there are at least two directors independent of T2 and Taurus Resources Limited No. 2 GP LLC and their respective associates on the Realm board at all times.

The undertakings described in paragraphs two and three terminate if T2 becomes entitled to compulsorily acquire Realm shares under Part 6A.2 of the Corporations Act 2001 No. 50 (Cth).

T2 has also undertaken to promptly issue a supplementary bidder's statement in a form acceptable to the Panel.

On acceptance of these undertakings, the Panel proceedings have now closed.

4.4 Panel publishes revised Guidance Note 17 - Rights issues

27 June 2018 - The Panel has published a revised *Guidance Note 17: Rights issues* (GN 17).

The Panel issued a consultation paper in relation to proposed amendments of GN 17 on 23 February 2018.

The final revised Guidance Note, and the *Public Consultation Response Statement* detailing the material comments received and the Panel's response, are available on the Panel's website.

5. Recent Research Papers

5.1 A reconsideration of s. 1324(10) of the Corporations Act 2001 (Cth): Damages in lieu of an injunction

This paper considers the operation of s. 1324(10) of the Corporations Act 2001 No. 50 (Cth), a section which closely resembles the more general Lord Cairns' Act provisions, and provides for damages in lieu of an injunction. It charts how s. 1324(10) has developed very differently from the general Lord Cairns' Act sections which inspired it. It is suggested that courts should take account of the peculiarities of remedies in lieu where companies are involved (including that the company may be the proper plaintiff where a breach of directors' duties is concerned). However, the section should not be interpreted as restrictively as it has been in cases such as *McCracken v Phoenix Constructions (Qld) Pty Ltd*, and can be used to deal with directors who transfer property away from their companies to evade creditors.

A Reconsideration of s. 1324(10) of the Corporations Act 2001 (Cth): Damages in Lieu of an Injunction.

5.2 What would we do without them: Whistleblowers in the era of Sarbanes-Oxley and Dodd-Frank

This symposium issue discusses whistleblowing in the post-Sarbanes Oxley and Dodd-Frank era. Through a panel at Fordham Law School comprising whistleblowing and corporate compliance experts, practitioners, and scholars, unique insights are offered as to the importance of whistleblowers today, their need for protection from retaliation, and the appropriate response of organisations to their reports.

What Would We Do Without Them: Whistleblowers in the Era of Sarbanes-Oxley and Dodd-Frank

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5.3 Déjà Vu: The effect of executives and directors with prior banking crisis experience on bank outcomes around the Global Financial Crisis

The authors investigate the effect of executives and directors with prior banking crisis experience on bank outcomes around the global financial crisis (the GFC). Executives and directors with previous experience leading banks through a bank crisis may have been uniquely able to understand the risks, recognise the warnings signs early, and thus more effectively respond to the GFC. Controlling for other executive, director, and bank-level characteristics, the authors examine whether bank performance, risk taking, and accounting quality in the period immediately before and during the GFC are affected by having executives or directors who previously served as bank executives or directors during the 1980s/1990s banking crisis (80s/90s crisis). Overall, the authors find that banks led by these crisis-experienced executives and directors exhibit stronger performance, lower risk taking, and higher accounting quality in the period around the GFC. These effects are strongest among bank leaders for whom the 80s/90s crisis was most salient. Results are robust to propensity matched samples and other analyses performed to rule out alternative explanations. The results suggest these individuals were able to learn from prior crisis experience.

Déjà Vu: The Effect of Executives and Directors With Prior Banking Crisis Experience on Bank Outcomes Around the Global Financial Crisis

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5.4 Catching pre-insolvency advisors: the hidden culprits of illegal phoenix activity

ASIC and the ATO are becoming increasingly concerned about the role that pre-insolvency advisors play in promoting illegal phoenix activity. Illegal phoenix activity occurs where the directors of a company liquidate or abandon the company with the intention of avoiding its obligations and then continue the same or a similar business via a new or related company. Pre-insolvency advisors who counsel directors to engage in illegal phoenix activity are subject to liability under a range of corporate, labour and taxation laws, as well as licensing and professional conduct rules. These advisors may be either qualified professionals, such as lawyers and accountants, or unqualified "turnaround specialists". This article explains how the existing laws and rules apply to advisors and also suggests a number of legislative and administrative reforms aimed at curtailing their participation in illegal phoenix activity, with a particular focus on early detection and prevention mechanisms.

Catching pre-insolvency advisors: the hidden culprits of illegal phoenix activity

6. Recent Corporate Law Decisions

6.1 Voidable transactions and the s. 181 duty of good faith in an insolvency context

(By Noah Lipshut, Herbert Smith Freehills)

Re Ezyfix Caravan Repairs Pty Ltd (In Liq) [2018] VSC 343 (22 June 2018) Supreme Court of Victoria, Gardiner AsJ

(a) Summary

Proceedings were brought by liquidators on behalf of an insolvent company to recover against directors who had improperly diverted the proceeds of an insurance claim to a third party company, thereby depriving the company's creditors. The Court held that, in doing so, these directors had breached their duty under s. 181 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). Furthermore, this diversion of funds was deemed to be a voidable transaction under s. 588FF of the Corporations Act. As a result, compensation orders were made against the impugned directors and the third party company.

(b) Facts

(i) Background

Ezyfix Caravan Repairs Pty Ltd (Ezyfix) operated a caravan repair business from 2008 to early 2015. During this period, Mrs Longordo was the company's sole director and secretary. Despite her formal position, Mrs Longordo played no significant role in the company's business, which was under the effective control of her husband, Mr Longordo.

On 19 January 2015, there was a fire at Ezyfix's premises which destroyed all of the company's significant assets. Additionally, all financial records of the company were purportedly lost in the fire.

(ii) Insurance claim

Ezyfix was able to make a claim under its insurance policy, which covered the business at the time of the fire. Mr Longordo instructed the insurer's representatives to direct the proceeds of the insurance claim to a bank account held by another company, Ezyrepairs Pty Ltd (Ezyrepairs), of which Mr Longordo was the sole director and shareholder. Ezyrepairs was incorporated in September 2014 and began trading in mid-February 2015, effectively inheriting the business of Ezyfix.

In total, $540,000 was paid into the Ezyrepairs bank account in three separate tranches across February, March and May 2015. These funds were then dispersed by Mr Longordo. Although the ultimate use of these funds was unclear, it was alleged that some of the funds were distributed to employees in back payments, as well as used to purchase tools and stock for Ezyrepairs. Despite the uncertainty, it was clear that portions of the proceeds were separately received by Mr Longordo and Mrs Longordo, who was complicit in their diversion to Ezyrepairs and aware of their subsequent disposal.

(iii) Substantial debts and subsequent liquidation

Meanwhile, by the time of the fire, Ezyfix had accumulated substantial debts with the ATO in respect of unpaid tax amounts. In April 2015, the ATO served a statutory demand on Ezyfix which was not complied with and, in June, a winding up application was filed against the company. Ezyfix was subsequently ordered to be wound up on 25 August 2015 and liquidators were appointed.

On 13 April 2017, Ezyfix's liquidators commenced proceedings pursuant to ss. 588FF, 1317H and 1317J of the Corporations Act, seeking orders in respect of the transactions constituting the diversion of the insurance claim proceeds (the Transactions).

(c) Decision

In reaching this decision, Gardiner AsJ considered three relevant issues:

- whether Mr Longordo was a "de facto" director of Ezyfix;
- whether Mr and Mrs Longordo had breached their duty under s. 181 of the Corporations Act; and
- whether the Transactions were "voidable transactions" under s. 588FF of the Corporations Act.

All of the above issues were answered in the affirmative. As a result, compensation orders were made against both Mr and Mrs Longordo, and Ezyrepairs.

(i) Mr Longordo - "de facto" director of Ezyfix

Gardiner AsJ held that Mr Longordo had "acted in the position of a director" of Ezyfix, and was therefore a "de facto" director within the extended meaning of the term in s. 9(b)(i) of the Corporations Act. In forming this view, his Honour considered evidence of the role played by Mr Longordo, including the manner in which he held himself out to outsiders and the fact that he represented the company in its most significant negotiations and communications with third parties.

His Honour also acknowledged that it was open for the Court to find that Mr Longordo was a "shadow" director of Ezyfix, as Mrs Longordo was accustomed to act in accordance with his instructions and wishes, having only peripheral involvement in the affairs of the company.

(ii) Claim against directors - breach of s. 181 in the context of insolvency

Gardiner AsJ then considered whether Mr and Mrs Longordo, as directors of Ezyfix, had complied with their duty pursuant to s. 181 of the Corporations Act. This duty requires directors to act in good faith in the best interests of the corporation and for a proper purpose. His Honour cited *Walker v Wimborne* (1976) 137 CLR 1 as authority for the proposition that in discharging this duty, directors must have regard to the interests of the company's creditors where the company is insolvent or nearing insolvency.

Ultimately, his Honour held that both directors had breached s. 181 by reason of their involvement in the redirection of the proceeds of the insurance claim to Ezyrepairs. Gardiner AsJ stated that, when viewed objectively, it was impossible to characterise the diversion of funds as being made in good faith for the best interests of Ezyfix, given that "there was no commercial reason or justification" for the action.

Moreover, his Honour accepted the Plaintiff liquidator's submissions that Ezyfix was insolvent at the time of the Transactions and that the interests of creditors were ignored throughout the decision-making process.

Accordingly, Mr and Mrs Longordo were ordered to compensate Ezyfix under s. 1317H of the Corporations Act, which provides for compensation orders where a company suffers damages as a consequence of a breach of a civil penalty provision (including s. 181). The quantum of the order was equal to the amount of the proceeds of the insurance claim plus interest.

(iii) Claim against Ezyrepairs - voidable transaction

In addition, Gardiner AsJ held that the Transactions amounted to uncommercial and insolvent transactions and were therefore "voidable" under s. 588FF of the Corporations Act.

As suggested, the Transactions were each held to be an "uncommercial transaction" within the meaning of the term in s. 588FB of the Corporations Act. The analysis supporting this decision closely followed the approach of Gordon J in *Capital Finance Australia v Tolcher* (2007) 245 ALR 528 (*Capital Finance*) and relied upon the fact that:

- Ezyfix derived no benefit from the diversion, instead the effect was to deprive Ezyfix of its remaining asset; and
- Ezyrepairs and the ultimate beneficiaries of the funds provided no consideration for the payments they received, described as "inexplicable by normal commercial practice."

His Honour adopted an objective standard in his consideration of the evidence in relation to commerciality. However, as set out by Gordon J in *Capital Finance*, this objective standard was considered against the state of knowledge of Mr Longordo, the directing mind of the company.

The Transactions were also held to be "insolvent transaction"' under s. 588FC of the Corporations Act. This is because the diversion of the insurance proceeds, the sole remaining asset of the company, left Ezyfix with no means to pay its creditors, rendering the company insolvent. Notwithstanding this finding, his Honour acknowledged that the facts of the case would enliven the statutory presumption of insolvency under s. 588E(4) of the Corporations Act by reason of Ezyfix's failure to keep proper financial records.

Accordingly, his Honour declared the Transactions voidable pursuant to s. 588FE(3) of the Corporations Act. A corresponding order was made requiring Ezyrepairs to pay Ezyfix an amount equal to the total of the funds disbursed as part of the Transactions.

6.2 Supreme Court clarifies the obligations of administrators in complex businesses

(By Chris Yapanis, King & Wood Mallesons)

Re Unlockd Ltd (administrators apptd) [2018] VSC 345 (22 June 2018) Supreme Court of Victoria, Sloss J

(a) Summary

This case concerned the administration of the Unlockd Group, a group of companies operating a technology business. The administrators sought, and were granted, the following orders:

- an extension of the convening periods for the second meetings of creditors;
- a direction permitting intercompany loans from the parent company to the operating company; and
- a direction capping the personal liability of the administrators for these intercompany loans at the extent of the operating company's assets.

The Court granted an extension of the convening periods for the second meetings of creditors largely due to the inherent complexity of the Unlockd Group's business. This complexity increased the time and effort required for the administrators to organise a sale or re-capitalisation of the business.

The Court permitted the administrators to engage in intercompany loans from the group's holding company to its operating company due to the satisfaction of two conditions:

- the proposed intercompany loans were in the interests of the lender's (Unlockd Limited) creditors; and
- the decision to engage in intercompany loans involved legal issues of some complexity.

Further, the Court determined that including a liberty to apply mechanism, which provides creditors with the opportunity to vary or discharge an order limiting the personal liability of an administrator, in a proposed order to cap the personal liability of an administrator may overcome the failure to advise the creditors of the application for this order.

(b) Facts

On 12 June 2018, Mr Keith Crawford and Mr Robert Smith were appointed administrators of the four companies in the Unlockd Group. The Unlockd Group contains a holding company (Unlockd Limited) and three subsidiaries (Unlockd IP, Unlockd Operations and Unlockd AU). The Unlockd Group operates a technology business centred on the "Unlockd App". The application (app) displays advertising on a user's phone and offers the user incentives, such as mobile phone credit and "points" in consumer loyalty programmes, for viewing the advertisements. The app relies on access to two technology platforms (AdMob and Play Store), which are owned and operated by Google LLC. The Unlockd Group generates its revenue from advertisers and content publishers.

Recently, Google LLC threatened to remove the Unlockd app from its AbMob and Play Store platforms. In response to these threats, Unlockd commenced proceedings in the UK High Court and Federal Court of Australia against Google LLC. Both proceedings are set for trial in September 2018. The administrators were appointed following the institution of these proceedings.

In the limited time since their appointment, the administrators attempted to familiarise themselves with the affairs of the Unlockd Group, but they were unable to conduct any comprehensive investigation of the Group's affairs. The administrators were of the view that to give the Unlockd Group the best chance of remaining in business, or to maximise the return to creditors, they require, first, sufficient time to allow them to properly investigate the Group's affairs and explore the prospects of re-capitalisation or sale (and taking account of the impact of the upcoming litigation against Google LLC), and, second, the ability to fund ongoing operations from the Group's own assets in the meantime.

For these reasons, the administrators commenced proceedings seeking three orders. First, an extension of the convening period for the second meeting of creditors. Second, a direction that they are acting properly and reasonably in extending loans from Unlockd Limited to Unlockd Operations (operating company) for the purpose of funding the Group's operations during the administration period. Third, an order capping their personal liability for intercompany loans at the extent of Unlockd Operations' assets.

(c) Decision

(i) Extending the convening period for the second meetings of creditors

The administrators applied for an order extending the convening periods by three months pursuant to s. 439A(6) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and a "*Daisytek* order" pursuant to s. 447A of the Corporations Act (at [14]). A "*Daisytek* order" enables administrators to hold the second meeting of creditors at any time during or five business days after the end of the extended convening period (at [21]). Section 439A(6) provides the Court with a discretionary power to extend the convening period for the second meeting in response to an application for an extension. Section 447A allows the Court to make any order it thinks appropriate about the operation of Part 5.3A to a particular company.

Justice Sloss outlined the extensive body of case law concerning the principles and factors relevant to granting extensions of time under s. 439A(6). Two primary principles emerge from the case law. First, in considering an extension of time, the Court seeks to strike the appropriate balance between speed and maximising the return for creditors (*Re Diamond Press Australia*, per Barrett J at [10]). Second, the Court takes a commercial approach to granting extensions of time, which recognises the commercial reality that the administration of complex companies requires significant time and effort.

The administrators relied upon the complexity of the Unlockd Group's business as the primary factor favouring the grant of an extension. Specifically, the administrators claimed that they could not organise a sale of the Unlockd Group or its business, or a re-capitalisation, within the default convening period. Conducting an orderly process for the disposal of assets to maximise the return to creditors has been recognised as a factor justifying an extension of time (*Parberry v Newsat Ltd* [2015] FCA 435, per Beach J at [63]). Ultimately, Sloss J accepted the administrators' evidence that, without an extension of time, the administrators would be unable to make an informed recommendation to creditors or execute a sale or re-capitalisation of the Unlockd Group. Justice Sloss granted the extension and "*Daisytek* order" sought by the administrators.

(ii) Direction permitting intercompany loans

The administrators sought a direction from the Court permitting intercompany loans from Unlockd Limited to Unlockd Operations pursuant to s. 90-15(1) of Schedule 2 (Insolvency Practice Schedule (Corporations)) of the Corporations Act. Section 90-15(1) provides the Court with a discretionary power to make any orders it thinks fit in relation to the external administration of a company. The direction sought was made by Sloss J for two reasons.

First, Sloss J accepted the administrators' argument that the proposed intercompany loans were in the interests of Unlockd Limited's creditors. The key issue raised in this regard was that the proposed intercompany loans had the potential to disadvantage the creditors of Unlockd Limited, as the lender. The primary reason for Sloss J accepting that these loans were in the interests of Unlockd Limited's creditors was that without ongoing support from Unlockd Limited, there was a real risk that the prospect of the administrators achieving a re-capitalisation or sale will be substantially diminished. A sale or re-capitalisation was in the interests of Unlockd Limited's creditors.

Second, applying *Re Nexus Energy Ltd* [2014] NSWSC 1041 (*Re Nexus*), Sloss J decided that the decision to loan funds from Unlockd Limited to Unlockd Operations involved legal issues, which justified ordering the direction. In *Re Nexus*, a direction permitting intercompany loans was granted in almost identical circumstances to those facing the administrators of the Re Unlockd Group. In *Re Nexus*, the direction was granted because the administrator was required to address legal issues of some complexity, rather than solely commercial issues (per Black J at [13]). In the present case, the decision to loan funds from Unlockd Limited to Unlockd Operations involved legal issues regarding balancing the risks to creditors of different companies within a corporate group against one another.

(iii) Cap on the administrators' personal liability for intercompany loans

The administrators sought orders pursuant to s. 447A that their personal liability for the intercompany debts to be advanced will be limited to the extent of the assets that Unlockd Operations has available to satisfy those debts.

Justice Sloss provides a summary of the case law on the granting of orders to vary the liability of administrators. The existing case law demonstrates that orders are frequently made to limit the personal liability of the administrators where courts are satisfied that administrators have entered into loan arrangements to enable companies to trade for the benefit of their creditors (*Secatore, in the matter of Fletcher Jones and Staff Pty Ltd (admins apptd)* [2011] FCA 1493, per Gordon J at [23]). This was the situation in the present case.

The only remaining hurdle to granting the proposed order was that the creditors had not been advised of the application due to its urgency. However, any problem caused by the absence of notification was ameliorated by the proposed orders, which included a bespoke liberty to apply mechanism. This liberty to apply mechanism provided creditors with an opportunity to vary or discharge the order prior to the administrators entering into the intercompany loans. Justice Sloss thus granted the proposed order.

6.3 One of Australia's largest banks penalised for poor supervision of its personnel

(By Sarah Dressler, DLA Piper)

Australian Securities and Investments Commission v Commonwealth Bank of Australia [2018] FCA 941 (21 June 2018) Federal Court of Australia, Beach J

(a) Summary

ASIC brought proceedings against the Commonwealth Bank of Australia (CBA) making various claims with respect to market manipulation and unconscionable conduct said to have been engaged in by CBA concerning trading in Prime Bank Bills in the Bank Bill Market during the period 31 January 2012 to 5 June 2012 (the relevant period). ASIC and CBA agreed to resolve the proceedings, subject to Beach J's determination of the appropriate penalty and approval of the declarations and other orders sought. Beach J determined that a pecuniary penalty fixed in the sum of $5 million was appropriate. Beach J concluded that that sum together with the other payments all totalling $25 million would be an adequate denouncement of and deterrence against the unacceptable trading behaviour of individuals within CBA that ought to have known better and a bank that ought to have better supervised its personnel.

(b) Facts

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

During the relevant period, CBA had a large number of products which were priced or valued off the BBSW. ASIC alleged that CBA traded with the intention of affecting the level at which the BBSW was set so as to maximise its profits or minimise its losses to the detriment of those holding opposite positions to CBA's.

(c) Decision

ASIC and CBA agreed to resolve the proceedings and as part of this resolution, CBA agreed to give an enforceable undertaking to ASIC pursuant to s. 93AA of the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) (the ASIC Act). The enforceable undertaking provided that CBA is to pay $15 million into a fund that is to be applied for the benefit of the community. Further, the parties submitted and Breach J agreed CBA will pay a pecuniary penalty in the sum of $5 million, to be paid to the Commonwealth of Australia within 14 days of the order, and that CBA will pay ASIC's costs including its investigative costs totalling $5 million.

Breach J commented that the payments totalling $25 million should be an adequate denouncement of and deterrence against the unacceptable trading behaviour of individuals within CBA that ought to have known better and a bank that ought to have better supervised its personnel.

The court declared that by the conduct specified above, CBA attempted, within the meaning of s. 12GBA(1)(b) of the ASIC Act, to engage in conduct which would be in all the circumstances unconscionable in contravention of s. 12CB(1) of the ASIC Act. Beach J's finding of unconscionability had regard to the vulnerability of certain CBA counterparties to CBA's conduct, CBA's knowledge as to the status and function of the BBSW as a central reference interest rate in Australia and intention to profit at the expense of its counterparties. In addition, Breach J had regard to the potential that counterparties may have been adversely affected were CBA to have been successful in changing where the BBSW was set in a way that advantaged itself.

Furthermore, the court declared that by engaging in such conduct, and by failing to have adequate policies and procedures in place requiring CBA staff to abstain from such conduct and have adequate supervision and monitoring during the relevant time, CBA failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence were provided efficiently, honestly and fairly, thereby breaching s. 912A(1)(a) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

The Court further declared that by failing to adequately train CBA staff not to engage in such conduct, CBA failed to ensure that during the relevant time CBA staff were adequately trained to provide financial services and thus breached s. 912A(1)(f) of the Corporations Act.

6.4 Assessment of pecuniary penalties under the Anti-Money Laundering and Counter-Terrorism Financing Act

(By Christine Collins, Corrs Chambers Westgarth)

Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Commonwealth Bank of Australia Limited [2018] FCA 930 (20 June 2018) Federal Court of Australia, Yates J

(a) Summary

The Court considered whether the Commonwealth Bank of Australia (CBA) had contravened ss. 36(1), 41(2)(a), 43(2) and 82(1) of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 No. 169 (Cth) (the AMLCTF Act), whether any pecuniary penalty should be imposed and for what quantum, and whether any other relief should be ordered. The Court declared that CBA had contravened the specified provisions of the Act and ordered the bank to pay a pecuniary penalty of $700 million to the Commonwealth.

(b) Facts

For the purposes of the proceeding, CBA admitted that it had contravened a number of the provisions of the Act. Many of the contraventions arose in relation to CBA's introduction of Intelligent Deposit Machines (IDMs) in May 2012, a type of ATM that could accept cash and cheque deposits and automatically deposit those funds into CBA accounts. The funds were instantly credited to the account and immediately available to transfer to another account, including an international account. The Court noted:

> "IDMs pose a high money laundering and terrorism financing risk because cash can be deposited anonymously at any time at hundreds of locations and transferred immediately, either domestically or internationally, without any cash limit being imposed."

For the purposes of the proceeding, CBA admitted that it had contravened the following civil penalty provisions of the Act in the following ways:

(i) Section 36(1)

Section 36(1) of the AMLCTF Act imposed an obligation on CBA to monitor its customers in order to identify, mitigate and manage the risk that its services might facilitate money laundering or the financing of terrorism. CBA admitted it contravened s. 36(1) by failing to sufficiently monitor 80 customers. This failure arose through:

- insufficient generation of automated transaction monitoring alerts for transactions that were complex, unusually large, had an unusual pattern, or which had no apparent economic or lawful purpose;
- slow review of customers/accounts where automated transaction monitoring alerts were generated;
- insufficient consideration given to whether the bank should terminate the customer relationship where the customer posed a money laundering or terrorism financing risk;
- provision of 30 days' notice to customers of the bank's intention to terminate the customer relationship and close the account without heightened restrictions in place enabled customers to continue transacting; and
- otherwise insufficient monitoring of customers to mitigate or manage money laundering or terrorism financing risks.

The parties submitted that an appropriate penalty for the contraventions was $170 million.

(ii) Section 41(2)(a)

Section 41(2)(a) required CBA to submit a suspicious matter report to the Australian Transaction Reports and Analysis Centre (AUSTRAC) within three business days of forming a reasonable suspicion that a CBA customer was not the person he or she claimed to be. CBA was also obliged to report that it had information that may be relevant to the investigation of, or prosecution of a person for, a Commonwealth, State or Territory offence. CBA admitted that it contravened s. 41(2)(a) of the AMLCTF Act on 120 occasions by failing to give suspicious matter reports within the required timeframe.

The parties submitted that an appropriate penalty for the contraventions was $110 million.

(iii) Section 43(2)

Section 43(2) of the AMLCTF Act required CBA to report on threshold transactions (involving the transfer of physical currency greater than $10,000) within 10 business days after such a transaction took place. CBA acknowledged that it had contravened s. 43(2) of the AMLCTF Act on 53,506 occasions by failing to provide reports within the required timeframe. These contraventions arose out of CBA's inadvertent failure to configure its automated process for identifying and reporting threshold transactions through its IDMs.

The parties submitted that an appropriate penalty for the contraventions was $125 million.

(iv) Section 82(1)

Section 82(1) of the AMLCTF Act obliged CBA to comply with its own anti-money laundering and counter-terrorism financing program. CBA acknowledged that it failed to comply with this program through failing to undertake an assessment of the inherent money laundering and terrorism financing risk posed by its IDMs and failing to introduce sufficient and appropriate risk-based controls to mitigate and manage that risk. CBA additionally failed to monitor transactions, which occurred through an internal error that resulted in automatic alerts not always being generated, or not being generated as intended, in respect of 778,370 accounts for a period of three years. The precise number of contraventions could not be ascertained but was, potentially, a very significant number.

The parties submitted that an appropriate penalty for the contraventions of s. 82(1) was a total of $280 million.

A number of CBA's contraventions arose from the bank's misapprehension of the requirements of the AMLCTF Act. Following a court-ordered mediation, the parties reached agreement as to the terms on which the Court should grant relief, including the payment of a pecuniary penalty in the total sum of $700 million.

(c) Decision

On the basis of the facts agreed by the parties and CBA's admissions, Yates J was satisfied that the contraventions were established.

The Court noted that, notwithstanding the parties' agreement to seek a pecuniary penalty of $700 million, it is for the Court to determine an appropriate penalty. However, his Honour referred to the judgment of *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, in which the plurality said that it was "highly desirable in practice for the court to accept the parties' proposal and therefore impose the proposed penalty".

His Honour noted that s. 175(3) of the AMLCTF Act required the Court to consider all "relevant matters", including:

- the nature and extent of the contravention;
- the nature and extent of any loss or damage suffered as a result of the contravention; and
- the circumstances in which the contravention took place.

In addition to those considerations, Yates J stated that the following factors were relevant to the assessment of penalties:

- the absence of past similar conduct;
- CBA's size and financial position;
- specific and general deterrence;
- the period of the contravening conduct;
- the conduct of CBA's board and senior management;
- the likelihood and nature of the loss or damage caused by CBA's conduct;
- corrective measures undertaken by CBA;
- CBA's co-operation with AUSTRAC in the conduct of the proceeding; and
- CBA's contrition and remorse.

His Honour considered that a $700 million penalty was sufficient to achieve the objective of specific deterrence and would also strongly deter others from contravening the AMLCTF Act.

The Court made a declaration that CBA had contravened the specified provisions of the AMLCTF Act and should pay the Commonwealth a pecuniary penalty of $700 million within 28 days of the order. CBA was also ordered to pay AUSTRAC's costs.

6.5 Solvent company wound up where both parties engaged in oppressive conduct

(By Hugh Pegler, MinterEllison)

In the matter of Pure Nature Sydney Pty Ltd [2018] NSWSC 914 (19 June 2018) Supreme Court of New South Wales, Black J

(a) Summary

The Supreme Court of New South Wales has ordered that Pure Nature Sydney Pty Ltd (the Company) be wound up and a liquidator appointed. The Company was owned by two families whose relationship broke down. Both sought an order that they be transferred the other's share in the Company.

Black J found that each families' conduct constituted oppression of the other. Neither was materially less culpable than the other so a winding up was the appropriate order.

(b) Facts

The Company operated a business selling Australian natural health supplements and products to Korean tourists visiting Australia, who were brought to its shop by tour agents.

The plaintiff Ms Chae was a shareholder of the defendant Company. She is the daughter of Mr Han Young Chae and his wife, Ms Kim, who was a director of the Company.

The second defendant is Ms Moon, who was also a director of the company. She is the wife of Mr Jin Sup Moon. The third defendant is Mr Moon's daughter, Ms Hong, who was a shareholder of the company.

It was commonly accepted that Mr Chae and Mr Moon were the beneficial owners of the business and neither Ms Chae nor Ms Hong had any substantive role in the company's affairs. It was also common ground that there had been an irretrievable breakdown in the relationship between the parties. Ms Chae and Ms Moon were the company's only directors and there was no mechanism in the Company's constitution or in a written shareholders agreement to resolve a deadlock between them.

Ms Chae thus applied for an order under ss. 233(1)(d), 233(1)(j), 461(1)(f) and 461(1)(k) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) that Ms Hong transfer her share of the company to Ms Chae for consideration determined at the Court's discretion, or alternatively that the company be wound up on just and equitable grounds.

Ms Moon and Ms Hong denied that it was just and equitable that the company be wound up. Ms Hong sought orders via interlocutory process under ss. 233(1)(d), 233(1)(j) and 467(1)(c) of the Corporations Act that Ms Chae transfer her share of the company to Ms Hong.

The allegations arose as a consequence of the following circumstances:

(i) Exclusion of Chae family

Mr Chae's employment was terminated by the Company on 27 March 2017. This was done without Ms Kim's knowledge or consent as a director.

From March 2017 to May 2017 Ms Moon and Mr Moon denied the Chae family access to the Company's operational and financial affairs (including access to the company's internet banking). Ms Chae was denied a request for a directors' report, and the company defended proceedings brought against it by Ms Chae without the authority of Ms Kim.

(ii) Competition by both families

Mr Chae established a business which competed with the Company. This was inconsistent with Mr Chae's duties to the Company as a de facto director as it diverted business from the Company and took advantage of relationships with tour guides which existed within the Company.

Mr Moon also operated separated businesses in competition with the company. This was, like Mr Chae's conduct, inconsistent with his duties to the Company. Mr Moon also diverted resources from the Company to advance the interests of his own businesses, including using the Company's employees to run his own business.

(iii) Cross-claim by the Moon family

Ms Moon and Ms Hong alleged that in 2016, $86,810 was transferred to Suri Trading Pty Limited, a company associated with Mr Chae. Mr Chae argued this was consented to by Mr Moon, and was a reimbursement.

(c) Decision

It was accepted that the exclusion of the Chae family was oppressive, and would ordinarily establish a claim for relief. However, it was also accepted that both Mr Chae and Mr Moon competed with the Company, without consent. Both parties' conduct was oppressive in this respect. It was also accepted that the payments to Suri Trading Pty Limited may have supported an order for the transfer of Ms Chae's shares to Ms Hong in ordinary circumstances.

Both Ms Chae and Ms Hong established oppression by the interests associated with Mr Moon and Mr Chae respectively, however neither could be considered less culpable than the other. These findings did not support a transfer of a share in the company from either Ms Hong or Ms Chae, but did support an order for the winding up of the company. The relationship between the shareholders and directors had broken down, there was deadlock in the management of the company and confidence between shareholders and directors was lost. It was noted that a lack of clean hands is not an absolute bar to a winding up order, lest neither party be able to obtain such an order where they are both at fault.

The Court rejected suggestions of a buy-back of shares in circumstances where both parties have engaged in oppression, and did not entertain arguments based on which oppressive acts were first in time.

A liquidator was appointed. The winding up was stayed for two weeks to allow the parties an opportunity to negotiate arrangements such that the business might continue. Given neither party obtained the primary relief sought, no orders were made as to costs.

6.6 Confirmation that it is permissible to set aside multiple statutory demands where the originating process only seeks one order

(By Simon Hong, King & Wood Mallesons)

Heirloom Vineyards Wine Company Pty Ltd v Sante Wines Pty Ltd [2018] SASCFC 56 (15 June 2018) Supreme Court of South Australia, Full Court, Parker, Lovell and Doyle JJ

(a) Summary

This case involved a dispute as to whether multiple statutory demands could be set aside or varied under s. 459G of the [Corporations Act 2001 No. 50 (Cth)](#) (the Corporations Act), even where only a single order is sought in the originating process. Doyle J (with Parker and Lovell JJ agreeing) held that this was permissible as long as the other requirements of s. 459G have been complied with and if the order sought can, in substance, be read as seeking relief with respect to each demand.

(b) Facts

(i) Background

Heirloom Vineyards Wine Company Pty Ltd and Dandelion Vineyards Pty Ltd each served statutory demands upon Sante Wines Pty Ltd (Sante) claiming monies owed to them by Sante. Sante then filed a single originating process that sought a single order to have both statutory demands set aside or varied under s. 459G of the Corporations Act. The originating process stated that Sante sought "an order that the statutory demands both dated 19 August 2016, served by the first defendant and second defendant upon the plaintiff, be set aside or varied".

(ii) Case history

The primary judge dismissed Sante's claim on the basis that it was not possible to set aside multiple statutory demands where the originating process only seeks one order (though it was permissible to set aside multiple statutory demands in a single proceeding).

On appeal, Nicholson J held that it was possible to set aside multiple statutory demands where the originating process only seeks one order (and within the single set of proceedings), as done by Sante.

This judgment is a subsequent appeal to the Full Court of the Supreme Court of South Australia.

(c) Decision

Doyle J (with Parker and Lovell JJ agreeing) dismissed the appeal, finding that the order in Sante's originating process could be read as seeking separate relief with respect to each statutory demand, and this could be done in a single proceeding.

(i) A single application seeking relief with respect to multiple statutory demands is permissible

In considering the text and context of s. 459G, Doyle J held that there was nothing to suggest that the section does not allow a plaintiff to pursue multiple applications at the same time or in the same proceeding. His Honour stated that though there must be an application to set aside or vary each statutory demand, this does not necessarily imply that a single proceeding cannot set aside multiple statutory demands. Further, his Honour stated that if this were the case, clear words from the legislature would be expected since the pursuit of multiple claims for relief in a single proceeding and application are commonplace in litigation.

In considering the purpose of s. 459G of the Corporations Act, Doyle J stated that it is likely that the legislature intended that composite proceedings were permitted given the regime that s. 459G is a part of focuses on "commercial justice", and substance over "technical difficulties."

Therefore, his Honour concluded that it is permissible to seek to set aside multiple statutory demands in a single proceeding (and therefore Sante's originating process was valid in this respect).

Doyle J held that where such applications are sought, the following requirements are the only requirements imposed by s. 459G, which must be separately considered and satisfied (if these requirements are not met with respect to one statutory demand, it does not affect the validity of the proceeding with respect to the other statutory demands):

- the company make an application to the Court (s. 459G(1));
- the application and supporting affidavit be filed and served within 21 days after service of the statutory demand (s. 459G(2) and 3));
- the application seek "an order setting aside [the statutory] demand" (s. 459G(1)); and
- the affidavit filed with the application is in truth an affidavit "supporting" the application to set aside the particular statutory demand (s. 459(3)(a)).

(ii) Proceedings seeking a single order is permissible

Doyle J held that in considering whether Sante's originating process satisfied the above requirement that the application seek "an order setting aside [the statutory] demand", a form over substance approach is preferred. Doyle J held that, in substance, Sante's order should be read as seeking an order setting aside each statutory demand instead of an "all or nothing" order. Therefore, Sante's originating process could be read as seeking relief from each statutory demand, and thus Sante's application was valid.

6.7 Federal Court finds that shareholders may have standing to wind up company

(By Madeleine Causbrook, Ashurst)

Bux Global Limited v Hooke [2018] FCA 882 (7 June 2018) Federal Court of Australia, McKerracher J

(a) Summary

It is arguable that persons who hold fully paid shares, despite not consenting to their issue, are contributories under s. 462 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and therefore have standing to seek winding up orders of a company pursuant to s. 461 of that Act.

It is not always the case that where an argument is raised as to standing, that argument ought to be determined discretely before any substantive issues. In this case, where complex issues of standing and potential entitlement to relief were "inextricably bound together", the issue of standing should not be determined on an interlocutory basis, but should be the subject of consideration in the substantive proceedings.

(b) Facts

This case was an appeal from a judgment of a judge of the Federal Court, Colvin J, who refused to summarily dismiss an application for the winding up of Bux Global Limited (Bux), brought by the respondent. The basis for the summary dismissal application was that the respondents were neither company members nor contributories under s. 462 of the Corporations Act, and were therefore ineligible to commence winding up proceedings under s. 461 of the Act.

Under s. 9 of the Corporations Act, "contributory" is defined to include "holder of fully paid shares" in a company. While "holder" is not defined by the Act, the respondents argued that they were holders of fully paid shares because they had been issued holding certificates and had their names on a register of members.

Bux argued that the application for winding up should be summarily dismissed because the respondents were not contributories as the legislative context and the history of s. 9 meant that only company members were "holders" of fully paid shares. Colvin J refused to summarily dismiss the application on the basis that the respondents had posed a complex question of statutory construction that was appropriate for the Court to resolve. Citing leave principles in *Décor Corp Pty Ltd v Dart Industries Inc* [1991] FCAFC 844, Bux argued on appeal that Colvin J's decision to refuse to summarily dismiss the application was attended by sufficient doubt to warrant reconsideration, and that substantial injustice would ensue if the company was not granted leave to appeal, supposing that the decision was wrong.

(c) Decision

(i) Not sufficient doubt to warrant the grant of leave to appeal

McKerracher J first distinguished *Treadtel International Pty Ltd v Cocco* [2016] NSWCA 360 as a case where there was a discrete standing issue to be determined before any substantive issues in that case. Here, where issues of standing and potential entitlement to relief were "inextricably bound together", his Honour found that Colvin J correctly concluded that the issue of standing should not be determined on an interlocutory basis, but, if arguable, should be the subject of consideration in the substantive proceedings.

In answer to the first limb of the *Décor* test, McKerracher J then found that the respondent's position was arguable, and thus there was not sufficient doubt on the question of standing to warrant the grant of leave.

His Honour accepted that the respondents had never agreed to become members of Bux, which is a requirement of s. 231(b) of the Corporations Act. However, he found that this was not determinative of the standing issue, as it was possible that the respondents otherwise satisfied the definition of "contributory" under s. 9 of the Corporations Act as "holders of fully paid shares". This was because it was not disputed that the respondents had been issued holding certificates or had their names on the register of members. Further, his Honour found that the respondents might satisfy a broader definition of members, citing *Re Nine Entertainment Group Ltd* (No 2) (2012) 211 FCR 439 as authority for the proposition that s. 231 is not determinative of the circumstances in which a person will be considered a company "member".

In coming to the conclusion that there was not sufficient doubt to warrant the grant of leave to appeal, McKerracher J also took into account case management considerations such that the proceedings had been on foot since late the previous year, the trial was imminent, and the matters raised in argument would likely be determined within a relatively short period of time.

(ii) No substantial injustice

In terms of the second limb of the *Décor* test, McKerracher J found that substantial injustice would not result to Bux supposing the primary judge's decision was wrong.

His Honour was not satisfied that there was sufficient, or any, evidence to support prejudice to Bux in continuing the proceedings other than the normal prejudice, namely that the company would be required to incur costs (albeit substantial) in preparing for the hearing. There was also no suggestion that should Bux succeed, it would not recover those costs.

6.8 Singaporean resident given green light for registration as liquidator in Australia

(By Kym Condon, Clayton Utz)

Mansfield and A committee convened under section 20-10 of the Insolvency Practice Schedule (Corporations) [2018] AATA 1510 (5 June 2018) Administrative Appeals Tribunal, Deputy President J Redfern

(a) Summary

Singaporean resident, Mr Mitchell Mansfield has successfully set aside the decision of a committee convened under the new *Insolvency Practice Schedule (Corporations)* (the IPS) to refuse his application for registration as a liquidator. Mr Mansfield's case was the first of its kind to be heard by the Administrative Appeals Tribunal (the AAT) since the introduction of the new regime. In its review of the committee's decision, the AAT considered the nature and extent of the experience required by the applicable legislation, and whether the regulatory and practical problems created by a liquidator residing outside the jurisdiction effectively exclude registration.

(b) Facts

Residing in Singapore, Mr Mansfield is both an Australian citizen and a Director of the restructuring, insolvency and forensic accounting firm, Borrelli Walsh. Mr Mansfield sought to be registered as a liquidator to enable Borrelli Walsh to undertake insolvency appointments in Australia, and eventually open an Australian office.

ASIC convened a committee to assess Mr Mansfield's application, which comprised a delegate of ASIC, a registered liquidator and an appointee of the Minister for Revenue and Financial Services. Mr Mansfield provided the requisite information to the committee and was interviewed about his qualifications and experience.

Subsection 20-20(4) of the IPS sets out the criteria that must be considered in determining an application for registration. Among other things, the committee must be satisfied that Mr Mansfield fulfilled the qualifications, experience, knowledge and abilities prescribed by the Insolvency Practice Rules (Corporations) 2016 (Cth) (the Rules). These include engaging in at least 4,000 hours of relevant employment at a senior level, and demonstrating the capacity to perform satisfactorily the functions and duties of a registered liquidator. Relevant employment includes assisting a registered liquidator in the performance of his or her duties as an external administrator, providing advice in relation to external administrations and exposure to processes under the Bankruptcy Act 1966 No. 33 (Cth) (the Bankruptcy Act).

On 1 September 2017, the committee rejected Mr Mansfield's application, as the committee was not satisfied that Mr Mansfield:

- had engaged in at least 4,000 hours of employment that provided exposure to processes under the Bankruptcy Act in the five years prior to his application;
- had demonstrated the capacity to perform satisfactorily the functions and duties of a registered liquidator (by reason of his foreign residency); and
- was able to satisfy any conditions that may be imposed in respect of continuing professional education (by reason of his foreign residency).

The fact Mr Mansfield resided in Singapore was a significant factor contributing to the committee's decision.

Mr Mansfield applied to the AAT for review of the decision. In doing so, he contended:

- he had sufficient exposure to processes under the Bankruptcy Act;
- his foreign residency did not impede his ability to practise; and
- his foreign residency should not prevent his registration as a liquidator.

The issues in dispute were therefore:

- the meaning of "exposure" to processes under the Bankruptcy Act;
- given the "logistical problems" associated with Mr Mansfield residing in Singapore, whether he had demonstrated the capacity to perform satisfactorily the functions and duties of a registered liquidator; and
- whether Mr Mansfield could nonetheless be registered as a liquidator in Australia subject to conditions.

Prior to Mr Mansfield's appointment to Borrelli Walsh, he had worked as an accountant in Australia for over 10 years. Mr Mansfield had primarily worked on corporate insolvency and restructuring matters, under the direction of registered liquidators. The nature and extent of his experience in bankruptcies was limited to work undertaken by him in the context of corporate insolvencies and receiverships. Counsel for the committee contended that exposure to the full spectrum of extant processes under the Bankruptcy Act was required. On the other hand, Mr Mansfield submitted that it was sufficient for a liquidator to possess knowledge and experience of the Bankruptcy Act in so far as that experience relates to the external administration of a corporation.

The fact that Mr Mansfield resides in Singapore raised two concerns for the committee. First, Mr Mansfield did not satisfy s. 20-20(4)(i) of the IPS in that he does not reside in Australia or in a prescribed country. Second, the committee was not satisfied that Mr Mansfield had demonstrated the capacity to perform satisfactorily the functions and duties of a registered liquidator because of "logistical problems" that were likely to arise including:

- whether his conduct and his administration of corporate insolvencies in Australia could be adequately and effectively supervised by ASIC;
- the ability of ASIC, creditors and third parties to engage with Mr Mansfield and/or inspect books and records if required; and
- the fact that regulatory measures available to ASIC do not have extraterritorial operation.

Mr Mansfield took the view that these issues could be overcome by his willingness to submit to any reasonable conditions. In that regard, the parties had agreed on 15 conditions to be imposed in the event the AAT decided Mr Mansfield would be suitable to be registered as a liquidator. These included:

- that Mr Mansfield appoint an Australian solicitor to accept service of court documents, statutory notices etc. on his behalf, and service on that solicitor would be proper and valid service;
- that where Mr Mansfield is overseas but is requested to be present in Australia by either Court or ASIC, he will return to Australia within 48 hours; and
- that Borrelli Walsh must open an operation in Australia before Mr Mansfield can accept his first Australian external administration.

Company books and records will be kept and maintained in Australia.

(c) Decision

The AAT considered Mr Mansfield had sufficient exposure to processes under the Bankruptcy Act such that he met that criterion. The AAT agreed with Mr Mansfield that exposure to bankruptcy processes does not require direct involvement or involvement in all bankruptcy processes, but rather exposure to or experience in the range of bankruptcy processes at a general level. While Mr Mansfield's experience was limited to a small number of administrations, the AAT accepted the administrations were significant and they were over an extended period of time.

The AAT also agreed that Mr Mansfield's non-residency should not prevent his registration. Given the IPS specifically contemplates registration when the residency requirement is not met, it was held that this demonstrated an intention by Parliament that non-residents may be registered as a liquidator in

Australia. The Deputy President considered the conditions on registration provided an adequate level of protection in that they:

- resolved the majority of the committee's concerns about the potential logistical issues that may arise if Mr Mansfield undertakes administrations in Australia while continuing to reside in Singapore; and
- overcame issues of service and enforceability.

The Deputy President set aside the committee's decision, and ordered Mr Mansfield be registered as a liquidator subject to 14 of the agreed conditions. It was also ordered that for a period of one year, Mr Mansfield could only accept Australian appointments on a joint and several basis with another Australian liquidator.

Ensuring liquidators are suitably qualified and experienced is an important tool for ASIC in regulating the administration of companies under external administration. For that reason, the judgment is a useful precedent in that it considers in some detail whether a person who resides outside Australia and who otherwise satisfies the relevant criteria under the new regime should be registered as a liquidator in Australia. It also provides valuable guidance as to the meaning of "exposure to processes" under the Bankruptcy Act for the purposes of s. 20-1(2)(c) of the Rules.

7. Contributions

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